



13th Annual Parsons Behle & Latimer **Idaho Employment Law Seminar**

for corporate counsel, business owners & human resource professionals

OCTOBER 14, 2025 | BOISE CENTRE EAST | BOISE, IDAHO

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Christina M. Jepson and Elena T. Vetter

Winning the Case Before it Starts: Investigations, Documents and Lawyers

Sean A. Monson and Kristyn B. Escalante

The Uses, Risks and Benefits of AI for HR Managers

Jason R. Mau and Garrett M. Kitamura

Session Two 9:45 – 10:45 a.m.

Wage and Hour: Hot Topics and Real-Life Examples of Employers Running Afoul of the Fair Labor Standards Act

Christina M. Jepson and Susan Baird Motschiedler

One Unlikely Rise, One Potential Demise: The Realities of Reverse Discrimination Claims and DE&I Initiatives in 2025

Mark D. Tolman and Elena T. Vetter

Policy Evolution: Changing Your Company's Policies to Keep Up With Changing Times

Michael Judd and Paul R. Smith

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The Next Right Thing: Choosing Your Path Through the ADA Minefield

Susan Baird Motschiedler

I Have Seen This Movie Before . . . But I am not Sure How It Ends This Time

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Ask us Anything (About Employment Law)

Parsons' Employment & Labor Practice Group

Lunch and Keynote Session

HR: Culture Coach or Compliance Cop?

Jathan Janove and Michael Patrick O'Brien

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Navigating the Multi-State Minefield: From Hiring to Firing (and Everywhere in Between)

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Oct. 14, 2025 | Boise Centre East

Legal Disclaimer and PDF Handbook

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To download a PDF handbook of today's seminar, including presentations and materials, please scan the QR code or visit parsonsbehle.com/idaho-seminar



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What part of the employee life cycle might be affected by multi-state considerations?



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Today's Agenda and Take-Away Topics

- How do you become a multi-state employer?
- How can multi-state considerations change your hiring process?
- How will multi-state issues affect your policies and procedures during an individual's employment?
- What may look different about the employment separation process?



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Becoming a Multi-State Employer (Elena)

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How do you become a multi-state employer?



Workers Are Moving First, Asking Questions Later. What Happens When Offices Reopen?

March 9, 2021, 8:28 AM ET

Read on at The New York Times

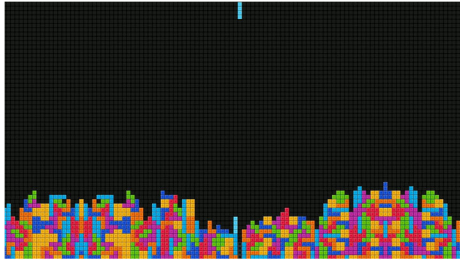
LAUREL WANSLEY

3-Minute Listen



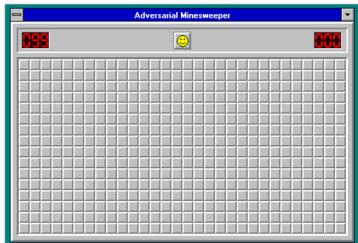
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In other words, sometimes it's like this . . .



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And other times it's like this.



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Now what?

- The US has federal, state, and local governments. They each have powers over employers and make laws that typically apply to and protect people subject to their jurisdictions. And these laws are not always uniform.
- Minnesota employment laws likely now apply to the NPR couple.
- Minnesota tax issues arise, such as state employment and business taxes.

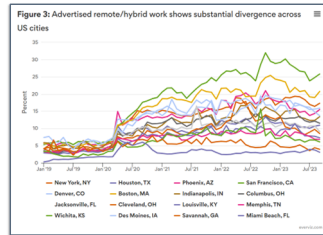
- Minnesota business license may be required.
- Worker's compensation and health insurance policies may be different in Minnesota . . .
- And the list goes on.



Remote work is 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.

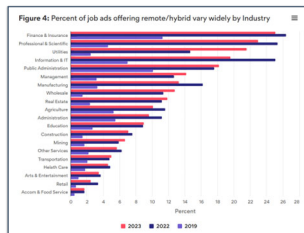


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And that's only becoming more the case

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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Here's a thought: can you avoid the problem altogether?

- 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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Multi-State Hiring Considerations (Christina)

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Let's start at the very beginning . . .

- Find out where your existing employees work
- This may sound simple . . . but fair warning:

Harder than it looks!

$$\frac{2x - 3}{x + 1} \leq 1$$

- A) $(-\infty, 4]$
- B) $(-\infty, -1) \cup (-1, 4]$
- C) $(-1, 4]$
- D) No solution



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Where do my employees work?

- You can look at permanent addresses, but . . .
 - What if an employee who works remotely does not self-disclose that they moved across state lines a few months ago?
 - You may be bound by employment laws in the new state!
 - What if an employee lives in Idaho, but regularly goes to California to sell product on behalf of your company? Are they now a California employee? Well, let's work through an example . . .
 - To analyze whether you have to pay California unemployment insurance, employment training tax, and state disability insurance, you have to apply up to FOUR tests.

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Four tests:

(1) Localization An employee's services are "localized" in California, and, therefore, considered subject to employment taxes if all or most of the employee's services are performed in California with only incidental services performed elsewhere (for example, where the out-of-state service is temporary or transient in nature or consists of isolated transactions).

- So if your Idaho-based employee **always or mostly works in California, you have to purchase California unemployment insurance and disability insurance, and pay employment training tax.** If not, apply the next test:

(2) Base of Operations If test (1) does not apply in any state, services are considered subject to these taxes if some of the services are performed in California and the employee's one and only base of operations for all of his or her services is in California.

