for corporate counsel, business owners & human resource professionals

APRIL 14, 2026 | THE GRAND AMERICA HOTEL

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.

IDAHO | MONTANA | NEVADA | UTAH | WYOMING | PARSONSBEHLE.COM

EXCEPTIONAL RESULTS
EVERY DAY

PARSONS BEHLE & LATIMER

Table of Contents

PARSONS BEHLE & LATIMER

Welcome and Sponsor Recognition

Breakout Session One 8:30 – 9:30 a.m.

Social Media, Free Speech and Employer Liability
Mark D. Tolman & Paul R. Smith

The Power of the Paper Trail
Liz M. Mellem & Elena T. Vetter

ICE Raids, I-9 Audits, E-Verify and Business Immigration
Lewis M. Francis

Beakout Session Two 9:45 – 10:45 a.m.

Investigations: Lessons from the Trenches
Christina M. Jepson & Susan Baird Motschiedler

Non-Competes on the Brink of Extinction: How HR Teams Keep IP and Relationships Safe in a Populist Era
Michael Judd & Paul R. Smith

Threading the Needle: How to Find the Middle Ground and Avoid Tricky Employment Law Traps
Elena T. Vetter, Haley B. Banks & Corey Hunter

Breakout Session Three 11 a.m. – Noon

"Don't Be the Test Case" -- Developments in Accommodation Requirements under the ADA, Title VII, and the PWFA
Liz M. Mellem & Sean A. Monson

HR: Culture Coach or Compliance Cop?
Jathan Janove & Michael Patrick O'Brien, moderated by Michael Judd

Ask Us Anything *(About Employment Law)*
Christina M. Jepson & Mark D. Tolman

Keynote Session 12:40 p.m.

2026 Utah Legislative Update
Mark D. Tolman

38th Annual **EMPLOYMENT LAW SEMINAR**

Social Media, Free Speech and Employer Liability

Mark D. Tolman
801.536.6932 | mtolman@parsonsbehle.com

Paul R. Smith
801.536.6941 | psmith@parsonsbehle.com

PARSONS
BEHLE &
LATIMER

A Professional
Law Corporation

38th Annual
Employment Law Symposium

Social Media, Free Speech and Employer Liability

Mark D. Tolman and Paul R. Smith

April 14, 2026 | The Grand America Hotel

parsonsbehle.com

Presenters

Mark D. Tolman
Parsons Behle & Latimer
mtolman@parsonsbehle.com

Paul R. Smith
Parsons Behle & Latimer
psmith@parsonsbehle.com

SHRM Salt Lake | PARSONS BEHLE & LATIMER

Legal Disclaimer

This presentation is based on available information as of Apr. 14, 2026, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

You can scan the following QR code to download a PDF handbook of today's event and subscribe to the Employment Law Update email newsletter.

3

Thanks to social media, who recognizes this guy?

How about now?

4

Employees Going Viral

CJ1

SE
0.0 mph
104278.5
Overall Avg 17.0
Moving Avg 40.6
Max Speed 153.3
Total Time 6140:22
Moving Time 2571:28
Stopped 3568:53
Back
Reset Trip
Reset Max
GARMIN

DRIVER

HIS BOSS

EMPLOYEE

I've spent too much of my life in a car.
Like · Comment · Share · 2:49pm (55 minutes ago) via Facebook for Windows Phone

likes this.

And way too much of that stopped in traffic.
2:49pm (55 minutes ago) · Like · Reply

$$$!!
2:50pm (54 minutes ago) · Like · Reply

No comment
2:51pm (53 minutes ago) · Like · Reply

We need to talk......
3:25pm (19 minutes ago) · Like · 1 · Reply

BOSS

Write a comment...

SHRM Salt Lake

PARSONS BEHLE & LATIMER

5

Employees Going Viral

California healthcare workers fired after TikTok video mocking patients goes viral

SHRM Salt Lake

PARSONS BEHLE & LATIMER

6

Slide 5

CJ1 I don’t get this. Someone is going to have to explain it to me.
Christina M. Jepson, 2026-01-09T01:39:38.079

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.

7

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

8

SHRM Salt Lake

PARSONS BEHLE & LATIMER

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

vs

UNIVERSITY OF SOUTH DAKOTA

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 mow [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.

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**. I understand that the professor is likely to be terminated from his position. I will keep you posted on the final decision. That kind of disgusting rhetoric from an employee and representative of our university directed toward a good man's family who was recently assassinated will not be tolerated.

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.

  This individual stands in front of South Dakota students to educate them. We must not send the message to our kids that this is acceptable public discourse.

  We need more Charlie Kirks on campus and less hatred like this.

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 restraining order preventing the school from "retaliating against him" and "continuing his administrative leave"

13

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

- The court concluded that Hook spoke as a citizen and his speech was on a matter of public concern.
  - While at home and off work, Hook made the first post on his private Facebook page. Defendants note that Hook's Facebook page identified himself as a professor at the University of South Dakota, but this alone does not show that a post made on his personal Facebook account is speech that arises from Hook's duties as a professor.
- At this stage, defendants have 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 message 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 the speech disrupted the workplace or affected morale, without evidentiary support, are insufficient.

14

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

- The court granted the TRO
- Hook voluntarily dismissed his case, likely due to settlement
- He's no longer on USD's faculty directory

15

PARSONS BEHLE & LATIMER

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

vs

UNIVERSITY OF TENNESSEE KNOXVILLE

16

PARSONS BEHLE & LATIMER

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:
  - "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 fuck for marrying him so I don't care about her feelings."

17

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

18

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

- The court concluded that the social-media post related to "a matter of **public concern**," but it fell outside of "the First Amendment's **core** because it is not political speech."
  - The **context** of Plaintiff's speech is political because it "referenced a high-profile public event," that "gripped national media ... just days earlier"
  - The **general content** of Plaintiff's speech, however, is not political. Plaintiff's comment did not **specifically engage with Charlie Kirk's politics** or his political message
- Because the content of Plaintiff's speech was not **core political speech**, her speech does not occupy "the '**highest rung** of the hierarchy of First Amendment' " protection

19

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."

20

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

The court decided that the university **could** make the "particularly strong showing":

- The comment was **shared broadly** on social media and "at least two (2) elected representatives" contacted the University to express concerns
- Plaintiff "received a significant amount of **hate mail**"
- Others associated with the University, including students and "numerous faculty members" **supported** Plaintiff's return.
- The comment and the context in which it was made caused the school's chancellor to assess that Plaintiff did "**not have the competencies** necessary to be an effective instructor"
- The University believed that Plaintiff "**lacked the fitness** to engage in teaching, research, or service as a member of this faculty"
- According to the University, the comment "**violated the university's expectations** for the people teaching our students"
- The chancellor assessed that Plaintiff's comment "**negatively impacted the academic environment** and increased the risk of violence on our campus"
- Plaintiff's comment purportedly "brought the University into **disrepute**" and "adversely affected the University"

21

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

- Balancing these factors, the court decided that the plaintiff **hadn't shown** that her speech was likely constitutionally protected
- The court **denied** the TRO
- Shirinian has moved for a preliminary injunction
- The case is still pending

22

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

23

Social Media Landmines: beyond public sector First Amendment issues, where do employers step in it?

- 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.

24

Concerted Activity

PARSONS BEHLE & LATIMER

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**.”

SHRM Salt Lake
PARSONS BEHLE & LATIMER

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

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

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.

29

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.

31

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."

32

State Restrictions

PARSONS BEHLE & LATIMER

State Laws Protecting Political Speech

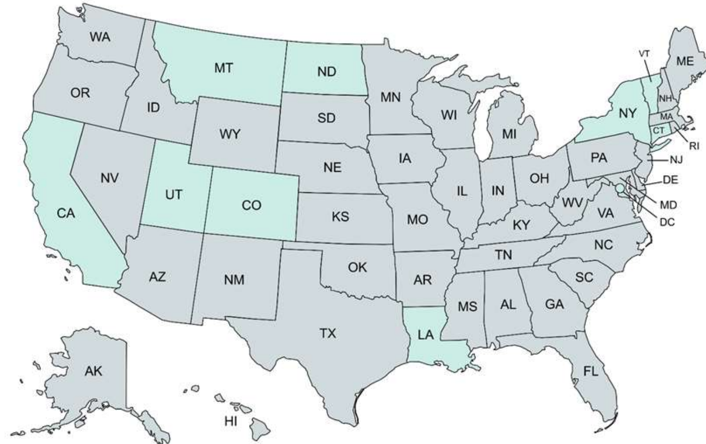
Several states have laws that protect after hours employee speech, including on social media.

- 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

SHRM Salt Lake

PARSONS BEHLE & LATIMER

State Laws Protecting Political Speech



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)

Utah Law Protecting Political Speech

Utah Code Ann. § 34A-5-112:

- An employee **may express** the employee's **religious or moral beliefs** and commitments **in the workplace** in a reasonable, non-disruptive, and non-harassing way on equal terms with similar types of expression of beliefs or commitments allowed by the employer in the workplace, **unless** the expression is in **direct conflict** with the essential business-related interests of the employer.
- An employer may not discharge, demote, …retaliate… 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.

Maragani v. Lucid, 2:25-cv-405 (D. Utah)

- Complaint filed in Utah federal court
- **Plaintiff**: Goud Maragani, former in-house attorney at Lucid
  - “Mr. Maragani is an attorney, an openly gay man, a racial minority as an Indian American, and a military veteran”
  - “Between November 15, 2022, and October 30, 2023, Mr. Maragani served as the President of the Utah Log Cabin Republicans in a volunteer capacity outside of his work hours with Lucid”
- **The Log Cabin Republicans**: a national non-profit organization and describe themselves as “America's oldest and largest organization for LGBT conservatives and our straight allies”
- **Defendant Lucid Software**: a Utah-based software company
- **Equality Utah**: a non-profit corporation that represents and leads the “efforts for LGBTQ equality at the state and local levels by sponsoring LGBTQ legislation, opposing harmful bills, lobbying elected officials, building coalitions, and empowering individuals and organizations to engage in the legislative process”
- **Lucid + Equality Utah**: Since 2021, Lucid has been a member of Equality Utah’s Business Equality Leader program

Maragani v. Lucid, 2:25-cv-405 (D. Utah)

- Outside of work, Mr. Maragani made posts on X critical of Equality Utah's policy positions:
  - "which includes giving children puberty blockers, cross-sex hormones, and surgeries, allowing men and boys to use women's and girls' locker rooms and restrooms, allowing men and boys to play women and girls sports, and teaching children in kindergarten through third grade about gender identity and sexual orientation, which included giving children pornographic books"
- Equality Utah emailed Lucid to complain about Mr. Maragani's social media posts
- Lucid then "told Mr. Maragani not to post about . . . Equality Utah on social media, or he would be terminated
- During a meeting, "Mr. Maragani pointed out that his posts were outside his work hours and unrelated to Lucid" and he "expressed concern that their demand that he stop posting social media content critical of Equality Utah violated UADA"

39

Maragani v. Lucid, 2:25-cv-405 (D. Utah)

- Eventually, Lucid terminated Maragani "for poor performance"
- Maragani sued
- After four months of litigation, the case was dismissed.

40

Utah Policy Solution

A Utah-specific social media disclaimer may look something like this (depending on the specific requirements of state law):

Team members may engage in lawful expression or expressive activity outside of the workplace regarding their religious, political, or personal convictions, unless the expression or activity is in direct conflict with the essential business-related interests of the Company (e.g., the Company's policies against discrimination and harassment).

41

PARSONS BEHLE & LATIMER

Harassment

PARSONS BEHLE & LATIMER

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."

Steven's posts were awful

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.

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."

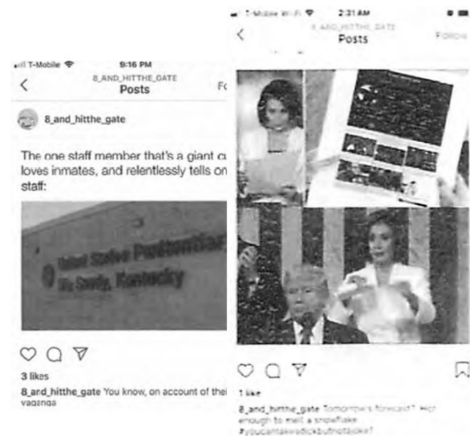
Making matters worse, the HR Manager dismissed Lindsay's concerns too, concluding that her complaint did not involve the workplace. He also said the memes were "funny."

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.



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**."

47

PARSONS BEHLE & LATIMER

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

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

48

PARSONS BEHLE & LATIMER

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

VERDICT

We, the jury in the above-entitled action, unanimously answer the following questions submitted to us:

QUESTION NO. 1:

Was Plaintiff Lindsay Okonowsky subjected to sexual advances, requests for sexual conduct, or other verbal or physical conduct of a sexual nature?

✓ Yes

___ No

If your answer to Question No. 1 is yes, then answer Question No. 2. If your answer to Question No. 1 is no, stop here and have the presiding juror sign and date this form below.

QUESTION NO. 2:

Was the conduct unwelcome to Plaintiff Lindsay Okonowsky?

✓ Yes

___ No

If your answer to Question No. 2 is yes, then answer Question No. 3. If your answer to Question No. 2 is no, stop here and have the presiding juror sign and date this form below.

///

SHRM Salt Lake

PARSONS BEHLE & LATIMER

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

QUESTION NO. 3:

Was the conduct sufficiently severe or pervasive to alter the conditions of Plaintiff Lindsay Okonowsky's employment and create a sexually abusive or hostile work environment?

___ Yes

✓ No

If your answer to Question No. 3 is yes, then answer Question No. 4. If your answer to Question No. 3 is no, stop here and have the presiding juror sign and date this form below.

SHRM Salt Lake

PARSONS BEHLE & LATIMER

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.

Thank you for attending

Thank you

Mark D. Tolman
mtolman@parsonsbehle.com

Paul R. Smith
psmith@parsonsbehle.com

You can scan the following QR code to download a PDF handbook of today's event and subscribe to the Employment Law Update email newsletter.

53

38th Annual **EMPLOYMENT LAW SEMINAR**

The Power of the Paper Trail

Liz M. Mellem
406.317.7240 | amellem@parsonsbehle.com

Elena T. Vetter
801.536.6909 | evetter@parsonsbehle.com

PARSONS BEHLE & LATIMER

38th Annual
Employment Law Symposium

The Power of the Paper Trail

Liz M. Mellem and Elena T. Vetter

April 14, 2026 | The Grand America Hotel

parsonsbehle.com

Presenters

Liz M. Mellem
Parsons Behle & Latimer
amellem@parsonsbehle.com

Elena T. Vetter
Parsons Behle & Latimer
evetter@parsonsbehle.com

Legal Disclaimer

This presentation is based on available information as of Apr. 14, 2026, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

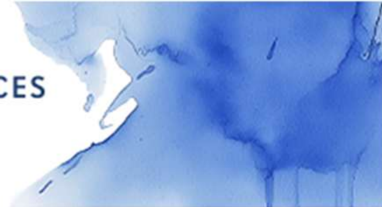
You can scan the following QR code to download a PDF handbook of today's event and subscribe to the Employment Law Update email newsletter.

3

Why should you care about documenting employee issues?

PARSONS BEHLE & LATIMER

"If You Had to Defend It Tomorrow"



If a complaint, audit, or board inquiry landed tomorrow, could you defend your hiring, promotion, or pay decisions with documentation that is job-related and consistently applied?

Expectations are shifting. HR leaders are being ask to demonstrate not just intent, but disciplined decision-making.

