36th Annual Employment Law Seminar

for corporate counsel, business owners & human resource professionals

MAY 14, 2024 | THE GRAND AMERICA HOTEL

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36th Annual Employment Law Seminar

DEI: The Great American Discussion

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A Professional Law Corporation

DEI: The Great American Discussion

Michael Patrick O'Brien, Elena T. Vetter, and John Barrand

SALT LAKE SHRM

May 14, 2024 | The Grand America Hotel – Salt Lake City

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Presenters

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Legal Disclaimer

This presentation is based on available information as of May 14, 2024, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

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DEI IN RECENT YEARS? CONTROVERSIAL!

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

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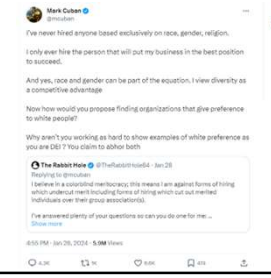
DEI IN RECENT YEARS

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



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Today's Presentation

- Recent Supreme Court Decision Regarding Affirmative Action and Its Effect on Employers
- The Current Legal Framework for Employers
- An Evolving Landscape and its Impact on Private Employer DEI Programs
- DEI for Public Employers: Perspectives from Someone on the Front Lines

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

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Why are we discussing this?

1. Well-settled Supreme Court precedent that colleges could use race as a factor or plus factor (not a quota) in determining admissions.
2. In the last few years, many companies have adopted DEI policies to help underrepresented groups (women, racial minorities, and others) succeed in the workplace. Political groups and anti-affirmative action groups have attacked both college admissions, DEI policies, and ESG policies.
3. Supreme Court just overruled well-established precedent and held colleges could not use race as a plus factor to promote diversity at colleges.
4. These same organizations now are suing companies (and even law firms) regarding DEI programs.

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Governing Law

THE EQUAL PROTECTION CLAUSE

- The Equal Protection Clause of the 14th Amendment provides that "**no state shall deny . . . to any person within its jurisdiction the equal protection of the laws**."
- Under the Equal Protection Clause, states and state-run institutions are generally prohibited from enacting racial classifications and such classifications receive a high level of judicial scrutiny.
- Public colleges are subject to 14th Amendment.
- Private employers are NOT subject to 14th Amendment.

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Governing Law

TITLE VI of the Civil Rights Act of 1964

- Title VI provides that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any program of activity receiving Federal financial assistance."
- "Title VI prohibits a recipient of federal funds from intentionally treating one person worse than another similarly situated person because of his race, color, or national origin."
- Most colleges receive federal funds and Title VI applies.
- Title VI does not apply to private employers. (Instead, Title VII of the Civil Rights Act of 1964.)

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Governing Law

STRICT SCRUTINY

- Courts analyzing affirmative action programs in education under either the Equal Protection Clause (public universities) or Title VI (private universities) apply a two-step review known as "**strict scrutiny.**"
- First, the racial classification must "**further compelling government interests.**"
- Second, if so, the government's use of race must be "**narrowly tailored – meaning necessary – to achieve that interest.**"

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Prior Supreme Court Precedent

- Prior Supreme Court decisions, applied this "strict scrutiny" test to colleges' affirmative action programs and allowed them
- Compelling state interest
  - Under prior precedent, the Supreme Court held that "student body diversity is a compelling state interest that can justify the use of race in university admissions."
  - However, diversity cannot be a goal in and of itself.
  - The university must articulate "precise and concrete goals" that its policy serves and provide a "reasoned, principled, explanation for its decision to pursue those goals."

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Prior Supreme Court Precedent

- Narrowly tailored
  - Under prior precedent, this generally meant that a policy that included "highly individualized holistic review of each applicant's file, giving serious consideration to all the ways the applicant might contribute to a diverse education environment" was sufficient.
  - The inclusion of race as one of many "plus factors" was permissible as long as its consideration was not decisive.

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SFAA v. Harvard

- A political activist group (led by Edward Blum) called Students for Fair Admissions sued Harvard (private) and UNC (state) regarding these admission practices.
- These practices were consistent with prior precedent.
- The Supreme Court (which has recently changed) found in favor of SFAA and struck down the two admissions programs as violating the 14th Amendment and Title VI.

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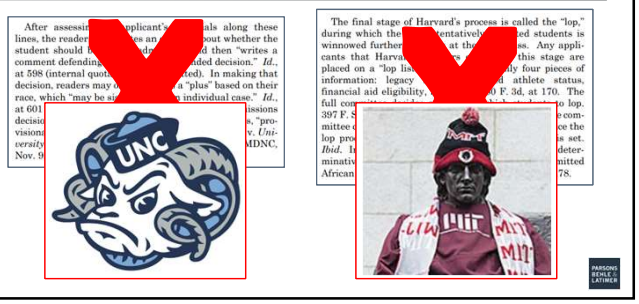
What's Next for DEI Initiatives?



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The Court's Ruling

- However, the court noted "that nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise."
- It is unclear exactly how this would function, and, in her dissent, Justice Sotomayer stated that "this supposed recognition that universities can, in some situations, consider race in application essays is nothing but an attempt to put lipstick on a pig."

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Effect on Employers

- The Supreme Court's decision in *SFAA v. Harvard* is unlikely to immediately affect most private employers because the case was decided under the Equal Protection Clause (which applies to states and state institutions) and Title VI (which applies to recipients of federal funds).
- Instead, the current legal framework governing private employers continues.
- Nonetheless, the decision represents a trend in the law and private DEI programs (which may be viewed as favoring disadvantaged minorities and women) are being challenged.
- In a concurring opinion, Justice Neil Gorsuch said there was no reason Title VII (which applies to employers) is any different from Title VI—setting up a bull's eye on private DEI programs.

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The Current Legal Framework For Employers

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Title VII

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

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Affirmative Action Under Title VII

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

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Voluntary Affirmative Action Under EEOC Guidelines

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

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Voluntary Affirmative Action Under EEOC Guidelines

- A voluntary affirmative action plan under the guidelines must contain:
  - Reasonable Self-Analysis. The employer must perform a self-analysis "to determine whether employment practices do, or tend to," discriminate or leave uncorrected past discrimination.
  - Reasonable Basis. The self-analysis must "show that one or more employment practices" result in adverse employment opportunities, leave uncorrected past discrimination, or result in disparate treatment.
  - Reasonable Action. The action taken "must be reasonable in relation to the problems disclosed by the self-analysis."

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Voluntary Affirmative Action Under EEOC Guidelines

- **CAUTION**: The adoption of a voluntary affirmative action plan under the test set forth in *Webber* or the EEOC's guidelines is rare and both require an employer to conduct an analysis of its work force to justify the plan. Thus, it is highly recommended that employers consult with counsel before adopting a voluntary affirmative action plan.
- Also note, that a voluntary affirmative action plan under *Webber* or the guidelines is distinct from diversity, equity, and inclusion policies implemented by many employers.

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Affirmative Action For Federal Contractors

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

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Affirmative Action For Federal Contractors

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

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Affirmative Action For Federal Contractors

- These obligations are distinct from and unaffected by the Supreme Court's decision in *SFAA v. Harvard* and the OFCCP has explained that "OFCCP enforces nondiscrimination and affirmative action obligations to ensure equal opportunity in the federal contractor workforce, while some post-secondary educational institutions have implemented **a wholly distinct concept** of affirmative action that permitted the use of race to be weighed as one factor among many in admissions processes. Further, the Supreme Court's decision in *Students for Fair Admissions* applies only to higher education admissions programs and does not address the employment context."

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EEOC
U.S. Equal Employment Opportunity Commission

An Evolving Legal Landscape and Impacts

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EEOC Response, part I

- Right after the *SFFA* decision, on June 29, 2023, EEOC Chair Charlotte Burrows, a Biden appointee, issued a press release stating that the Supreme Court's decision "does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers regardless of their background. It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace."
- On July 11, 2023, Jocelyn Samuels, Vice Chair of the EEOC, a Biden Appointee, wrote an opinion piece noting that "DEIA initiatives in employment are legally distinguishable from the race-based decisions at issue in the Harvard and UNC cases [and] that [t]hose calling for an end to DEIA efforts due to the court's decisions are wrong."

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EEOC Response, part II

- However, EEOC Commissioner, Andrea Lucas, a Trump appointee, has made several statements indicating that the decision should cause employers to look closely at their DEI programs.
- She has noted that, "[e]ven though the Court's ruling today does not alter federal employment law, now is a good time for employers to review their compliance with existing limitations on race- and sex-conscious diversity initiatives. Companies seriously err if they evaluate their risk under federal employment law by mistakenly referring to (now outdated) standards for higher education admissions which had approved of diversity-motivated affirmative action."
- She has indicated that she believes affinity groups/employee resource groups must be open to everyone.

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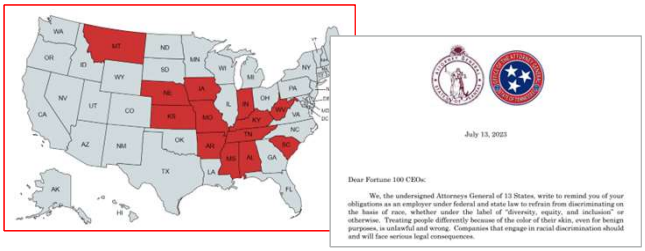
What's Next for DEI Initiatives?



July 13, 2023

Dear Fortune 100 CEOs:

We, the undersigned Attorneys General of 13 States, write to remind you of your obligations as an employer under federal and state law to refrain from discriminating on the basis of race, whether under the label of "diversity, equity, and inclusion" or otherwise. Treating people differently because of the color of their skin, even for benign purposes, is unlawful and wrong. Companies that engage in racial discrimination should and will face serious legal consequences.

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What's Next for DEI Initiatives?

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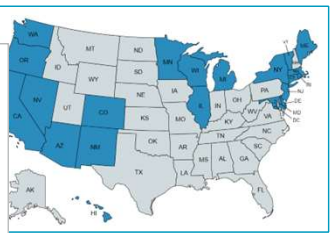
July 19, 2023

Dear Fortune 100 CEOs,

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



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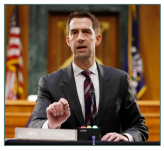
Tom Cotton Letter to Law Firms

- On July 17, 2023, Senator Tom Cotton, a Republican Senator from Arkansas sent a letter to 51 law firms citing to the Supreme Court's decision in *SFAA v. Harvard* and cautioning them that "Congress will increasingly use its oversight powers – and private individuals and organizations will increasingly use the courts – to scrutinize the proliferation of race-based practices. To the extent that your firm continues to advise clients regarding DEI programs or operate one of your own, both you and those clients, should take care to preserve relevant documents in anticipation of investigations and litigation."



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Lawsuits and Other Legal Actions

- A number of lawsuits and other legal actions have recently been brought or threatened against companies based on the allegations that their DEI initiatives violate Title VII. These lawsuits have been brought by anti-affirmative action activists, employees, former employees, and shareholders.
- Three law firms (Morrison & Foerster, Perkins Coie, and Winston Strawn LLP) sued, alleging that their diversity fellowships for summer associates from underrepresented communities violate Title VII. All three lawsuits were dropped after the firms changed the language of their fellowships.
- New pending lawsuit against Harvard arguing that Legacy admissions favor white students. Legacy admissions are preferential treatment to children of wealthy donors and legacy students.

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Lawsuits and Other Legal Actions

- Pfizer, Inc. was sued by an activist group called Do No Harm alleging that its Breakthrough Fellowship Program violated Title VII:
  - The criteria for the program stated that applicants "must meet the program's goals of increasing the pipeline for Black/African American, Latino Hispanic, and Native Americans."
  - Pfizer revised this criteria to state that applicants can apply "regardless of whether you are of Black/African American, Latino/Hispanic, or Native American descent."
  - A district court found that the plaintiffs lacked standing and plaintiffs appealed to the 2nd circuit which implied during oral argument that the changes to the criteria may moot the case.

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Lawsuits and Other Legal Actions

- America First Legal, founded by former Trump advisor Stephen Miller, has filed a lawsuit against the Association of Independent Commercial Producers (AICP) and others including Meta:
  - AICP had adopted an advertising apprenticeship program called Double the Line which asked companies to pay for an additional single position to be filled by a BIPOC (black, indigenous, people of color) on certain productions.
  - James Harker, a white male with nearly thirty years of experience in the industry sued alleging he was denied work opportunities that were reserved for people of color.

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Lawsuits and Other Legal Actions

- America First Legal has filed EEOC complaints against over nearly two dozen companies it identifies on its website as "woke corporations."
- The complaints allege that the companies' DEI policies constitute unfair employment practices.
- The EEOC has not yet provided any publicly information related to the actions.

Activision	Alaska Air	American Airlines
Anheuser-Busch	Blackrock	Dick's Sporting Goods
Hasbro	Hershey	IBM
Kellog's	Koontor Brands (Lee Jeans)	Lyft
Major League Baseball	Macy's	Mars
Mattel	McDonald's	Morgan Stanley
Nascar	Nordstrom	Price Waterhouse Coopers
Salesforce	Southwest	Starbucks
Twillio	Unilver	United Airlines
Yum Brands/Pizza Hut		

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Lawsuits and Other Legal Actions

- According to Reuters news, "JP Morgan changed the descriptions of its 'Advancing Hispanic & Latinos' and 'Advancing Black Pathways' programs that were previously for Black and Latino students to now invite applications for all students "regardless of background."
- BlackRock "removed language stating a scholarship was 'designed for' members of specific underrepresented groups.
- Koontor Brands (the maker of Lee Jeans) set DEI goals which included pay incentives for executives to increase gender and racial representation. Following the letters "the incentives were instead tied to improving inclusion scores on an employee survey without any mention of gender or racial representation."
- Yum! Brands, American Airlines, Lowe's, also made changes.

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Lawsuits and Other Legal Actions

- Starbuck's directors were sued by Morenoff and a conservative shareholder group National Center for Public Policy Research in November 2022.
- The suit alleged Starbucks directors were pushing DEI initiatives to gain "social-credit" for themselves at the expense of the company.
- The case was dismissed in September 2023 by U.S. District Judge Stanley Bastian holding that "courts of law have no business involving themselves with reasonable and legal decisions made by the board of directors."

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New Utah State Laws

- On January 30, 2024, Utah Governor Spencer Cox signed into law the H.B. 261 titled Equal Opportunity Initiatives prohibiting DEI at Utah's public colleges and universities and at government employers. Under H.B. 261 a public employer cannot:
  - Ask for a diversity statement in connection with employment status, admission, participation in a program, or qualification for financial aid.
  - Give special preference to an individual who provides a diversity statement
  - Implement policies that promote differential treatment in hiring, admissions, promotions, and program participation based on "personal identity characteristics defined as "race color, ethnicity, sex, sexual orientation, national origin, religion or gender identity."

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New Utah State Laws

- Engage in initiatives or mandatory training that assert that individuals with a particular personal identity characteristic are inherently superior, privileged, oppressed or culpable for past actions; that "meritocracy is inherently racist or sexist;" that "socio-political structures are inherently a series of power relationships and struggles among racial groups;" or promote "resentment between, or resentment of, individuals by virtue of their personal identity characteristics."
- Maintain offices with the title 'diversity, equity, and inclusion,' or positions established to implement any of the practices outlined above.
- Employ a third-party to develop, promote or implement any of the practices outlined above. (Summary from Salt Lake Tribune)

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Proposed Utah State Laws

- Representative Tim Jimenez proposed proposed H.B. 111 entitled Employment Training Requirement Limitations, applicable to private employers. The bill did not pass.
- Initially, the bill made it an unlawful or discriminatory employment practice to "subject an individual as a condition of employment" to training or required activities that promoted, advanced, or compelled individuals to believe any of the following:
  - That members of one race, color, sex or national origin are morally superior to members of another race, color, sex or national origin.
  - That an individual by virtue of the individual's race, color, sex, or national origin is inherently racist, sexist, or oppressive, whether unconsciously or not.
  - That an individual's moral character or status as either privileged or oppressed is necessarily determined by the individual's race, color, sex, or national origin.
  - That members of one race, color, sex or national origin cannot or should not attempt to treat others without respect to race, color, sex, or national origin.
  - That an individual by virtue of the individual's race, color, sex or national origin bears responsibility for, or should be subject to discrimination or adverse treatment because of actions that other members of the same race, color, sex, or national origin committed in the past.
  - That an individual by virtue of the individual's race, color, sex, or national origin should be subject to discrimination or adverse treatment to achieve diversity, equity or inclusion.
  - That virtues including merit, excellence, hard work, fairness, neutrality, and objectivity are racist or sexist, or that members of a particular race, color, sex or national origin created these virtues to oppress members of another race, color, sex, or national origin.