- So if the **"base of operations"—i.e., a more or less permanent place from which the employee starts work and customarily returns to receive employer's instructions, to receive communications from customers or others, to replenish stocks or supplies, to repair equipment is in California for that employee—then you have to purchase California unemployment insurance and disability insurance, and pay employment training tax.** If not, apply the next test:



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Four tests, continued:

(3) Place of Direction and Control If tests (1) and (2) do not apply in any state, an employee's services are considered subject to these taxes if some of the services are performed in California and the place from which the employer exercises basic and general direction and control over all the employee's services is in California.

- **Does your Idaho employee not meet the other two tests, but receive "basic and general direction and control" from California? If so, you have to purchase California unemployment insurance and disability insurance, and pay employment training tax.** If not, apply the next test:

(4) Residence of Employee If tests (1), (2), and (3) do not apply in any state, an employee's services are considered subject to California employment taxes if some services are performed in California and the employee's residence is in California. Residence means having a more or less permanent place of abode. It is more than a mere transient stopover but does not require the intent necessary to establish a permanent residence in the domiciliary sense.

- **So . . . if you're an Idaho-based employer who's hiring a California resident to work in California, you have to purchase California unemployment insurance and disability insurance, and pay employment training tax.**



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But wait! There's more

What about personal income tax?

- In California, the **Personal Income Tax (PIT)** withholding and wage reporting requirements differ from those shown on the last slide for California unemployment insurance, employment training tax, and state disability insurance.
- Wages paid to a resident employee for services performed within or without California, or to a **nonresident employee for services performed within this state, are subject to California PIT withholding and reportable as PIT wages.**
- For PIT purposes only, an employer is an individual or organization that pays wages to employees for services performed within California and meets one or more of the following criteria:
 - **Does business in California.**
 - **Derives income from sources within California.**
 - **Is subject in any manner whatsoever to the laws of California.**
- **An employer that meets the above definition must withhold California PIT and report PIT wages paid to resident employees for services performed within and/ or without this state and for nonresident employees for services performed within this state.**



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Get organized

- Institute a policy requiring **notice of a move** out of state before it occurs . . .
- Because ignorance is *not* a defense against violating local law
 - Be aware that some states have provisions that preempt other states' laws—i.e., they say that if an employee works or lives there, their state laws trump any conflicting provisions in other states' laws
 - If you have an employee who lives ^{CH}and works in Colorado, Colorado's state laws about non-solicitation and non-competition agreements will govern, *not Idaho's*
- Establish an **assessment and approval process**
 - Document the process to evaluate requests to ensure consistent treatment

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Register to do business

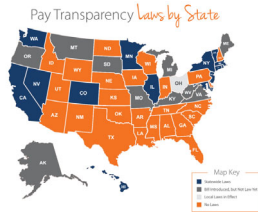
- If you've already decided to be a multi-state employer (or have now found out you are), check to see **local registration** requirements
 - Register as a foreign entity with state tax agency, unemployment agency, etc.
 - Check with Department of Labor, Department of Revenue, or Chamber of Commerce
 - A business license in Alaska costs \$50 for a one- or two-year license, and another \$50 to renew.
 - But a similar business license costs \$500 a year plus filing fees in Nevada.
- In conjunction with that registration, research:
 - **New hire reporting** requirements (ask the licensing agencies)
 - **Mandatory postings** in the workplace (the posters vary widely by states)
 - State and local (i.e., municipal) ordinances, laws, regulations

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Check your job posting

- Think about **designating state of hire**—even if remote
- Think about required disclosures in job postings: **pay transparency**
 - In Massachusetts, applies to employers with 25+ employees
 - In Vermont, applies to employers with 5+ employees
 - In Minnesota, applies to employers with 30+ employees



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As you're sorting resumes . . .

- What kind of background checks can you run?
 - Different background check laws
 - Ban the box legislation
 - Does not exist in Idaho, but in Washington state, it applies to private employers.



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Make a decision, and put it in the offer letter

- Include **authorized location/state in the offer letter** (e.g., "You are being hired to work in Idaho")
- Require **disclosure of a move** prior to the move
- Also, at this point: think about restrictive covenants you may want to include . . .



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And here's one more idea . . .

. . . consider no hire states!

Investigations

Companies post jobs where you can work anywhere - except for Colorado

A 911calls to Know investigation found at least 10 companies may be avoiding hiring Coloradans to get around a new labor law.

T.H.Q. Latest News Topics Podcasts Events Resources

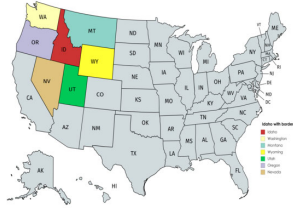
Want to work remotely? Be mindful of the state you live in

Coloradans Need Not Apply: Some Companies Won't Hire Coloradans Because of New Labor Law

By: [Name] | [Date]

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State laws differ . . .

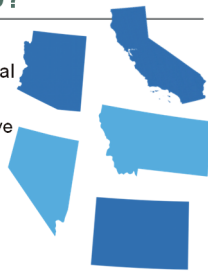


- It's illegal to whistle underwater in Oregon
- You can't hug someone while they're driving in Washington
- Montana prohibits fishing with a lasso (who does this?)
- You may not ride a camel on a highway in Nevada
- It's against the law to hunt elephants in Utah (not that they're easy to find in the wild)
- It's illegal to wear a hat that blocks someone's view in a theater in Wyoming
- And in Idaho, you can't ride a merry-go-round on a Sunday

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Do employment laws differ, too?

- California employment laws...enough said
- Lots of variation in state laws related to medical leave, protected classes, vaccines, etc.
- Arizona law requires certain types of paid leave
- Montana law prohibits age discrimination against any age, not just 40 and above, and prohibits termination without "good cause" as defined by the statute



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And some more . . .