Source: SHRM email dated March 3, 2026

Two Pillars of Managing Risk & Employee Performance

Communication

- Oral and written communication conveys information about:
  - Job duties
  - Expectations
  - Performance feedback
  - Corrective action
- Frequent and early communication avoids claims and helps protect against claims

Documentation

It is a *form* of communication

AND

Evidence of communication

"Golden Rule" of Documentation

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

7

How will documentation help limit risk?

- In a jury trial, never rely on testimony alone because the jury gets to pick who to believe
  - ***Spoiler Alert: They tend to believe the employee more often than the company!***
  - *See Frappied v. Affinity Gaming Black Hawk, LLC* (10th Cir. 2020): reversing summary judgment for employer because inconsistent reasons for termination, including as entered in employer's contemporaneously created spreadsheet, could support a jury's finding that employer lacked credibility
  - Memories fade
  - Witnesses are unreachable (death; outside of subpoena power)
- Documents help to establish **intent** and disciplined, consistent decision-making:
  - Decisions were performance or business based
  - Decisions were **NOT** motivated by discriminatory, retaliatory, or other unlawful intent

8

Important Documents in Litigation

- Job Description
- Employee Handbook
- Performance Evaluations
- Discipline Records
- Records of interactive process
- But, lots of others can be important depending on the claim:
  - Time cards, payroll, attendance record, emails/Slack/Team chats/texts, etc.

9

Other Reasons for Documenting?

- Improves communication between management and employees
- Record performance issues, feedback/discipline, and employee's growth or development
- Uniformity in business decisions
- Show that you did everything you should in furtherance of the employee's rights, such as:
  - ADA accommodations
    - Interactive process takes time, and every point should be documented
  - Investigated claims of discrimination, harassment, or retaliation

10

Who Else Cares About Documentation?

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

11

Documents Relevant to UALD Investigations

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

12

Real World Example: *Ames v. Ohio Department of Youth Services* (2025)

PARSONS BEHLE & LATIMER

Ames v. Ohio Dept. of Youth Servs.

(Photo credit: Megan Jelinger, REUTERS)

- Marlene Ames, heterosexual woman working for Ohio Dept of Youth Services
- After she was interviewed for a management position, she was fired from her program administration role and offered a secretarial position
- Lesbian woman hired to fill management position
- Gay man was hired to fill vacant program admin position
- Ames alleged she was denied a promotion and effectively demoted (with pay cut) based on her sexual orientation
- Alleged LGBTQ+ candidates were favored

14

SHRM Salt Lake

PARSONS BEHLE & LATIMER

Ames, continued

- District Court dismissed her case because she is failed to show "background circumstances" suggesting employer discriminates against majority group she is part of
- Sixth Circuit Court of Appeals affirmed
- **Unanimous** SCOTUS vacated and remanded = Title VII's protections apply equally to majority and minority groups (no higher standard for majority group)

15

Ames, continued

Why is this relevant to documentation?

- The Department gave shifting reasons for demotion at different points in the process:
  - Supervisors refused to give Ames a reason for her demotion when it occurred
  - But, before the EEOC, Department said it demoted Ames because she was at-will and it could remove her at any time without cause;
  - Then, in deposition, one supervisor claimed Ames was not the right person to fill his "vision"
- If had Department properly documented what occurred, when, and why – it could have avoided Ames filling in the gaps by assuming discrimination

16

Documenting Throughout Employment Cycle

PARSONS BEHLE & LATIMER

When to document?

- Numerous opportunities to document employee interactions:
  - Recruitment
  - Hiring
  - Training
  - Day-to-day Feedback/Daily Meetings
  - Biannual Reviews
  - Write Ups/Performance Improvement Plans
  - Termination of employment relationship

18

SHRM Salt Lake

PARSONS BEHLE & LATIMER

What to document?

- Performance Issues
- Performance Review/Evaluations
- Employee Discipline
- Requests for accommodation or leave
- Complaints about discrimination, harassment, retaliation
- Investigation into complaint
- Termination

PARSONS BEHLE & LATIMER

Be smart about what you document

Actual Employee Evaluations

"Since my last report, this employee has hit rock bottom and has started to dig."

"His men would follow him anywhere, but only out of morbid curiosity."

"I would not allow this employee to breed."

"He sets low personal standards and then consistently fails to achieve them."

"This employee should go far – and the sooner he starts the better."

"This employee is depriving a village somewhere of an idiot."

PARSONS BEHLE & LATIMER

Be smart about what you document

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

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

Documenting Performance Issues

Managers should **intervene immediately** after the ***first*** sign of a serious performance or conduct problem.

- Don’t need a formal performance improvement plan in the first instance; can be a verbal feedback session
- Document the discussion with a note to file or email (or possibly discipline, like a written warning).
- And **involve HR!**

Conduct a Truthful and Accurate Performance Review

Conduct a truthful and accurate review of employee's performance during full relevant period (e.g., one year).

- Note if problems exist and include discussion of relevant job actions (e.g. warnings or discipline, successes, etc.).

23

Performance Evaluations, Reviews, Appraisals

- Should address: C.A.P.
  - CONDUCT
  - ATTENDANCE
  - PERFORMANCE
- Be Courageously Honest
- But Not About Non C.A.P. Issues!

24

Characteristics of Good Evaluation Ratings

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

Characteristics of Bad Evaluation Ratings

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

Leniency – supervisor gives high ratings to all employees.

Strictness – supervisor gives low ratings to all employees.

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

Key Ingredients for Documenting Discipline

When managing performance or conduct, including in **warnings**, always include these **FOUR** ingredients:

1) nature of problem,
2) how it can be fixed,
3) clear timetable for doing so, and
4) consequences of failure to do so (such as discharge).

27

PARSONS BEHLE & LATIMER

Bad Example of Discipline Document

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

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

Is this helpful documentation?

28

PARSONS BEHLE & LATIMER

Good Example of Discipline Document

A proper signed write-up might look like this:

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

29

Common Mistakes Documenting Discipline

- Vague communication of the expectations and consequences going forward
  - Be clear and unequivocal
- Inconsistent discipline for similar infractions across the company
  - Disparate treatment claims rise from inconsistent treatment (even unintentional)
  - Communicate across managers/supervisors to ensure acting similarly
- Inappropriately light discipline or giving too many chances to improve
  - Being the "nice guy" can backfire!
- Bringing unrelated or irrelevant issues into the documentation
  - Keep it clean and business-related

30

Documenting Termination/Discharge

Trigger for Discharge: should be some event that moves situation towards termination (e.g., expiration of last chance time-period without needed improvement, additional major mistake, misconduct, etc.)

Beware of subjective conclusions (e.g., “He just doesn’t fit in!”) and instead identify underlying objective facts leading to your conclusions and decisions

Primary goal: anyone second-guessing you should conclude there was **clear explanation of expectations, notice of problems** and a **documented chance to improve** before discharge.

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

Common Mistakes in Termination

- NO DOCUMENTATION
- Not giving a complete, written reason for the termination to employee
- Terminating without having exhausted the ADA reasonable accommodation process
- Termination for retaliatory reasons (known to the decisionmaker, but not to HR)
- Ignoring company’s own procedure/process for discipline
- Sugar-coating or leaving out some reasons for termination – if it is not noted in a contemporaneous document, it did not happen
- Getting HR or counsel involved too late – after a bad decision has been made or bad documentation has been created

Hypotheticals to Consider

PARSONS BEHLE & LATIMER

Too Busy to Document, Until…

Shannon's supervisor, Jan, finds Shannon "abrasive" and believes she "doesn't collaborate well with others." Shannon's team members have informally complained to Jan that Shannon "talks over others in meetings" and "pushes back too much." Jan did not document these conversations.

Jan has not issued Shannon a formal write up. Jan has made some vague meeting notes where she references "culture" and messages to Shannon like "let's work on tone."

SHRM Salt Lake PARSONS BEHLE & LATIMER

Still Too Busy to Document, Until…

Shannon complains to HR that she feels Jan is targeting her because she is neurodivergent and communicates differently than others.

A few days later, Shannon makes a comment in a team meeting that Jan views as disrespectful. Jan wants to terminate Shannon.

- ***What risks might exist if Shannon is terminated?***
- ***What should Jan have done to limit these risks?***

Too Obvious to Document, Until…

Matt has constant attendance issues and has been late for work nineteen times. His supervisor, Jake, has not mentioned it to him, because he figures it is obvious that employees need to be to work on time. Further, the employee handbook states that tardiness may result in discipline.

Matt requests leave under FMLA. A few days after putting in his request, Matt is tardy for the twentieth time. Jake has had enough and wants to terminate him.

Are there potential risks to terminating Matt?

What should Jake have done to minimize the risk?

Questions?

PARSONS BEHLE & LATIMER

Thank you

Liz M. Mellem
amellem@parsonsbehle.com

Elena T. Vetter
evetter@parsonsbehle.com

You can scan the following QR code to download a PDF handbook of today's event and subscribe to the Employment Law Update email newsletter.

38

SHRM Salt Lake

PARSONS BEHLE & LATIMER

38th Annual **EMPLOYMENT LAW SEMINAR**

ICE Raids, I-9 Audits, E-Verify and Business Immigration

Lewis M. Francis
801.536.6859 | lfrancis@parsonsbehle.com

PARSONS BEHLE & LATIMER

38th Annual
Employment Law Symposium

ICE Raids, I-9 Audits, E-Verify, H-1Bs & Other Business Immigration Issues

Lewis M. Francis

April 14, 2026 | The Grand America Hotel

parsonsbehle.com

Presenter

Lewis M. Francis
Parsons Behle & Latimer
lfrancis@parsonsbehle.com

2

SHRM Salt Lake | PARSONS BEHLE & LATIMER

Legal Disclaimer and PDF Handbook

This presentation is based on available information as of Apr. 14, 2026, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

You can scan the following QR code to download a PDF handbook of today's event and subscribe to the Employment Law Update email newsletter.

3

Introduction / Overview

- Changes To Employment-Based Immigration
  - H-1B visas and lottery
  - Attempts to restrict business immigration options
  - Limitations on EAD extensions
- Workplace Enforcement Actions
  - I-9 Audits
  - ICE Workplace Raids
  - Internal I-9 Audits
  - E-Verify Options and Requirements

4

PARSONS BEHLE & LATIMER

A Professional Law Corporation

Differences Between Trump I and II

- First Trump Administration was more focused on restricting legal immigration
  - Lots of RFEs and Rejections
  - Attempts to Restrict Legal Classifications for Business-based applications
  - Not much evidence of that so far
- Second Trump Administration mostly focused on illegal immigration
  - Deporting those with Criminal Records
  - Existing Deportation Orders
  - Affiliations with or support of Gang or Terrorist organizations

SHRM Salt Lake

PARSONS BEHLE & LATIMER

Differences Between Trump I and II

- Closed Border Policies
  - Asylum applications restricted
    - No more CBP App applications
    - Can't make Asylum claims and enter country
    - Many Asylum applications have been summarily denied
  - Temporary Protected Status (TPS) for many countries has not been renewed or has been revoked
  - No More Prosecutorial Discretion on deportation cases.
  - Administration taking a hard-line approach, and also pushing back against "Sanctuary Cities" which are unwilling to cooperate
- Likely More Worksite Enforcement Actions Now that Funded

EADs no longer get Auto Extensions

- As of October 31, 2025, EAD extension applications are no longer entitled to automatic extensions
  - Applies to nearly all categories of EADs (including DACA and H-4 EADs)
  - Applications filed after that date must be approved to entitle work authorization (including for existing employees)
- EAD apps are currently taking as long as 6 months to process, and include a new biometrics requirement (appearing for USCIS photos)
- As a result, if an employee currently working on an EAD does not file for the extension 6 months before its expiration, it will most likely expire before the extension is approved.

The new $100,000 H-1B fee that really wasn't

- 2025 Executive Order Restricting Entry of Nonimmigrant Workers
- New H-1B applications to have a $100,000 surcharge
  - This would have destroyed the H-1B program
  - H-1B program is already completely oversubscribed
- Executive Order has now been greatly limited
  - Trump administration later retreated on this, so the fee only applies to new H-1Bs for potential employees outside the U.S. – think of it as an import tax or "tariff"
  - Fee does not apply to workers already in the U.S., such as those on F-1 OPT or STEM OPT, extending current H-1B, or transferring from an H-1B employer

9

Actual Changes to H-1B Program

- H-1B visa are the only real option for US employers seeking to employ highly-skilled foreign national workers,
- H-1Bs require that the employee have at least a bachelor' degree in a "specialty" occupation requiring that type of degree,
- H-1Bs also require that the employee be paid at least the prevailing wage for this type of position, as defined by the U.S. DOL.
- Most of the H-1B applicants are already in the US, working on OPT or STEM OPT, after graduating from US universities
- H-1B visas are so limited that there is a lottery every year, with less than 25% chance of being selected

10

New Wage-Based Considerations on H-1Bs

- Changes to H-1B lottery for 2026
- The system now favors the higher-paid employees (by quite a bit).
- Employer must state SOC category for the position and the wage level. https://flag.dol.gov/wage-data/wage-search.
- Level IV salaries get 4 chances of being selected, Level III 3 chances, Level II 2 chances, and Level I only 1 chance.
- USCIS is also collecting information regarding the wage level, required degree, experience and skills on the H-1B application.
- This could be used to defeat a later PERM application requiring more than stated on the H-1B app (unless a different position.

11

Workplace Enforcement Actions

I-9 Audits by USCIS

- This is the most common type of Workplace Enforcement Action
- 3 Day Notice to provide copies of I-9s within 3 business days
  - Current employees
  - Employees terminated within last year
- ICE typically will not grant extensions on producing I-9s
- 3-Day Notice may be accompanied by an Administrative Subpoena

13

Administrative Subpoenas with I-9 Notice

- Immigration Enforcement Subpoena
  - Will ask for more information, such as list of prior employees
  - Will ask about contract employees and their work authorization info
  - More room to negotiate on timing of response
  - Possible defenses if subpoena not properly prepared
  - Have your lawyer review before responding to this

14

Types of Penalties for I-9 Violations

- Substantive violations:
  - Failing to complete I-9
  - I-9 fails to show that party has work authorization
  - Failure to update I-9 after employment authorization ends
  - Carry highest penalty (from $716 to $5724 per unauthorized worker)
  - Includes knowingly hiring employee without work authorization
  - Possible criminal liability for pattern or practice of hiring unauthorize workers

Technical and Paperwork Violations

- Technical and Paperwork Violations are of lesser concern, and ICE may allow the employer to fix after sending a Warning Notice
- Types of Technical violations include:
  - Not completing I-9 properly
  - Boxes not filled out
  - Documents in wrong location
  - Employment authorization not reverified
  - Missing signatures from employee and employer
  - Not completing within first 3 days of employment (Can't be fixed, so important to note that this should be done)

Internal I-9 Audit by Employer

- Best Way to Avoid Liability in case of an ICE Audit
- Make sure that all I-9s and supporting records are in an easily located place (should be separate from employment files)
- Revise and fix problems on existing I-9s
- Complete I-9s where missing
- Purge old I-9s for terminated employees (must keep for 1 year after termination of employment, or 3 years from date of hire, whichever is greater)

17

PARSONS BEHLE & LATIMER

Actions to take on Internal I-9 Audits

- Must not act in discriminatory fashion (look at all I-9s)
- Only employee can change Section 1 information
- Employer can only change Section 2 and Section 3 information
- Do not backdate forms, but rather include correct information and initial with current date. All changes should be transparent
- The USCIS has detailed instructions for how to properly conduct Internal I-9 Audits (see handouts on fixes that can be made)
- Conduct in conjunction with an attorney if you want to preserve attorney-client privileged communications

18

PARSONS BEHLE & LATIMER

Use of E-Verify

PARSONS BEHLE & LATIMER

E-Verify

- If really concerned about employment authorization, use E-Verify
- E-Verify creates actual knowledge– no defense if no work authorization
- More defenses are available for simply completing the I-9 Form
- E-Verify is the electronic wall, but Congress has never agreed to require employers to use it (except for government contractors).
- E-Verify is required under Utah law for companies with 15 or more employees, but there is no real penalty for not using it, except as follows
  - You have to use E-Verify if a government contractor
  - $100 penalty in administrative action for each employee w/o authorization
- If you use it, it must be for all new employees (cannot discriminate)
- Cannot go back in time and use on existing employees (unless you are a federal contractor).