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H.B. 257 Sex-Based Designations for Privacy

Passed with portions already effective, and balance effective May 1, 2024.

Found at: https://le.utah.gov/~2024/bills/static/HB0257.html

- This bill addresses government-owned bathrooms and changing facilities.
- In a nutshell, an individual may only use a public restroom or changing room that corresponds to the individuals' biological sex.

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How does H.B. 257 impact public employers?

In recent guidance entitled "Sexual Orientation and Gender Identity (SOGI) Discrimination," the EEOC reminds us that it takes "**the position that employers may not deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee's gender identity**."

- HB 257 only applies to public facilities that are "open to the general public."
- This definition expressly excludes facilities "only accessible to employees of a government entity; or any area that is not normally accessible to the public."

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H.B. 396 Workplace Discrimination Amendments

Passed and effective May 1, 2024.

Primary bill sponsor is Rep. Brady Brammer (District 54 – Utah)

Found at: https://le.utah.gov/~2024/bills/static/HB0396.html

This bill expands religious liberty protections:

- Prohibits an employer from **compelling an employee to engage in "religiously objectionable expression**" unless accommodating the employee would impose undue burden by interfering with (1) the employer's core mission or ability to conduct business in an effective manner or (2) the employer's ability to provide training and safety instructions."
- Disputes re: pronoun usage at work?

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Further Legal Developments

- In *Muldrow v. City of St. Louis*, the Supreme Court seems to have removed the requirement of an adverse employment action under Title VII opening the way for further attacks on affirmative action and DEI initiatives. New standard now looks at whether "some harm" was done.
- In *Muldrow*, a female police office worked as an investigator. Despite excellent performance she was replaced by a male officer and moved to patrol work at the same rank and salary.
- Muldrow, sued alleging she suffered an adverse employment action under Title VII.
  - The district court had granted summary judgment for the defendant and the Eighth Circuit affirmed holding that a transfer was "not an adverse employment action," i.e., "a tangible change in working conditions that produces a material employment disadvantage."

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Further Legal Developments

- During oral argument in *Muldrow*, legal scholars noted that some justices questions hinted that removing the adverse employment requirement could allow challenges to DEI initiatives or of reverse racism in the workplace to proceed. (Melissa Murray, NYU).
  - Justice Thomas: "Can you have discrimination that is perceived by someone who [says] that this is law enforcement and we need in this particular precinct more black or Hispanic officers, and so you are moved or transferred because of race."
  - Justice Barrett: "But are you saying then, if the employer wants to increase diversity in the workplace and so promotes, say, some black employees, and they get better jobs then that's discrimination."
  - Justice Barrett: "What if it's we want to have a, you know, face first, we want women out there, we want to promote women, we want to show that we are friendly to women, let say it's a law firm and there's – you know, the number of female partners are low and so they want to bring that up. That's actionable?"

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Impact on DEI Programs and Takeaways

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Benefits v. Costs

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

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Review of DEI Policies – General

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

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Review of DEI Policies – Legal

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

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Review of DEI Policies – Legal

Permissible Actions

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

Potentially Impermissible Actions

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

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Future Legal Developments

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

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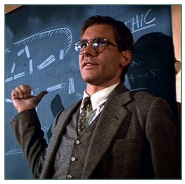
Takeaways

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



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DEI and Utah Public Employers/Employee Perspective

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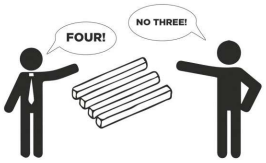
DEI and Public Employers/Employee Perspective

- Hiring Practices
  - Emphasis on neutral
  - Allowing for Federal and State requirements
  - Reducing subjectivity in performance evaluations, promotions, work assignments, incentives, etc.
- Hiring manager training
  - Objectivity vs Subjectivity
  - Skills Based Hiring
  - Modernization
- We continue to focus on people-centric actions



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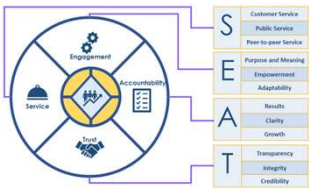
Moving to Values Based Proposition



- Values are driving how we engage internal and external stakeholders
- Values provide the lens to focus on individual and collective needs (constitutions and Employees)
- Ensuring Intent and Impact Alignment
- Ex: SEAT Values driving our goals

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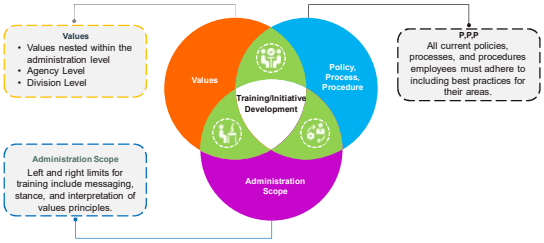
Values in Decision-Making



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

Thank You

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Thank You

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36th Annual Employment Law Seminar

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

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Michael Judd
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PARSONS BEHLE & LATIMER

36th Annual Employment Law Seminar

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

Paul Smith & Michael Judd

SALT LAKE SHRM

May 14, 2024 | The Grand America Hotel – Salt Lake City

1

Remote Work as an Entrenched Expectation

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2

Remote Work as an Entrenched Expectation

Managers want workers back—but workers have other ideas

make it

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

SCRIPPS NEWS

U.S.

Remote work has significantly shifted employee expectations

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

WORKPLACE OCTOBER 9, 2023

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

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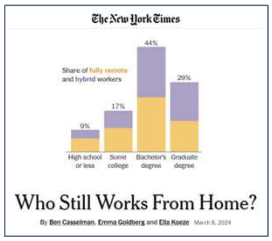
Remote Work as an Entrenched Expectation

Practices vary widely by region, industry, and education level

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



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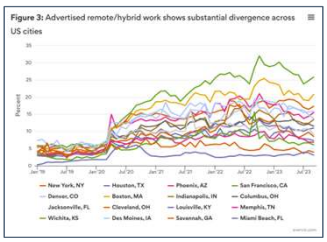
Remote Work as an Entrenched Expectation

Practices vary widely by region, industry, and education level

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



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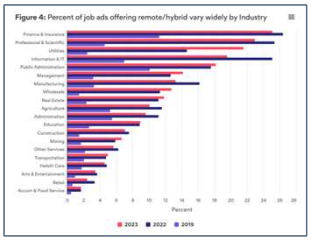
Remote Work as an Entrenched Expectation

Practices vary widely by region, industry, and education level

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



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Today's Agenda

- Multi-state-employer issues
- Wage-and-hour issues
- ADA issues

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Becoming a Multi-State Employer… by Accident

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Remote Work Can Subject You to a Multi-State Minefield

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

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Remote Work Can Subject You to a Multi-State Minefield

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

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Some Ideas for Dealing with the Multi-State Minefield

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

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But *Where* Will My Remote Employees Sue Me?

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

WARNING: Jurisdictional issues incoming.

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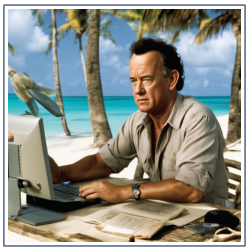
But *Where* Will My Remote Employees Sue Me?

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



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

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

Are those good facts for Clearbridge? They are not.

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But *Where* Will My Remote Employees Sue Me?

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

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

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

Key facts:

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

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Remote Work Can Subject You to a Multi-State Minefield

Workers love remote work.

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

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The FLSA: Tasks and Time While Remote

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The FLSA: Properly Paying Remote Workers

What does the FLSA require?

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

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The FLSA: Properly Paying Remote Workers

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

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

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FLSA Background: Donning and Doffing Cases

FLSA Hours Worked Ac

Principal Activities

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

For example:

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

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

For example:

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

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FLSA Background: Donning and Doffing Cases

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

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

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

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

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

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

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

Does that count as compensable working time under the FLSA?

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

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

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

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

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

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

What does *de minimis* mean?

- The court applied its balancing test to determine if work time is *de minimis*:
  - (1) the practical administrative difficulty of recording the time,
  - (2) the size of the collective employees' time in the aggregate, and
  - (3) whether the employees performed the work on a regular basis.

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

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

- The Tenth Circuit found:
  - (1) Nelnet failed to establish that it could not estimate the boot up time;
  - (2) the size of the aggregate claim was not so small to be considered *de minimis* (even though the total claim was only $32,000); and
  - (3) the employees were required to boot up every day, satisfying the regularity requirement.

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

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

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

Welcome to Utah, specialized FLSA counsel.

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

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

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

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

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

What do damages look like?

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

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The ADA: Remote Work as an Accommodation

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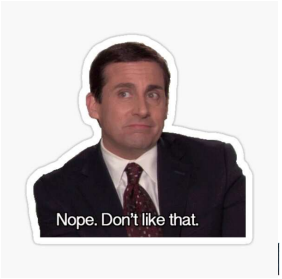
What if your company doesn't like remote work?

- If an employee simply prefers remote work, you may simply tell them no.
- But if an employee cannot work onsite for health reasons—physical (e.g., immunocompromised conditions) or mental (e.g., anxiety or depression)—the employee may be eligible for leave under the **Family & Medical Leave Act (FMLA)** or an accommodation under the **Americans with Disabilities Act (ADA)** and related state law.



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

- FMLA-covered employers should initiate the FMLA process by providing eligible employees with the FMLA's Notice of Eligibility and Rights and Responsibilities form.
- Employers also should initiate the ADA's interactive process:
  - Does the employee have an ADA-covered disability?
  - Can the employer provide an accommodation without undue hardship, e.g., remote work.

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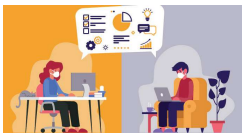
Employees Who Resist Onsite Work

- Recall that under the ADA, you do not need to excuse an essential job function as an accommodation.
- As a result, if onsite work is essential, you do not need to excuse it for an employee who cannot return to onsite work because of a disability (although you may need to provide other accommodations).
- Anticipate that employees may claim that onsite work is non-essential and head those arguments off with clear communication.



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Lamm v. DeVaughn James, LLC

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

The *Lamm* case provides insight on two important issues:

The distinction between remote work and leave accommodations.

Whether employers need to excuse "regular and predictable" attendance requirements under the ADA.

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Lamm v. DeVaughn James, LLC


Our Award-Winning Team

We were very proud to be nominated for the Best Places to Work in Wichita by the Wichita Business Journal, and to win first place for 2017, 2019, 2020, and 2021.

What happened in 2016?

Allison Lamm worked for DJ as a litigation case manager.

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

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

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

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Lamm v. DeVaughn James, LLC

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

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

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

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Lamm v. DeVaughn James, LLC

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

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

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

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

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Mobley v. St. Luke Health System

Mobley v. St. Luke Health System, Inc., 53 F.4th 452 (8th Cir. 2022)

Joseph Mobley worked as a Patient Access Supervisor for the St. Luke's Hospital system in Kansas City, MO.

He supervised a team of customer service employees who assisted patients with insurance questions via telephone.

Like all other supervisors, Joseph worked a hybrid schedule—three days onsite and two days remote.

The Hospital expected Joseph to work three days onsite to supervise.

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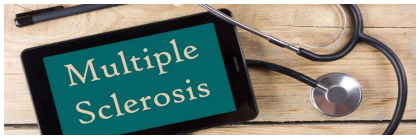
Mobley v. St. Luke Health System

Joseph suffers from Multiple Sclerosis.

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

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

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



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Mobley v. St. Luke Health System

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

The Hospital asked the court to enter a "summary judgment," dismissing his claims instead of moving forward with a jury trial, on the grounds that (a) onsite work was essential and (b) it provided an alternative leave accommodation.

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

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Mobley v. St. Luke Health System

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

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

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

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Montague v. US Postal Service (5th Cir. 2023)

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

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

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

The Postal Services denied her request

Montague sued.

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Montague v. US Postal Service (5th Cir. 2023)

The Post Office moved for summary judgment

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

Montague appealed to the Fifth Circuit.

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Montague v. US Postal Service (5th Cir. 2023)

The Fifth Circuit reversed:

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

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

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

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Montague v. US Postal Service (5th Cir. 2023)

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

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

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

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Jordan v. School Board of the City of Norfolk
(E.D. Va. Sept. 7 2023)

Principal for Sherwood Forest (Elementary)

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Jordan v. School Board of the City of Norfolk
(E.D. Va. Sept. 7 2023)

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

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

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Jordan v. School Board of the City of Norfolk

Cheryl suffered from asthma

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

The Virginian-Pilot

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

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

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Jordan v. School Board of the City of Norfolk

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

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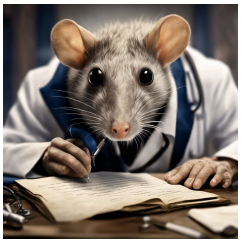
Jordan v. School Board of the City of Norfolk



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

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Jordan v. School Board of the City of Norfolk

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

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Jordan v. School Board of the City of Norfolk

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

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Jordan v. School Board of the City of Norfolk

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

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Remote Work as an ADA Accommodation

Key Takeaways

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

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

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

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

Explore alternative accommodations (hospital case)

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

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Remote Work as an ADA Accommodation

Key Takeaways (continued)

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

Balance consistency/planning with case-by-case analysis

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

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

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

If you provide a provisional telework accommodation, document that you are temporarily excusing some essential job functions and provide that context in your performance reviews.

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

Thank You

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Thank You!

- Paul Smith
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36th Annual Employment Law Seminar

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

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PARSONS BEHLE & LATIMER

36th Annual Employment Law Seminar

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

J. Kevin West

SALT LAKE SHRM

May 14, 2024 | The Grand America Hotel – Salt Lake City

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Legal Disclaimer

This presentation is based on available information as of May 14, 2024, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

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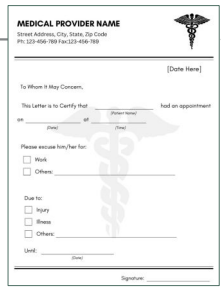
Common Scenario

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


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

[Date Here]

To Whom It May Concern,

This Letter is to Certify that _____ had an appointment on _____ (Date) at _____ (Time)

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

Due to:
☐ Injury
☐ Illness
☐ Others: _____

Until: _____ (Date)

Signature: _____

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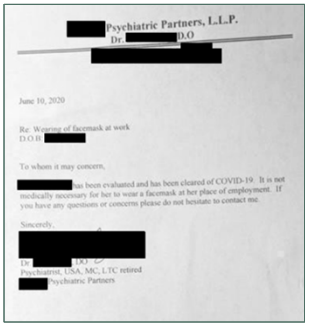
The signing physician is a psychiatrist and a relative of the patient.



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

June 10, 2020

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

To whom it may concern,

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

Sincerely,

[redacted]
Dr [redacted], DO
Psychiatrist, USA, MC, LTC retired
[redacted] Psychiatric Partners

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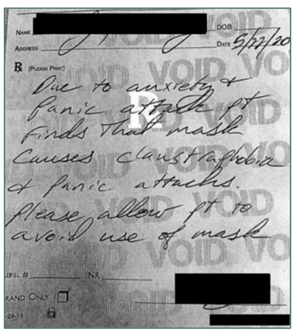
"Due to anxiety and panic attacks, patient finds that mask causes claustrophobia and panic attacks. Please allow patient to avoid use of mask."