- Nevada law requires daily overtime (for more than 8 hours in a day)
- Colorado law strictly limits the use of non-competes and makes violation of that law a crime
- . . . and that's just the beginning



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Handbooks, handbooks, handbooks

- Of course we are going to tell you to update your handbooks and potentially create different handbooks for different states
- But that's not all
 - You may need to provide additional training
 - Certainly for managers
 - Most likely for HR and leaders, too
 - Different required postings in the workplace or on the intranet
 - You may think about how different policies for different employees affects company culture
 - You may even want to think about potential perceived discriminatory impact

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Pay and wages

- Different states and even municipalities can impose different minimum wage standards
- Check on differences in overtime calculations (is it weekly or daily?)
- Pay frequency requirements change state by state
- Meal break requirements (and pay for them) can vary state by state
 - Federal law provides no paid breaks
 - California employees get a 30-minute paid meal break during a shift that is longer than five consecutive hours

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Protected Classes

You likely know the federal protected classes and Idaho's protected classes by heart: as the Idaho Division of Human Resources reminds us, they are . . .

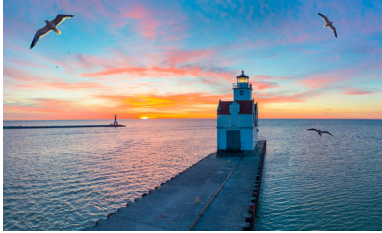


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But let's say an employee moves to Michigan

What protected classes do they gain from living in Michigan?



EV1

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What if they move to San Francisco?



EV1

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And how about Chicago?



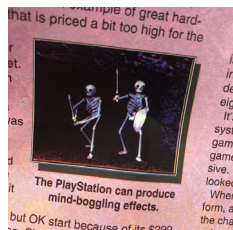
EV1

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What do protected classes affect?

- Discrimination
- Harassment
- Retaliation
- And all these potential problems can arise in hiring, training, promotional opportunities, adverse actions (which, according to the United States Supreme Court is "some harm" to the affected employee), and firing.



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So to avoid feeling like this . . .

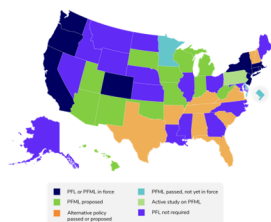


. . . you've got to stay informed and organized.

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What other laws change state by state?

State Paid Family Leave



And remember, this information is subject to (yearly) change . . .

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Other types of paid leave

This can include things like:

- Paid jury duty time
 - Alabama, Tennessee, Georgia (and others)
- Bereavement leave
 - California, Illinois, Maryland, Washington, Oregon
- Domestic violence leave
 - Arizona (and others)



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Are there more things to think about?

Of course!

- Workers' compensation programs
- Tax issues
- Unemployment insurance



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Employee Termination Issues for Multi-State Employers (Christina)

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How should you pay out the last check?

- You may know this answer for your home state, but what about other states?
 - What's the required timing?
 - Colorado: Next scheduled pay date
 - Maryland: On or before next scheduled pay date
 - Alabama: no timing requirement!
 - Some jurisdictions differentiate between fired employees and resigning employees:
 - In Texas, if an employee is laid off, final pay is due within six calendar days. If the employee quits, retires, resigns, or otherwise leaves employment voluntarily, the final pay is due on the next regularly-scheduled pay date.

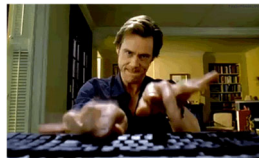


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Review severance agreements

You'll want to ensure legal compliance with state laws for any state where they're being used

- Update the waiver of claims sections
- Don't want to waive California claims for a Colorado employee (or vice-versa)!



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Can you even have restrictive covenants?

State laws differ greatly on scope and enforceability of non-competition, non-solicitation, and non-disclosure agreements.

These bills on labor issues passed the Colorado Legislature in 2025

Florida on Verge of Enacting Employer-Friendly Non-Compete Law

By Dan Brown, James Schwartz, Andrew S. Rosen & Justin Clavner on June 30, 2025

UPDATED July 7, 2025

COLORADO NEWSLINE

ATTORNEY GENERAL BONTA ISSUES CONSUMER ALERT

These bills on labor issues passed the Colorado Legislature in 2025

Gov. Polis expected to veto legislation that would ease union formation

by JAMES SCHWARTZ on July 10, 2025



Minnesota Reformer

HOME & ABOUT OUR MISSION HEALTH CARE EDUCATION BUSINESS & TRANSPORTATION

Democrats protect ban on noncompete agreements from carve-outs sought by big businesses

by MARYKATE HARRIS on June 10, 2025



Attorney General Bonta Issues Consumer Alert Reminding California Workers of Their Rights

Press Release - Attorney General Bonta Issues Consumer Alert Reminding CA Workers of Their Rights

San Francisco, December 15, 2024

Consumer Alerts (CA Alerts) - agnewsroom@doj.ca.gov

As part of, non-compete, and other anti-competitive agreements that restrict employee mobility are generally unenforceable in California.

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Remember, this is a non-exhaustive list



Questions?