SHRM Salt Lake

PARSONS BEHLE & LATIMER

ICE Raids

PARSONS BEHLE & LATIMER

ICE Raids at Worksite

- Quite Uncommon enforcement action (in the past has been limited industries with high rate of unauthorized employment).
- May increase with new congressional funding
- Requires a warrant
- Different than a search for an identified employee.
- When ICE arrives at the worksite, direct the receptionist/managers to contact legal counsel.
- The receptionist should state "Our company policy is to call our lawyer, and I am doing that now."

SHRM Salt Lake

PARSONS BEHLE & LATIMER

Basic Rule—Access to Private Areas Requires a Warrant

- ICE can search public areas (lobbies/parking lots/common areas) etc. without any kind of warrant.
- To access an area normally reserved for employees or otherwise not accessible to the public, ICE needs to have a warrant.
- If no warrant, do not consent to a search of private premises or documents.
- If ICE insist on doing it anyway, your lawyer can later exclude any evidence obtained in violation of the 4th Amendment to the US Constitution.

Different Types of Warrants

- A "judicial warrant" is a formal written order authorizing a law enforcement officer to make an arrest, a seizure, or a search. A judicial warrant is issued by a judicial court (federal or state).
- ICE officers are permitted to enter any public areas of your workplace but must have a valid search warrant or the company's consent to enter non-public areas. Should not consent to any unauthorized search.
- A valid judicial search warrant must be signed and dated by a judge. It will include a timeframe within which the search must be conducted, a description of the premises to be searched, and a list of items to be searched for and seized (e.g., payroll records, employee identification documents, Forms I-9, SSA correspondence, etc.).

You can object to the Warrant, but you Cannot Refuse to Allow it to Proceed

- You can accept the warrant but not consent to the search. If you do not consent, the search will proceed, but you can later challenge it if there are grounds to do so.
- Examine the warrant to ensure that it is signed by the court, that it is being served within the permitted timeframe, and that the search is within its scope (the area to be searched and the items to be seized).
- Do not engage in a debate or argument with the agent about the scope of the warrant. Simply state your objection to the agent and make note of it.
- Do not block or interfere with the agents' activities. But, again, you are not required to give the agents access to non-public areas if they did not present a valid search warrant for those areas.

25

What Can ICE Do?

- ICE may demand that equipment be shut down and that no one leave the premises without permission. You should comply.
- ICE may move employees into a contained area for questioning.
- Employees are not required to answer questions – but don't direct them not to
- Do Not assist any employee in escaping from ICE
- Do Not Hide employees from ICE
- List of does and don'ts in AILA Employer Rights and Responsibilities handout

26

What Can the Employer do?

- Do not provide false or misleading information, falsely deny the presence of named employees, or shred or otherwise obscure documents.
- Enforcement actions can sometimes last for hours. If an employee requires medication or medical attention, or if employees have children who need to be picked up from school, communicate these concerns to ICE.
- If an employee is detained or taken into custody, ensure that you assign someone to contact the family, and pay them any money owed for wages.

27

What Can the Employer Do?

- If agents wish to examine documents designated as attorney-client privileged material (such as letters or memoranda to or from counsel), inform them that the documents are privileged and request that attorney-client documents not be inspected by the agents. If agents insist on taking such documents, you cannot prevent them from doing so. If such documents are seized, try to record in your notes exactly which documents were taken by the agents and your efforts to explain to the agents that the documents were privileged.
- Ask for a copy of the list of items seized during the search. The agents are required to provide an inventory.

28

Employee Rights

- Employees have the right to remain silent and the right to hire an attorney if they choose.
- While you should not instruct your employees to refuse to speak to federal agents, they also have the right to remain silent and do not need to answer any questions.
- Employees do not need to answer questions about their immigration status, where they were born, or how they entered the United States.

Employee Rights

- If ICE tries to determine your employees' immigration status by asking them to stand in groups according to status, they do not have to move, or they can move to an area that is not designated for a particular group.
- Employees may also refuse to show identity documents that disclose their country of nationality or citizenship.
- If an employee has valid immigration documents, they may present them. They should never present false documents.

Summary

- Get your I-9 paperwork in order
  - Conduct an Internal I-9 Audit
  - Use E-Verify going forward
- Know your rights but cooperate with ICE agents.
- ICE is looking for illegal workers, not to punish unsuspecting U.S. employers
- However, you can create liability for yourself or your employer by not cooperating or actively interfering
- ICE coming to detain one of your employees is not an “ICE Raid”.
  - Employee may have committed a crime, been ordered deported, or their status has been terminated

31

Questions?

Thank you for attending

PARSONS BEHLE & LATIMER

Thank you

Lewis M. Francis
lfrancis@parsonsbehle.com

You can scan the following QR code to download a PDF handbook of today's event and subscribe to the Employment Law Update email newsletter.

SHRM Salt Lake

PARSONS BEHLE & LATIMER

34

38th Annual EMPLOYMENT LAW SEMINAR

Investigations: Lessons from the Trenches

Christina M. Jepson
801.536.6820 | cjepson@parsonsbehle.com

Susan Baird Motschiedler
801.536.6923 | smotschiedler@parsonsbehle.com

PARSONS
BEHLE &
LATIMER

A Professional
Law Corporation

38th Annual
Employment Law Symposium

Investigations: Lessons from the Trenches

Christina M. Jepson and Susan Baird Motschiedler

April 14, 2026 | The Grand America Hotel

parsonsbehle.com

Presenters

Christina M. Jepson
Parsons Behle & Latimer
cjepson@parsonsbehle.com

Susan Baird Motschiedler
Parsons Behle & Latimer
smotschiedler@parsonsbehle.com

Legal Disclaimer

This presentation is based on available information as of Apr. 14, 2026, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

You can scan the following QR code to download a PDF handbook of today's event and subscribe to the Employment Law Update email newsletter.

Investigations: Lessons From The Trenches

Introduction: What Do Courts Look for in an Investigation?

Investigations: What Are Courts Looking For?

- Promptness
- Thorough
- Impartial/Fair
- Competent Investigator
- Notice Provided to the Accused
- Reasoned Conclusion/Substantial Evidence/Documented
- ~~Perfection~~

5

An Adequate Investigation Can Help:

- **Show No Material Dispute of Fact:** Well documented investigation shows court there is no genuine dispute over what conduct occurred or how handled
- **Assert Affirmative Defense:** Show employer exercised reasonable care to prevent and correct behavior
- **Defend Against a Retaliation Claim:** Document a legitimate non-retaliatory reason for discipline
- **Defend Against Punitive Damages:** Shows good faith and lack of discriminatory intent

6

Investigations: Lessons From The Trenches

Investigations Done Wrong

Case #1

7

Kramer v. Wasatch County Sheriff's Office (10th Cir. 2014)

- Camille Kramer worked in the Wasatch County Sheriff's Dept.
- In 2006, she complained to the Sheriff about sexual and non-sexual harassment. Sheriff said "I'll deal with it."
- Convened a staff meeting, used Kramer as the "victim," and acted out the exact harassing scenarios complained about.
- Said "that's harassment. Don't do it."

8

Kramer v. Wasatch County Sheriff's Office (10th Cir. 2014)

- Moved to Court as a bailiff; reported to Sergeant Benson
- Benson demanded foot massages from Kramer and jokingly made a doctor's note
- Benson said he would stop bothering her if she came to his house and gave him a foot massage
- He promised "road training"
- Grabbed her, pulled her on top of him, and tried to kiss her. She escaped and ran out
- Kramer did not report - feared demotion, as Benson was her supervisor

Kramer v. Wasatch County Sheriff's Office (10th Cir. 2014)

- Benson agreed to take Kramer for road training in his patrol car
- Instead, he sexually assaulted her – twice in the patrol car
- Told her: "Don't act weird. Don't act weird on me"
- Benson became retaliatory and controlling
  - Denied leave requests
  - Monitored her to see where she went after work
  - Messaged or called her if she did not go straight home
- Kramer also cleaned houses on the side for extra money
- She declined to clean Benson's house

Kramer v. Wasatch County Sheriff's Office (10th Cir. 2014)

- Benson told coworkers that Kramer thought she was "too good" to clean his house and got coworkers to also harass her to clean his house
- Agreed to clean if her kids and his daughter were home
- When kids were outside playing, Benson raped Kramer
  - Benson: "This is wrong. I can't believe you made me do this."
  - "You better be quiet about this and not say anything. This is a career ender."
- Threatened her with a bad performance review and said, "keep [your] mouth shut and not say anything and you'll be taken care of"
- Assigned her an undesirable job and accused her of stealing money

11

Kramer v. Wasatch County Sheriff's Office (10th Cir. 2014)

- Final sexual assault: Benson on medical leave and convinced Kramer to come to his house. He grabbed her, exposed his penis, and pulled her on top of him
- Shortly after, Kramer confided in several court clerks that Benson had raped and sexually assaulted her. Consented to one of the clerks reporting it
- Sheriff assigned Detective Brian Garner, "the unfortunate guy that was on-duty on that particular day" to investigate "possible sexual misconduct" between Benson and Kramer

12

Kramer v. Wasatch County Sheriff's Office (10th Cir. 2014): The Investigation

- Detective Garner:
  - Not a human resource professional
  - "Not trained in conducting sexual harassment training
  - Was not aware of and did not look at County procedure for sexual harassment investigations
  - Friend of Benson's for over 10 years; viewed Benson as a "mentor"
- Investigation Focus:
  - Kramer was having an affair with another County employee and was pregnant
  - Who was father? Had they had sex while on-duty? Where and When?
  - Threatened Kramer that nobody would believe her allegations of rape if she did not disclose father of baby
  - Encouraged Kramer to resign

13

Kramer v. Wasatch County Sheriff's Office (10th Cir. 2014): The Investigation

- Transferred investigation to Detective Hull, a state investigator in charge of the stolen money investigation
  - Detective Hull interviewed Kramer about Benson's sexual assaults – that's it! Nobody else
- Sheriff reported Kramer to POST (Peace Officer Standards and Training) because she had an affair with another employee
  - Her certifications were suspended because they had sex while her paramour (but not her) was on duty
  - Sheriff wanted Kramer to resign to "protect" the other employee and the Sheriff's Dept.
- Kramer resigned and brought lawsuit; District Court granted summary judgment to County

14

Kramer v. Wasatch County Sheriff's Office, (10th Cir. 2014)

- Appeals Court reversed, finding investigation was inadequate:
  - Investigator was neither competent or impartial
  - Did not explore Kramer's allegations
  - Did not investigate prior complaints that Benson had sexual relations with confidential informants
  - Did not investigate prior complaints from other female court employees that Benson had intimidated them
  - "There is no legitimate, nondiscriminatory reason for forcing Ms. Kramer into choosing whether to in effect retract her allegations of sexual harassment and rape or else disclose the father of her baby."

Kramer v. Wasatch County Sheriff's Office (10th Cir. 2014)

TAKEAWAYS

- Choose a trained, competent, and unbiased investigator
- Investigate the allegations – all of them!
- Scope the investigation appropriately – interview more people than just the complainant
- Do not side-track the investigation at hand with other issues
- Do not threaten or unfairly punish the complainant

16

Investigations: Lessons From The Trenches

Investigations Done Wrong

Case #2

17

Mohamed v. Society for Human Resource Management No. 1:22-CV-01625 (D. Colo.)

- In 2016, Reba Mohamed, a non-white Egyptian woman, was hired by SHRM
- On **January 19, 2020**, Mohamed was promoted to Senior Instructional Designer where she worked with vendors on education programs that were offered to clients. Her supervisor was Carolyn Barley
- **On June 3, 2020**, Mohamed complained to Jeanne Morris, Vice President of Education, that she was having trouble performing her work because Barley micromanaged her and treated her white peers differently
- On **June 4, 2020**, Mohamed raised these same concerns in a Zoom meeting with Morris and Barley. Barley was upset by Morris's complaint and cried.
- On **June 12, 2020**, Mohamed discussed her concerns with Barley again.

18

Mohamed v. Society for Human Resource Management
No. 1:22-CV-01625 (D. Colo.)

Getting HR involved is the right idea. But what should have happened at this point?

- Barley consulted with Mike Jackson, an HR employee, who told Barley to document her interactions with Mohamed.
- Jackson was also placed in charge of investigating Mohamed's complaint. It was his first investigation.
- Jackson interviewed Mohamed and Barley's team.
  - Mohamed and another black employee complained that Barley micromanaged them and treated them differently due to their race. Two white employees did not report similar concerns.
  - Mohamed testified that Barley asked to review all of her emails and to attend all of her meetings with vendors.
  - Mohammed also testified she was discouraged from attending an important meeting that all team members were invited to.

Mohamed v. Society for Human Resource Management
No. 1:22-CV-01625 (D. Colo.)

Should HR be ghostwriting emails for Barley?

- During the investigation, Jackson helped Barley ghostwrite emails regarding Mohamed's deadlines.
- On **August 12, 2020**, Barley emailed Mohamed stating that two projects she was working on should be finished by **August 31, 2020**.
- Mohamed replied describing issues she was having with the vendors and asking Barley to "work with [her] to ensure that these deadlines are met."

Mohamed v. Society for Human Resource Management
No. 1:22-CV-01625 (D. Colo.)

Does the "support an eventual case for termination" language make you nervous?

- On August 13, Nick Schalcht, SHRM's Chief Global Development Officer, sent an email to Jackson asking him to assist Barley with drafting a response.
- The email stated that "this offers an opportunity to get the right language on the table to correct her quickly, or to support an eventual case for termination."
- Barley's ghostwritten reply to Mohamed's email stated that no help would be provided and that the deadlines were non-negotiable.

21

Mohamed v. Society for Human Resource Management
No. 1:22-CV-01625 (D. Colo.)

What should SHRM have done when it received Mohamed's additional retaliation complaint?

- On **August 19, 2020**, Mohamed complained to HR that she was being retaliated against for her prior complaint.
- That same day, SHRM created a draft of Mohammed's termination documents.
- Jackson was also placed in charge of investigating Mohamed's retaliation complaint.
- No investigation was conducted.
- On **August 31, 2020** Jackson notified Mohamed that it had concluded its investigations and that both her complaints were unfounded.

22

Mohamed v. Society for Human Resource Management No. 1:22-CV-01625 (D. Colo.)

- Mohamed turned in both of her projects before the August 31, 2020 deadline.
- On September 1, 2020, SHRM gave Mohamed termination documents including documents that had been prepared and approved a few days before.
- SHRM and Barley claimed they terminated Mohamed solely for failing to meet the August 31 deadline.

23

PARSONS BEHLE & LATIMER

Mohamed v. Society for Human Resource Management No. 1:22-CV-01625 (D. Colo.)

- Mohamed's projects were reassigned to two white members of the team.
  - One of the teammates, Carrie Mills, testified that Barley told her that she not sure how complete the project was and gave her no completion date. Mills finished it in a week.
  - Mills also stated that "not once during my employment with Defendant did I *ever* meet the target completion deadline for a major project and was never coached or disciplined or coached for missing a deadline."
  - Mills also stated that Barley's focus on Mohamed's deadline was "quite odd given that neither me nor [another white employee] were held to the same standard."
- Mohamed sued and a jury trial was held.