(Written by the patient's <u>chiropractor</u>.)



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

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June 4, 2020

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

To Whom it May Concern:

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

Sincerely,

[redacted], FNP

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

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Title I of the ADA

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

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Title I of the ADA (cont.)

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

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Title I of the ADA (cont.)

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

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Title I of the ADA (cont.)

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

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Title I of the ADA (cont.)

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

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Title I of the ADA (cont.)

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

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Title I of the ADA (cont.)

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

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Obtaining Necessary Information to Provide an Accommodation

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Guidelines for Obtaining Disability Documentation

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

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Guidelines for Obtaining Disability Documentation (cont.)

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

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Guidelines for Obtaining Disability Documentation (cont.)

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

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Guidelines for Obtaining Disability Documentation (cont.)

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

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Step 1: Informal Discussion

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

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Step 2: Requesting Information from the Employee's Doctor

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

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

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

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

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

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Case Studies

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Case Study #1: Disclosing Therapy

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

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Case Study #1: Disclosing Therapy (cont.)

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

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Case Study #1: Disclosing Therapy (cont.)

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

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Case Study #1: Disclosing Therapy (cont.)

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

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Case Study #1: Disclosing Therapy (cont.)

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

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Takeaways from Case Study #1

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

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Takeaways from Case Study #1 (cont.)

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

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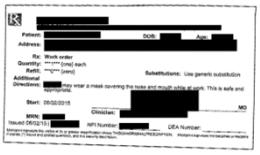
Case Study #2: Masking

- John Doe was employed as a cashier and food prepper in a fast-food establishment.
- One day, John wore a mask to work. (This was ~5 years before the COVID-19 pandemic.)
  - Supervisors were concerned that the mask would cause customers to think John was ill.
  - When a supervisor asked John why he was masking, John said he didn't like the smell of the restaurant.
- Without further inquiry, the supervisor asked John to get a doctor's note.
  - John obtained a doctor's note (pictured).
  - John then commented that he had a dust allergy and did not want to get coworkers/customers sick.
  - John reiterated that he didn't like the smell of the restaurant.



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Case Study #2: Masking (cont.)

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

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Case Study #2: Masking (cont.)

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

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Takeaways from Case Study #2

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

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Takeaways from Case Study #2 (cont.)

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

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

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

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

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

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

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

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

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

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

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

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Takeaways from Case Study #3

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

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Case Study #4: Elbow Restrictions

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

Activity Status Report - 01/21/22

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

VISIT SUMMARY

Reason for Visit:	Arm injury 1. Lateral epicondylitis of left elbow 2. Numbness and tingling in left arm
Medication(s) Ordered	
Prescription	No
Over-the-Counter	Yes Anti-inflammatory Tylenol/acetaminophen
Diagnostic Testing	None
Other Orders	Ice, Heat, Brace / Support
Next Appointment Here	2/4/2022 11:30 AM Video Visit

ACTIVITY STATUS

Full Activity	No
Off Work	No

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

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

Today's Examiner: [redacted] MD

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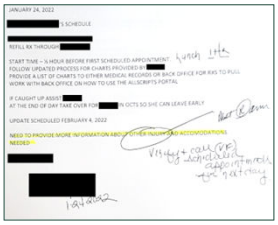
Case Study #4: Elbow Restrictions (cont.)

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



JANUARY 24, 2022

[redacted]'S SCHEDULE

REFILL RX THROUGH [redacted]

START TIME – ½ HOUR BEFORE FIRST SCHEDULED APPOINTMENT. lunch 1hr

FOLLOW UPDATED PROCESS FOR CHARTS PROVIDED BY [redacted]

PROVIDE A LIST OF CHARTS TO OTHER MEDICAL RECORDS OR BACK OFFICE FOR RXS TO PULL

WORK WITH BACK OFFICE ON HOW TO USE THE ALLSCRIPTS PORTAL

IF CAUGHT UP ASSIST [redacted]

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

UPDATE SCHEDULED FEBRUARY 4, 2022

NEED TO PROVIDE MORE INFORMATION ABOUT OTHER INJURY AND ACCOMMODATIONS NEEDED

[redacted]

[redacted]

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Case Study #4: Elbow Restrictions (cont.)

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

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Case Study #4: Elbow Restrictions (cont.)

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

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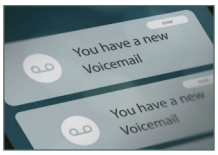
Case Study #4: Elbow Restrictions (cont.)

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



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Case Study #4: Elbow Restrictions (cont.)

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

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Takeaways from Case Study #4

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

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Recap

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

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Recap (cont.)

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

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

Thank You

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Thank You

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36th Annual Employment Law Seminar

Handbook Updates: 2024 Policy Pointers and Pitfalls

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PARSONS BEHLE & LATIMER

36th Annual Employment Law Seminar

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Handbook Updates: 2024 Policy Pointers and Pitfalls

Mark D. Tolman & Karen M. Clemes

SALT LAKE SHRM

May 14, 2024 | The Grand America Hotel – Salt Lake City

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Legal Disclaimer

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The most important clause in your handbook is…

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Cabaness v. Thomas (UT 2010)

Bountiful Power had an anti-harassment policy in its Employee Handbook:

Any behavior or conduct of a harassing or discriminating nature . . . which is pervasive, unwelcome, demeaning, ridiculing, derisive or coercive, or results in a hostile, abusive or intimidating work environment constitutes harassment and shall not be tolerated by the City.

***

No City official or employee shall harass, coerce, intimidate, threaten or discipline employees who exercise their rights under this procedure in good faith.

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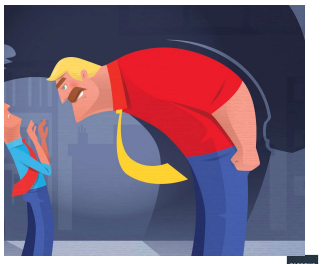
Cabaness v. Thomas (UT 2010)

Kipp Cabaness's lawsuit told the story of the classic bad boss—Superintendent Brent Thomas. Although employees complained, Thomas engaged in the following behaviors over many years:

- He used gross profanity and ridiculed his employees, who referred to him as "Little Hitler" or "Dr. Jekyl and Mr. Hyde."
- He called Cabaness "dumbass," "jackass," "asshole," and used cutting sarcasm.
- He made the work of his subordinates harder without providing any justification and disregarded safety procedures.
- He told Cabannes that he was "lucky to have his job" and would be fired if he didn't do as he was told.



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Cabaness v. Thomas (UT 2010)

- "An implied contract may arise from a variety of sources including personnel policies or provisions of an employment manual."
- However, ""a clear and conspicuous disclaimer, as a matter of law, prevents employee manuals or other like material from being considered as implied-in-fact contract terms."
- The disclaimer: "No contract exists between Bountiful City and its employees with respect to salary, salary ranges, movement within salary ranges, or employee benefits."
- The Court: the Handbook's anti-harassment policy created a contract, because the disclaimer "only disclaims contractual liability 'with respect to' a few specifically identified items."

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Policy Example

It's so simple. In addition to your at-will disclaimer, add a contract disclaimer like this:

This Handbook shall not be construed as constituting a promise from or contract of any kind with the Company, either express or implied.

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Multi-state considerations

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Multi-state legal differences, just in the West:

- California employment laws…enough said.
- Lots of variation in entitlement to unused PTO upon termination.
- Ever-increasing paid sick/safe laws (e.g., AZ, CA, CO, WA, etc.).
- Other unpaid or paid leave laws, including state medical/pregnancy protections, bone marrow donation leave, bereavement leave, voting/jury leave, and others.
- Discrimination/harassment laws
- Wage and hour laws (overtime, meal/rest breaks, etc.)
- Montana law prohibits termination without "good cause" as defined by the statute (vs. at will)

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Policy takeaways for multi-state employers

Balance goals for consistency against state-specific compliance.

The lowest common denominator approach (apply the laws of the state with the most employee-friendly requirements).

State-specific policies, e.g., a supplement for each state that identifies material policy differences or where you need to provide notice of policies/right.

Disclaimer approach, e.g., “To the fullest extent allowed by the law in the state where you reside,…” Or other disclaimers that make clear that when the law in the employee’s state varies from the policy, we will follow the law.

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Anticipate remote work accommodation requests in your policies and job descriptions.

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What if you don’t want to allow remote work?

- For employees who simply prefer remote work, you may compel them to return onsite, citing your policies.
- But if an employee cannot work onsite for health reasons—physical (e.g., immunocompromised conditions) or mental (e.g., anxiety or depression)—the employee may be eligible for a remote work accommodation under the ADA (among other things).
- You’ve got to provide remote work when needed for a disability, **unless onsite work is essential or remote work would impose an undue hardship**.

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Document how onsite work is essential now, not only in response to ADA requests.

If you believe onsite work is essential, don't wait for an employee to request remote work as an accommodation to document why. Document these issues now!

- Review your remote work policy. If you are going to bring folks back to onsite work, or you've done so already and want to keep it that way, document how telework was a challenge. Also document why onsite work is essential. Don't just say it's essential—explain it.
- Review your job descriptions. Is there something there about onsite work? If not, add it.

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Religious expression accommodations

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H.B. 396 Workplace Discrimination Amendments

Effective May 1, 2024.

Primary bill sponsor is Rep. Brady Brammer (District 54 – Utah)

Found at: https://le.utah.gov/~2024/bills/static/HB0396.html

This bill expands religious liberty protections:

- Prohibits an employer from **compelling an employee to engage in "religiously objectionable expression,"** i.e., expression that offends a sincerely held religious belief.
- Unless accommodating the employee would impose undue burden by interfering with (1) the employer's core mission or ability to conduct business in an effective manner or (2) the employer's ability to provide training and safety instructions."

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Addressing conflicts between H.B. 396 and federal law

What about an employee who refuses to use a transgender coworker's pronouns and preferred name?

- EEOC: "Although accidental misuse of a transgender employee's name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment."
- Consider relying on the exception that granting a request to deadname a transgender employee or to refuse to use that employee's preferred pronouns interferes with an employer's "ability to conduct business in an effective manner" because lawsuits are expensive!

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HB 396 policy addition

Consider this addition to your religious accommodation policy:

"The Company also will provide reasonable accommodations, absent undue hardship, to excuse employees from engaging in religiously objectionable expression, i.e., an expression that offends your sincerely held religious beliefs. If you believe that the Company has asked you to express something that offends your religious beliefs, you may seek an accommodation from Human Resources. The Company will endeavor to provide such accommodations, unless doing so would cause an undue hardship, such as by interfering with a core mission, our ability to conduct business in an effective manner, or our ability to provide training and safety instructions."

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Update your harassment policies to comply with fresh EEOC guidance

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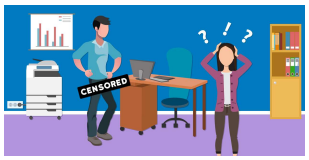
NEW EEOC enforcement guidance on harassment

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

- Found here:

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

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



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Harassment policy updates: race-based mistreatment

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

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

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

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Harassment policy updates: sexual orientation and gender identity

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

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

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Harassment policy updates: remote work and virtual meetings

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

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

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Other highlights from the EEOC's guidance

- Harassment can be based on a misperception, for example mistakenly harassing a Hispanic employee based on a belief the person is Pakistani.
- "Associational discrimination" is prohibited (e.g., bias against a white employee married to a black person).
- Harassment by a supervisor may heighten severity due to supervisory power. Due to this power, a supervisor's harassment outside the workplace may be actionable.
- Train your supervisors to immediately report harassment concerns to HR. The EEOC states: "An employer is liable for a hostile work environment created by non-supervisory employees or non-employees where the employer was negligent by failing to act reasonably to prevent the unlawful harassment from occurring."

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PWFA: pregnancy accommodations

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PREGNANT WORKERS FAIRNESS ACT

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

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

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PREGNANT WORKERS FAIRNESS ACT (PWFA)

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

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

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

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PWFA final regulations

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

- Among other things, the non-exhaustive definition includes pregnancy, lactation, use of birth control, infertility, menstruation, endometriosis, postpartum depression, miscarriages, and abortions.

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).

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PWFA final regulations

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

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

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

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Basic PWFA policy example

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

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Lactation Policies: compliance with the federal PUMP Act

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PUMP Act

The PUMP Act amends the Fair Labor Standards Act, with an effective date of December 29, 2022.

- This law requires employers provide new birthmothers with reasonable breaktime to express breastmilk for the employee's nursing child for one year after childbirth.
- Employers also must provide a private place (other than a bathroom) to express breastmilk.

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Basic lactation policy example (from SHRM.org)

As part of our family-friendly policies and benefits, the Company supports breastfeeding employees by accommodating an employee who needs to express breast milk during the workday.

For up to one year after the child's birth, any employee who is breastfeeding will be provided reasonable break times to express breast milk. The Company has designated the room located [insert location] for this purpose.

For non-exempt (hourly) employees, breaks of more than 20 minutes in length will be unpaid, and recorded on timesheets where appropriate.

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NLRB: the new sheriff in town?

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Stericycle®

We protect what matters.

NLRB issues *Stericycle* decision—changing the standard for employer conduct rules

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The handbook provision at issue. . .

In order to protect everyone's rights and safety, it is the Company's policy to implement certain rules and regulations regarding your behavior as a team member. Conduct that maliciously harms or intends to harm the business reputation of the Company will not be tolerated. You are expected to conduct yourself and behave in a manner conducive to efficient operations. Failure to conduct yourself in an appropriate manner can lead to corrective action up to and including termination.

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Have you checked your handbook lately?

On August 2, 2023, the NLRB issued a long-anticipated opinion in a case called *Stericycle*, which analyzes whether employer conduct rules are lawful.

Your policies likely address conduct standards, such as rules requiring professionalism and civility.

These rules need to be balanced against an employees' Section 7 rights to engage in **concerted activity** (to discuss together, or complain about, the terms and conditions of employment).

Prior to *Stericycle*, we applied an employer-friendly balancing test to weigh the conduct rule against the Section 7 rights.

Facially neutral rules about professionalism and civility were presumptively valid.

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Pendulum swings in favor of employees

Stericycle reversed that precent, adopting a new case-by-base balancing approach to determine if a conduct rule has "a reasonable tendency to chill employees from exercising their Section 7 rights."

The Board will read conduct rules from the perspective of a "reasonable employee."

If a "reasonable employee" could interpret the rule in a way that limits Section 7 rights, the rule will be presumptively invalid.

The employer's intent in making the rule is irrelevant.

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Conduct policy takeaways

Avoid sweeping conduct and professionalism policies that broadly, and without context, require employees to avoid harming the employer's reputation or interests, to treat coworkers "respectfully and professionally," or to refrain from "disparaging" the employer or coworkers.

Instead, craft narrowly tailored policies that prohibit employees from disclosing confidential information, defaming the employer or coworkers (i.e., knowingly lying), breaching their duties of loyalty not to engage in competitive activities while employed, or violating EEO policies against discrimination, harassment, and retaliation.

Provide express Section 7 context for your conduct policies, e.g., that your policies shall not be read to preclude (non-supervisory) employees from speaking with other employees about the terms and conditions of their employment.

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Another handbook provision to consider . . .

Investigation Confidentiality Policies

All complaints will be promptly investigated. All parties involved in the investigation will keep complaints and the terms of their resolution confidential to the fullest extent practicable.

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Confidentiality instructions changed too

For internal investigations, many employers instruct all witnesses to maintain the confidentiality of the investigation—during and after the investigation.

- For supervisors, there's no change. Recall that supervisors don't have Section 7 rights. Feel free to tell them to keep it secret.
- But what about non-supervisors?

