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2025 Employment Law Update

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Semi-Monthly Employment Law Update

Feb. 6, 2025

Content

- New EEOC Chair with New Agenda
- Gender Identity in the Crosshairs
- Religious Accommodations Are Getting Trick-ier
- DEI Under Attack
- ICE May Be Coming to Your Workplace

As you all know, employment law is an area that is constantly changing. That is why we do these updates twice a month. However, the pace of change under the Trump administration has been dizzying. In a matter of days, Trump issued several executive orders that significantly impact employment law. These executive orders will likely be challenged in court and the law will remain unsettled. Employers should buckle up and stay informed.

Now Happening at Parsons

SHRM Salt Lake

Join Parsons and Salt Lake SHRM for the 37th Annual Employment Law Seminar

Parsons' employment and labor attorneys will review the latest on DEI, the Department of

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Legal Disclaimer

This presentation is based on available information as of March 11, 2025, 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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EEOC Update

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Pregnant Workers Fairness Act

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

On **December 18, 2024**, the EEOC issued guidance to healthcare providers regarding the documentation employers may seek to support requests for accommodation.

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PWFA

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

PREGNANT WORKERS FAIRNESS ACT

NEW RESOURCES

WWW.EEOC.GOV/PREGNANCY-DISCRIMINATION

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PWFA and Accommodations

Four accommodations 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.

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New EEOC Guidance on PWFA

If employers request supporting documentation, the guidance states healthcare providers should:

- explain the healthcare provider's qualifications;
- confirm the employee's physical or mental condition;
- confirm that the condition is related to pregnancy, childbirth, or related medical conditions; and
- describe the needed adjustment or change at work, including the expected duration.

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New EEOC Guidance on PWFA

Providers may also give additional information or clarification, such as a view on whether a proposed "alternative accommodation would be effective."

Two more points, keyed to employee privacy:

> "Generally, employers cannot require a specific form be used for the supporting documentation for a PWFA accommodation, especially one that asks for unnecessary information."
>
> "You should not simply provide your patient's medical records, because they will likely contain information that is unnecessary for the employer to have."

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Last year, the EEOC published new harassment guidance . . .

- Among other things, that guidance extended the protections of EEO laws to repeatedly misgendering individuals, outing individuals, and restricting use to bathrooms or other sex-segregated facilities based on gender identity.
- Now, it comes with a warning:

> "When issuing certain documents, the Commission acts by majority vote. Based on her existing authority, the Acting Chair cannot unilaterally remove or modify certain 'gender identity'-related documents subject to the President's directives in the executive order."

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And:

Discrimination claims that might conflict with Trump's executive orders, including one executive order declaring that "sexes are not changeable," will now sent to the EEOC for review, rather than follow the normal investigatory process.

A statement released by the EEOC explains: "all charges that implicate these executive orders" will "be elevated for review at EEOC headquarters to determine how to comply with these executive orders prior to the recission or revision of the harassment guidance," and "to the extent that a charging party requests a notice of right to sue for one of those charges, EEOC will issue that notice of right to sue, as statutorily required."

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Andrea R. Lucas, Acting Chair of the EEOC

"I look forward to restoring evenhanded enforcement of employment civil rights laws for all Americans. . . ."

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What does that mean?

“Consistent with the President’s Executive Orders and priorities, my priorities will include rooting out unlawful DEI-motivated race and sex discrimination; protecting American workers from anti-American national origin discrimination; defending the biological and binary reality of sex and related rights, including women’s rights to single sex spaces at work; protecting workers from religious bias and harassment, including antisemitism; and remedying other areas of recent under-enforcement.”

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How did Commissioner Lucas vote on the PWFA Final Rule?

Andrea Lucas' Post

Andrea Lucas
Acting Chair, United States Equal Employment Opportunity Commission (EEOC)
9mo

Today, the EEOC issued its final rule implementing the Pregnant Workers Fairness Act (PWFA). I voted to disapprove the final rule. My full, sixteen-page statement addressing my vote is attached to this post. The statement can be downloaded from this post for further review.