24

PARSONS BEHLE & LATIMER

Mohamed v. Society for Human Resource Management
No. 1:22-CV-01625 (D. Colo.)

1. Did Ms. Mohamed prove by a preponderance of the evidence that but for her race Defendant SHRM would not have terminated her in violation of Section 1981?

ANSWER: Yes X No ______

2. Did Ms. Mohamed prove by a preponderance of the evidence that but for her complaints about race discrimination and/or retaliation Defendant SHRM would not have terminated her in violation of Section 1981?

ANSWER: Yes X No ______

25

Mohamed v. Society for Human Resource Management
No. 1:22-CV-01625 (D. Colo.)

PART TWO: DAMAGES

3. Did Ms. Mohamed prove by a preponderance of the evidence that she is entitled to an award of compensatory damages, as described in Instruction No. 21?

ANSWER: Yes X No ______

If you answered "Yes," state the amount of such damages: $ 1.6 Million

4. Do you find by a preponderance of the evidence that Ms. Mohamed is entitled to an award of punitive damages, as described in Instruction No. 23?

ANSWER: Yes X No ______

If you answered "Yes," state the amount of such damages: $ 10 Million

26

Mohamed v. Society for Human Resource Management No. 1:22-CV-01625 (D. Colo.)

TAKEAWAYS

- Investigations need to actually investigate and determine facts, not function as formalities.
- Complete all investigations - SHRM never investigated Mohamed's retaliation complaint.
- Investigations should be unbiased and seek to uncover what occurred rather than serve to support and execute decisions made by others.

27

Investigations: Lessons From The Trenches

Investigations Done Wrong

Case #3

28

Graham v. Bristol Hospice (D. Utah 2026)

- Plaintiff Elizabeth Graham worked at Bristol Hospice as an HR benefits generalist. She reported to Debra Wertz, the VP of HR.
- In February 2018, Graham provided support for a coworker's sexual harassment EEOC claim. Wertz was apparently very angry with Graham.
- On March 28, 2018, Graham filed a Charge with the UALD, alleging Wertz and another coworker, the Director of Payroll and Benefits, created a hostile work environment on the basis of age and gender.
- At some point, Wertz said Graham's allegations were untrue and ludicrous.
- On April 24, 2018, the parties engaged in mediation; it was unsuccessful.

29

Graham v. Bristol Hospice (D. Utah 2026)

- Plaintiff offered to withdraw the Charge if they could move forward in "good faith."
- **April 30, 2018:** Graham withdrew the Charge.
- **June 7, 2018:** the UALD issued notice that the Charge was withdrawn.
- **Summer 2018:** Bristol was in the process of purchasing another company Optimal Hospice.
- **July 10 and 11, 2018:** the Optimal HR and Bristol HR teams met.
    - Graham was to train Optimal employee Faith Myers on July 11 on "benefits, process, Paylocity, etc."
    - At some point, Wertz moved the training to July 10. Graham claims she was not told that the date had changed.

30

Graham v. Bristol Hospice (D. Utah 2026)

- Wertz asked Meyers about the training, and Meyers said she did not receive the training and felt uncomfortable with Graham.
- Wertz emailed Graham and requested a summary of the training.
- Graham replied:
  - As per your instructions, I met with [Meyers] on 7/10/2018 . . . and reviewed [benefits, workers' comp, FMLA processes and briefly reviewed Paylocity; however the Paylocity training was cancelled so [Meyers] and I never met for her scheduled training."
- What should Wertz have done at this point?

31

Graham v. Bristol Hospice (D. Utah 2026)

- Wertz did not conduct a formal investigation.
  - talked to witnesses present when Meyers said she didn't receive training and to witnesses who claimed Graham said she was upset about "babysitting" Meyers.
- Graham was not informed of the allegations that she did not provide training and was not provided with an opportunity to respond.
- **July 13, 2018:** Wertz fired Graham
- Wertz later represented to DWS that Graham 1) was insubordinate in not providing the training; 2) falsified the training she provided

32

Graham v. Bristol Hospice (D. Utah 2026)

- In her deposition, Wertz said she found Meyers more credible because she had no reason to lie.
  - What is the problem with that assessment?
- Although Wertz did not conduct a formal investigation, she had witnesses prepare statements of recollection regarding the matter **after** she terminated Graham.
  - What is the problem with requesting statements after terminating Graham?

Graham v. Bristol Hospice (D. Utah 2026)

- Graham filed a lawsuit under Title VII for retaliation.
- Graham and Bristol each moved for summary judgment
- The Court denied both motions, stating the issues were for the jury:
  - Whether Wertz conducted a fair investigation
  - What the facts underlying the Paylocity training are
  - Whether Wertz's reaction to Graham's evidentiary support for a coworker's sexual harassment claim and her statements that Graham's own Charge allegations were "untrue and ludicrous" demonstrated retaliatory animus
- What could Bristol have done to help prevent this?

Graham v. Bristol Hospice (D. Utah 2026)

- **The result:**

1. Do you find by a preponderance of the evidence that Bristol Hospice terminated Ms. Graham's employment because of Ms. Graham's protected activity?

   Yes ✓ No ________

2. If you answered "yes" to Question 1, write the amount, if any, of non-economic damages that Ms. Graham sustained because Bristol Hospice terminated her.

   $ 75,000

Write the amount, if any, of punitive damages you award against Bristol Hospice.

$ 5,000,000

35

Investigations: Lessons From The Trenches

Investigations Done Wrong

Case #4

36

Gray v. State Farm Auto. Mutual Ins. Co.
159 F. 4th 1024 (6th Cir. 2025)

- Monica Gray was a longtime State Farm employee who worked on a team managed by Chris Martin.
- Gray was friends with another State Farm employee Sonya Mauter who worked on a different team managed by Joe Kyle.
- Mauter had an ADA accommodation that exempted her from overtime work.
- In August 2017, Kyle told Mauter that State Farm would no longer accommodate her work schedule and that if she did not agree to work overtime that she could eventually be terminated.
- Mauter asked to use her FMLA leave but Kyle falsely told her that she had none left.

37

Gray v. State Farm Auto. Mutual Ins. Co.
159 F. 4th 1024 (6th Cir. 2025)

- Mauter asked Gray to help her with the situation. Gray agreed to help and took the following actions:
  - Researched ADA law and State Farm policies
  - Contacted human resources for information
  - Lodged an internal complaint against Kyle
  - Coached Mauter how to advocate for herself
  - Advised Mauter to seek legal counsel and file an EEOC charge – which Mauter did
- Mauter repeatedly informed Kyle that Gray was assisting her

38

Gray v. State Farm Auto. Mutual Ins. Co. 159 F. 4th 1024 (6th Cir. 2025)

- Kyle responded by intensifying his scrutiny of Mauter and issued her a warning for discussing accommodations with colleagues, threatening her with "action up to and including termination."
- Mauter's lawyer sent State Farm a letter alleging that Kyle engaged in illegal retaliation.
- State Farm investigated Mauter's claim and transferred her to another team.
- In November 2017, Gray's supervisor Martin went on vacation and Kyle filled in for him.

39

Gray v. State Farm Auto. Mutual Ins. Co. 159 F. 4th 1024 (6th Cir. 2025)

- State Farm policy required employees to closely adhere to their scheduled shifts and allotted meal breaks and to track their time to the minute.
- However, Martin was relaxed about this policy and did not monitor or verify his employee's timesheets and at least some members of his team rounded time rather than reporting it to the minute.
- While filling in for Martin, Kyle pored over Gray's timesheet and compared it to her computer activity. Kyle found three instances where Gray reported time while logged off her computer.

40

Gray v. State Farm Auto. Mutual Ins. Co. 159 F. 4th 1024 (6th Cir. 2025)

- Kyle reported this issue to Martin's direct supervisor Denise Hensley. Hensley told Kyle to report the issue to HR in accordance with State Farm policy.
- Kyle reported to HR that
  - "Gray had manually adjusted her time to hide long lunches and early departures," falsely claimed that Gray had been coached for such behaviors, and suggested that HR would find more discrepancies if it investigated Gary's records.
- HR launched an investigation and found more errors, including seven instances when Gray reported returning from lunch before she had re-entered the building.

41

Gray v. State Farm Auto. Mutual Ins. Co. 159 F. 4th 1024 (6th Cir. 2025)

What did State Farm do right regarding their investigation?

What could State Farm have done better?

- Martin and HR interviewed Gray about these discrepancies
- Gray denied wrongdoing and insisted that Kyle had targeted her for helping Mauter secure an accommodation
- Gray also claimed the timing was suspicious and asked if State Farm was reviewing other employee's timesheets
- HR reported Gray's retaliation claim to Hensley (Martin's Supervisor) but State Farm did not pursue the issue further
- A little over a week later, State Farm terminated Gray for falsifying time sheets

42

Gray v. State Farm Auto. Mutual Ins. Co. 159 F. 4th 1024 (6th Cir. 2025)

- Gray sued State Farm alleging retaliation under the ADA
- The district court granted summary judgment in favor of State Farm holding that Gray could not prove pretext because State Farm had an "honest belief" that Gray falsified her time and fired her for that reason. Gray appealed
- Sixth Circuit reversed holding that State Farm could potentially be held liable under a "Catspaw" theory, *i.e.*, State Farm could be liable for Kyle's actions if he had an improper retaliatory motive and manipulated State Farm into firing Gray

43

Gray v. State Farm Auto. Mutual Ins. Co. 159 F. 4th 1024 (6th Cir. 2025)

- Kyle selectively reported her to HR, and that his report led State Farm to investigate and terminate her. What's more, Gray alerted State Farm to potential retaliation, but State Farm failed to take her allegation seriously. Gray told [State Farm] that Kyle targeted her because she had helped Mauter with her accommodation. And she identified specific colleagues who also rounded their time entries but were not reported. Yet State Farm made no effort to determine whether Kyle had singled Gray out for retaliatory reasons. From these factual allegations, a jury could conclude that State Farm acted as a quintessential 'conduit' of Kyle's bias."

44

Gray v. State Farm Auto. Mutual Ins. Co. 159 F. 4th 1024 (6th Cir. 2025)

TAKEAWAYS

- Don't ignore claims of retaliation – investigate!
- Ensure that similar claims are reported and investigated in the same manner

Investigations: Lessons From the Trenches

Investigation Done Right

Case #1

Welch v. Heart Truss & Engineering Corp.
No. 24-1584, 2025 WL 2828895 (6th Cir. 2025)

- Daniel Welch worked as a delivery driver for Heart Truss
- He injured his knee in an on-the-job fall. Two years later, he submitted a workers' compensation claim after aggravating the injury but was denied
- He injured his ankle sometime after and filed a separate claim, which was granted
- His knee, however, continued to bother him

47

Welch v. Heart Truss & Engineering Corp.
No. 24-1584, 2025 WL 2828895 (6th Cir. 2025)

- Welch complained that "the company screwed him" by denying his left knee claim and said that "it hurt to climb up and down on the loads" with "3 tears in his meniscus"
- Welch told his supervisor that "one day (coming soon)" he would be unable to do his job and "then we will see what happens"
- Based on Johnson's written account of these conversations, Heart Truss's plant manager Tom Gustafson reassigned Welch from driving to a job working on the factory production line which paid less
- Was it appropriate for Gustafson to reassign Walsh?

48

Welch v. Heart Truss & Engineering Corp.
No. 24-1584, 2025 WL 2828895 (6th Cir. 2025)

- Graffiti started appearing on trusses that were shipped to customers
- The graffiti included "smiley faces (some adorned with devil horns) and pairs of circles with dots in the middle that some customers interpreted to be depictions of female breasts"
- One customer called Heart Truss to ask whether it was "appropriate to send products to their home to sit in their yard with a pair of boobs on the front"

Welch v. Heart Truss & Engineering Corp.
No. 24-1584, 2025 WL 2828895 (6th Cir. 2025)

- Gustafson felt that this was a "very bad look for the company" and after finding even more trusses with graffiti on them at the production facility he determined that it warranted discharge
- The production facility was staffed with two successive shifts. When Gustafson began his investigation the first shift (which included Welch) had left for the day. Gustafson interviewed the second shift and determined that none of them was responsible for the graffiti

Welch v. Heart Truss & Engineering Corp.
No. 24-1584, 2025 WL 2828895 (6th Cir. 2025)

- The next day, the first shift supervisor, Tim Oberlin, began interviewing employees
- Oberlin asked an employee Ryan Wixson if he had painted the graffiti and Welch who was within earshot stated "I did it. What's it hurting." Welch later denied saying this but Wixson corroborated Oberlin's account
- Oberlin reported Welch's comments to Gustafson and Welch was fired
- Welch denied having made the statement

Welch v. Heart Truss & Engineering Corp.
No. 24-1584, 2025 WL 2828895 (6th Cir. 2025)

- Welch sued for wrongful demotion and termination stating his transfer was the product of discrimination and retaliation under the ADA, claiming his termination was pretext
- The wrongful demotion claim was settled and the district court granted summary judgment on the wrongful termination claim
- The Sixth Circuit affirmed, holding that Heart Truss's reason for terminating Welch was not pretextual under the "honest belief rule, which prevent[ed] a finding of pretext, regardless of whether Welch was the actual culprit, if Gustafon reasonably and honestly relied on particularized facts in concluding that he was."

Welch v. Heart Truss & Engineering Corp. No. 24-1584, 2025 WL 2828895 (6th Cir. 2025)

- The Sixth Circuit found that Gustafson reasonably and honestly relied on particularized facts when terminating Welch's employment, including taking the following steps to investigate:
  - Finding more examples of graffiti
  - Determining that the graffiti originated at the factory
  - Eliminating the second shift from suspicion
  - Assigning Oberlin to investigate the first shift
  - Oberlin's report of Welch's confession
- From this investigation, Gustafson formed the honest belief that Welch was responsible

53

Welch v. Heart Truss & Engineering Corp. No. 24-1584, 2025 WL 2828895 (6th Cir. 2025)

- The Sixth Circuit rejected Welch's argument that Gustafson should have interviewed other witnesses or cross-referenced graffitied job number to Welch's assigned loads
- The Sixth Circuit stated "perhaps . . . Gustafson could have done more to confirm Welch's guilt. But the honest belief rule does not require an optimal investigation that left no stone unturned. Rather, [courts] ask only if Gustafson's decision was reasonably informed and considered. And here, we agree that it was, given that Welch has produced no evidence that Gustafson had reason to disbelieve Oberlin's report"
- Would the outcome have been the same if there was direct evidence of disability discrimination on Heart Truss' part?

54

Welch v. Heart Truss & Engineering Corp.
No. 24-1584, 2025 WL 2828895 (6th Cir. 2025)

TAKEAWAYS

- Heart Truss settled the wrongful demotion claim. What should it have done before reassigning Welch to a lower paying job based on his perceived disability?
- An investigation does not have be “optimal” or leave “no stone unturned”
- However, a decision based on an investigation must be “reasonably informed and considered”

55

Investigations: Lessons From The Trenches

Investigation Done Right

Case #2

56

Plump v. GEICO
161 F.4th (10th Cir. 2025)

- On June 8, 2020, Geico hired Dion Plump, a black male, in its Kansas City Office to sell insurance to customers across the United States.
- As part of his job, GEICO required Plump to obtain licenses from various states' insurance departments including New York.
- Three days after he was hired Plump applied for a New York License.