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Confidentiality instructions to non-supervisors

- In 2019, the NLRB ruled that employer rules requiring employee confidentiality during open investigations are lawful. But you needed to apply "individualized scrutiny" in each case to maintain confidentiality post-investigation, e.g., to protect the integrity of the investigation, or to protect the complainant against mistreatment or retaliation.
- In *Stericycle*, the NLRB overruled their 2019 decision with respect to confidentiality instructions during the pendency of the investigation. Now, you need a specific reason—during and after the investigation—to maintain confidentiality with non-supervisors.

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Investigation confidentiality policy example

Instead of: All parties involved in an investigation will keep complaints and the terms of their resolution confidential.

Consider: All supervisors involved in an investigation will keep complaints and the terms of their resolution confidential. The Company may require that non-supervisors maintain confidentiality during an investigation when confidentiality is needed, e.g., to protect the integrity of the investigation, or to protect complainants or witnesses against tampering or mistreatment.

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H.B. 55 Employee Confidentiality Amendments

Effective May 1, 2024, but applies retroactively to Jan. 1, 2023.

Primary bill sponsor is Rep. Kera Birkeland (District 4 – Daggett, Duchense, Morgan, Rich, Summit)

Found at: https://le.utah.gov/~2024/bills/static/HB0055.html

- This bill renders void nondisclosure and nondisparagement clauses in employment agreements when those clauses could prohibit disclosures about sexual assault or sexual harassment.
- A severance agreement with a former employee (apparently) may prohibit these types of disclosures, but such agreements are subject to a three-business day revocation right.

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Exclude sex assault and harassment from your definitions of confidential information

Consider how you've defined "Confidential Information" in your policies and contracts. If that definition is broad (most are), add a disclaimer like this:

The term Confidential Information shall not mean: (a) any information that is known by me prior to my employment, without an obligation of confidence; (b) any information that is publicly disclosed by the Company; or (c) information related to sexual assault or sexual harassment as those terms are defined under Utah Code § 34A-5-114.

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FLSA exemptions: executive, administrative, and professional

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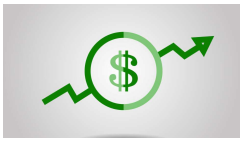
Increase of the FLSA salary threshold

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

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



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

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

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Rolling increases in 2024, 2025, and beyond.

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

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

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

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Policy Takeaways

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

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

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Drafting compliant DEI policies

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Students for Fair Admissions v. Harvard/UNC

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

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

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

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

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Drafting compliant DEI policies

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

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

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

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

Finally, expect continued scrutiny of DEI policies and practices. Some companies have rebranded their DEI initiatives to avoid the spotlight.

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Are DEI issues a semantics game?

- In the wake of HB 261, a 2024 Utah bill that bars public sector employers from maintaining DEI offices, UVU renamed its "Office of Inclusion and Diversity" to the "Office of Institutional Engagement and Effectiveness."
- In other words, DEI became IEE.
- According to a report from the Salt Lake Tribune, UVU President Astrid Tuminez has stated that the name change would not alter the school's ultimate mission of equity.

www.sltrib.com/news/education/2024/03/12/first-university-utah-renames-dei/

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Thank You

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36th Annual Employment Law Seminar

No Non-Competes for Exempt Independent Contractors

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Non-Competes for Exempt Independent Contractors (Ha! Ha! Ha!)

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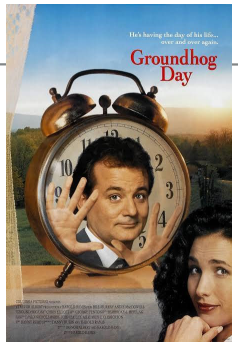
Have you seen…



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Haven't we talked about this before?

- Yes, but the rules keep changing
- Independent Contractor classification under the FLSA – Final Rule departs from the Interim Rule in some significant ways
- Salary Threshold for White Collar Exemptions under the FLSA – President Biden tries to "finish the job" started by President Obama
- Noncompete Covenants – they are very, very bad

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Fair Labor Standards Act – Background

- The FLSA establishes minimum wage, overtime pay eligibility, recordkeeping, and child labor standards
- Applies to full-time and part-time workers
- Applies in the private sector and to federal, state, and local governments
- Federal Minimum Wage is currently $7.25 per hour
- Some states or municipalities have adopted higher minimum wage requirements – current trend is $15 an hour

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Fair Labor Standards Act – Litigation

- From 1997 to 2017, FLSA lawsuits increased by 417 percent (8,261 from 1,597)
- But total number of claims has declined -- 5,532 FLSA claims filed in 2023
- Claims involve minimum wage, break time, overtime, travel time, misclassification as exempt or independent contractor
- 79 percent of the wage claims pursued by the Department of Labor resulted in back wages being awarded – if the DOL decides to bring a claim, it likely will win
- 2-year statute of limitations; but that can be extended to 3 years if a court determines that the violation was willful
- Liquidated (double damages)

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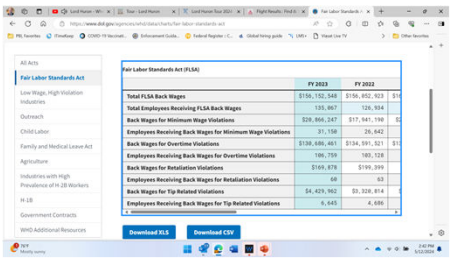
Some FLSA Statistics



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Some FLSA Statistics – Collective Actions

- In 2023, 423 FLSA collective actions settled in federal court -- settlements totaled $493,571,392, for an average of $1,166,835 per case.
- The largest FLSA collective settlement reached in 2023 was $65,500,000. The total amount of cases settling on a collective basis annually has stayed consistent over the past 3 years.
- The settlement values rose significantly in 2023.
- In 2022, 432 cases settled in federal court on a collective basis for a total of $309,148,520; and in 2021, 424 cases settled in federal court on a collective basis for a total of $286,071,727.

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Overtime – Basic Rules

- Overtime is generally a federal issue under the FLSA
- Some states have their own additional overtime rules; most states do not
- Basic rule – pay 1.5 the wage rate (regular rate of pay) for every hour worked past 40 hours in a week
  - Don't combine weeks (i.e. 60 in one week, 20 in one week)
  - Week by week basis
  - Compare to California which requires overtime for time over 8 hours in one day and for the first 8 hours on the seventh consecutive day of work – so in California, subject to both federal and state rules

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Common Mistakes Regarding Overtime

- **Misapplication of exemption**
- **Improper assumption that all salaried employees are exempt**
- **Improper classification of employee as independent contractor**
- Failure to record, pay for all hours worked
- Ignoring applicable state law (which may be lurking)

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Let's have a little history lesson about the DOL and Independent Contractors…

- The traditional worker classification "economic realities test" articulated in the DOL's guidance over time originates from 1947 Supreme Court decision *United States v. Silk*.
- 2015: the Obama Rule
  - Six-factor test
  - Primary focus is whether the worker is economically dependent on the employer
- 2021: the Trump Rule
  - June 2017: Withdrew Obama Rule
  - January 2021: Put in the Trump Rule
    - Five factors
    - Core factors: Control and opportunity for profit or loss

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And now today (again)… the Biden Rule

- Four days before Trump Rule would have taken effect in March 2021, Biden admin delayed the effective date and then withdrew it entirely
- March 2022—Texas federal district court rules it was unlawful to delay/withdraw the Trump rule and reinstated it
- October 11, 2022, Biden admin proposed new rule that would reinstate the economic realities test under the Obama rule
- Final Rule is effective on March 11, 2024

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What does the Final Rule say?

- Factors
  - (1) opportunity for profit or loss depending on managerial skill;
  - (2) investments by the worker and the potential employer;
  - (3) degree of permanence of the work relationship;
  - (4) nature and degree of control;
  - (5) extent to which the work performed is an integral part of the potential employer's business; and
  - (6) skill and initiative.
- The final rule provides detailed guidance regarding the application of each of these six factors.
- No factor has a predetermined weight, and additional factors may be relevant.

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How is the Final Rule similar to Trump Rule?

- Both rules advise that **independent contractors** are workers who (as a matter of economic reality) are in business for themselves, whereas **employees** are workers who are (as a matter of economic reality) economically dependent on the employer.
- Both rules identify economic dependence as the "ultimate inquiry" of the analysis.
- Both rules provide a non-exhaustive list of factors to assess economic dependence.
- Both rules caution that no single factor is determinative.
- Both rules note that economic dependence does not focus on the amount of income the worker earns, or whether the worker has other sources of income.

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How is the Final Rule different from the Trump Rule?

- Returns to a totality-of-the-circumstances economic reality test (no single factor is assigned any predetermined weight).
- Emphasizes that economic dependence is dependence **for work**.
- Considers six factors (instead of five).
- Provides additional analysis of the control factor.
- Returns to the DOL's consideration of whether the work is integral to the employer's business.
- Provides additional context to some factors, including a discussion of exclusivity in the context of the permanency factor and initiative in the context of the skill factor.
- Omits a provision from the Trump Rule which minimized the relevance of an employer's reserved but unexercised rights to control a worker.

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How does the Final Rule differ from the Proposed Rule?

- The Department received approximately 55,400 public comments in response to the Proposed Rule
- The final rule also advises that costs to a worker which are **unilaterally imposed** by a potential employer are not "investments" indicative of independent-contractor status.
- The Final Rule states that actions taken by the potential employer for the **sole purpose** of complying with specific, applicable federal, state, tribal, or local law or regulation would not indicate "control."

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The Final Rule's Guidance on the Control Factor

- This factor considers the potential employer's control (including reserved control) over the performance of the work and the economic aspects of the working relationship.
- Facts relevant to control: Does the potential employer set the worker's **schedule**, supervise the **performance** of the work, or explicitly limit the worker's ability to **work for others**?
- Does the potential employer use technological means to **supervise** the performance of the work (such as by means of a device or electronically), reserve the right to supervise or **discipline** workers, or place demands or restrictions on workers that do not allow them to **work for others** or work when they choose?
- Does the potential employer control **economic aspects** of the working relationship (e.g., control over prices or rates for services, and the marketing of the services or products provided by the worker)?

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The Final Rule's Guidance on the Control Factor

- Actions taken by the potential employer for the sole purpose of complying with a specific law/regulation are not indicative of control.
- Examples:
  - A publication's requirement that a writer comply with libel law
  - A home care agency's requirement that all individuals with patient contact undergo background checks in compliance with a specific Medicaid regulation.
- Actions taken by the potential employer that go beyond **legal compliance** and instead serve the **employer's own compliance** (methods of safety, quality control, or contractual or customer service standards) may be indicative of control.
- Example: A home care agency's imposition of extensive provider qualifications, such as fulfilling comprehensive training requirements (beyond training required for relevant licenses), may be probative of control.

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The Final Rule's Guidance on the "Integral Part of Employer's Business" Factor

- This factor considers whether the work performed is an **integral** part of the potential employer's business.
- This factor **does not** depend on whether any **individual worker** in particular is an integral part of the business, but rather whether the **function** they perform is an integral part of the business.
- This factor weighs in favor of the worker being an employee when the work they perform is **critical, necessary, or central** to the potential employer's principal business.

19

Some things to keep in mind…

- The Final Rule only applies to FLSA.
  - Doesn't impact NLRA, IRS, state law
- The **DOL** will certainly follow the Final Rule's guidance when conducting an audit.
- While not controlling, the **courts** will likely cite the 2024 rule as persuasive authority
  - But existing case law continues to control, as it is courts—and not regulatory agencies—that create binding precedent law.

- Various organizations are almost certainly going to challenge the legality of the Final Rule
- So, we're almost certainly going to repeat this day again.

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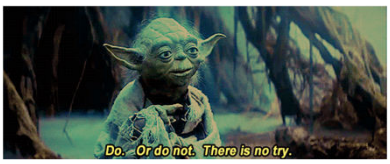
"Do or do not. There is no try."

- Yoda's advice to the Biden administration



21

Overtime – Exemptions

- Certain categories of employees are "exempt" under the FLSA – don't have to pay overtime
- Employer has obligation to **prove** that employees are exempt—presumption that they are not
- Multiple "White Collar" Exemptions
  - Executive
  - Owner Executive
  - Administrative
  - Professional
  - Computer professional
- Others: Retail Workers
- Certain of these must be paid on a salary basis of not less than $684 per week (raised recently) or $35,568 per year

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Overtime Exemption – Executive Employees

- Must meet salary threshold of $684 per week **and**
- The employee's **primary duty** must be **managing** the enterprise, or managing a customarily recognized department or subdivision of the enterprise **and**
- The employee must customarily and regularly direct the work of at least **two or more** other full-time employees or their equivalent **and**
- The employee must have the **authority to hire** or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight

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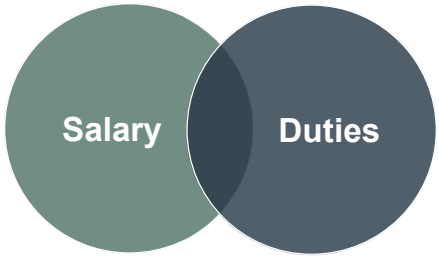
Remember, Two Hoops, Not One



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Overtime Exemption – Administrative Employees

- Must meet the salary threshold of $684 per week **and**
- The employee's **primary duty** must be the performance of **office** or non-manual work directly related to the management or general business operations of the employer or the employer's customers **and**
- The employee's primary duty includes the exercise of **discretion and independent judgment** with respect to matters of significance
  - Analysis, making determinations, setting prices, assessing risk, committing company resources, negotiating

25

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Overtime Exemption – Administrative Employees

- Management of general business operations means things such as:
  - Tax, Finance, Budgeting, Accounting
  - Auditing, Legal and Regulatory Compliance
  - Quality Control, Insurance, Safety, Health
  - Purchasing, Procurement
  - Advertising, Marketing, Researching
  - Human Resources, Labor Relations, Benefits
  - Computer network, database administration

26

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Overtime Exemption – Professional Employees

- Must be paid the salary threshold of $684 per week **and**
- Have a **primary duty** that consists of the performance of work requiring **advanced knowledge** -- work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment **and**
- The advanced knowledge must be in a field of **science or learning and**
- The advanced knowledge must be customarily acquired by a prolonged course of **specialized intellectual instruction** (usually, but not always, a degree)

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Professional Exemption – Field of Science or Learning

- Law
- Medicine
- Theology
- Accounting
- Actuarial computation
- Engineering
- Architecture

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Professional Exemption – Field of Science or Learning

- Teaching
- Physical, chemical and biological sciences
- Pharmacy
- Other occupations that have a recognized professional status and are distinguishable from the mechanical arts or skilled trades
  - Chefs
  - Certified Athletic Trainers
  - Licensed Funeral Directors/Embalmers

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Professional Exemption – Common Errors

- Common mistakes in claiming the professional exemption (according to DOL Wage and Hour Division)
  - Licensed Practical Nurses
  - Paralegals, legal assistants
  - Engineering Technicians
  - Accounting clerks, bookkeepers performing routine work
  - Cooks performing predominately routine mental, manual, mechanical, or physical work

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Highly Compensated Employee Exemption

- The regulations contain a special rule for "highly compensated" employees who are paid total annual compensation of $107,432 or more. A highly compensated employee is deemed exempt under Section 13(a)(1) if:
  1. The employee earns total annual compensation of $107,432 or more, which includes at least $684 per week paid on a salary or fee basis;
  2. The employee's primary duty includes performing office or non-manual work; and
  3. The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.
- Thus, for example, an employee may qualify as an exempt highly compensated executive if the employee customarily and regularly directs the work of two or more other employees, even though the employee does not meet all of the other requirements in the standard test for exemption as an executive.
- NOTE: Has to be based on weekly compensation, not daily compensation (remember *Helix Energy Solutions v. Hewitt* -- $900 to $1,300 a day (over $200,000 annually), not exempt because no weekly guarantee)

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One Hoop is Not Enough

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President Obama Tried This Once

- In 2016 the Obama administration attempted to raise the salary level to over $900 per week
- Lawsuit filed in (you guessed it!) Texas successfully blocked the rule from taking effect
- Change in presidential administration led to an abandonment of the proposed rule.