In short: I support elements of the final rule. However, I was unable to approve it because it purports to broaden the scope of the statute in ways that, in my view, cannot reasonably be reconciled with the text. At a high level, the rule fundamentally errs in conflating pregnancy and childbirth accommodation with accommodation of the female sex, that is, female biology and reproduction. The Commission extends the new accommodation requirements to reach virtually every condition, circumstance, or procedure that relates to any aspect of the female reproductive system. And the results are paradoxical. Worse, the Commission chose not to structure the final rule in a manner that realistically allows for severability of its objectionable provisions from its reasonable and rational components.

The PWFA was a tremendous, bipartisan legislative achievement. Pregnant women in the workplace deserve regulations that implement the Act's provisions in a clear and reliable way. It is unfortunate that the elements of the final rule serving this purpose are inextricably tied to a needlessly expansive foundation that does not. I cannot support the Commission's final product.

#LegalUpdate #EEOC #HR #Law #Pregnancy #Accomodation #EEO #PWFA

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How did Commissioner Lucas vote on the harassment guidance?

No!

No!

Andrea Lucas' Post

Andrea Lucas
Acting Chair, United States Equal Employment Opportunity Commission (EEOC)
8mo

Today, the EEOC issued its Enforcement Guidance on Harassment in the Workplace, available here: https://lnkd.in/eaiR9Axp. I voted to disapprove the final guidance, for reasons including the guidance's assault on women's sex-based privacy and safety rights at work, as well as on speech and belief rights. My statement addressing my vote is attached to this post. The statement can be downloaded from this post for further review.

#LegalUpdate #EEOC #HR #Law #EEO #MeToo #Harassment #SexMatters

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What else has happened?

- The EEOC is composed of five commissioners who are appointed by the president for staggered five-year terms.
  - That structure is meant to protect agency independence, but . . .
- When Trump first took office the EEOC had three Democratic commissioners, one Republican commissioner, and a vacancy he could fill.
- Trump then fired two of the Democratic EEOC members before their terms expired. These removals are illegal and likely to be challenged in court.
- The EEOC now has no quorum, and it's unclear how it will function.

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What will the EEOC do next?

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Supreme Court Update

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Adverse Action Backdrop: *Boone v. Golden*

Until recently, Title VII discrimination claims required an "**adverse employment action**" that is **significant**, *e.g.*, **discharge, demotion, changes that impact pay, promotional opportunities, etc.**

Mere reassignment, even to a wind tunnel, didn't qualify.

"Significant" or **"material"** adverse action had been the standard for job reassignment cases for the last twenty-five years, until 2024.

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New Standard: *Muldrow v. City of St. Louis*

On April 17, 2024, the Supreme Court issued a decision in *Muldrow v. City of St. Louis*

The case creates a new standard for determining when job reassignment is an adverse employment action - expanding employee protections in reassignment cases and possibly beyond

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Muldrow v. City of St. Louis, 601 U.S. 346 (2024)

Jatonya Muldrow alleged that the St. Louis Police Department transferred her to a less desirable role because of her gender

Lower courts ruled against Muldrow, finding her reassignment was not materially adverse because her pay and rank were unchanged

The Supreme Court reversed holding that Muldrow didn't need to show a "significant employment disadvantage" to sustain a Title VII claim—she only needed to show "**some harm from a forced transfer**"

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Muldrow continued . . .

- Easier to file discrimination cases
- "Some harm" is all that is required for a transfer to be deemed adverse, which can be shown through evidence of diminished responsibilities, perks, and schedule
- "Some harm" now likely is the standard for other types of discrimination and retaliation claims too, *e.g.,* discipline and counseling
- Retaliation claims already are the most frequently filed EEO claim--that's only going to increase
- Be proactive—train your supervisors to document legitimate non-discriminatory, non-retaliatory business motivations for all their employment decisions, including transfers

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Religious Accommodation – Raising the Bar

Title VII of the Civil Rights Act of 1964 requires employers provide reasonable accommodations for their employees' religious beliefs and practices.