Plump v. GEICO
161 F.4th 1222 (10th Cir. 2025)

February 5, 2021: the New York Department of Financial Services ("NYDFS") denied his application because "he failed to report that he was involved in a 'fine, suspension, or revocation' of his North Dakota license"

Plump was given fifteen days to respond with additional information; Plump did not respond

July 21,2021: NYDFS sent Plump a letter stating his application would be denied unless he provided requested information by August 6, 2021; Plump did not respond

Plump v. GEICO
161 F.4th 1222 (10th Cir. 2025)

August 9, 2021: NYDFS provided a deadline until August 24, 2021 to appeal the decision. Plump did not appeal.

NYFDS sent a copy of the denial to Geico's Texas licensing team but due to an error it was not uploaded to Plump's personnel file, and he never informed the Kansas licensing team of the denial.

October 21, 2021: the Kansas licensing team discovered the denial and that the timeframe to appeal had passed.

Plump v. GEICO
161 F.4th 1222 (10th Cir. 2025)

November 3, 2021: GEICO management met with Plump and told him that without a New York license he could not work as a sales representative and that it would consider transferring him to the service department.

November 17, 2021: GEICO management requested a performance review of Plump's performance and attendance from Plump's direct manager Selg:

- Plump received an "overall good rating"
- An audit of Plump's calls showed a high percentage of his calls were transferred and his quote to call ratio was low,
- He was the only sales representative with licensing problems and had been denied his New York license

Plump v. GEICO
161 F.4th 1222 (10th Cir. 2025)

December 1, 2021: Plump interviewed for, but did not get, the Service Department position.

December 7, 2021: GEICO management discovered that Plump's high transfer rate was 50% due to licensing issues and 20% due to call avoidance issues. Selg was instructed to investigate Plump's call avoidance and to terminate him on that basis or for his licensing issues.

In **December 2021,** Plump initiated two separate inquiries that are relevant to the case. A complaint to human resources and a request for FMLA leave. We'll discuss the timeline for each of these requests separately.

61

Plump v. GEICO
161 F.4th 1222 (10th Cir. 2025)

- **First: December 10, 2021**, Plump emailed HR with concerns about the handling of his New York license, his interview with the service department, and his working relationship with Selg. HR met with Plump and he did not mention racial discrimination.
- **December 22, 2021**, GEICO concluded its investigation into Plump's HR complaint concluding that Pump was held to the same standard as all Sales Representatives. The investigation included witness interviews with members of GEICO's licensing and supervision teams and several of Plump's peers.
- Due to Plump's absences from work and rescheduling meetings, HR was unable to meet with him to discuss the investigation until February 2, 2022. The same day, Beaver told Plump management would be reviewing his employment and asked him to submit a written statement raising any issue he wished them to consider. Plump did so.

62

Plump v. GEICO
161 F.4th 1222 (10th Cir. 2025)

- **Second: December 15, 2021:** Plump contacted HR to request FMLA and to obtain the required paperwork.
- **December 16, 2021:** Plump told Selg he was going to check into a hospital, would be out sick and was in the process of applying for FMLA leave. Plump did not check into a hospital and did not report to work for the next forty-two days.
- **January 7, 2022:** GEICO emailed Plump to tell him he was eligible for FMLA leave and to provide the requested paperwork. Plump submitted the paperwork and on **January 21, 2022**, he was approved for retroactive intermittent leave from December 17, 2021, to September 21, 2022, limited to one-day episodes up to two times a month and two doctor appointments a year.

63

Plump v. GEICO
161 F.4th 1222 (10th Cir. 2025)

- **February 3, 2022:** Beaver emailed HR for permission to fire Plump for his failure to obtain his New York license, failure to inform his supervisor he had not obtained the license and failure to appeal the licensing decision.
- **February 4, 2022:** Plump told Selg he was checking himself into a hospital. He did not do so.
- **February 8, 2022:** HR approved Plump's firing. Beaver tried contacting Plump but was unable to reach him. The next day, Beaver contacted Plump's emergency contact. Plump had instructed his emergency contact to tell her that Plump was unavailable because he in was in the hospital for an extended stay. This was not true and Plump never checked into a hospital.
- Unable to reach Plump, GEICO sent him a letter informing him that he had been dismissed.

64

Plump v. GEICO
161 F.4th 1222 (10th Cir. 2025)

- Plump sued GEICO for discrimination and retaliation based on race, ADA, and FMLA. The district court granted summary judgment to GEICO and Plump appealed.
- On appeal, the Tenth Circuit rejected Plump's claim that a jury could find that GEICO's "unfair and inadequate" investigation was evidence or pretext.
- The Tenth Circuit explained that "[t]he record is devoid of evidence from which a jury could reasonably conclude GEICO's investigation was inadequate or unfair."

65

Plump v. GEICO
161 F.4th 1222 (10th Cir. 2025)

- The 10th Circuit explained that:
  - The same day Plump initiated a complaint with Human Resources about treatment unrelated to race or discrimination, Human Resources initiated a meeting to discuss Plump's concerns.
  - The subsequent investigation included witness interviews with various members of GEICO's licensing and supervision teams and several of Plump's peers.
  - Human Resources met with Plump to discuss the results of the investigation on February 2, 2022.
  - That same day, Beaver reminded Plump his management team would be reviewing his employment due to the denial of his New York insurance license application and invited him to submit a written statement containing any information he wanted them to consider. Plump submitted a written statement later that day.
  - Plump does not identify any aspect of this process that is irregular or unfair.

66

Plump v. GEICO
161 F.4th 1222 (10th Cir. 2025)

- The Tenth Circuit further rejected Plump's claim that the investigation was unfair because it reached the wrong result holding that "evidence GEICO should not have made the termination decision – for example, that it was mistaken or used poor business judgment – is not sufficient to show that its explanation is unworthy of credibility."

Plump v. GEICO
161 F.4th (10th Cir. 2025)

TAKEAWAYS

- Even in cases where an employee's behavior may be egregious it is important to follow company procedures and conduct a thorough investigation in accordance with them.

Investigations: Lessons From The Trenches

Cautionary Tale: Investigation Done Wrong Leads to Secondary Case for Malicious Prosecution

69

Cautionary Tale: Bungled Investigation

Cole v. Skin RN Aesthetics, LLC (Tenn. Ct. of App 2023)

- Plaintiff was registered nurse aesthetician caught up in botched investigation
- Medical spa owner had been tracking missing supplies for several months and suspected RN was the thief
- Discovered two vials of Botox missing (50 and 100 units) and went to search the nurse's purse
- Purse was allegedly hanging open enough for the owners to see the vials; upon search of purse, owner found additional supplies

70

Cautionary Tale: Bungled Investigation

- The owner took pictures of the purse contents and called the police
- The RN was in with a walk-in patient; after the visit, she was called to the office where the police were waiting
- The police handcuffed her and searched her purse and her car, where more supplies were found
- Employee said she had planned on holding an off-site Botox party with her mom; claimed the other supplies were hers from an employee gift bag or her former place of employment
- Spa owner claimed she had video proof; employee confessed and was arrested

71

Cautionary Tale: Bungled Investigation

- Employee was indicted for the theft, but was acquitted at trial
- Employee then sued medical spa and owner for malicious prosecution; owner and spa countersued for value of missing product
- At trial, the spa owner admitted she lied about having video proof
- Only proof at trial was two vials in the employee's purse and a spreadsheet tracking the stolen items
- Jury found in favor of employee and awarded her $325,000 in compensatory damages; appellate court affirmed

72

Cautionary Tale: Bungled Investigation

WHAT DID THE SPA OWNER DO WRONG?

- Jumped to conclusions about the thief without further investigation
- Made accusations about the missing inventory without proof
  - All employees had access to the products for business and personal use
- Used coercive tactics to obtain a confession (lied about the video)
- Continuing criminal proceedings even after there was no probable cause (which she tried to overcome by lying about having a video)

73

PARSONS BEHLE & LATIMER

Thank you for attending

PARSONS BEHLE & LATIMER

Thank you

Christina M. Jepson
cjepson@parsonsbehle.com

Susan Baird Motschiedler
smotschiedler@parsonsbehle.com

You can scan the following QR code to download a PDF handbook of today's event and subscribe to the Employment Law Update email newsletter.

75

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

Michael Judd
801.536.6648 | mjudd@parsonsbehle.com

Paul R. Smith
801.536.6941 | psmith@parsonsbehle.com

PARSONS
BEHLE &
LATIMER

38th Annual
Employment Law Symposium

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

Michael Judd and Paul R. Smith

April 14, 2026 | The Grand America Hotel

parsonsbehle.com

Presenters

Michael Judd
Parsons Behle & Latimer
mjudd@parsonsbehle.com

Paul R. Smith
Parsons Behle & Latimer
psmith@parsonsbehle.com

Legal Disclaimer

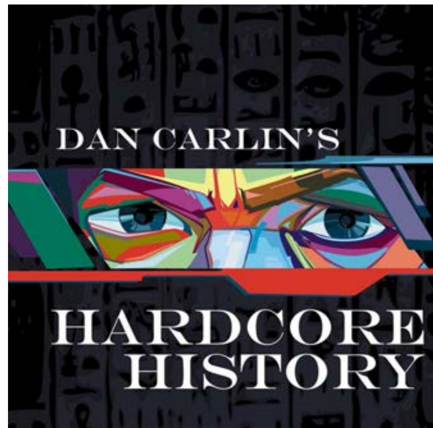
This presentation is based on available information as of Apr. 14, 2026, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

You can scan the following QR code to download a PDF handbook of today's event and subscribe to the Employment Law Update email newsletter.

Question….

Who likes **podcasts**?

History Podcasts Are the Best!



5

SHRM Salt Lake | PARSONS BEHLE & LATIMER

Let's Talk about History: The Fall of the Incas

- The Fall of the Incas (6-part series; starting with episode 644)
- At its height:
  - **Territory:** Spanned 2,500–3,250 miles long (north to south) along the Andes and Pacific coast.
  - **Population:** Approximately 10 to 12 million people from over 100 ethnic groups.
  - **Infrastructure:** An estimated 25,000 miles of road networks connected the empire.
- Then Francisco Pizarro showed up
  - **Initial Force (1531):** Pizarro set sail from Panama with roughly 180 men
  - **The March to Cajamarca (1532):** He had 168 men, including 62 on horseback and 106 on foot.
  - **The Capture of Atahualpa:** Pizarro's small force confronted and defeated a much larger army of over 40,000 Inca soldiers.

6

SHRM Salt Lake | PARSONS BEHLE & LATIMER

The Fall of the Incas

- Eventually the Spaniards conquered the entire Inca empire—again, 10 to 12 million people!
- The Incas failed to recognize the **red flags** raised by the Spaniards:
  - Spaniards constantly betraying them
  - Incas didn't understand that the tiny force of Spaniards would grow and grow and grow

Okay Now Let's Talk About Non-Compete History

- Like in the story of the Incas, there have been lots of **red flags** about the Fall of the Non-Competes
- On a national level
- On a state level—including Utah!

Non-Compete History: National Level

- **January 2023 – FTC proposes rule**: Bans most non-compete clauses nationwide.
- **April 23, 2024 – FTC final rule issued**: 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**

9

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.

10

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; retroactive (duty to notify current and former employees that existing non-competes are void)

Non-Compete History: Utah

- What about in **Utah**?
- In 2026, the Utah Legislature spent a lot of time discussing putting significant limits on the use of noncompete agreements.
- One measure was tabled.
- Two others passed.

Non-Compete History: Utah

- House Bill 203: Comprehensive overhaul to the way non-compete agreements are enforced in Utah.
- All non-compete agreements with independent contractors would be void.
- Rendered void non-competes with employees who:
  - Are nonexempt (i.e., paid by the hour);
  - Are student interns enrolled in a full-time or part-time undergraduate or graduate program;
  - Are 18 years old or younger;
  - Make less than $155,000 per year; ***or***
  - Are terminated as part of a reduction in force.
- The bill passed with a favorable vote from a House Committee but was "circled" and not put up for a full House vote.
- After hearing objections from the business community, the bill's supporters agreed to table the measure until next session.
- Get ready for a vigorous debate about non-compete agreements in 2027!

13

Non-Compete History: Utah

- House Bill 270 was enacted
- The bill broadly applies to all **healthcare professions**, and renders void a non-compete agreement signed by a healthcare worker after May 6, 2026.
- A non-solicitation agreement signed by a healthcare worker also needs a disclaimer allowing the healthcare worker to inform patients about their current or future place of employment.

14

Non-Compete History: Utah

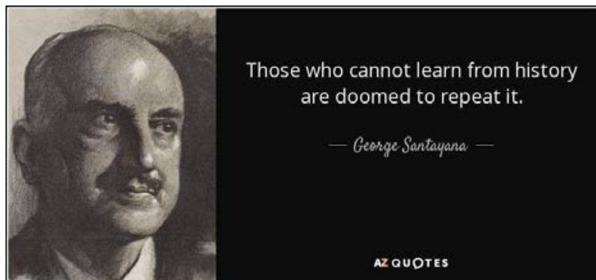
- The Legislature also banned noncompete agreements in the **pet-health sector**!
- Senate Bill 111 was enacted
- Bans non-compete agreements signed by veterinarians after May 6, 2026.
- There's more to this bill than meets the eye….**stay tuned** for Mark Tolman's lunch presentation

15

SHRM Salt Lake | PARSONS BEHLE & LATIMER

Non-Compete History: Utah

- Don't be like the Incas: Take these non-compete red flags seriously!
- Especially if your company currently relies on non-competes to deter employee / customer mobility or to protect IP.



16

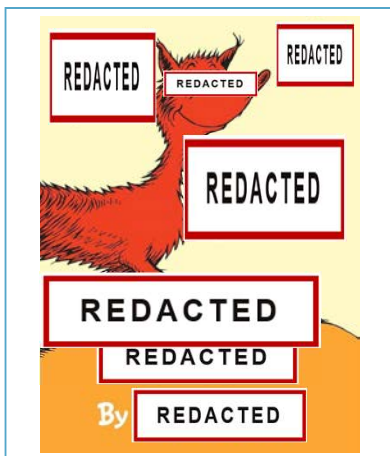
SHRM Salt Lake | PARSONS BEHLE & LATIMER

Restricted Covenants That (Might!) Work

PARSONS BEHLE & LATIMER

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.

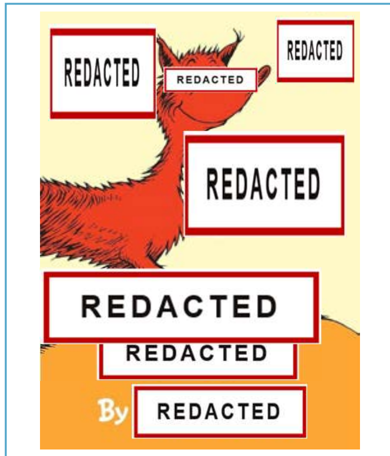
SHRM Salt Lake

PARSONS BEHLE & LATIMER

18

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.

SHRM Salt Lake | PARSONS BEHLE & LATIMER

19

First Things First: *Why*?

If we start wrong, we end wrong.

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

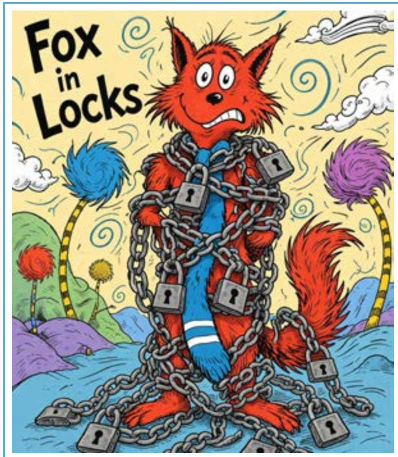
Question 2. Once we have a decent answer to the first question, we then ask, "How do I tailor the restriction to that goal?"