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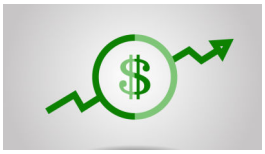
President Biden Tries Again

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

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



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Rolling increases in 2024, 2025, and beyond.

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

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

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

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Policy Takeaways

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

Or (3) wait for someone to sue in Texas to block the new rule. (Tongue in cheek)

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

36

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Common Myths about Exemptions

- Not about being paid a salary alone
- Not about just job title
- Not about job description (if not correct)
- Not about how “everyone else” does it
- OT cannot be waived

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And now, another instance of déjà vu all over again. . .

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Non-competes are very, very bad

- On January 19, 2023, the FTC announced it was proposing a ban on noncompete covenants
- It received over 26,000 comments
- The FTC then published the final rule in late April, 2024
- The final rule will go into effect 120 days after it is published in the Federal Register
- Lawsuits have already been filed to block enforcement of the rule

39

39

What does the rule do?

- It bans noncompete covenants going forward after it becomes effective (120+ days in the future)
- It prohibits employers from enforcing existing noncompete covenants against ordinary employees (unless a cause of action has already arisen)
- It allows employers to enforce existing noncompete covenants against "senior executive" employees (workers earning more than $151,164 in a "policy-making position") – the FTC estimates that this is less than 1% of the workforce

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What does the rule do?

- It prohibits an employer from representing to a non-executive employee that the worker is subject to a non-compete covenant
- And, the rule requires employers **to notify employees** with non-compete covenants that are no longer enforceable under the rule, that the non-compete covenant the employee entered into is no longer valid

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What does the rule not do?

- The rule does not apply to noncompete covenants entered into in conjunction with the sale of a business

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NLRB Enters the Non-Compete Fray

- On May 30, 2023, NLRB General Counsel (GC) Jennifer Abruzzo issued a memorandum declaring that overbroad non-compete agreements are unlawful because they chill employees from exercising their rights under Section 7.
- Abruzzo asserts that non-competes interfere with Section 7 rights by making workers believe they'll have a harder time replacing lost income if they're discharged for exercising their Section 7 rights. Abruzzo's memorandum is not an official statement or ruling by the NLRB. But, as the NLRB's GC, Abruzzo sets the direction for regional offices and instructs them on the types of complaints to file against companies.

43

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Utah Legislature weighs in, again

- Over past few years, Utah legislature has jumped in the pool
- The past session, proposed rule that would have made employees who are lower than the salary threshold under the FLSA, exempt from noncompete covenants
- Bill did not pass
- But noncompete covenants are cat nip to the legislature

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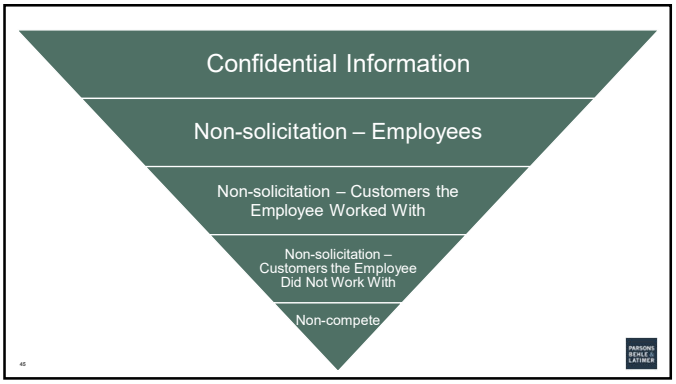

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Legal Disclaimer

This presentation is based on available information as of May 14, 2024, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

2

2

Informal Audience Survey

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

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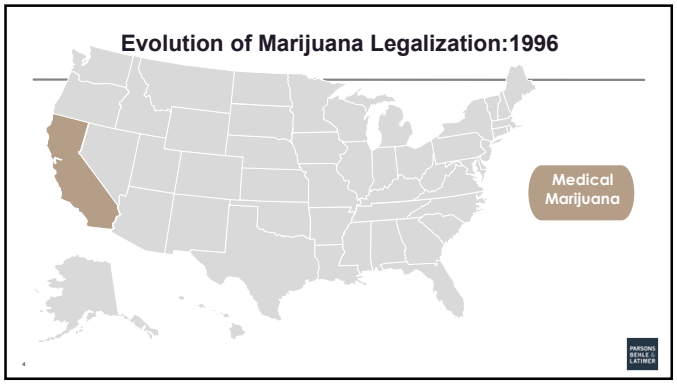
Evolution of Marijuana Legalization:1996
Medical Marijuana

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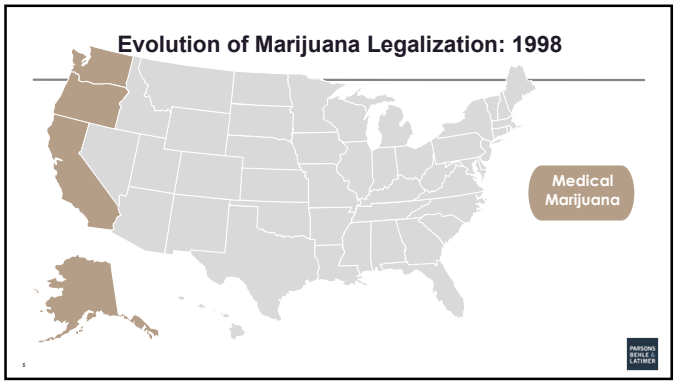
Evolution of Marijuana Legalization: 1998
Medical Marijuana

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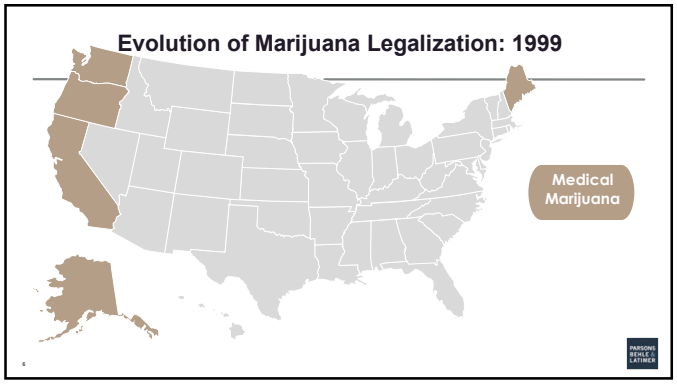
Evolution of Marijuana Legalization: 1999
Medical Marijuana

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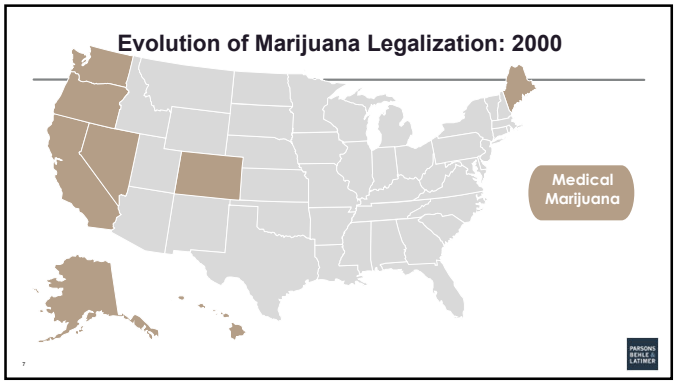
Evolution of Marijuana Legalization: 2000
Medical Marijuana

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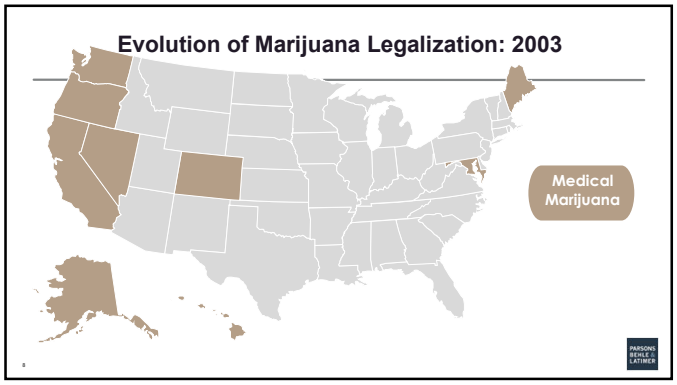
Evolution of Marijuana Legalization: 2003
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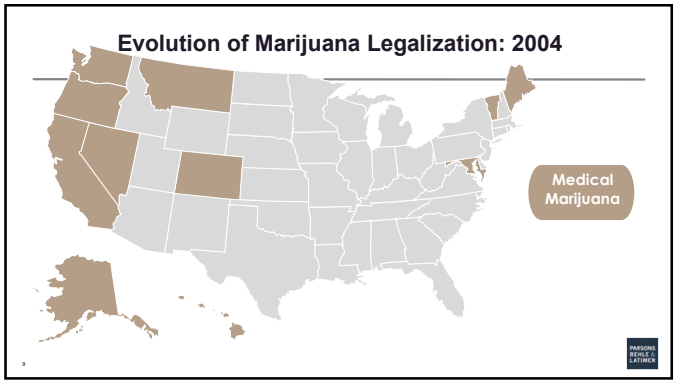
Evolution of Marijuana Legalization: 2004
Medical Marijuana

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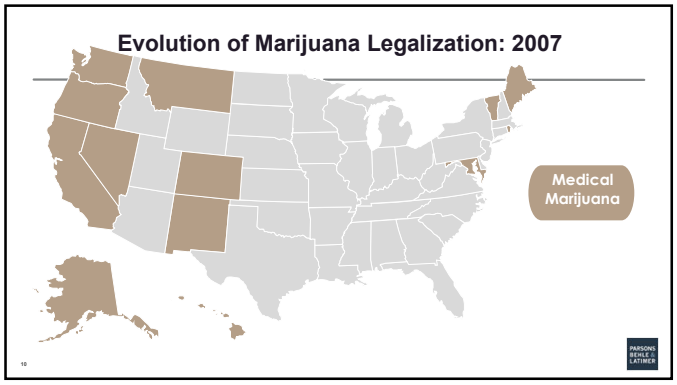
Evolution of Marijuana Legalization: 2007
Medical Marijuana

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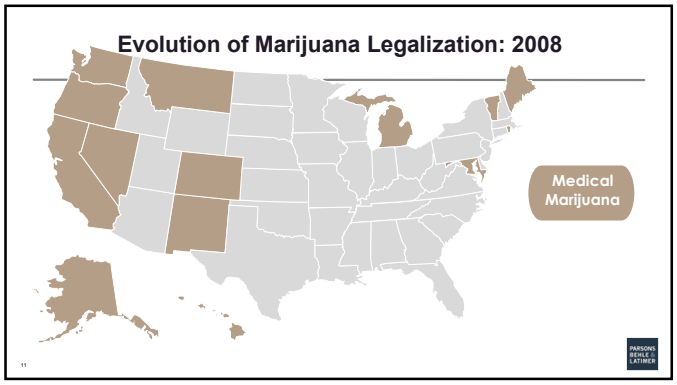
Evolution of Marijuana Legalization: 2008
Medical Marijuana

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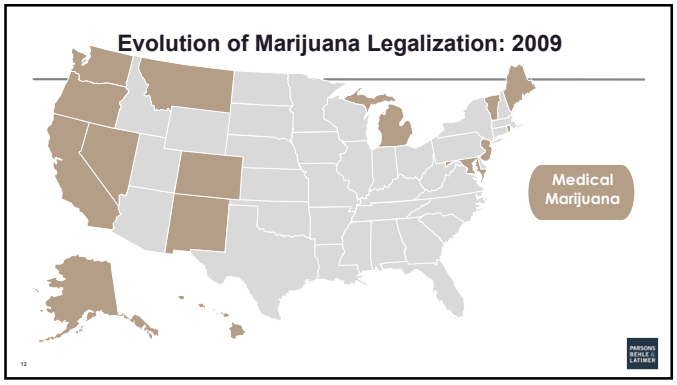
Evolution of Marijuana Legalization: 2009
Medical Marijuana

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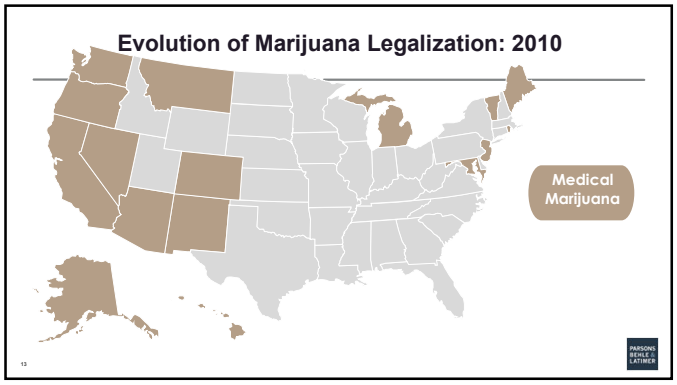
Evolution of Marijuana Legalization: 2010
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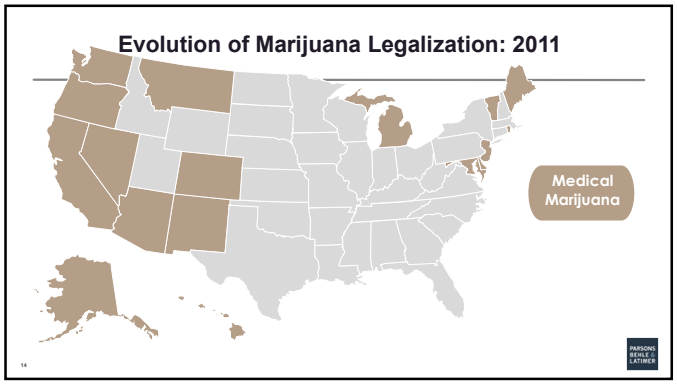
Evolution of Marijuana Legalization: 2011
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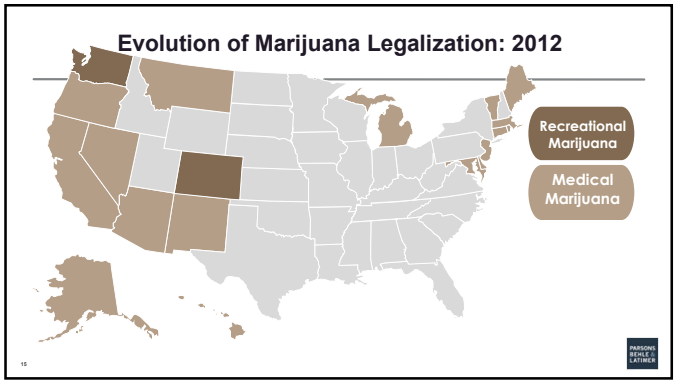
Evolution of Marijuana Legalization: 2012
Recreational Marijuana
Medical Marijuana
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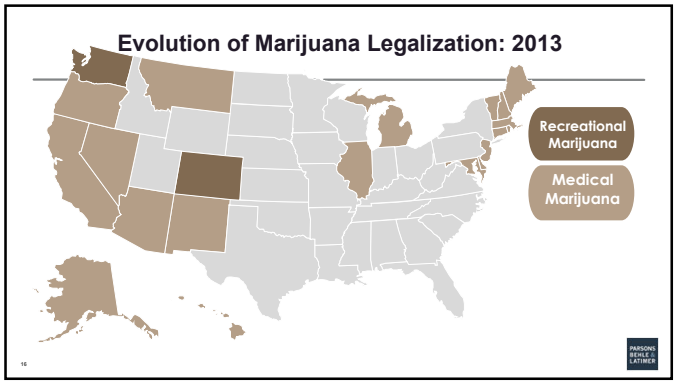
Evolution of Marijuana Legalization: 2013
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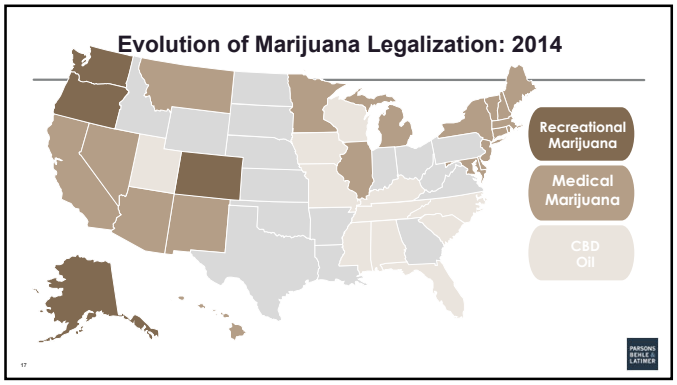
Evolution of Marijuana Legalization: 2014
Recreational Marijuana
Medical Marijuana
CBD Oil
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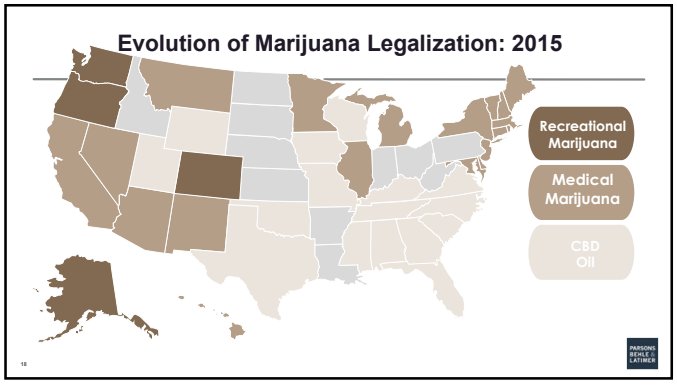
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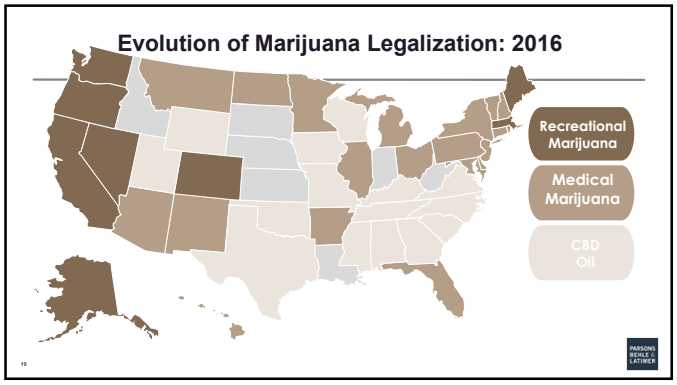
Evolution of Marijuana Legalization: 2016
Recreational Marijuana
Medical Marijuana
CBD Oil