In late June 2023, the United States Supreme Court issued a decision in *Groff v. DeJoy*—a case that reset the standard for the burden an employer must meet in demonstrating that it is not required to grant an employee's request for a religious accommodation.

What *is* an "undue hardship"?

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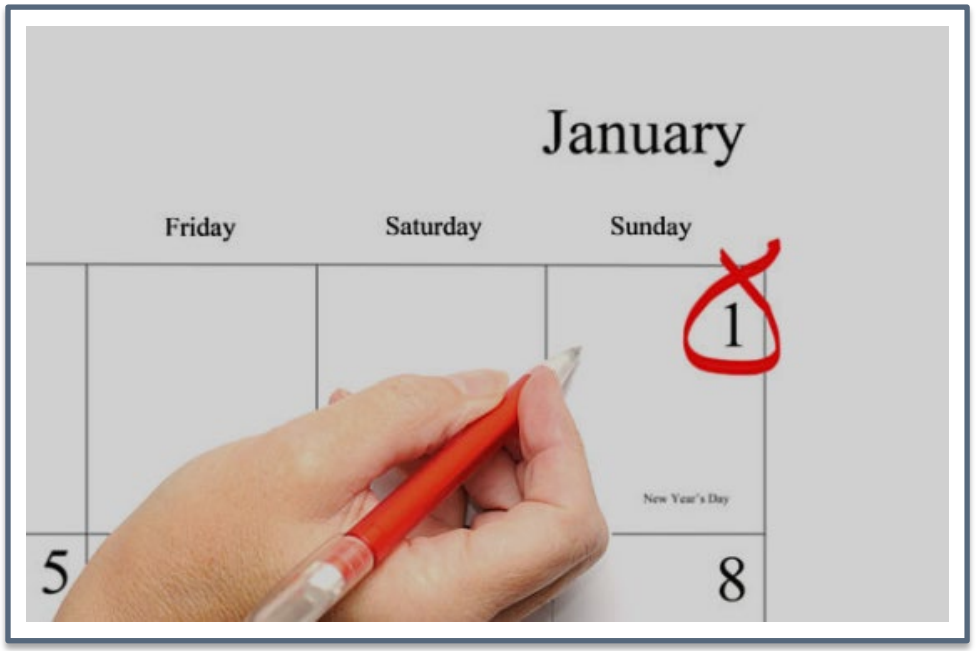
Religious Accommodation – Raising the Bar



An employee may seek an exception to a dress standard to allow for religious garb, or ask for a Saturday or Sunday off for worship, etc.

Courts have long maintained that employers must provide such religious accommodations unless the request imposes an "undue hardship," defined as "more than a de minimis cost."

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Religious Accommodation – Raising the Bar

- The plaintiff, Gerald Groff worked for the U.S. Postal Service (USPS) and asked for Sundays off, asserting that his religion as an Evangelical Christian forbad Sunday work.
- USPS asked Goff's coworkers to voluntarily trade shifts with him, but that did not work.
- Ultimately, USPS denied Groff's request and then disciplined him when he missed work on Sundays. Groff resigned and filed suit.

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Religious Accommodation – Raising the Bar

A federal district court and appellate court found in favor of USPS because Groff's request for Sundays off imposed "more than a de minimis cost" because the request "imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale."

But the Supreme Court reversed and rejected the "de minimis cost" standard.

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Religious Accommodation – Raising the Bar

Takeaways

The *de minimus* standard is out, but the work of making "context-specific" determinations of how to apply the undue-hardship standard for religious accommodations has been left to the lower courts.