SHRM Salt Lake | PARSONS BEHLE & LATIMER

20

Start Easy: Confidentiality

If we start wrong, we end wrong.



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.

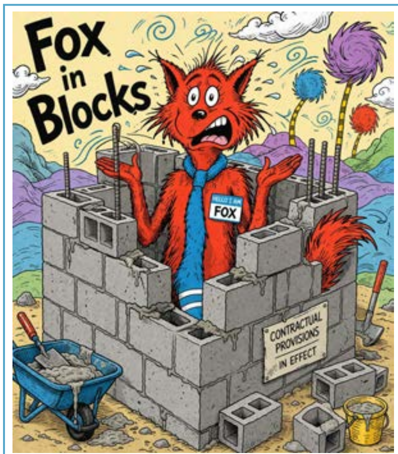
What would enforcement look like here?

SHRM Salt Lake

PARSONS BEHLE & LATIMER

Next Up: Non-Solicitation (Pt. 1)

Contractual protection against a mass exodus?



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.

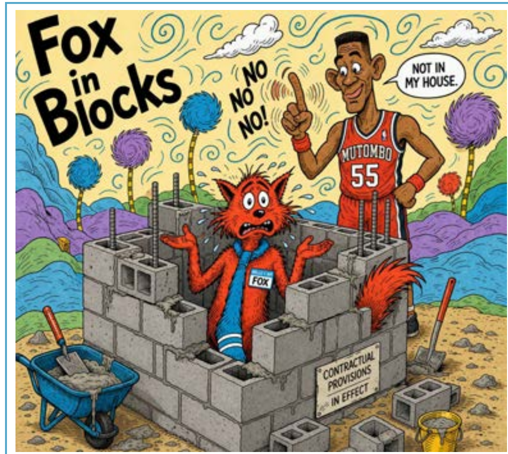
Do we have a damages problem here?

SHRM Salt Lake

PARSONS BEHLE & LATIMER

Next up: Non-Solicitation (Pt. 2)

Who owns a client? Says who?



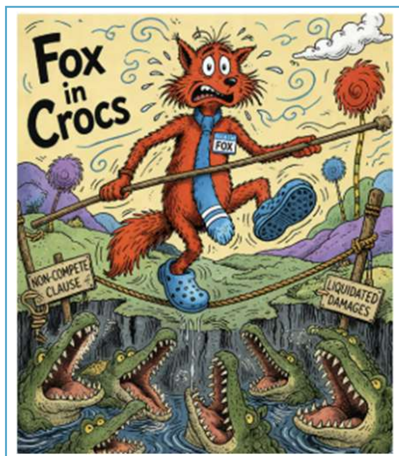
Client non-solicitation. General or specific? Can they be identified? How do *clients* feel about this? What about clients that are brought or developed by the departing employee?

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

23

A Highwire Act: Non-Compete Provisions

Chomp chomp chomp chomp.



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?

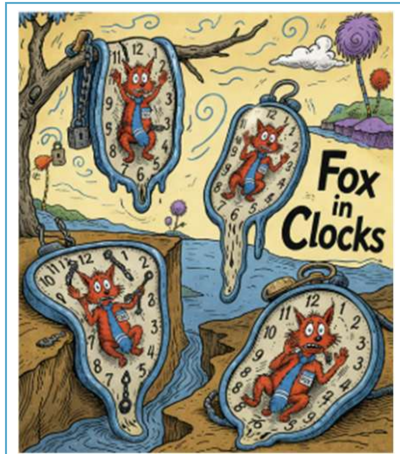
Industry. Is this even allowed? Is it taboo?

Enforceable if terminated?

24

How Much *Time* Do I Get?

Well, that depends.



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?)

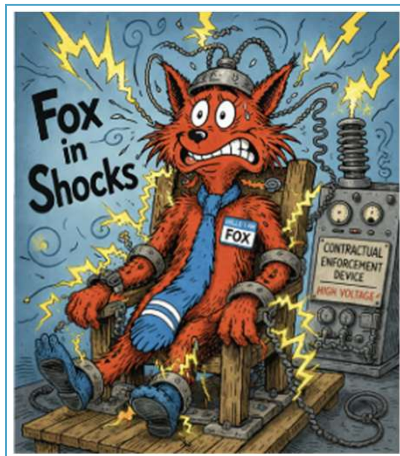
Garden leave. Are you willing to *pay* for time?

25

SHRM Salt Lake | PARSONS BEHLE & LATIMER

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?

26

SHRM Salt Lake | PARSONS BEHLE & LATIMER

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!

27

SHRM Salt Lake

PARSONS BEHLE & LATIMER

Alternatives to Non-Competes

PARSONS BEHLE & LATIMER

Alternatives to Non-competes

- Retention / Protection strategies:
  - Carrots
  - Sticks
  - Culture

29

PARSONS BEHLE & LATIMER

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!

30

PARSONS BEHLE & LATIMER

Equity / Ownership Structures

- Stock options, RSUs, profit interest
  - Vesting schedules

31

SHRM Salt Lake | PARSONS BEHLE & LATIMER

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

32

SHRM Salt Lake | PARSONS BEHLE & LATIMER

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.

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%).

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.

35

Non-Competes in Practice

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.

37

SHRM Salt Lake | PARSONS BEHLE & LATIMER

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."

38

SHRM Salt Lake | PARSONS BEHLE & LATIMER

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."

SHRM Salt Lake | PARSONS BEHLE & LATIMER

39

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**

SHRM Salt Lake | PARSONS BEHLE & LATIMER

40

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)**

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.

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.

SHRM Salt Lake

PARSONS BEHLE & LATIMER

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.

SHRM Salt Lake

PARSONS BEHLE & LATIMER

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]

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 buller.

> 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.

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").

47

SHRM Salt Lake

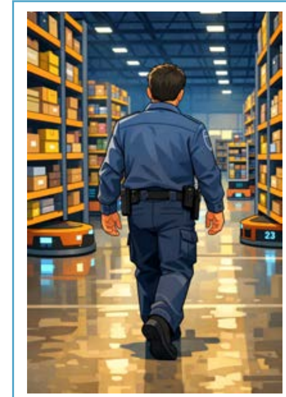
PARSONS BEHLE & LATIMER

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 . .owledge 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.

48

SHRM Salt Lake

PARSONS BEHLE & LATIMER

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.**

SHRM Salt Lake

PARSONS BEHLE & LATIMER

Thank you for attending

PARSONS BEHLE & LATIMER

Thank you

Michael Judd
mjudd@parsonsbehle.com

Paul R. Smith
psmith@parsonsbehle.com

You can scan the following QR code to download a PDF handbook of today's event and subscribe to the Employment Law Update email newsletter.

38th Annual **EMPLOYMENT LAW SEMINAR**

Threading the Needle: How to Find the Middle Ground and Avoid Tricky Employment Law Traps

Elena T. Vetter
801.536.6909 | evetter@parsonsbehle.com

Haley B. Banks
801.536.6675 | hbanks@parsonsbehle.com

Corey Hunter
801.536.6786 | chunter@parsonsbehle.com

PARSONS
BEHLE &
LATIMER

A Professional
Law Corporation

38th Annual
Employment Law Symposium

Threading the Needle: How to Find the Middle Ground and Avoid Tricky Employment Law Traps

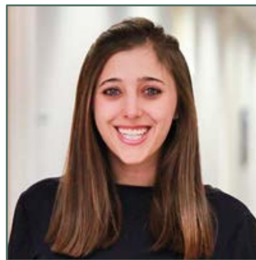
Elena T. Vetter, Haley B. Banks and Corey J. Hunter

April 14, 2026 | The Grand America Hotel

parsonsbehle.com

Presenters

Elena T. Vetter
Parsons Behle & Latimer
evetter@parsonsbehle.com



Haley B. Banks
Parsons Behle & Latimer
hbanks@parsonsbehle.com

Corey J. Hunter
Parsons Behle & Latimer
chunter@parsonsbehle.com

Legal Disclaimer and PDF Handbook

This presentation is based on available information as of Apr. 14, 2026, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

You can scan the following QR code to download a PDF handbook of today's event and subscribe to the Employment Law Update email newsletter.

3

As an HR Professional, do you ever feel like . . .

The Oregon Trail

4

Everything starts out fine . . .

The Oregon Trail

. . . Until it's not!

The Oregon Trail

Can I play Oregon Trail on my phone?

What month should I leave in The Oregon Trail game?

We're here to help.

You will:

1. Travel the trail
2. Learn about the trail
3. See the employment law traps
4. Turn them into opportunities
5. Choose Management strategies
6. End

What is your choice? _

Threading the Needle: DEI

PARSONS BEHLE & LATIMER

In the sphere of DEI:

- What does the law allow?
- What do leaders and stakeholders—and employees—expect?
- How can you develop policies and practices that support a fair and inclusive workplace?
- We'll explore these questions through lessons learned from two cases: *Dill v. IBM* and *Washington v. IBM*.

SHRM Salt Lake

PARSONS BEHLE & LATIMER

Dill v. IBM (W.D. Michigan March 26, 2025)

- Randall Dill worked as a consultant for IBM.
- For seven years, his reviews were stellar.
- Then, Randall was put on a performance improvement plan . . .
- Eventually, Randall's employment was terminated.

SHRM Salt Lake

PARSONS BEHLE & LATIMER

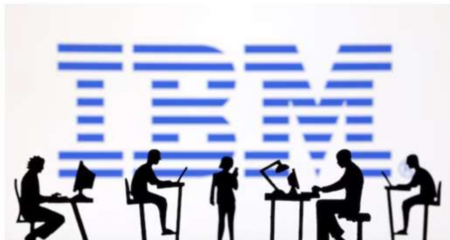
Dill continued . . .

Reuters World Business Markets Sustainability Legal Breakingviews Technology Investigations More

IBM must face white worker's lawsuit over diversity goals

By Daniel Wiessner

March 26, 2025 4:01 PM MDT · Updated 6 days ago



- Randall sued for **race and gender discrimination**.
- He said IBM implemented a policy that incentivized management to **terminate white male employees and seek a higher percentage of minorities and women in the workplace**.

SHRM Salt Lake

PARSONS BEHLE & LATIMER

Dill continued . . .

- IBM moved to dismiss the complaint.
- The court denied that motion, noting these allegations:
  - IBM's policy provided a **bonus multiplier** for managers hiring diverse candidates.
  - IBM's CEO stated **"specific quotas" for minority and female employees** at a company meeting, and IBM Annual Reports listed specific representation goals.
  - The PIP tasked Dill with **wholly new tasks**, and therefore could have been pretextual.

Lessons from *Dill*

- The court listed the following ways to analyze "whether a diversity policy goes beyond mere aspirational goals" and violates Title VII:
  - Does the policy define **specific quotas** based on protected classes?
  - Does the policy "refer[] to any **caste system** designating a hierarchical preference for certain racial groups over others"?
  - Does the policy provide specific **plans for how to achieve diversity goals**?
  - Does the policy place managers under pressure to increase minority representation in the workplace (by, e.g., **compensating them** to do so)?

Washington v. IBM (D. Maryland – filed Oct. 2025)

- Zena Washington worked for IBM for 26 years.
- She alleges that she received positive performance reviews and was in a program designed to prepare employees for senior executive management-level positions.
- Then, Washington was terminated:

> Plaintiff is an African American woman and former executive employee of Defendant, who lives in Maryland, and worked in Maryland and Massachusetts. On or about February 28, 2025, Plaintiff was terminated from her employment, ostensibly as part of a corporate reorganization. Plaintiff herein alleges that she was selected for termination, and not offered alternate placement with Defendant because of her race, African American. Herein, Plaintiff asserts that she is a member of a protected class, that she suffered an adverse employment action, and there substantial evidence that establishes that the reason Defendant has given for her termination is not credible, and is pretext for racial discrimination.

Washington continued . . .

> 33. During a regularly scheduled question session held by IBM's CEO Arvind Krishan (hereinafter "Mr. Krishnan"), when asked about IBM's posture with respect to the Trump administration's directives on DEI, Mr. Krishnan stated "of course we will comply," or words to the effect.
>
> 34. While IBM has made no other public statements about abandoning DEI, shortly after the inauguration of the Trump administration, and the dissemination of Executive Orders on reversing DEI efforts, an inexplicable exodus of Black senior executives occurred at IBM, which included Ms. Washington.
>
> 35. Plaintiff asserts that in order to appease the Trump administration, and to remain favored by the Department of War and other government agencies with large IBM contracts, Defendant removed several high profile African American employees, despite the fact that there was no performance-based reason to terminate their employment.

Washington continued . . .

- Washington's allegations include that IBM discriminated against her because of her race to **placate the Trump administration's hostility toward DEI**.
  - It's the same CEO!
- In late March, IBM filed a motion to dismiss.
- The motion to dismiss raises only **statute of limitations** arguments.

Breaking News:

IBM to pay $17 million to settle US government probe over DEI

By Kanishka Singh

April 10, 2026 3:21 PM MDT · Updated April 10, 2026

The logo of IBM is seen during the Adopt AI International Summit at the Grand Palais in Paris, France, November 26, 2025. REUTERS/Abdul Saboor Purchase Licensing Rights

What employers should do:

- Review existing materials and programs to ensure legal compliance.
- Think about messaging—especially **public-facing materials**, which may create the highest legal risk.
- Think outside the box: The DEI acronym is under attack. Consider alternatives words to “diversity” and “equity” like fairness, belonging, respect, and tolerance.

SHRM

Companies Are Dropping the D or E From DEI to Avoid Criticism

Companies such as Toyota and Ford have modified DEI initiatives after being attacked.
EQUALITY. October 28, 2024 at 7:10 AM EDT.

Harvard Business Review Tips

Diversity And Inclusion

The Legal Landscape Around DEI Is Shifting. Your Messaging Should, Too.

by Kenji Yoshino, David Glasgow and Christina Joseph

February 11, 2025

David Malan/Getty Images

“DEI communications create legal risk when a statement suggests that the organization engages in what we call the ‘three Ps’ by conferring a ***preference*** on a ***protected group*** with respect to a ***palpable benefit***.”

What about affinity groups?

- Make sure affinity groups are inclusionary, not exclusionary.
- Watch out for benefits or training available *only* to members of certain protected classes . . .
  - In *Muldrow v. City of St. Louis*, a 2024 SCOTUS decision, the Supreme Court lowered the standard for “adverse action” for employment discrimination claims under Title VII discrimination from “material” or “significant” harm to “some harm.”

Threading the Needle: Remote Work as an Accommodation

When it comes to ADA accommodations:

- What does the law require?
- What have employees come to expect?
- How can you decide whether (and when) to grant remote work as an accommodation?
- We'll explore these questions through two cases: *Russo v. National Grid, USA* and *Jones v. Fairfax County School Board*.

23

PARSONS BEHLE & LATIMER

Russo v. National Grid, USA (E.D.N.Y., 2025)

- National Grid is an electrical utility provider in the Northeastern United States.
- The plaintiffs, emergency crew dispatchers, were allowed to work remotely during the COVID-19 pandemic. Their jobs are all done by computer and phone

PARSONS BEHLE & LATIMER

Russo continued . . .

- As National Grid transitioned workers to a hybrid work schedule, the plaintiffs were **initially allowed to continue to work remotely**.
  - One employee had a back injury, diabetes, and a gastrointestinal condition;
  - The other employee had back and hip injuries and an anxiety disorder.
- In June 2022, National Grid said it **could no longer accommodate** the plaintiffs working from home because of the "**nature of their jobs**."

Russo continued . . .