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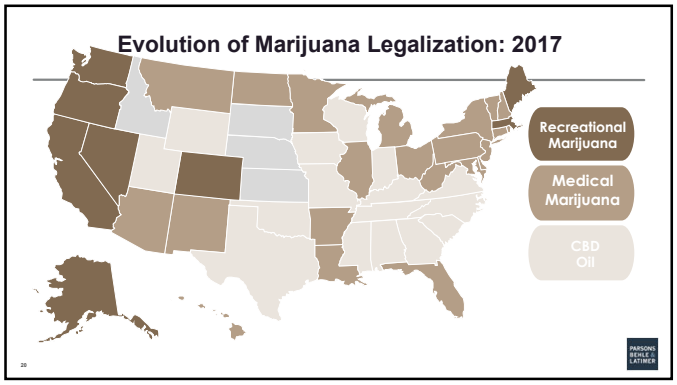
Evolution of Marijuana Legalization: 2017
Recreational Marijuana
Medical Marijuana
CBD Oil

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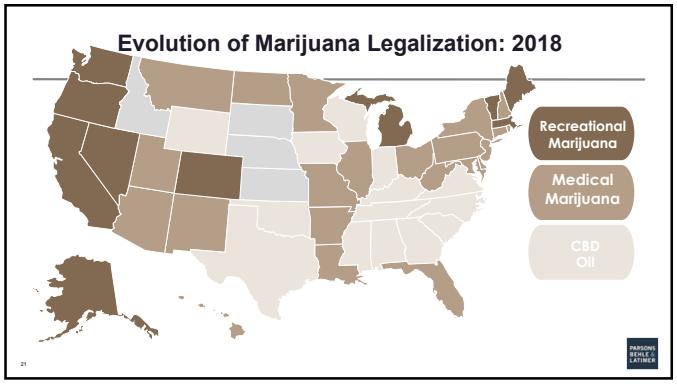
Evolution of Marijuana Legalization: 2018
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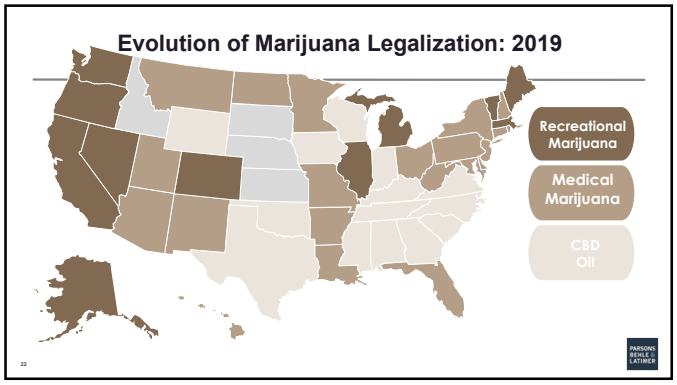
Evolution of Marijuana Legalization: 2019
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Medical Marijuana
CBD Oil
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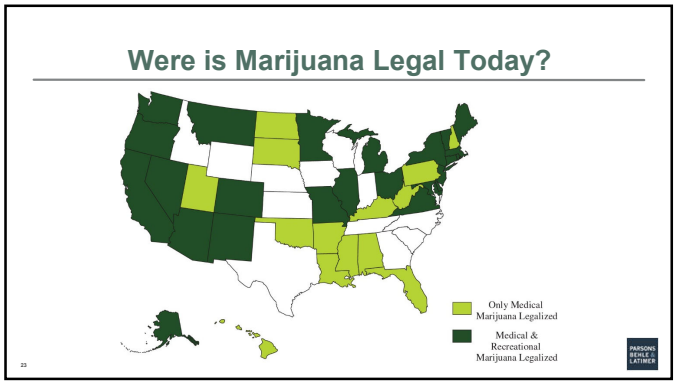
Were is Marijuana Legal Today?
Only Medical Marijuana Legalized
Medical & Recreational Marijuana Legalized
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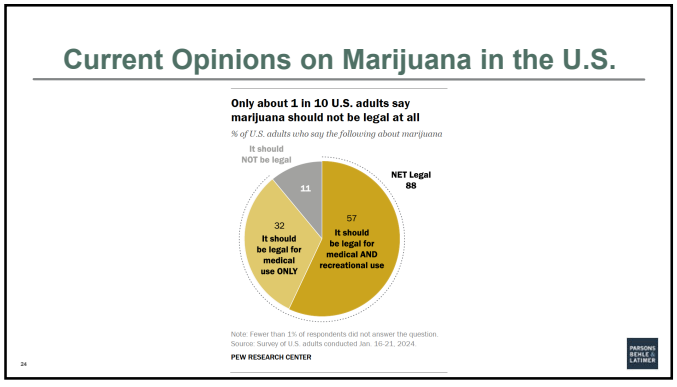
Current Opinions on Marijuana in the U.S.
Only about 1 in 10 U.S. adults say marijuana should not be legal at all
% of U.S. adults who say the following about marijuana
It should NOT be legal
11
NET Legal 88
32
It should be legal for medical use ONLY
57
It should be legal for medical AND recreational use
Note: Fewer than 1% of respondents did not answer the question.
Source: Survey of U.S. adults conducted Jan. 16-21, 2024.
PEW RESEARCH CENTER
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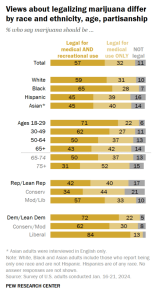
Current Opinions on Marijuana in the U.S.



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

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Trends in Marijuana and the Workplace

- NYC ban on employer preemployment drug testing, April 2019.
- Only Half of CO Employers Will Fire for a Single Pot Test, *Denver Post*, March 2019.
- Quest Diagnostics Study, April 11, 2019:
  - Workforce drug testing positivity climbs to highest rate since 2004.
  - 2.8% of workers test positive for marijuana nationwide, up from 2.4% in 2014.

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Trends in Court Cases and Marijuana and the Workplace

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

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Trends in Court Cases and Marijuana and the Workplace

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

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

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

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How Does this Affect You?

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Must Employers Accommodate Medical Marijuana?

- Under Federal Law, Marijuana remains **illegal**.
- Under Utah Law:
  - Medical Marijuana is legal
  - Recreational Marijuana is **not** legal.
- Neighboring states have some level of legality:
  - Colorado, Nevada, Arizona, and New Mexico
- Neighboring states where cannabis remains illegal:
  - Wyoming and Idaho

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Must Employers Accommodate Medical Marijuana?

- Qualifying Conditions for a Medical Cannabis Card in UT:
  - HIV or acquired immune deficiency syndrome
  - Alzheimer's disease
  - Cancer
  - Persistent nausea that is not significantly responsive to traditional treatment, except for nausea related to pregnancy or various conditions.
  - Epilepsy or debilitating seizures
  - Multiple sclerosis or persistent and debilitating muscle spasms
  - Post-traumatic stress disorder that is being treated and monitored by a licensed mental health therapist
  - Autism
  - A terminal illness when the patient's remaining life expectancy is less than six months
  - Pain lasting longer than two weeks that is not adequately managed with various treatments

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Must Employers Accommodate Medical Marijuana?

- Public vs. Private in Utah
  - **Public Employers MUST Accommodate Medical Marijuana Usage**
  - Utah Medical Cannabis Act : state and political subdivision employees cannot be discriminated against on the basis of their use of medical cannabis, as long as they are otherwise in compliance with the law.
    - Cannabis card
    - No evidence of impaired or otherwise adversely affected job performance due to medical cannabis usage
  - **34A-5-115.** ***Nondiscrimination for medical cannabis use while employed by the government -- Medical cannabis and prescription use.***

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Must Employers Accommodate Medical Marijuana?

- However, **private employees'** medical cannabis use is **not protected** under the Utah Medical Cannabis Act.
- Although private employers do not have to accommodate, should you?
- The top questions that clients ask about Drug Testing is:
  - Can I drug test for serious stuff like cocaine, meth, etc. and not test for marijuana?
  - Can I have different testing requirements for different parts of my workforce?

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Drug-Testing Considerations for Current and Prospective Employees

- How is Marijuana different from Alcohol?
- Problem with testing for Marijuana/THC:
  - Does not test for impairment
  - THC stays in the system for a long time after use
  - So: the user can test positive but not be impaired
    - Same with cocaine, amphetamines, prescription drugs, but has a much longer half life in the body
    - Testing sensitivity varies wildly
  - May not always differentiate between THC and CBD

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Drug-Testing Considerations for Current and Prospective Employees

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

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Drug-Testing Considerations for Current and Prospective Employees

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

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Drug-Testing Considerations for Current and Prospective Employees

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

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Drug-Testing Considerations for Current and Prospective Employees

Drug Free Workplace Act (federal contractors/grant recipients)

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

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Drug-Testing Considerations for Current and Prospective Employees

Department of Transportation:

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

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Drug-Testing Considerations for Current and Prospective Employees

OSHA General Duty Clause

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

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

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Disciplining and Terminating Medical Marijuana Users: Current Legal Perspectives

- Some States specifically protect legal medical marijuana users under the state's disability act
  - Must accommodate unless undue burden
  - AZ, NM, NV have express accommodation or non-discrimination provisions
- Don't have to allow possession on the job
- Don't have to allow influence or impairment on the job
- Safety sensitive positions or tasks, such as heaving machine operators, driving, handling medicine or regulated chemicals, or working in high or confined spaces
- Where may constitute negligence, professional negligence, or professional misconduct.

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Disciplining and Terminating Medical Marijuana Users: Current Legal Perspectives

Legal Considerations:

- Federal Law Enforcement has decreased enforcement.
- Many states have signaled they will not enforce federal laws and have none/have modified/do not enforce possession and use.
- U.S. public sentiment towards marijuana usage has changed.
- In the last 20 years, judicial interpretation of medical marijuana usage (outside UT) appears to be trending more favorably to employees in the last 20 years.
- Potential for ADA case down the road.

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Disciplining and Terminating Medical Marijuana Users: Current Legal Perspectives

Practical Considerations:

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

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Creating Drug and Alcohol Policies That Leave No Room for Interpretation

- If you drug and alcohol test, you must have a written policy that tracks information in the Utah Drug Testing Statute.
- Must identify what type of testing you will do:
  - Post hire, random, post accident, regular, etc.
  - If you do random, must include supervisors
- Make clear what you are testing for – marijuana, methamphetamines, all the new variants of gas station drugs.

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Creating Drug and Alcohol Policies That Leave No Room for Interpretation

- If you include marijuana in your testing panel, be clear whether medical marijuana is included.
- If you will accommodate medical marijuana and a failed test, be clear how you will accomplish that:
  - Request for an accommodation?
    - Safety sensitive positions?
    - Potential undue hardship?
  - Excuse a positive on appeal?

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Creating Drug and Alcohol Policies That Leave No Room for Interpretation

- Consider reasonable suspicion/post accident testing instead of mandatory or random.
- Make clear the policy for usage among on-call employees.
  - Does the type of position matter?
    - IT after hours help vs. EMT or ER MD
- Consider reasonable suspicion instead of mandatory.
  - Train how to recognize impairment – poor concentration, dilated pupils, impaired perception, abnormal behavior, slurred speech or movement, gloss eyes, slow responses or reflexes, smell of marijuana or alcohol.
- Use/possession at work grounds for termination.

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Creating Drug and Alcohol Policies That Leave No Room for Interpretation

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

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

Thank You

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Thank You

- Susan Baird Motschiedler
  smotschiedler@parsonsbehle.com
  801.536.6923

§ 34-38-1. Legislative findings--Purpose and intent of chapter

(1) The Legislature finds that a healthy and productive work force, safe working conditions free from the effects of drugs and alcohol, and maintenance of the quality of products produced and services rendered in this state, are important to employers, employees, and the general public. The Legislature further finds that the abuse of drugs and alcohol creates a variety of workplace problems, including increased injuries on the job, increased absenteeism, increased financial burden on health and benefit programs, increased workplace theft, decreased employee morale, decreased productivity, and a decline in the quality of products and services.

(2) The Legislature does not intend to prohibit an employee from seeking damages or job reinstatement, if action is taken by the employer on the basis of an inaccurate test result.

§ 34-38-2. Definitions

For purposes of this chapter:

(1) "Alcohol" means ethyl alcohol or ethanol.

(2) "Drugs" means a substance recognized as a drug in the United States Pharmacopoeia, the National Formulary, the Homeopathic Pharmacopoeia, or other drug compendia, or supplement to any of those compendia.

(3) "Employee" means an individual in the service of an employer for compensation.

(4)(a) "Employer" means a person, including a public utility or transit district, that has one or more workers or operators employed in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or

written.

(b) “Employer” does not include the federal or state government, or other local political subdivisions.

(5) “Failed test” means a confirmed drug or alcohol test that indicates that the sample tested is:

(a) positive;

(b) adulterated; or

(c) substituted.

(6) “Inaccurate test result” means a test result that is treated as a positive test result, when the sample should not have resulted in a positive test result.