Until the courts establish a new standard, applying the ADA standard for undue hardship seems like the most conservative approach—i.e., grant a religious accommodation unless it imposes "significant difficulty or expense."

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Applying *Groff* - *Kluge v. Brownsburg Community Sch. Corp.*, 732 F.Supp.3d 943 (S.D. Ind. 2024)

- Brownsburg Community School Corporation's ("BCSC") policy allowed students to change their preferred name, pronoun, and gender marker in the school's database if the student requested the change and provided a letter from a parent and a letter from a health care provider
- Teachers were required to call students by the preferred name listed in the school's database
- John Kluge, an orchestra teacher, opposed the policy on religious grounds and requested that as an accommodation he be allowed to call all students by their last name only

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What did the school do?

- The School initially granted the accommodation but later revoked it after determining that the proposed accommodation harmed transgender students and was disruptive to other students and teachers
- Kluge filed suit alleging religious discrimination
- The District Court for the Southern District of Indiana granted summary judgement in favor of the School finding that the accommodation was an undue hardship because it imposed more than a "de minimis cost" and the Seventh Circuit affirmed

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Kluge continued . . .

- Following the Seventh Circuit's decision, the Supreme Court issued its decision in *Groff v. Dejoy*
- The Seventh Circuit remanded the *Kluge* case back to the district court to evaluate it under the standard set forth in *Groff.*

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Kluge continued . . .

- On remand, the district court once again granted summary judgment in favor of the School
- The court explained that as a public school, the purpose of the school "is **providing a supportive environment for students** and respecting the legitimate expectations of their parents and medical providers" and that this "**mission can legitimately extend to fostering a safe, inclusive learning environment for all students and evaluating whether that mission is threatened by substantial student harm and the potential for liability**"

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Kluge continued . . .

- The court found that the accommodation caused “emotional harm” to transgender students and “disrupted the learning environment” of all students and teachers
- The court explained that even if most students and teachers were not bothered by the accommodation: “BCSC is a public-school corporation and as such has an obligation to meet the needs of *all* of its students, not just a majority of students or the students that were unaware of or unbothered by Mr. Kluge's practice of using last names only”
- The court further noted that even if the only harm to the School’s business was emotional harm to transgender students that “[a]s a matter of law, this is sufficient to demonstrate undue hardship, because if BCSC is not able to meet the needs of all of its students, it is incurring substantially increased cost to its mission to provide adequate public education that is equally open to all.”

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Kluge continued . . .

- The court also found that the school suffered an undue hardship from a risk of liability. The court explained that "Title VII does not require an employer to grant a religious accommodation that would place it on the razor's edge or liability" and that "the threat of disrupting litigation may in some circumstances constitute undue hardship."
- In this case, the court acknowledged that there were several examples of Title IX litigation involving transgender students and that "it has become clear that treating transgender students differently than other students invites litigation under a variety of theories beyond Title IX, many of which have been successfully litigated."
- How will the current SC view this case if it takes up this case?

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Kluge continued . . .

1. It is easier for an employee to bring a claim regarding religious accommodations
2. Under *Groff*, the undue hardship must be considered in the context of the employer's business. In this case, it was critical that BCSC was able to define it business as providing a safe and inclusive learning environment for *all* students.
3. If a proposed accommodation risks subjecting an employer to serious and disruptive litigation it can be an undue hardship.
4. New EEOC Chair Andrea Lucas: "my priorities will include . . . Protecting workers from religious bias and harassment"

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Overtime Exemptions – Burden of Proof

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E.M.D. Sales, Inc. v. Carrera, No. 23-217, 2025 WL 96207 (Jan. 15, 2025)

- The Fair Labor Standards Act ("FLSA") generally requires employers to pay workers who work more than 40 hours in a week overtime pay
- The FLSA includes a number of exemptions from overtime pay
- Under the FLSA, an employers bears the burden of showing that an exemption applies

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Carrera continued . . .