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Thank You



Thank You



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Winning the Case Before it Starts: Investigations, Documents and Lawyers

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Agenda

Conduct needing documentation or an investigation

- Non-protected class
- Protected class

Documentation of misconduct – practical tips

Nuts and bolts of conducting investigation

When to bring in outside investigator

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Conflict/Harassment -- Categories



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Protected Categories

- Race, color, ethnicity, or national origin
- Religion
- Sex/gender (reverse discrimination)
- Sexual orientation (perceived or actual)
- Transgender status
- Pregnancy, childbirth, breastfeeding, and related conditions
- Age (40 and over)
- Physical or mental disability
- Veteran status
- Genetic information



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Workplace Conflict/Bullying

- Prohibit Bullying/Hazing even if it does not constitute unlawful harassment
 - Boss is a jerk v. boss is a racist or sexist
 - Approximately two-thirds of all harassment is "status-blind," and poses an occupational health hazard
 - Non-protected class harassment destroys employee morale as well

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Examples – Non-Protected Class Bullying?

- "I don't give a s--t about what you have going on at home, get this done NOW"
- "You are so d--n stupid. Why would ever think doing that would be ok?"
- "You have got to be one of the dumbest employees I have ever had in the past 20 years"
- "Get your lazy a-- in here right now, and do some work for a f---ing change"



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Handling Conflict/Bullying Issues

- You must build employee trust
- You must encourage voicing of complaints – environment where employees can voice concerns
- If there is conflict between two workers
 - Assess whether there has been a violation of your anti-bullying policy or anti-discrimination statute
 - If yes, move to investigation
 - If no, meet with employees – individually or together – out of site of other workers—explain what you observed – ask to understand the conflict – negotiate solutions



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Best Practices for Employers

Documentation!

Documentation!

Documentation!



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Why Document?

- Improved communications
- Uniformity in business decisions
- Lawsuit defense aids:
 - Faded memories
 - Credibility battles
 - Binding admissions

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Documenting Misconduct: Nuts/Bolts

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: Nuts/Bolts

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

- 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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Corrective Action Documentation

- 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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Corrective Action Documentation

- 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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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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Common Mistakes in Disciplining

- LYING in a performance review – Number One Problem
- Don't lie in a performance review to save someone's feelings or avoid confrontation
 - Will bite you like a rabid dog with 6-inch incisors
 - Not fair to employee – deprives them of chance to improve

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Cautionary Tale: *LaCasse v. Owen*

- Plaintiff was fired by Fountain Plaza, LLC. Plaintiff alleged the termination was retaliatory and motivated by his involvement in a complaint of sexual harassment at a different company with common ownership interests
- Plaintiff was presented with a “conference report” referring to a meeting two weeks earlier where his poor performance was addressed
 - Plaintiff refused to sign the report and objected that he had never received a performance review or been told he was not performing well
- Plaintiff objected to the executive director and he was fired the next day

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Cautionary Tale continued

- Fountain Plaza moved for summary judgment asserting Plaintiff could not prove causation – that his involvement in the sexual harassment complaint (rather than his poor performance) was the reason for his discharge
- Lower court granted summary judgment in favor of Fountain Plaza **despite ongoing dispute between the parties about whether the “conference report” (performance review) was fabricated and backdated**
- Appellate Court reversed and held that issue of fact was created by Plaintiff’s allegation (and retention of a computer forensic expert) that performance review was fabricated

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Why Should You Take the Time to Conduct an Effective, Thorough Investigation?

Evidence of a flawed or cursory investigation can support a finding of pretext to support a discrimination/retaliation case.

A jury may infer discriminatory intent when an employer “fail[s] to conduct what appeared to be a fair investigation....”

-- *Trujillo v. Pacificorp*, 524 F.3d 1149 (10th Cir. 2008)

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Investigations

- Workers should be instructed to bring harassment/bullying concerns to management
- Workers do not have to approach the bully/hazer/harasser before complaining to management
- Complaints from workers who change their minds about complaining still are complaints and must be handled
- "I don't want to make a big deal about this. I just wanted to let you know. Please don't do anything about this. I don't want [name of harasser/bully] to get in trouble"

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Investigations

- Respond to all complaints—harassment, retaliation, violation of public policy, OSHA, etc.
- Explain the process, and emphasize retaliation is prohibited
- Set expectations
- Start by showing willingness to believe and then listen
- Separate alleged victim and harasser/bully pending investigation – different shifts, administrative leave.
- DOCUMENT, DOCUMENT, DOCUMENT
- First document – investigation plan
 - What is the scope of the investigation
 - What documents do you need to review before interviews/after interviews
 - Outside investigator or no
 - How handle confidentiality issues
 - Timeline for completing investigation

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Investigations

- No retaliation
- Who you are working for
- 5Ws – who, what, when, where, witnesses
 - Step one – Get the victim's story
 - Ask the victim – what happened, who did it, where did it happen, and when did it happen.
 - Were there any witnesses? If yes, who?
 - Have the victim sign a statement – you do not want the story to change
- Step two – Get the witnesses' story
 - Ask the witness – 5Ws – what did you see or hear, when and where did you see or hear it, who else was present
 - Have the witness sign a statement

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Investigations

- Step Three – Confront the harasser/bully
 - Confront the harasser with the allegations
 - Give him or her a chance to respond
- Step Four – Make a decision
 - Make a decision regarding the extent to which you believe that the victim was subject to unlawful harassment/bullying
 - You will have to decide whose testimony is more credible – the victim and witnesses or the alleged harasser/bully
 - Don't make legal conclusions – "Employee X was the victim of sexual harassment"
 - Instead "I find that Employee Y said _____ to Employee X"

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Investigations

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

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Investigations

- Report
 - List documents reviewed and summary of what they contain
 - List witnesses interviewed and summary of testimony – note dates interviewed
 - Summarize complaint/allegations
 - Factual findings (with supporting evidence references)
 - Any evidence discounted? Why?
 - Summary of who you believed and why
 - Conclusions
 - Again, not legal conclusions – try not to say "Employee X was the victim of unlawful harassment under Title VII"
 - Can make conclusions that certain behavior violated company policies
 - Recommended actions

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EEOC Enforcement Guidance

In 1999, the EEOC issued “Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors,” which contains guidance on “credibility determinations”:

“If there are conflicting versions of relevant events, the employer will have to weigh each party’s credibility. Credibility assessments can be critical in determining whether the alleged harassment in fact occurred.