(7) “Licensed physician” means an individual who is licensed:

(a) as a doctor of medicine under Title 58, Chapter 67, Utah Medical Practice Act, or similar law of another state; or

(b) as an osteopathic physician or surgeon under Title 58, Chapter 68, Utah Osteopathic Medical Practice Act, or similar law of another state.

(8) “Prospective employee” means an individual who applies to an employer, either in writing or orally, to become the employer’s employee.

(9) “Sample” means urine, blood, breath, saliva, or hair.

§ 34-38-3. Testing for drugs or alcohol

(1) If an employer tests an employee or prospective employee for the presence of drugs or alcohol as a condition of hiring or continued employment, the employer is protected from liability as provided in this chapter if the employer complies with this chapter. However, employers and management in general shall submit to the testing themselves on a periodic basis.

(2)(a) An organization that operates a storage facility or transfer facility or that is engaged in the transportation of high-level nuclear waste or greater than class C radioactive waste within the exterior boundaries of the state shall establish a mandatory drug testing program regarding drugs and alcohol for prospective and existing employees as a condition of hiring any employee or the continued employment of any employee. As a part of the program, employers and management in general shall submit to the testing themselves on a periodic basis. The program shall implement testing standards and procedures established under Subsection (2)(b).

(b) The executive director of the Department of Environmental Quality, in consultation with the Labor Commission under Section 34A-1-103, shall by rule establish standards for timing of testing and dosage for impairment for the drug and alcohol testing program under this Subsection (2). The standards shall address the protection of the safety, health, and welfare of the public.

§ 34-38-4. Samples--Identification and collection

In order to test reliably for the presence of drugs or alcohol, an employer may require samples from his employees and prospective employees, and may require presentation of reliable identification to the person collecting the samples. Collection of the sample shall be in conformance with the requirements of Section 34-38-6. The employer may designate the type of sample to be used for testing.

§ 34-38-5. Time of testing--Cost of testing and transportation

(1) Any drug or alcohol testing by an employer shall occur during or immediately after the regular work period of current employees and shall be deemed work time for purposes of compensation and benefits for current employees.

(2) An employer shall pay all costs of testing for drugs or alcohol required by the employer, including the cost of transportation if the testing of a current employee is conducted at a place other than the workplace.

§ 34-38-6. Requirements for collection and testing

(1) The collection and testing of a sample for drugs and alcohol under this chapter shall be performed in accordance with this chapter.

(2) The collection of a sample shall be performed under reasonable and sanitary conditions.

(3) A sample shall be collected and tested:

(a) with due regard to the privacy of the individual being tested; and

(b) in a manner reasonably calculated to prevent substitutions or interference with the collection or testing of a reliable sample.

(4) The sample collection shall be documented. The documentation procedures required by this Subsection (4) include:

(a) labeling of a sample so as reasonably to preclude the probability of erroneous identification of test results; and

(b) an opportunity for the employee or prospective employee to provide notification of any information that the employee or prospective employee considers relevant to the test, including:

(i) identification of currently or recently used prescription or nonprescription drugs; or

(ii) other relevant medical information.

(5) Sample collection, storage, and transportation to the place of testing shall be performed so as reasonably to preclude the probability of sample contamination or adulteration.

(6)(a) Testing of a sample shall conform to scientifically accepted analytical methods and procedures.

(b) Before a test of a sample may be considered a failed test and used as a basis for an action by an employer under Section 34-38-8, testing of the sample shall include a confirmation test:

(i) by gas chromatography, gas chromatography-mass spectroscopy, or other comparably reliable analytical method; and

(ii) if the sample used for a test is a urine sample, by a laboratory that is certified by the United States Department of Health and Human Services under the National Laboratory Certification Program.

§ 34-38-7. Employer's written testing policy--Purposes and requirements for collection and testing--Employer's use of test results

(1) Testing or retesting for the presence of drugs or alcohol by an employer shall be carried out within the terms of a written policy which has been distributed to employees and is available for review by prospective employees.

(2) Within the terms of his written policy, an employer may require the collection and testing of samples for the following purposes:

(a) investigation of possible individual employee impairment;

(b) investigation of accidents in the workplace or incidents of workplace theft;

(c) maintenance of safety for employees or the general public; or

(d) maintenance of productivity, quality of products or services, or security of property or information.

(3) The collection and testing of samples shall be conducted in accordance with Sections 34-38-4, 34-38-5, and 34-38-6, and need not be limited to circumstances where there are indications of individual, job-related impairment of an employee or prospective employee.

(4) The employer's use and disposition of all drug or alcohol test results are subject to the limitations of Sections 34-38-8 and 34-38-13.

§ 34-38-8. Employer's disciplinary or rehabilitative actions

(1) An employer may take an action described in Subsection (2) if:

(a) the employer receives a test result that:

(i) indicates a failed test;

(ii) is confirmed as required by Subsection 34-38-6(6); and

(iii) indicates a violation of the employer's written policy; or

(b) an employee or prospective employee refuses to provide a sample.

(2) An employer may use a test result or a refusal described in Subsection (1) as the basis for disciplinary or rehabilitative actions, which may include the following:

(a) a requirement that the employee enroll in an employer-approved rehabilitation, treatment, or counseling program, which may include additional drug or alcohol testing, as a condition of continued employment;

(b) suspension of the employee with or without pay for a period of time;

(c) termination of employment;

(d) refusal to hire a prospective employee; or

(e) other disciplinary measures in conformance with the employer's usual procedures, including a collective bargaining agreement.

§ 34-38-9. No cause of action for failure to test or detect substance or problem, or for termination of testing program

No cause of action arises in favor of any person against an employer who has established a policy and initiated a testing program in accordance with this chapter, for any of the following:

(1) failure to test for drugs or alcohol, or failure to test for a specific drug or other substance;

(2) failure to test for, or if tested for, failure to detect, any specific drug or other substance, disease, infectious agent, virus, or other physical abnormality, problem, or defect of any kind; or

(3) termination or suspension of any drug or alcohol testing program or policy.

§ 34-38-10. A cause of action does not arise against employer unless inaccurate test result--Presumption and limitation of damages in claim against employer

(1) A cause of action may not arise in favor of a person against an employer who establishes a program of drug or alcohol testing in accordance with this chapter, and who takes an action under Section 34-38-8, unless the employer takes the action on the basis of an inaccurate test result.

(2) If a person bringing a claim, including a claim under Section 34-38-11, alleges that an employer's action is based on an inaccurate test result:

(a) there is a rebuttable presumption that the test result is valid if the employer complies with Section 34-38-6; and

(b) the employer is not liable for monetary damages if the employer's reliance on an inaccurate test result is reasonable and in good faith.

(3)(a) There is a rebuttable presumption that the employer complies with Section 34-38-6 if as part of the employer's drug

and alcohol testing program a licensed physician who is trained in the interpretation of drug and alcohol test results:

(i) provides medical assessment of a result that indicates a failed test;

(ii) requests re-analysis of a test result if necessary; and

(iii) makes a determination whether or not alcohol or other drug use has occurred.

(b) A court may find that an employer complies with Section 34-38-6 notwithstanding that the employer's drug and alcohol testing program does not include an action described in Subsection (3)(a).

§ 34-38-11. Bases for cause of action for defamation, libel, slander, or damage to reputation

No cause of action for defamation of character, libel, slander, or damage to reputation arises in favor of any person against an employer who has established a program of drug or alcohol testing in accordance with this chapter, unless:

(1) the results of that test were disclosed to any person other than the employer, an authorized employee or agent of the employer, the tested employee, or the tested prospective employee;

(2) the information disclosed is based on an inaccurate test result;

(3) an inaccurate test result is disclosed with malice; and

(4) all elements of an action for defamation of character, libel, slander, or damage to reputation as established by statute or common law, are satisfied.

§ 34-38-12. No cause of action for failure of employer to establish testing program

No cause of action arises in favor of any person based upon the failure of an employer to establish a program or policy of

drug or alcohol testing.

§ 34-38-13. Confidentiality of test-related information

(1) For purposes of this section, "test-related information" means the following received by the employer through the employer's drug or alcohol testing program:

(a) information;

(b) interviews;

(c) reports;

(d) statements;

(e) memoranda; or

(f) test results.

(2) Except as provided in Subsections (3) and (6), test-related information is a confidential communication and may not be:

(a) used or received in evidence;

(b) obtained in discovery; or

(c) disclosed in any public or private proceeding.

(3) Test-related information:

(a) shall be disclosed to the Division of Professional Licensing:

(i) in the manner provided in Subsection 58-13-5(3); and

(ii) only to the extent required under Subsection 58-13-5(3); and

(b) may only be used in a proceeding related to:

(i) an action taken by the Division of Professional Licensing under Section 58-1-401 when the Division of Professional Licensing is taking action in whole or in part on the basis of test-related information disclosed under Subsection (3)(a);

(ii) an action taken by an employer under Section 34-38-8; or

(iii) an action under Section 34-38-11.

(4) Test-related information shall be the property of the employer.

(5) An employer is entitled to use a drug or alcohol test result as a basis for action under Section 34-38-8.

(6) An employer may not be examined as a witness with regard to test-related information, except:

(a) in a proceeding related to an action taken by the employer under Section 34-38-8;

(b) in an action under Section 34-38-11; or

(c) in an action described in Subsection (3)(b)(i).

§ 34-38-14. Employee not a person with a disability

An employee or prospective employee whose drug or alcohol test result is confirmed as positive in accordance with this chapter may not, because of those results alone, be defined as a person with a disability for purposes of Title 34A, Chapter 5, Utah Antidiscrimination Act.

§ 34-38-15. No physician-patient relationship created

A physician-patient relationship is not created between an employee or prospective employee, and the employer or any person performing the test, solely by the establishment of a drug or alcohol testing program in the workplace.

End of Document

36th Annual Employment Law Seminar

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

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

Liz M. Mellem and Leah Trahan

SALT LAKE SHRM

May 14, 2024 | The Grand America Hotel – Salt Lake City

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Legal Disclaimer

This presentation is based on available information as of May 14, 2024, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

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Documentation Basics

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Communication and Documentation

- Two pillars of good employee performance management and risk management
- Communication = oral and written
  - Conveys information regarding job duties, expectations, performance feedback, corrective actions, etc.
  - Frequent and early communication and intervention will help avoid employment claims and protect an employer when claims are brought
- Documentation can be a form of communication AND evidence of communication

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"Golden Rule" of Documentation

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

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How will documentation help limit risk?

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

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Other reasons for documenting?

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

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Who Else Cares About Documentation?

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

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Excerpt from UALD Request for Information

REQUEST FOR INFORMATION FROM RESPONDENT
UALD No. C0-0xx & EEOC No. 35C-2020-00xxx

This form contains a request for specific information the Division requires to complete its investigation. Failure to provide this information may affect the outcome of the Division's findings.

Within 30 days of the date of this Request For Information (the "Request"), provide Waiva Charlesworth responses via e-mail at wroberts@utah.gov OR you may send a hardcopy of the documents and information requested below by U.S. mail. **The Division prefers and strongly encourages parties to communicate with the Division using email and to provide any documents or other evidence in an electronic format.** Provide your answers and any supporting documentation or documents specifically requested by the Division organized by number to correspond with the specific Request to which it is responsive. The answers to this Request must be provided to the Division **in addition to** the Response/Position Statement to the Charge, as described on the first page of this letter.

Provide the following:

1. Verify whether the correct Respondent has been named in the Charge, and provide any necessary corrections to the name of the company or its address.
2. The name and contact information (including email) of the individual from Respondent the Division can contact to schedule interviews of witnesses and parties that are or have been employed by you.
3. All documents relating to any disciplinary actions taken by Respondent against Charging Party in the past five years.
4. All documents related to the Charge.
5. 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.
6. A copy of any employee handbook, specifying any policies therein which Charging Party is alleged to have violated.
7. Proof that Charging Party received the employee handbook.
8. Name, position and contact information for all individuals, known to Respondent, to have any information regarding the underlying facts of the Charge.
9. 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.)

9

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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.)

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Why is documentation important?

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Stainsby v. Oklahoma Healthcare Authority

- Stainsby, a 55-year-old woman, was Director of Office of Public Communications for 20 years
- Zumwalt became her supervisor in 2019
- Over Zumwalt's first two weeks as supervisor, she observed several instances of failure to adhere to deadlines or poor quality work

  - Stainsby had been disciplined for failure to follow deadlines in 2014, but overall had "exceeds standards" ratings on reviews
  - No other documentation of performance issues
  - Zumwalt did not document the issues contemporaneously

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Stainsby, continued

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

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

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Diaz v. Tesla, Inc.

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

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

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Diaz's Allegations

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

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Diaz Incident with Supervisor (Martinez)

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

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Additional Incident Involving Martinez

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

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Verdict and Takeaways

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

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Diaz Takeaways, continued

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

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Documenting throughout employment

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Best Practices

- Outline the lifecycle of an employee and identify all communication possibilities:
  - Hiring
  - Training
  - Day-to-day Feedback/Daily Meetings
  - Biannual Reviews
  - Write Ups/Performance Improvement Plans
  - Termination of employment relationship

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Employee Lifecycle Documentation

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

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Employee Lifecycle Documentation

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

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Employee Lifecycle Documentation

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

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Event – Documentation Outline

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

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Employee Lifecycle Documentation

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

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Employee Lifecycle Documentation

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

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Employee Lifecycle Documentation

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

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Employee Lifecycle Documentation

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

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Employee Lifecycle Documentation

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

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Documenting Misconduct

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Documenting Misconduct

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

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

Is this helpful documentation?

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Documenting Misconduct

A proper signed write-up might look like this:

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

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Documenting Misconduct

Is this helpful documentation of misconduct?:

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

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Documenting Misconduct

Compare with:

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

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Common Mistakes in Disciplining

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

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Documenting Misconduct

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

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Guidelines for Corrective Actions

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

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Guidelines for Corrective Actions

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

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Guidelines for Corrective Actions

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

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Documenting Performance

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AVOIDING LEGAL TROUBLE

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

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BAD Excerpts from Federal Employee Evals

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

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Be Smart About Documentation

Terms used in a female employee's evaluation:

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

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

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Characteristics of Bad Evaluation Ratings

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

Leniency – supervisor gives high ratings to all employees.

Strictness – supervisor gives low ratings to all employees.

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

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Characteristics of Good Evaluation Ratings

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

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Documenting Termination

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How Terminations Often Go

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Common Mistakes in Termination

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

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Thank You

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36th Annual Employment Law Seminar

Ask Us Anything

(About Employment Law)

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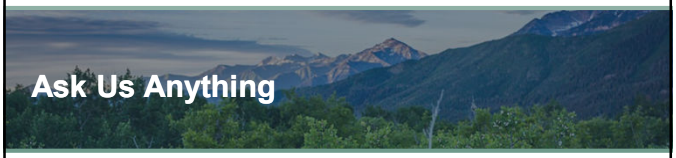

Ask Us Anything

Parsons Behle & Latimer
Employment & Labor Department
May 14, 2024 | The Grand America Hotel – Salt Lake City

SALT LAKE SHRM

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Legal Disclaimer

This presentation is based on available information as of May 14, 2024, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

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36th Annual Employment Law Seminar

Business Immigration Nuts and Bolts

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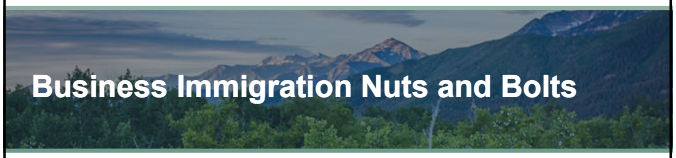

Business Immigration Nuts and Bolts

Lewis M. Francis

SALT LAKE SHRM

May 14, 2024 | The Grand America Hotel – Salt Lake City

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Immigration and Work Authorization Options

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Common Temporary Work Visas

Students – F-1 Work Visas

- Some students have part-time work authorization during period of study, which is known as Curricular Practical Training ("CPT").
- Many college students have a year of authorized employment following their graduation, known as "Optional Practical Training" ("OPT")
- Students with STEM degrees can obtain additional 2 years of OPT. However, employers must be registered for E-Verify, and have to complete a Training Plan

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H-1Bs
(for Bachelor's Degree Holders in Specialty Occupations)

- The H1-B category includes aliens employed in "specialty occupations" requiring highly specialized knowledge and a bachelor's degree or its equivalent in the specialty area (such as a Software Developer with a Bachelor's degree in Computer Science).
- Generally speaking, the employer has to pay the USCIS filing fees and attorney's fees associated with the application
- These visas are employer-specific, and are good for up to 6 years of employment. Can be extended for longer if Permanent Residency application (PERM) is filed.
- Cost is approximately $7,000 (including USCIS filing fees and attorney fees).
  - This includes new "Asylum" surcharge on every business immigration application
  - USCIS fees are somewhat less for small employers (less than 25 workers), or nonprofits
- Premium Processing of applications requires an additional filing fee of $2805
- Subject to annual H-1B Lottery on April 1st

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H-1B Lottery and H-1B1

H-1B Lottery

- If the foreign national does not already have an H-1B, he/she will have to be selected for H-1B processing through the annual H-1B lottery, which takes place April 1st of each year. Depending on whether the foreign national has a U.S. Master's Degree or just a bachelors degree, the chance of being selected is usually around 50%. However, due to recent gaming of the system by consulting and tech companies, the selection rate this year was only 15%.