- EMD is a distributor of international food products that employed “sales representatives to manage inventory and take orders at grocery stores that stock EMD products”
- The sales representatives worked more than 40 hours per week but were not paid overtime because EMD classified them as exempt under the “outside-sales” exemption for an employee who “primarily makes sales and regularly works away from the employer’s place of business”
- The sales representative sued EMD alleging EMD violated the FLSA by failing to pay them overtime

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Carrera continued . . .

- The district court found that EMD had "failed to prove by **clear-and-convincing evidence** that the employees qualified as outside salesmen"
- EMD appealed arguing that the district court should have applied the "less stringent preponderance-of-the evidence standard." The Fourth Circuit of Appeals upheld the district court.
- The Supreme Court reversed holding that **a preponderance-of-the-evidence standard applies when an employer seeks to prove that an employee is exempt under the FLSA**

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Carrera continued . . .

1. This case may have limited applicability because "[t]he Fourth Circuit [stood] alone in requiring employers to prove the applicability of the [FLSA] exemptions by clear and convincing evidence
2. Nevertheless, the difference in the two evidentiary standards is significant
3. Still need to careful about exemptions

FLSA
FAIR LABOR STANDARDS ACT

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ICE Raids

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ICE Raids

1) Train receptionist to tell ICE that she is calling company lawyer
2) Administrative warrant
   - Does not allow searches
   - Signed by ALJ or government official
   - Usually issued in association with an I-9 audit
3) Judicial warrant
   - Allows searches
   - Check to make sure signed by judge
   - Allows search to be made at a particular time – check to make sure raid is compliant

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ICE Raids

4) Can only search areas that is allows for in warrant
5) Can't tell your employees to leave
6) Employees are not required to answer questions
7) Employees can hire their own lawyer
8) If employees are detained, have someone contact next of kin and deliver paycheck
9) I-9 self audit? E-verify?
10) MAKE A PLAN!!!

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The Rise of Reverse Discrimination Cases

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Standard for Title VII Discrimination Claims

- Direct Evidence of discrimination
  - Statements (e.g., from a manager)
  - Policies
- Circumstantial evidence of discrimination
  - Burden-shifting framework (*McDonnell-Douglas*)

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Circumstantial Evidence—Burden Shifting

- Plaintiff's Burden
  - Person was a member of a protected class
  - Person was qualified for position
  - Person suffered an adverse employment action
  - After rejection, position remained open, and the employer continued to seek applicants of plaintiff's qualifications
- Employer's Burden
  - Articulate a legitimate, nondiscriminatory reason for employee's rejection
- Back to Plaintiff's Burden
  - Show employer's reason is pretextual

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Reverse Discrimination—Two Approaches

- **The Majority**
  - The test stays the same
  - Circuits: 1st 2nd 3rd 4th 5th 9th 11th
- **The Minority**
  - The first element (plaintiff belongs to a protected class) is modified—Plaintiff must show:
  - "Background circumstances" or
  - "Evidence that there is something 'fishy' going on"— "indirect evidence to support the probability that but for the plaintiff's status he would not have suffered the challenged employment decision"
  - Circuits: D.C. 7th 8th 10th

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Hurlow v. Toyota Motor of North America (N.D. Ill.)

Darryl Hurlow joined Toyota in Fall 2015 as an intern.

In May 2016, he was promoted to a District Services & Parts Manager (DSPM) position.

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Hurlow continued . . .

Then what happened?