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EEOC Enforcement Guidance (cont’d.)

- “Factors to consider include:
- Inherent plausibility: Is the testimony believable on its face? Does it make sense?
- Demeanor: Did the person seem to be telling the truth or lying?
- Motive to Falsify: Did the person have a reason to lie?

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EEOC Enforcement Guidance (cont’d.)

- Corroboration: Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party’s testimony?
- Past record: Did the alleged harasser have a history of similar behavior in the past

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Common Handbook Provision

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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EEOC Guidance

- This is based on EEOC guidance – “need to know” basis only
- An employer should make clear to employees that it will protect the confidentiality of harassment allegations to the extent possible. An employer cannot guarantee complete confidentiality, since it cannot conduct an effective investigation without revealing certain information to the alleged harasser and potential witnesses. However, information about the allegation of harassment should be shared only with those **who need to know** about it. Records relating to harassment complaints should be kept confidential on the same basis.

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EEOC Guidance

- A conflict between an employee’s desire for confidentiality and the employer’s duty to investigate may arise if an employee informs a supervisor about alleged harassment, but asks him or her to keep the matter confidential and take no action. **Inaction** by the supervisor in such circumstances could lead to **employer liability**. While it may seem reasonable to let the employee determine whether to pursue a complaint, the **employer** must discharge its **duty** to prevent and correct harassment.

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NLRB Disagrees?

- 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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NLRB Disagrees

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



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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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Investigations – When to Call In the Cavalry?

■ It depends:

- Complaint involves alleged sexual harassment between two entry level employees. Something that potentially can be handled in house.
- Advantages –
 - institutional knowledge of the Human Resource department
 - likely comfort the parties will have when they are interviewed by a friendly face.
- Disadvantages –
 - level of involvement Human Resources has in promoting, demoting, and/or terminating employees as the greater the involvement the more likely a conflict of interest exists.

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Investigations – When to Call In the Cavalry?

■ It depends:

- Complaint is made by a lower level employee against the owner/president of the company.
- Investigation would likely need to be conducted by an outside investigator.
- Avoids the inference of impropriety.
- Even if Human Resources vows to be neutral and fair, the owner/president controls that individual's employment – obvious potential bias.
- If the investigator has a prior relationship with any potential witness, inference that the witnesses' statements may be given more weight than other witnesses.

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Investigations – When to Call In the Cavalry?

■ It depends:

- The investigation must be fair, impartial, and timely if you are to use the outcome of the investigation as a defense to potential civil liability.
- If you have any doubts that the standard can be met, call in an outside investigator.

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Consider Splitting the Cavalry In Two

- One person to investigate
- One person to advise
- Why?
- Attorney-Client Privilege/Work Product Doctrine
 - Investigator could potentially be deposed/called as a witness

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Lessons Learned Vandegrift v. City of Philadelphia (2017)



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Investigations – Lessons Learned

- The story
 - Two police officers allege sexual harassment and sexual assault by their boss
 - One officer claims that she was sexually assaulted in boss' car
 - Inspection results in a finding of physical evidence that something was going on in that car
 - The boss says, "Oh yeah, I have had sex a couple of times in the car" with a civilian woman
 - What is the next question?

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Investigations – Lessons Learned

▪ The story

- City did NOT do that
- The investigators did not ask for the name of the civilian or for her description
- Boss did not provide investigators any contact information for the civilian
- Although victim had two witnesses who corroborated her account of the events (he had been hitting on her at a bar before the alleged assault), the investigation resulted in a finding of “not sustained”
- Lesson One – Ask the follow up question!!

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Investigations – Lessons Learned

▪ The story

- The second officer complained about a litany of inappropriate, sexual comments and sexual assault by the same guy (this time in his office)
- First response when the complaint was filed?
- Shortly after Ms. Vandegrift made her internal EEO complaint, Captain Derbyshire spoke with his superior and told him he would transfer Ms. Vandegrift from 3 Squad to 2 Squad. The superior, an Inspector, responded, “that would be a good move.” Captain Derbyshire then told Lieutenant Morton—who is responsible for 2 Squad—he would transfer Ms. Vandegrift to 2 Squad because she filed the internal EEO complaint. Ms. Vandegrift did not want to leave 3 Squad, where she worked the night shift, because she needed the night shift schedule. Ms. Vandegrift’s mother normally watched her son, but at the time her mother could not because she was hospitalized.

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Investigations – Lessons Learned

▪ The story

- Doubling down
 - “Inspector Washington told Captain Derbyshire Ms. Vandegrift would be reassigned to the Southwest Division.
 - The Southwest Division is an extremely busy and hectic place to work. There is a perception within the Philadelphia Police Department assignment to the Southwest Division is a punishment. The Southwest Division is also a longer commute for Ms. Vandegrift than the South Division. Captain Derbyshire told Ms. Vandegrift the City reassigned her to the Southwest Division for her protection. When she asked what he meant, Captain Derbyshire said they could not move all the male detectives at once, so they were going to move her for her protection. Captain Derbyshire never spoke with Ms. Vandegrift about whether she wanted to move out of the South Division before he talked with Inspector Washington. Captain Derbyshire never considered moving the male detectives who engaged in the conduct Ms. Vandegrift had complained about.”
- Lesson Two—Don’t reassign the claimant to make the problem go away!!