- Plaintiffs sued under the Americans with Disabilities Act (ADA), claiming National Grid **failed to explain why their remote work requests could not be fulfilled**.
- A New York jury agreed and awarded the two plaintiffs **$3.1 million dollars.**
- These were the same duties that the employees had been performing remotely during the pandemic . . . when it was convenient (or necessary) for the employer to allow them to do so.

Lessons from *Russo*

- If you have granted remote work before, you may have to again.
- It's critical to have **job descriptions** before an accommodation request is made which **specifically and reasonably explain** why working in person is **an essential function of a particular job.**
  - Consider if in-person work is required to perform well at work
- Large companies should conduct individualized assessments, rather than blanket denials

Lesson From Russo: When Dealing with the ADA, Think About if In-Person Work is Just Employer Preference

More lessons from *Russo*

- After the jury came back with its verdict, the plaintiffs' lawyer said:

  "Employers, mainly large ones, do view disabled workers as a group seeking privilege, just like [National Grid's] lawyer said. They better look at this verdict and think twice."

- National Grid's takeaway from the case? Get a new lawyer!

Jones v. Fairfax County School Board (Fourth Circuit, 2025)

- Donna Jones worked as a resource teacher for an elementary school. Her job duties included **administering tests to students and co-teaching lessons**.
- In 2022, she developed a lung condition and took two leaves of absence for surgeries.
- But she **wanted to work remotely**, instead of taking leave. (Remember, employees are not entitled to the accommodation of their choosing under the ADA.)
- The school **denied her request**.

Jones continued . . .

- Jones then sued the School Board on the grounds that the School Board failed to accommodate.
- In response, on summary judgment, the School Board said she had to be **in-person to perform some of the essential functions of the job** – administering tests, co-teaching.
- And the District Court agreed.

Jones continued . . .

- Fourth Circuit Court of Appeals affirmed.
  - Essential functions of job are to test and co-teach (these require **in-person** interaction).
  - Jones **admitted** that she not could not perform such functions while teleworking.
  - A request for accommodation which enables the employee to perform **some, but not all**, of her essential functions while recovering from a short-term disability is **not reasonable**.
  - An employer is **not obligated** under the ADA to **reallocate** the disabled employee's essential functions to other employees.
  - A request to reallocate or modify essential job functions would not constitute a reasonable accommodation.

What employers should do:

- Think about and revise job descriptions
- Consider how a jury will evaluate the nature and type of job
  - Is it a job juries are knowledgeable about?
  - Is it a job jurors will feel strongly about?
- Consider if in-person attendance is critical *regardless* of job descriptions

33

Threading the Needle: Conducting an Employment Investigation

Conducting an Employment Investigation:

- What does the law require?
- Should different investigations be handled differently?
- How can you make investigations both efficient and thorough?
- We'll explore these questions through two cases: *Gray v. State Farm* and *Welch v. Heart Truss*.

35

Gray v. State Farm (Sixth Circuit, 2025)

- Monica Gray—a longtime State Farm employee—was friends with a co-worker named Sonya Mauter. Mauter needed an ADA accommodation, and Gray helped her navigate that process.
- Mauter's supervisor was named Joe Kyle. Kyle had pressured Mauter to go without the accommodation and told Mauter—wrongly—that she had no FMLA leave to take.
- Gray's more-relaxed supervisor had always taken a casual approach to timecards. But when that supervisor took a short vacation, Kyle saw his opportunity and stepped in as Gray's substitute boss.

36

Gray continued . . .

- Kyle was a . . . less relaxed boss. While subbing for Martin, he "pored over" Gray's records and found several irregularities. He reported those irregularities to HR.
- HR found additional inaccuracies. Eventually, Gray was interviewed by HR, and when she learned of the investigation and of Kyle's involvement, she claimed she was being targeted for helping Mauter secure leave.
- She asked, specifically, whether others were being investigated. That should have prompted a retaliation investigation.
  - HR . . . did **not** investigate.

Gray continued . . .

- State Farm fired Gray and Gray sued. Despite Kyle's role, the district court granted summary judgment, relying on State Farm's "honest belief" that Gray had committed misconduct.
- On appeal, a sharply divided Sixth Circuit reversed, in part because it found that Kyle had reported "true but selective information" and that State Farm had leaned on Kyle's "biased report" in *starting* the investigation.

Lessons from *Gray*

- When the investigated employee speaks, **listen**.
- Just say **no** to disparate treatment.
- Read the room.
- When preparing investigation reports, identify **all** misconduct discovered.

39

Welch v. Heart Truss (Sixth Circuit, 2025)

- Daniel Welch worked for Heart as a driver.
- Drivers are required to climb onto the bed of their truck to unload trusses – though only to secure straps, a crane does the unloading.
- In 2017, Welch fell off a load and injured his knee.
- In 2019, he aggravated the injury and filed a work comp claim.
- In 2020, he injured his ankle.

40

Welch continued . . .

- When his boss, Bryan Johnson, asked him about his limp, Welch said that Heart Truss had "screwed him" on his knee claim and that it hurt to climb loads with three tears in his meniscus.
  - Welch added, "One day, coming soon, I'll be unable to do my job at all, ***then we'll see what happens***."

- After hearing this, plant Manager, Tom Gustafson reassigned Welch to the factory production line where he didn't have to unload trusses, but **he also earned less.**

41

Welch continued . . .

- Shortly thereafter, graffiti started appearing on trusses shipped to customers.
- Graffiti included smiley faces with devil horns and circles with dots, which caused one customer to call Heart Truss and ask whether the company considered it "appropriate to send products to their home to sit in their front yard with a pair of boobs on the front."
- Gustafson did not and determined he'd fire whoever was responsible.

42

Welch continued . . .

- Gustafson approached shift manager Tim Oberlin to see whether one of his workers was the artist.
- Welch overheard Oberlin asking a co-worker about the graffiti and allegedly said, “I did it.” He then downplayed it by saying, “What’s it hurting?”
- In the eventual litigation, the co-worker corroborated Oberlin’s story, but Welch denied having confessed.

43

Welch continued . . .

- Gustafson informed his boss that Welch would be terminated for violating a shop rule, which prohibited defacement of company property.
- Before he could be fired, *and on the same day*, Welch claimed to experience another injury, this time to his right knee. Gustafson arranged transport to the workers compensation clinic where Welch was released to return to work. Welch was then fired.
- Welch sued for ADA discrimination and retaliation.

44

Welch continued . . .

- Heart Truss argued that it fired Welch based on the *honest belief* that Welch had defaced the trusses.
- Welch took issue with the investigation, saying Gustafson did not:
  - Interview other witnesses; or
  - Cross reference the graffitied job numbers with Welch's assigned loads.
- The court sided with **Heart Truss**.

PARSONS BEHLE & LATIMER

Welch continued . . .

- "…the honest belief rule does not require an 'optimal' investigation that 'left no stone unturned.' . . . Rather, we ask only if Gustafson's decision was '**reasonably informed and considered**.' And here, we agree that it was, given that Welch has produced **no evidence that Gustafson had reason to disbelieve** Oberlin's report."

PARSONS BEHLE & LATIMER

Welch continued (or extrapolated) . . .

In other words, be "good enough."

47

What employers should do:

- **Conduct investigations you can honestly believe in.**
  - Promptly document complaints and allegations.
  - Interview relevant witnesses (including the accused).
  - Preserve records of the decision-making process.
  - Avoid rubber-stamping a supervisor's version; verify it.
  - Ensure the decision-maker doesn't have any bias or axe to grind.
  - If someone raises a concern about retaliation, investigate!

48

Threading the Needle: Complaints

PARSONS BEHLE & LATIMER

When it comes to employee complaints:

- What kind of complaint should you investigate?
  - Spoiler alert: all good-faith complaints!
- What kinds of complaints are *specific enough* to trigger potential retaliation claims?
- How do you distinguish between an employee airing workplace frustrations and an employee raising potential discrimination, harassment, or retaliation concerns?
- Let's look at two cases: *Bajaj v. Turner* and *Russell v. Warmuth*.

SHRM Salt Lake

PARSONS BEHLE & LATIMER

Bajaj v. Turner (*D. Columbia*, April 2025)

- Bajaj worked for the U.S. Department of Housing and Urban Development (HUD).
- At deposition, Bajaj testified that her problems at HUD began just a few months after she started, when she was "forced . . . to work with stalkers and bullies."
- At deposition, Bajaj also testified to those stalking and bullying behaviors.
- By way of example, she said one coworker followed her around everywhere she went, another coworker teased her about her grammar, another coworker made rude hand gestures, another coworker "was a business guy who didn't know anything," many coworkers walked past her office, and dealing with this gave her headaches, . . . etc.
- **She also said one coworker compared and ranked people based on race and gender.**

Bajaj continued . . .

- But while employed, she sent her boss an email complaint that read:

Kevin,

I tried to talk to you many times but every time you had some excuse and we never talked. You removed Sumangala and Kabir (Which George didn't want) and that didn't fix the problem and you thought it will go away.

You are so unfair. You didn't even ask me why did I say to Eric that he is unprofessional? You started almost screaming at me in your email that I am Petty and Unprofessional without knowing what happened? (Even included him in the email, Wow)[.] A Person who comes to my cubicle, yells, screams, curses, intimidates is not unprofessional. Right?

I feel so helpless. I feel I am going though Mobbing. What that means is bullying of me by a group.

Eric's problem also started because of Shyni. I will never say anything without evidence.

The way you have started insulting/bullying/torturing me in front of the person I am talking about is proof enough that you encourage such bullies behavior and really know how to insult people and make them Sick.

You have created a very stressful, irksome and unpleasant environment for me. The atmosphere you have created for me is very unhealthy.

You have become a horror for me. Your name also frightens me. You are my Boss and I should be comfortable talking to you, But you thought is also daunting. You discriminate me all the time. You are being hostile towards me for no reason.

I had to take it out so that you know how your behavior makes me feel.

Bajaj continued . . .

- She later resigned and sued for race, sex, national origin, and age discrimination; failure to accommodate; hostile work environment; constructive discharge; and retaliation.
- HUD moved for summary judgment—here we will focus on the retaliation claim.

Bajaj continued . . .

- The court granted the motion on the retaliation claim.
- Why? Just because her email said "discriminate" and "hostile" does not mean she was engaging in protected opposition.
- As the court noted, "nothing in the email identifies the allegedly discriminatory practice, nor does it identify the allegedly discriminatory classification or status."
- " . . . the email reflects Bajaj's general frustration with her workplace, her belief that she was being bullied, and her annoyance that Evans had failed to credit, or to take sufficient action with respect to, her complaints about Krapf and Dennis."

Lessons from *Bajaj*

13 To be sure, an employee need not cite to a particular statute or set forth a detailed complaint to satisfy the first element of a retaliation claim, and each retaliation claim must be evaluated based on the particular context and circumstances. Mere use of the word "discriminate" might suffice in some circumstances. If a male employee objected to a leave policy that applied only to new mothers, for example, it might be enough simply to assert that the policy "discriminates." *Cf. Savignac v. Day*, 754 F. Supp. 3d 135, 174–177 (D.D.C. 2024). But, here, nothing in the email identifies the allegedly discriminatory practice, nor does it identify the allegedly discriminatory classification or status. To the contrary, read in context and without any reference to any protected classification or status, the email seems merely to complain that Evans has *favored* Krapf, Dennis, and others over Bajaj, believing what they say as opposed to crediting Bajaj's version of events. But regardless of what Bajaj may—or may not—have meant, her email fails to identify a practice made unlawful *182 by Title VII, the ADEA, or the Rehabilitation Act and, instead, focuses on office politics unconnected to any protected classification.

Russell v. Wormuth (D. Kansas, Nov. 2024)

- Russell worked as a readiness manager in the logistics division of Irwin Army Community Hospital.
- His supervisor, MAJ Tamara Tran, openly complained that there were "no other women in supervisory positions," assigned "gender-specific readings to discuss at . . . meetings," and segregated meetings to discuss issues with men and women separately. She also assigned a female employee to replace her when she left on parental leave.
- Russell spoke with COL Sexton—a different supervisor—about MAJ Tran's gender-segregated meetings and various "communication shortcomings."

Russell continued . . .

- Russell later testified that he didn't "specifically stat[e] there's a complaint" to COL Sexton.
- He testified that he said:
  - "there was a lack of communication between us"
  - "about the different meetings, types of meetings . . . [t]he male and female supervisors . . . [t]he meetings were counterproductive"
  - that splitting the Logistics Division up into male and female led to a "lack of communication" that was "counterproductive."
  - that "it could lead to harassment" and was "inappropriate"
- He testified he did "not in those words" state that the behavior was harassing or discriminatory.

57

Russell continued . . .

- Hospital moved for summary judgment arguing that Russell did not raise a complaint.
- Court did not grant summary judgment.
  - Plaintiff's emphasis on counterproductivity and communication shortcomings parallel the "general complaints of workplace hostility" our Circuit [finds] insufficient as a report of discrimination . . . but a reasonable jury could conclude that plaintiff's use of the word "inappropriate," coupled with the context of his complaints about the gender-segregated meetings, gender-specific book assignments, and MAJ Tran's comments about no females in leadership, congealed to constitute a discrimination report.

58

What employers should do:

- Review and investigate employee concerns—even if they are about general workplace hostility.
- Pay specific attention to complaints that name protected classes or highlight treatment based on or motivated by protected status.
- Think about potential retaliation claims . . . no set magic words are required.

PARSONS BEHLE & LATIMER

Thank you!

PARSONS BEHLE & LATIMER

Contact

Elena T. Vetter
evetter@parsonsbehle.com

Haley B. Banks
hbanks@parsonsbehle.com

Corey J. Hunter
chunter@parsonsbehle.com

You can scan the following QR code to download a PDF handbook of today's event and subscribe to the Employment Law Update email newsletter.

61

38th Annual **EMPLOYMENT LAW SEMINAR**

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

Liz M. Mellem

406.317.7240 | amellem@parsonsbehle.com

Sean A. Monson

801.536.6714 | smonson@parsonsbehle.com

PARSONS
BEHLE &
LATIMER

A Professional
Law Corporation

38th Annual
Employment Law Symposium

"Don't Be the Test Case" -- Developments in Accommodation Requirements under the ADA, Title VII, and the PWFA

Liz M. Mellem and Sean A. Monson

April 14, 2026 | The Grand America Hotel

parsonsbehle.com

Presenters

Liz M. Mellem
Parsons Behle & Latimer
amellem@parsonsbehle.com

Sean A. Monson
Parsons Behle & Latimer
smonson@parsonsbehle.com

Legal Disclaimer

This presentation is based on available information as of Apr. 14, 2026, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

You can scan the following QR code to download a PDF handbook of today's event and subscribe to the Employment Law Update email newsletter.

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

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**

5

PARSONS BEHLE & LATIMER

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

6

PARSONS BEHLE & LATIMER

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

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

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

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**

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 Tenth Circuit, which has jurisdiction over Utah)

11

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

12

ADA Accommodation – Our Old Friend, Work from Home

- A few weeks ago, 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

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"

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."

15

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"

16

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

17

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

18

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

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

Muldrow Creep

- The standard articulated in *Muldrow* has crept into the ADA

Muldrow Creep

- 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

Muldrow Creep

- 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

Muldrow Creep

- 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

Ancillary Lesson from *Scheer v. Sisters of Charity*

- The sisters were 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

Ancillary Lesson from *Scheer v. Sisters of Charity*

- The sisters were 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 had done the PIP or the term after **maybe the second or third disciplinary action**, not in a situation where get to potentially create new law
  - Related to this (maybe a third rule of employment law) – **poor performing employees rarely become high performing employees**

Religious Accommodation

27

Religious Accommodation 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

28

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”

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”

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”

31

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”

32

Tenants of the Church of the Flying Spaghetti Monster

- The FSM created the universe while drunk – that is why the earth is imperfect
- Heaven has a volcano of beer and is full of lovers just for you
- Hell is the same, EXCEPT, the beer is stale and the lovers have sexually transmitted diseases

33

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

34

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 10th Circuit have consistently stated that "religion typically concerns ultimate ideas about life, purpose, and death" while "social, political, or economic philosophies, as well as mere personal preferences, are not religious beliefs protected by Title VII"

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

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)

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, said Detwiler, 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

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
- A complaint of religious discrimination, said the Court, "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

39

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

40

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

41

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."