- Promotions
  - 2017: Toyota promoted a male and a female to management positions
  - 2018: Toyota promoted a female
  - September 2019: Hurlow applied for management position, but Toyota gave the job to a female candidate
  - November 2019: Toyota promoted a male
  - September 2020: Toyota promoted a female
- Other employment benefits
  - Bonuses/ranking
  - Negative feedback
  - Awards: Trip to Aspen, Colorado—it went to a female

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Hurlow sued, alleging sex discrimination

- The court listed some examples of what a reverse-discrimination plaintiff could point to:
  - Schemes to fix performance ratings to their detriment
  - Hiring system that seemed rigged against them
- Not enough for Hurlow to say there weren't "objective measures" for the ranking system
- Some quarters, women ranked higher, other quarters men ranked higher
- 4 out of 6 of the promotions went to women (66%) was not enough—court said that wasn't "nearly all" of the open positions
- The decision makers were predominately male
- "The bare fact that a woman got a job that a man wanted to get or keep is insufficient, without more, to raise an inference that an employer is included to discriminate against men."

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Duvall v. Novant Health, Inc.

- David Duvall
- Hired in 2013 as Novant Health's VP of Marketing and Communications
- Evidence at trial demonstrated that Duvall "performed exceptionally in his role"
  - He received strong performance reviews
  - Received national recognition for himself and the program he developed
- Novant fired Duvall in July 2018
- What happened?

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Duvall continued . . .

- In 2015, Novant Health hired Tanya Blackmon as Senior VP of Diversity and Inclusion
- Novant tasked Blackmon to develop a "Diversity and Inclusion Strategic Plan" for the company
- The Plan had 3 phases
  - **Phase 1**: Asses Novant's DEI culture, benchmark its DEI levels, and get the company's Board to commit to using DEI in decision making
  - **Phase 2**: Set goals to embed diversity and inclusion in 3-5 years, with a commitment to adding additional dimensions of diversity to the executive and senior leadership teams
  - **Phase 3**: Evaluate the progress toward embedding DEI and implement strategies and tactics to close identified gaps

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Duvall continued . . .

- In May 2018, Novant's DEI Council met and reviewed DEI data
  - Decline in female leaders from 2015 to 2017
  - 82% of Novant's workforce was female but only 4% female
  - Increase in white male representation
- In July 2018, Novant fired Duvall. Novant replaced him with a white woman and 2 black women
- In October 2018, the DEI Council met again
  - Discussed their philosophy: "Our team members should reflect our communities. Our leadership should reflect our team members."
  - Discussed quotas and targets
- In February 2019, the DEI Council met again and reviewed a report
  - DEI Plan had seen great success in using qualitative and quantitative data as drivers to track progress
  - Showed that Novant had made progress in increasing Black/African American representation in leadership roles

Duvall continued . . .

- When Duvall's supervisor told him he was being fired, he simply said the company was "going in a different direction"
- No prior indication that his job was in jeopardy
- At trial, the supervisor testified that Duvall was fired because he "lacked engagement" and "support from the executive team"
  - He said Duvall "damaged his credibility" when he "froze" and "walked off" the stage while giving a presentation to Novant's leadership team, and then declined opportunities to speak before the Board
- But it turned out that Duvall was actually sick—a fact that the supervisor knew at the time

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Duvall continued . . .

- The supervisor also testified that Duvall missed two management meetings
  - But both absences were the product of known and previously existing scheduling conflicts (one for a presentation at a national conference, and one for a family reunion)
- In December 2018, just a few months after the termination, Duvall's supervisor praised Duvall's performance to a recruiter
  - Supervisor said the reason Duvall was let go was because the company had experienced "a lot of change"—there was a "desire to bring new leaders" and for a "different point of view"
- Four months before Novant fired Duvall, it fired another white male worker and replaced him with a black male employee

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Duvall continued . . .