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Investigations – Lessons Learned

▪ The story

- Plaintiff submitted expert testimony and court agreed:
 - The investigators improperly applied a criminal law standard to some of Det. Vandegrift's complaints;
 - The investigators failed to investigate all claims, including no investigation of Det. Vandegrift's retaliation complaints;
 - The investigators failed to interview or investigate, or attempt to interview or investigate anyone not currently employed by the Philadelphia Police Department;
 - The investigators' questioning methods were unreasonably brief and shallow;

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Investigations – Lessons Learned

▪ The story

- Plaintiff submitted expert testimony and court agreed:
 - The investigations should have been conducted by a single investigator;
 - The investigators failed to review or consider background information about the alleged harassers;
 - The investigators failed to judge the credibility of the complainant, witnesses and alleged harassers.
- Lesson Three—Apply the correct standard of “fact finding”!!
- Lesson Four—Interview all the witnesses; ask the 5Ws, persistently!!
- Lesson Five—Consider and explain credibility decisions

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Investigations – Lessons Learned

▪ The story (not the most helpful investigator)

- Lieutenant Raymond Saggese has been an investigator in the internal affairs division for sixteen years
- During Lieutenant Saggese's interview of Ms. Vandegrift during the investigation, Lieutenant Saggese told Ms. Vandegrift certain employees have “carte blanche” to act the way they do, and he had “run into a brick wall” regarding other investigations
- He also told Ms. Vandegrift other sexual allegations against “higher-ups” are swept under the rug
- Lesson Six – Choose your investigator wisely!!

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Investigations – Lessons Learned

▪ The story—

- On July 29, 2014, Ms. Vandegrift sent a Facebook message to four of her male colleagues in her squad which included a picture of a baby whose facial expression reminded her of Detective Ruth and included quotes from Detective Ruth:

John Ruth at 6 months. He's saying—"yo Jim this job won't make me money" 'My payroll number is ...' 'Get off my Dick' 'a good detective is knowing when to work hard on a job and when to put the crap aside' 'this is silly' 'you alright buddy?' 'Yep, 30 years later and not much has changed lol.

- Vandegrift is disciplined for this even though, in violation of Police Department policy, no one asks her about the message – i.e. there was no investigation, just discipline
- Lesson Seven—Follow your policies!! (In all things, not just investigations)

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Investigations – Lessons Learned

▪ The story--

- Chief Inspector Christopher Flacco testified the City disciplined Ms. Vandegrift for the Facebook message because she complained about similar conduct:
 - Q. So do you agree with me, then, that the reason why Vandegrift is being written up for the Facebook message is because she made the complaint about similar conduct herself?
 - A. You can make that assumption, yeah, that's part of it.
- Lesson Eight—Prepare for your deposition!! With your lawyer!!

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Common Mistakes in Terminating Employees

- NO DOCUMENTATION
- Not giving a complete, written reason for the termination to employee
- Terminating without having exhausted the ADA reasonable accommodation process
- Termination for retaliatory reasons (known to the 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



Thank You



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13th Annual Idaho Employment Law Seminar

The Uses, Risks and Benefits of AI for HR Managers

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The Uses, Risks, and Benefits of AI for HR Managers

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Oct. 14, 2025 | Boise Centre East

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AI Trends in Human Resources

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AI Trends: 2024 SHRM Survey

- In January 2024, 2,366 HR professionals answered a SHRM survey on AI
 - 26% of respondents say they use AI to support HR-related activities
- Of HR professionals who use AI, the most common uses were:



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AI Trends: 2024 SHRM Survey (cont.)

Nearly 2 in 3 organizations only began using AI to support HR-related activities within the past year.



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AI Trends: 2024 SHRM Survey (cont.)

- Of respondents who use AI (approximate percentages):
 - 90% say AI saves time or increases efficiency in recruiting, interviewing, or hiring
 - 67% use AI to help generate job descriptions
 - 32% find AI enables "somewhat better" or "much better" recruiting, interviewing, or hiring of diverse candidates
 - 10% say AI allows them to access underrepresented pools of talent they weren't previously reaching

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AI Trends: 2024 SHRM Survey (cont.)

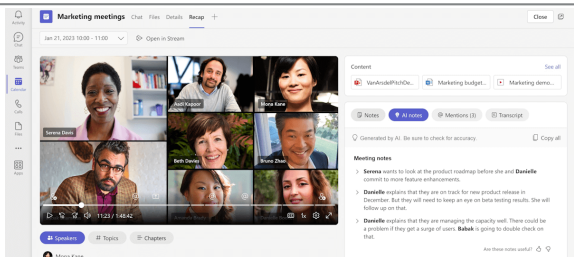
- Of respondents who use AI (approximate percentages):
 - 40% have concerns about security and privacy of data used by AI tools
 - Only 34% say the vendor(s) they purchase AI from are **very transparent** about the steps taken to ensure the tools prevent or protect against discrimination/bias
- Reasons why organizations **do not** use AI (approximate percentages):
 - 42% lack knowledge about what AI tools would best fit their needs
 - 29% have concerns that AI may accidentally overlook/exclude qualified applicants/employees
 - 20% are concerned that AI can repeat/exacerbate patterns of bias because it learns from past data



Uses & Benefits of AI in HR



Meeting Assistant (e.g., Teams' Intelligent Recap)



AI Agent for HR



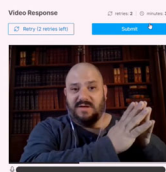
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Virtual Interviews (e.g., HireVue)

- Candidates can participate in on-demand interviews outside traditional business hours
- AI "scores" candidates interview responses
- AI considers physical and vocal responses to questions
- HireVue: "We've learned a lot by conducting over 70 million interviews. With this data, our models focus on skills, behaviors, and competencies specific to the job and not on irrelevant information like how someone was dressed, which university they attended, or which keywords are in their resume."