42

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"

43

Post Groff – What Are We Seeing

- Bordeaux v. Lions Gate Ent., Inc., (C.D. Cal.), a film production company's assertion that exempting an employee from COVID-19 vaccination would cost in excess of $300,000 increase in production costs met the new standard of "substantial increased costs"
- Smith v. Atlantic City, (D. N.J.), court finds that firefighters request to keep beard would create substantial increase in costs because PPE would not work properly and other firefighters may have to rescue him when fighting 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")

44

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

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.

SHRM Salt Lake

PARSONS BEHLE & LATIMER

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.

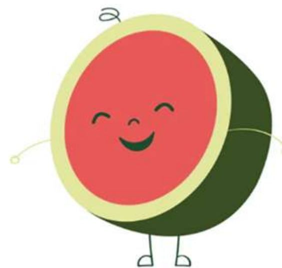
SHRM Salt Lake
PARSONS BEHLE & LATIMER

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!



SHRM Salt Lake
PARSONS BEHLE & LATIMER

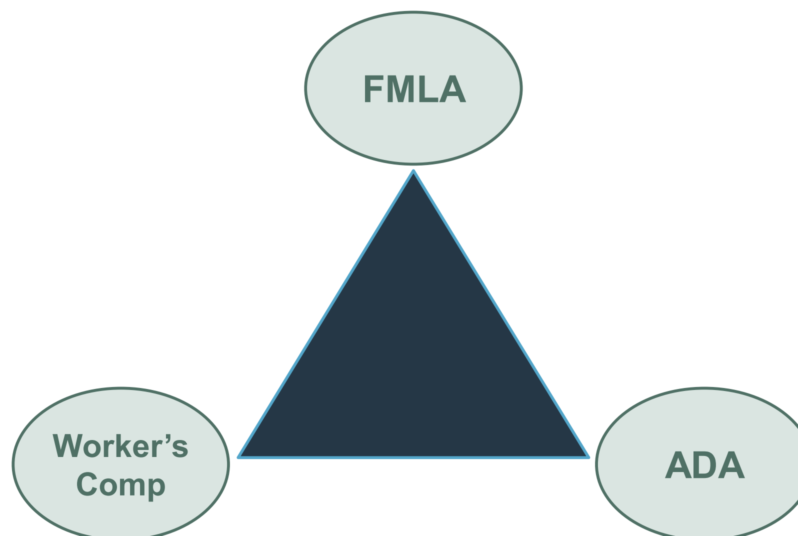
PWFA Medical Certifications

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

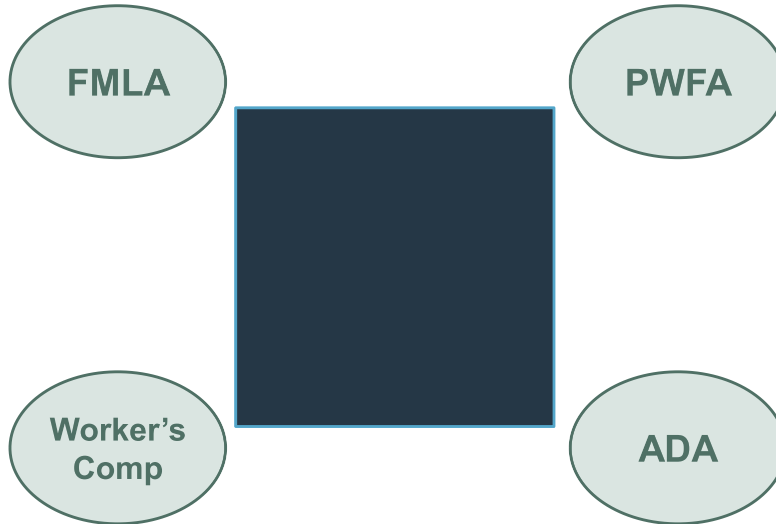
- (1) keeping water near and drinking as needed; (2) extra time for bathroom breaks; (3) to sit or stand as needed; and (4) extra breaks to eat and drink as needed.

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.

Leave Requests – the Bermuda Triangle of Employment Law



The Bermuda Square?



PARSONS BEHLE & LATIMER

Thank you for attending

PARSONS BEHLE & LATIMER

Thank you

Liz M. Mellem
amellem@parsonsbehle.com

Sean A. Monson
smonson@parsonsbehle.com

You can scan the following QR code to download a PDF handbook of today's event and subscribe to the Employment Law Update email newsletter.

53

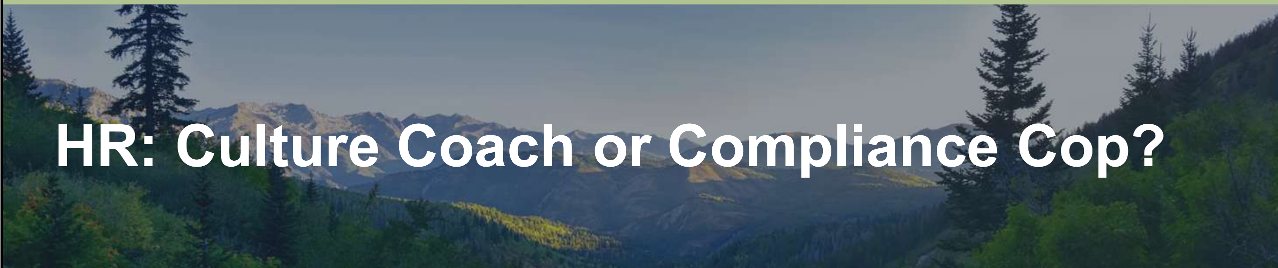
HR: Culture Coach or Compliance Cop?

Jathan Janove
info@jathanjanove.com

Michael Patrick O'Brien
801.536.6715 | mobrien@parsonsbehle.com

Michael Judd (moderator)
801.536.6648 | mjudd@parsonsbehle.com

38th Annual
Employment Law Symposium



HR: Culture Coach or Compliance Cop?

Jathan Janove, Michael O'Brien and Michael Judd

April 14, 2026 | The Grand America Hotel

parsonsbehle.com

Presenters

Jathan Janove
Janove Organization Solutions
info@jathanjanove.com

Michael Patrick O'Brien
Parsons Behle & Latimer
mobrien@parsonsbehle.com

Michael Judd (moderator)
Parsons Behle & Latimer
mjudd@parsonsbehle.com

38th Annual EMPLOYMENT LAW SEMINAR

Ask Us Anything
(About Employment Law)

Christina M. Jepson
801.536.6820 | cjepson@parsonsbehle.com

Mark D. Tolman
801.536.6932 | mtolman@parsonsbehle.com

PARSONS
BEHLE &
LATIMER

A Professional
Law Corporation

38th Annual
Employment Law Symposium

Ask Us Anything (Employment Panel)

Mark D. Tolman and Christina M. Jepson

April 14, 2026 | The Grand America Hotel

parsonsbehle.com

Presenters

Mark D. Tolman
Parsons Behle & Latimer
mtolman@parsonsbehle.com

Christina M. Jepson
Parsons Behle & Latimer
cjepson@parsonsbehle.com

38th Annual **EMPLOYMENT LAW SEMINAR**

Keynote Presentation:
2026 Utah Legislative Update

Mark D. Tolman
801.536.6932 | mtolman@parsonsbehle.com

PARSONS
BEHLE &
LATIMER

38th Annual
Employment Law Symposium

2026 Utah Legislative Update

Mark D. Tolman
mtolman@parsonsbehle.com

April 14, 2026 | The Grand America Hotel

parsonsbehle.com

Legal Disclaimer and PDF Handbook

This presentation is based on available information as of Apr. 14, 2026, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

You can scan the following QR code to download a PDF handbook of today's event and subscribe to the Employment Law Update email newsletter.

2026 Utah Legislative Update

PARSONS BEHLE & LATIMER

Non-Compete Agreements in the Crosshairs

4

SHRM Salt Lake

PARSONS BEHLE & LATIMER

H.B. 203 Non-Compete Amendments

Sponsored by Rep. Clancy and Sen. Balderree

Found at: https://le.utah.gov/Session/2026/bills/static/HB0203.html

This bill would effectively eliminate most noncompete agreements.

- No noncompetes with independent contractors.
- No noncompetes with employees who:
  - Are under 18;
  - Are a student intern;
  - Are nonexempt (hourly);
  - Have total earnings less than $155,000; ***or***
  - Are terminated as part of RIF.

H.B. 203 Non-Compete Amendments

Sponsored by Rep. Clancy and Sen. Balderree

Received favorable recommendation from House Committee. But was "**circled**" after business community raised objections. Some form of this bill likely will be proposed in 2027.

Found at: https://le.utah.gov/Session/2026/bills/static/HB0203.html

Even for the class of employees for whom a noncompete would be enforceable—a salaried employee whose annual earnings exceed $155,000—there would be restrictions:

- A noncompete would need to be **disclosed at the time of hire**; and
- Employers would need to give **14 days advance written notice** of the need to sign a noncompete.

H.B. 270 Healthcare Worker Post-Employment Amendments

Sponsored by Rep. Hall

This bill passed and has been signed by Gov. Cox.

Found at: https://le.utah.gov/Session/2026/bills/static/HB0270.html

After May 6, 2026, a noncompete agreement signed by a "healthcare worker" is void.

- "Healthcare worker" is broadly defined and seems to include all healthcare professions.

This bill also narrows the enforceability of a non-solicitation agreement with a healthcare worker.

- An employer cannot prevent a healthcare worker from informing their patients about their current or future place of employment.

- Note: the bill does not apply to a noncompete in a severance agreement or in connection with sale of a business, and does not impact nondisclosure agreements.

S.B. 111 Veterinary Post-Employment Amendments

Sponsored by Rep. Hall

This bill passed and has been signed by Gov. Cox.

Found at: https://le.utah.gov/Session/2026/bills/static/HB0270.html

After May 6, 2026, a noncompete agreement signed by a veterinarian is void.

Additionally, after May 6, 2026, a nonsolicitation agreement signed by a veterinarian is void.

S.B. 111 Veterinary Post-Employment Amendments

SB 111 goes beyond just veterinarians.

The bill added definitions for "nondisclosure" and "nonsolicitation" clauses to Utah's 2016 noncompete statute (which limited noncompete agreements to one year).

These definitions will not surprise you:

- A "**nondisclosure**" clause prohibits disclosure of "information the individual learned" because of their employment.
- A "**nonsolicitation**" clause is an employee's agreement that "they will not solict the [employer's] clients, customers, or employees."

S.B. 111 Veterinary Post-Employment Amendments

If an employer sues any employee—*not just a veterinarian*—to enforce a noncompete, nonsolicitation, or nondisclosure agreement, and **it is determined that any of those clauses are unenforceable, the employer is liable**:

- for attorney fees,
- court or arbitration costs, and
- actual damages.

Employers Must Pay for Medical Examinations, Including Drug Tests.

11

SHRM Salt Lake | PARSONS BEHLE & LATIMER

H.B. 130 Employment Medical Examination Expense Amendments

Sponsored by Rep. Gwynn

This bill passed and has been signed by Gov. Cox.

Found at: https://le.utah.gov/Session/2026/bills/static/HB0130.html

Clarifies existing law that an employer must pay for a "medical examination" (including a drug test) that it "requires as a condition of employment."

Specifically, an employer may **NOT**:

- Charge a fee for a medical exam.
- Require an employee to pay for the medical exam (even if the employer reimburses).
- Require an employee to receive a medical exam outside of the employee's shift without pay.
- Require an employee to use leave for an exam.

12

SHRM Salt Lake | PARSONS BEHLE & LATIMER

H.B. 130 Employment Medical Examination Expense Amendments

HB 130 does not apply to an "**appointment conducted to allow an employee to take or return from medical leave following an injury or illness that occurs outside the course and scope of employment**."

By implication, a medical examination to support a leave arising from a workplace injury or illness would need to be paid for by the employer.

What about non-leave ADA accommodations?

13

PARSONS BEHLE & LATIMER

Removing the Concept of "Gender" and "Gender Identity" from Utah Law?

14

PARSONS BEHLE & LATIMER

H.B. 183 Sex Designation Amendments

Initially sponsored by Rep. Lee

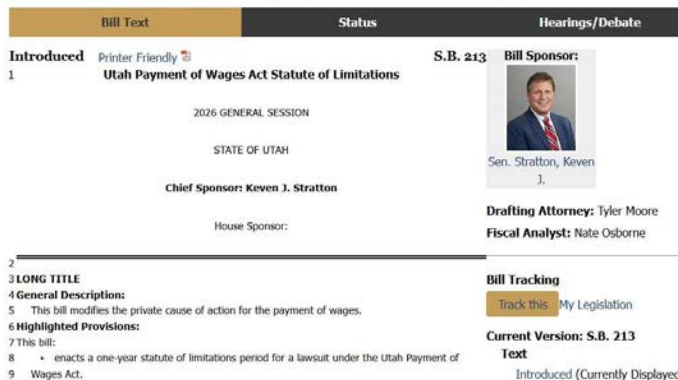
Never had traction. Rep. Lee was removed as sponsor, and an amendment was passed that **did not impact the UADA**.

Found at:

https://le.utah.gov/Session/2026/bills/static/HB0183.html

- Replaced the term "**gender**" with "**sex**" throughout the Utah Code.
- Would have rolled back the 2015 "Utah Compromise"—which added employment protections based on gender identity and sexual orientation (together with protections for religious expression)—by **eliminating gender identity as a protected class under the Utah Antidiscrimination Act (UADA)**.

Cleaning Up the Utah Payment of Wages Act



S.B. 213 Utah Payment of Wages Act Statute of Limitations

Bill Text | Status | Hearings/Debate

Introduced Printer Friendly **S.B. 213**

1 **Utah Payment of Wages Act Statute of Limitations**

2026 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Keven J. Stratton

House Sponsor:

2
3 **LONG TITLE**
4 **General Description:**
5 This bill modifies the private cause of action for the payment of wages.
6 **Highlighted Provisions:**
7 This bill:
8 • enacts a one-year statute of limitations period for a lawsuit under the Utah Payment of
9 Wages Act.

Bill Sponsor:

Sen. Stratton, Keven J.

Drafting Attorney: Tyler Moore

Fiscal Analyst: Nate Osborne

Bill Tracking

Track this My Legislation

Current Version: S.B. 213

Text

Introduced (Currently Displayed)

S.B. 213 Utah Payment of Wages Act Statute of Limitations

Sponsored by Sen. Stratton

Passed the full Senate. Received favorable recommendation from House Committee. Stalled in the House after opposition from plaintiffs' lawyers.

Found at: https://le.utah.gov/Session/2026/bills/static/SB0213.html

- Proposed by Salt Lake SHRM and Utah SHRM.
- Clarifies that the statute of limitations for a wage claim lawsuit is **one year** from the date that wages are earned.

17

PARSONS BEHLE & LATIMER

Contact

Mark D. Tolman
mtolman@parsonsbehle.com

You can scan the following QR code to download a PDF handbook of today's event and subscribe to the Employment Law Update email newsletter.

18

PARSONS BEHLE & LATIMER