H-1B1s

- If the foreign national is from Chile or Singapore, they may qualify for H-1B1. The requirements are the same as for an H-1B, but not currently subject to the annual lottery.

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H-1B Transfers

If an employee already has an H-1B for another employer, it can be transferred to a new employer, using the same process as a new application.

- Important to determine whether the prospective employee already has an I-140 immigrant visa approval, or if not, how much of the 6 year H-1B status they have left.
- Takes about 3 weeks to prepare and file an H-1B transfer application.
- Transferring employee is legally entitled to start work for the new employer upon receipt of the H-1B transfer application by the USCIS. However, many transferring employees require any approval first.

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E-3 and TN Visas

E-3 Visas:

- H-1Bs for Australians, but costs are less. Also not required to go through H-1B lottery.

TN Visas:

- Canadian and Mexican workers who qualify in one of the listed professions can obtain temporary work authorization
- These visas are employer specific, and are valid in 3 year increments, with no outside limit on renewals
- Cost of application is less than $1,000, but usually has to be done at border crossing

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U.S. Permanent Residency: Green Card

- Complicated, expensive and time-consuming process for permanent employees. Steps 1 and 2 Cost around $12,000 to complete, and the whole process and can take from 2-10 years to complete, depending on the type of job, education, and the country of origin
- Most employers don't start process until at least a year after employee is hired. If employee on an H-1B, must start the process at least 1.5 years prior to the end of their six years in H-1B.
- Requires Labor Certification (PERM) – Employer have to perform DOL-required advertising steps to show that no Qualified U.S. workers for the position (Step I)
- If Labor Certification approved, then employer can then file an I-140 immigrant visa application (Step II)

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U.S. Permanent Residency: Green Card

- Final step is the employee's I-485 Adjustment of Status to Permanent Residence, once visa number becomes current (Step III)
- Employer required to pay for at least the Labor Certification (PERM) stage of the proceeding, as well as the costs of recruitment. Approximately $6,000.
- I-140 approvals are employer-specific, but can be used to extend the H-1B status of employees moving to new employer (beyond the 6 year limit in H-1B). However, the new employer will eventually need to get their own PERM approval for employee.

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"PERM" (LABOR CERTIFICATION) PROCESS

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"PERM" Process

- Before the U.S. employer can file an I-140 immigration worker petition, it must first obtain a certified Labor Certification.
- A Labor Certification issued by the U.S. Department of Labor (DOL) allows an employer to hire a foreign worker to work permanently in the U.S.
- The DOL must certify to USCIS that there are not sufficient U.S. workers able, willing, qualified and available to accept the job opportunity in the area of intended employment *based on the minimum qualifications for the position*, and that employment of the foreign worker will not adversely affect the wages and working conditions of similarly-employed U.S. workers.
- This is a complicated and multi-stage process that takes approximately 1.5 years to complete, given current processing times.

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Current Timelines

- STEP 1: Prevailing Wage Determination by DOL: 7-8 months
- STEP 2: PERM Recruitment by employer: 2-3 months
- STEP 3: DOL Labor Certification: 8-12 months (assuming no audit, which can extend by extra year or longer)
- STEP 4: I-140: 6 months if regular processing.
- For additional USCIS filing fee of $2805, Premium Processing gets a response in 15 days.
- If a Request for Evidence (RFE) is issued, it can take another 60 days to resolve

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U.S. Department of Labor

Step 1: PERM Description, Requirements and Prevailing Wage Determination

A. Formulate job duties and minimum requirements
   - The first step in the process is creating the PERM job description.
   - This includes job title, job duties, minimum education and experience requirements, location, and other important details.
   - **Note:** Generally speaking, the employee must be able to show that they possess the job requirements based on experience obtained before starting work for the petitioning employer.

B. Prevailing Wage Determination (PWD) from DOL: This application is prepared by the Attorney after finalizing the PERM description and requirements.

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U.S. Department of Labor (cont.)

Step 2: Recruitment- Must occur during a certain time frame and in specific ways, including:

1. Job order with the local SWA serving the area of intended employment for 30 days
2. Ads with Sunday print newspaper for two consecutive weeks.
3. Physical posting at work location for at least 15 business days
4. Online recruiting through national service for 30 days
5. Company website for 30 days
6. At least one more recruitment step, such as campus placement office.

- Attorney provides a draft Recruitment Report detailing the required steps and coordinate recruitment steps with the designated company representative (usually an HR Generalist or recruiter)

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U.S. Department of Labor (cont.)

Step 3: Labor Certification Application

- Once the Recruitment is complete, Attorney prepares and submits the Form 9089 Labor Certification application to the DOL.
- Once issued by the DOL, it allows employer to file I-140 application for the foreign worker to work permanently in the U.S.

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U.S. Department of Labor (cont.)

Step 4: I-140 Application

- Once the Labor Certification is approved, Attorney files Form I-140, Petition for Alien Worker, with the USCIS. Regular processing can take 6-8 months. With Premium Processing, this can be done in 15 days so long as further evidence is not requested by USCIS.

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Business Immigration Visas Types

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F-1 Optional Practical Training

Students work with the college or university to apply for OPT. It is very important that they check in with the Designated School Official (DSO) because status in the U.S. is tracked through ICE's SEVIS database.

- Full-time F-1 student in good standing for at least 1 academic year.
- Maintaining F-1 status with a valid Form I-20 issued by the school.
- Proposed work must be directly related to major area of study.
- Applicant must file I-765 for an Employment Authorization Document.
- 12 months of OPT is available after completing each higher level degree program.
- Unemployment is allowed for no more than 90 days.
- The employment may occur anywhere in the U.S.
- A job offer is not required to apply for OPT.

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Optional Practical Training (cont.)

- No special permission is required to change employers or terminate your employment.
- During the period of OPT, a student continues in F-1 status, since OPT is considered to be part of the program of study.
- OPT can only be extended beyond 12 months (for up to 17 additional months) IF:
  - OPT is based on a US Bachelor's, Master's, or Doctoral in a STEM major (Science, Technology, Engineering or Mathematics) at the time of application for the extension.
  - Employer subscribes to E-Verify.
  - Student is already authorized for OPT and working in a job related to his or her degree.
- OPT is available both before and after completing the degree program. Students should seek advice from their international office about using OPT before they complete their degree.
- F-2 dependents are not permitted to apply for an Employment Authorization Document.

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J-1 Exchange Visitor Program

The J-1 Exchange Visitor Program "fosters global understanding through educational and cultural exchanges. All exchange visitors are expected to return to their home country upon completion of their program in order to share their exchange experiences."

- J-1s are governed by the Department of State – not USCIS. However, ICE monitors J-1 visitors through the SEVIS database.
- A J-1 holder is only allowed to perform the activity listed on his/her Form DS-2019 and as stated in the regulations for that category of exchange. J-1 spouses may apply for an Employment Authorization Document under special circumstances if their sponsor recommends employment.
- The purpose of a J-1 is limited to participation in one of the following categories: Au Pair; Camp Counselor; College and University Student; Government Visitor; Intern; International Visitor; Physician; Professor and Research Scholar; Secondary School Student; Short-Term Scholar; Specialist; Summer Work Travel; Teacher; or Trainee.
- Institutions and organizations generally apply to be a certified J-1 sponsor. (e.g. American Immigration Council)

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J-1 Exchange Visitor Program (cont.)

- Participation in a J-1 exchange program can trigger a two-year home-country foreign residency requirement:
  - Funded by J-1's government or the U.S. government.
  - Involves specialized knowledge or skills deemed necessary by J-1s home country.
  - All foreign physicians coming to the U.S. for graduate medical training.
- If two-year home-country foreign residency requirement applies, the J-1 must return to home country for a cumulative total of two years at the end of the exchange visitor program before he/she is eligible to apply for most employment based visas or LPR status.
  - Waivers from the requirement are available if the home country does not object to the J-1 remaining in the U.S. after completing the J-1 exchange visitor program.
  - See "No Objection" waivers (DOS Bureau of Consular Affairs)
  - http://travel.state.gov/content/visas/english/study-exchange/student/residency-waiver.html

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H-1B Specialty Occupations

- The H-1B petition must be filed by the employer, rather than the employee. The employer must pay all fees except Premium Processing.
- The position offered must require the skills and services of a professional and the worker must have the professional credentials to fill it.
- The minimum educational level acceptable is a bachelor's degree in the field of the proposed employment.
- The employment relationship must be defined by contract or employment offer letter, which specifies the terms of employment, such as job title and duties, dates, salary, and benefits offered.
- Position, salary, location, and employer-specific. Changes in the terms and conditions of the employment after approval require filing a new or amended H-1B petition.
- The employer must pay a regular salary to the H-1B. The wage must be at least the "prevailing wage" as determined by the Department of Labor. The Department of Labor must also approve a Labor Condition Application.

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H-1B Specialty Occupations (cont.)

- An employee is allowed to hold H 1B status for up to six years. An employer may request up to three years on the initial H-1B petition and extensions may be requested for a maximum period of three years. After working in the U.S. in H-1B status for six years, an H-1B employee can become eligible for another six-year period if s/he remains outside the U.S. for one year or more.
- The process for extending H-1B status is identical to a new H-1B status, subsequent H-1B status, or amended H-1B status due to a change in employment. It also involves a similar cost to the employer.
- Dependents are not allowed to apply for an Employment Authorization Document.
- H-1B and dependents are permitted to go to school.
- Limited to 65,000 visas per year, with an additional 20,000 reserved for individuals with at least a master's degree from a U.S. college or university. 6,800 are for employees from Chile and Singapore and count against the 65,000. Overall cap is 58,200.
- Substantially similar to TN and E-3 visas (Canada, Mexico and Australia)

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O-1 Extraordinary Employees

The O-1 nonimmigrant category is for people with extraordinary ability in the sciences, arts, education, business, athletics or who have demonstrated extraordinary achievement in the motion picture or television industry. The O-1A visa is for people who are recognized as being at the very top of their field and who are coming to the United States to continue work in that field. To establish eligibility for an O-1A visa the employee must have received a major, internationally recognized award, similar to a Nobel Prize or Oscar, or submit evidence that he/she qualifies based on meeting 3 of the following criteria:

- Receipt of nationally or internationally recognized prizes or awards for excellence in his/her field.
- Membership in an association in the field which requires outstanding achievements of its members, as judged by national or international experts in the field.
- Published material in professional or major trade publications or major media about the person, concerning the person's work in the field.
- Participation on a panel, or individually, as a judge of the work of others in the field.
- Scientific, scholarly, or business-related contributions of major significance in the field.
- Authorship of scholarly articles in the field in professional journals or other major media.
- Employment in a critical or essential capacity for organizations and establishments that have a distinguished reputation.
- High salary or other remuneration commanded by the person for services.
- Other comparable evidence.

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O-1 Extraordinary Employees (cont.)

- An advisory opinion, also called a consultation, written by an individual or group with expertise in the field is required.
- No numerical limitation on the number of O-1s issued each year.
- Initially admitted for a period of three years. Renewable annually thereafter.
- Dependents cannot work in the United States but are allowed to attend school

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L-1 Intracompany Transferee

The L-1A enables a U.S. employer to transfer an executive or manager from one of its affiliated foreign offices to one of its offices in the United States. This classification also enables a foreign company, which does not yet have an affiliated U.S. office, to send an executive or manager to the United States with the purpose of establishing one.

The L-1B classification enables a U.S. employer to transfer a professional employee with specialized knowledge relating to the organization's interests from one of its affiliated foreign offices to one of its offices in the United States

- The employee must have worked outside the U. S. for a parent, subsidiary, or affiliate of the U.S. company on a full-time basis for one continuous year out of the last three (3) years in order to qualify for L-1 classification.
- The foreign and U.S. employers must be related, through at least fifty (50%) percent common ownership, as parent and subsidiary, affiliates, branches, or joint venture partners.

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L-1 Intracompany Transferee (cont.)

- An Executive directs management of the organization, division, or major function, including establishing goals and policies and exercising wide discretionary decision-making. An executive is supervised only by higher level executives, board of directors, or stockholders.
- A Manager has day-to-day responsibilities and manages the operational affairs of the organization as a whole, or a major function of an operating division. Management includes responsibility for personnel decisions affecting supervisory and professional personnel unless a function is managed. A functional manager must operate at a senior level.
- A Specialized knowledge individual is one who possesses special knowledge (as opposed to knowledge that is common throughout an industry) of the petitioning organization's products, services, research, equipment, techniques, management, or other important factors relating to its international competitive position, or knowledge which could only have been gained through experience with a related foreign entity.
- Dependent spouses are permitted to apply for an Employment Authorization Document.
- Dependents are permitted to study in this visa category.
- L-1A Initial admission for 3 years maximum, extendible twice for periods of two years each. L-1B Initial admission for 3 years maximum, extendible once for two years. If foreign company is establishing a new office, initial admission is for only 1 year.

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Visa Categories

Visa Category	General Description
E-3	The E-3 classification applies only to nationals of Australia coming to the United States solely to perform services in a specialty occupation. The specialty occupation requires theoretical and practical application of a body of knowledge in professional fields and at least the attainment of a bachelor's degree, or its equivalent, as a minimum for entry into the occupation in the United States.
H-1B: Person in Specialty Occupation	For the purpose of employing a foreign worker in a specialty occupation. Requires a higher education degree or its equivalent. Includes fashion models of distinguished merit and ability and government-to-government research and development, or co-production projects administered by the Department of Defense.
H-2A: Temporary Agricultural Worker	For temporary or seasonal agricultural work. Limited to citizens or nationals of designated countries, with limited exceptions, if determined to be in the United States interest.
H-2B: Temporary Non-agricultural Worker	For temporary or seasonal non-agricultural work. Limited to citizens or nationals of designated countries, with limited exceptions, if determined to be in the United States interest.
L: Intracompany Transferee	To work at a branch, parent, affiliate, or subsidiary of the current employer in a managerial or executive capacity, or in a position requiring specialized knowledge. Individual must have been employed by the same employer abroad continuously for 1 year within the three preceding years.
TN: NAFTA Occupations for Mexico and Canada	The TN nonimmigrant classification permits qualified Canadian and Mexican citizens to seek temporary entry into the United States to engage in business activities at a professional level.
O: Extraordinary Ability or Achievement	For persons with extraordinary ability or achievement in the sciences, arts, education, business, athletics, or recognized achievements in the motion picture and television fields, demonstrated by sustained national or international acclaim, to work in their field of expertise. Includes persons providing essential services in support of the above individual.

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