- The jury awarded Duvall $10 million in punitive damages
- The *Duvall* court highlighted several things
  - The use of quotas
  - The folks with whom Novant replaced Duvall
  - The supervisor's "shifting, conflicting, and unsubstantiated explanations for Duvall's termination"
    - "[M]erely post hoc rationalizations invented for the purposes of litigation and therefore unworthy of credence"

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Lessons from *Duvall*

- Don’t use DEI quotas
  - DEI programs should be about expanding the applicant pool (outreach and removing barriers), not about meeting hiring/promotion quotas
- Document performance issues
- When terminating an employee, provide the actual reason—don’t just say “not a good fit” or “going in a different direction”
  - You don’t want it to appear that you’re changing or manufacturing your story once in litigation
- Follow your policies for *everyone*

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The U.S. Supreme Court Has Taken Up the Issue

- SCOTUS granted cert and heard argument on a case from the Sixth Circuit: *Ames v. Ohio Department of Youth Services*
- In *Ames*, the court applied the heightened standard and dismissed the plaintiff's sexual-orientation-discrimination case
  - Plaintiff was a heterosexual woman who, after 30 years of public service, applied for a promotion and was instead demoted, and the promotion was given to a "25-year-old gay man"
- Given the tenor of the arguments, the heightened standard will likely be discarded

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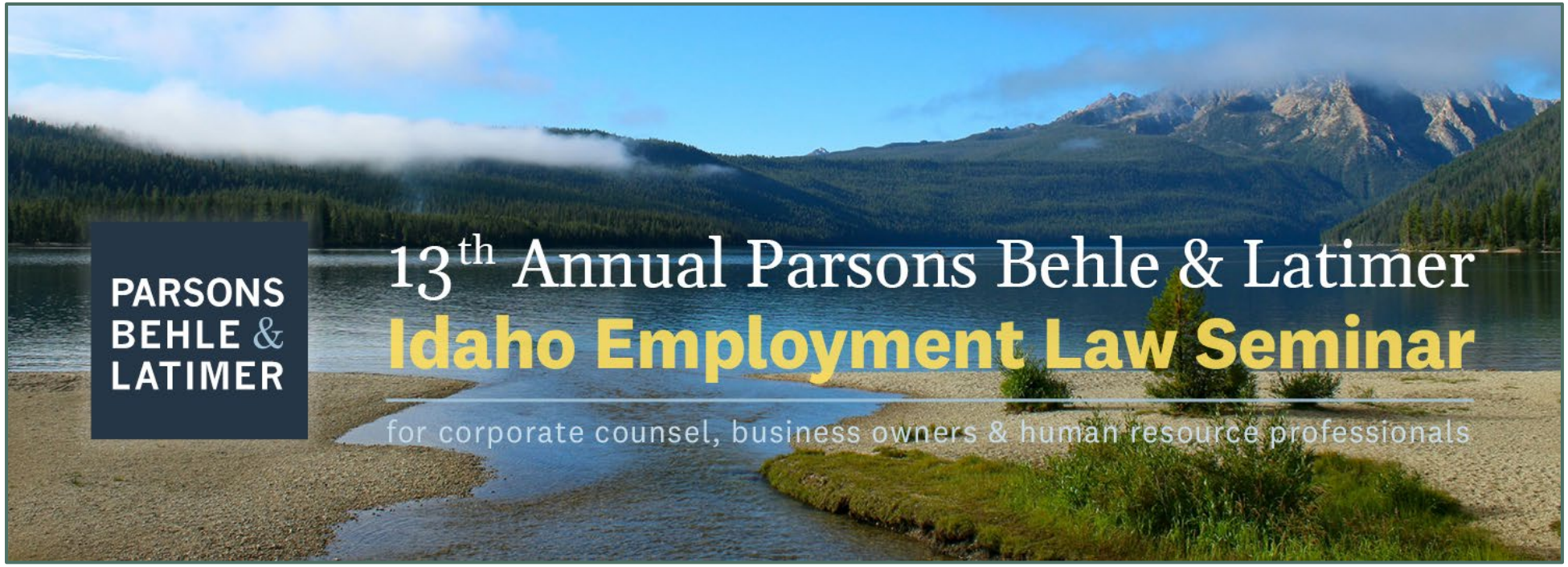
Mark Your Calendars!



TUESDAY, OCTOBER 14, 2025 | 8 A.M. – 1:30 P.M.

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More details to follow.

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