Question 3 of 6

Share briefly your experience in managing end-to-end recruitment process.



Powered by HireVue

Getting a Top Score in a HireVue Interview

Ace your next interview! Here are the Top 10 most asked job interview questions with the best answers. It's the "Job Interview Secrets" ...
YouTube · Self Made Millennial · Jul 28, 2022

10 key moments in this video

HireVue Video Interview: 5 MISTAKES You Need to AVOID

Land a job in less than 12 weeks (Online Course)
[https://link.primacareer.com/course/Checklist to NAIL your Next Video...](https://link.primacareer.com/course/Checklist%20to%20NAIL%20your%20Next%20Video...)
YouTube · The Independent Consultant · Nov 21, 2019

7 key moments in this video

How HireVue AI interviews work and what you can do about it!

HireVue interviews are the bane of job applicants all over the world, for every sort of role and at all seniority levels.
YouTube · Voomer · May 24, 2022

5 key moments in this video

Hirevue Interview Tips - 10 Most Common Hirevue Questions

This is the most comprehensive Hirevue Interview Tips video ever created on YouTube. This is the only Hirevue Video Interview Tips video you ...
YouTube · Rambling Recruiter · Mar 7, 2022

13 key moments in this video

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AI and Employment Law

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AI Use in HR Can Implicate Federal Employment Laws

▪ Title I of the Americans with Disabilities Act of 1990

◦ Prohibits employment discrimination against qualified individuals with disabilities who can perform essential functions of the job with or without accommodation

◦ Requires the employer to provide reasonable accommodations to qualified individuals with disabilities unless doing so would cause the employer an undue hardship



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Implicated Federal Employment Laws (cont.)

▪ Equal Employment Opportunity Commission (EEOC) Guidance (May 2023) (Rescinded)

◦ EEOC cautions that use of AI for HR tasks can violate the ADA

◦ AI tools may unlawfully disadvantage or screen out qualified applicants or employees with disabilities

◦ Inquiries or decisions by AI concerning individual's disability or medical history could violate the ADA

◦ Employer can be liable for ADA violations even if the AI tools are administered by a third-party vendor



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Implicated Federal Employment Laws (cont.)

- Title VII of the Civil Rights Act of 1964
 - Prohibits employment discrimination based on race, color, religion, sex, or national origin
- EEOC Guidance (May 2023) (Rescinded)
 - AI decision-making that adversely affects a particular social group (e.g., race, religion, sex) will violate Title VII unless employer can show that use of the AI tool is “job related and consistent with business necessity”



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Implicated Federal Employment Laws (cont.)

- To avoid Title VII violations, EEOC suggests following the “Four-Fifths Rule”
 - “Four-Fifths Rule” is a rule of thumb can be used to determine if treatment of one group is “substantially” (i.e., illegally) different than the other.
 - “Four-Fifths Rule”: Rate of selection between two groups is “substantially” if ratio is less than four-fifths (80%)



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Implicated Federal Employment Laws (cont.)

- Example of “Four-Fifths Rule”: AI helps to select 20% of black applicants for a position and 80% of white applicants for the same position
 - Ratio of black to white applicants selected is 20/80 (or 25%)
 - Because 20/80 (or 25%) is lower than 4/5 (or 80%), the Four-Fifths Rule indicates that selection rate of black applicants is substantially different than selection rate of white applicants
 - This can indicate discrimination but is not determinative. Again, it’s a rule of thumb.
- EEOC caution: Even where the Four-Fifths Rule is satisfied, statistically significant differences in hiring can create liability Title VII discrimination

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Implicated Federal Employment Laws (cont.)

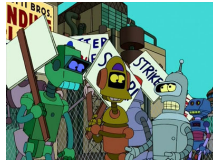
- Age Discrimination in Employment Act of 1967
 - Prohibits employment discrimination against anyone age 40 years of age or older
 - Among other nuances, ADEA requires waiver agreement in severance package must clearly note that the employee is waiving ADEA rights and must provide said employee 21 days to consider the agreement



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Implicated Federal Employment Laws (cont.)

- National Labor Relations Act of 1935
 - Prohibits employers from interfering with union activity or interfering with employees making concerted efforts to improve working conditions
- Family Medical Leave Act of 1993
 - Requires employers to provide eligible employees with job-protected leave for certain family or medical reasons
- Genetic Information Nondiscrimination Act of 2008
 - Prohibits discrimination against employees or applicants because of genetic information



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And Then There's State and Local Laws

- State Human Rights Laws
 - State-level civil rights acts that can provide even broader discrimination protection
- State-specific Wage and Hour Laws
 - Does your payroll AI know about tip credit laws in Oregon?
- Polygraph Tests
 - Many states have laws prohibiting or heavily restricting the use of lie detector tests in hiring and employment
 - These state laws can be more stringent than the federal Employee Polygraph Protection Act



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Risks and Liabilities

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Cautionary Tale: *Baker v. CVS Health*

- Brendan Baker applied to work at CVS in Massachusetts
 - Part of his application included a virtual HireVue interview
 - According to Baker, HireVue claims it can detect whether an applicant "has an innate sense of integrity and honor" and can screen out "embellishers"
- Federal law and Massachusetts law prohibit lie-detector tests in pre-employment screenings
 - Baker filed suit against CVS in early 2023, seeking to certify a class-action lawsuit
 - Federal judge denied CVS's motion to dismiss
 - CVS settled in July 2024

HireVue

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Cautionary Tale: *ACLU v. HireVue*

- March 2025, ACLU submitted complaint of discrimination to Colorado Civil Rights Division and EEOC, alleging...
 - HireVue AI tool discriminated against deaf and Indigenous employee at Intuit seeking a promotion
 - Audible portions of HireVue interview video lacked subtitles
 - Employee's request for human-generated captioning as an accommodation was denied
 - AI-generated suggested feedback told a hearing-disabled employee to "practice active listening"

HireVue

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Federal Action on AI in Employment: Past and Present

- Biden-era agency actions and guidance focused on the risk of employment discrimination stemming from AI
 - Brought action against companies and supported employee lawsuits
- Trump-era agencies have rescinded guidance for use of AI in employment
 - Agencies appear less poised to bring action against employers or implement stringent regulation/guidance
- It is a question of when, not if, federal agencies will return to scrutinizing the use of AI in employment



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Biden-era Agency Actions

- *EEOC v. iTutorGroup, Inc.* (E.D.N.Y., 2022)
 - iTutorGroup hired remote English tutors for students in China
 - EEOC alleged iTutor's hiring software "intentionally discriminated against older applicants because of their age" by "automatically reject[ing] female applicants age 55 or older and male applicants age 60 or older."
 - Alleged violation of federal Age Discrimination in Employment Act
 - iTutorGroup settled: \$365,000 payment to rejected applicants



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Biden-era Agency Actions (cont.)

- *Mobley v. Workday* (N.D. California, 2023)
 - **Workday:** AI-powered applicant screening tool
 - **Derek Mobley:** Used Workday to apply for over 100 jobs between 2017 and 2024
 - All of Mobley's Workday applications were rejected
 - Mobley alleged Workday's AI could infer that he was black, over 40, mentally disabled



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- *Mobley v. Workday* (N.D. California, 2023)

- Mobley alleged the AI incorporated illegal biases and prejudicial training data
- Mobley alleged Workday acted as agent of hiring employers, subjecting Workday to federal labor laws (e.g., ADA, Title VII)
- Biden EEOC filed brief in support of this theory and the Court agreed
- May 2025: Judge grants Mobley collective-action certification (think "class action")
- In response, Workday has expressed that the lawsuit lacks merit and stresses that the court's decision is only preliminary.



Article from *The Wall Street Journal* (June 22, 2025)

By LAUREN WEISS

U.S. job hunters submit millions of online applications every year. Often they get an automatic rejection or no response at all, never knowing if they got a fair shake from the algorithms that gatekeep today's job market.

One worker, Derek Mobley, is trying to discover why. Mobley, an IT professional in North Carolina, applied for more than 100 jobs during a stretch of unemployment from 2017 to 2019 and for a few years after. He was met with rejection or silence each time. Sometimes the rejection email

discrimination, claiming its algorithm screened him out, based on his age, race and disabilities. Mobley, a Black graduate of Morehouse College who suffers from anxiety and depression, said the math didn't add up.

He says he applied only for jobs he believed he was qualified for. "There's a standard bell curve in statistics. It didn't make sense that my failure rate was 100%," said Mobley, who has since gotten hired and twice promoted at Allstate.

His suit is now emerging as the most significant challenge yet to the software behind nearly every hiring decision

He says he applied only for jobs he believed he was qualified for. "There's a standard bell curve in statistics. It didn't make sense that my failure rate was 100%," said Mobley, who has since gotten hired and twice promoted at Allstate.



Derek Mobley used *Workday* for discrimination in 2023.

strong, good, fair or low match.

While employer clients can set up "knockout questions" that lead to automatic rejections—for example, asking if a person has legal authorization to work in the U.S. or is available for weekend shifts—the software is designed to ensure employers make no final decisions on candidates who make it through the initial screen. Workday argued in court filings.

"There's no evidence that the technology results in harm to protected groups," the company said.

Before his job search, Moh-

Continued from page B1
into a permanent position. Mobley said he was let go, and he later joined a lawsuit against HPE alleging age and race discrimination. The case was settled in 2020. HPE de-



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Current and Forecasted AI Laws

■ Federal

- Initial draft of One Big Beautiful Bill Act had A.I. deregulation
 - Removed from final version
- No sign of further action from federal agencies
- No anticipated executive action

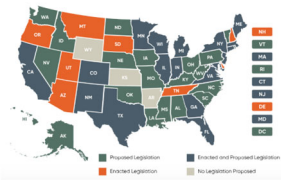


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Current and Forecasted AI Laws (cont.)

■ States and Cities

- Private-sector AI governance bills have been proposed or passed in nearly all state legislatures
- Utah, Colorado, and California (among others) currently have AI laws on the books
- Existing and proposed state legislation generally focused on consumer protection
- Idaho has three AI laws all focused on deepfakes
- New York City passed "first-of-its-kind plan" to address use of AI in employment decisions



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Utah's Artificial Intelligence Policy Act

■ Effective May 1, 2024

■ Focused on consumer protection

- Requires business/individual to disclose generative AI use upon inquiry
- Prominent mandatory disclosure of generative AI use if it is used for services in "regulated occupations" (e.g., doctors, dentists, lawyers)
- Penalties of up to \$2,500 for each violation
- Establishes Artificial Learning Laboratory Program and Office of Artificial Intelligence Policy to establish regulations and have participating businesses test/develop A.I.



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New York City's "Bias Audit Law"

Local Law 144 is effective January 1, 2023

- Automated employment decision tools (AEDTs) prohibited in employment decisions unless certain criteria are met, including notice of use and independent bias audits
- Applies to AEDT use "in the city," which includes:
 - Job located in an office in NYC, at least part time;
 - Fully-remote job associated with an office in NYC; or
 - Employment agency using the AEDT is in NYC.
- Civil penalties
 - \$500 maximum fine for first violation
 - \$500 to \$1,500 fines for each subsequent violation



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Federal Agency Guidance

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2022 Dep't of Justice Guidance: AI Hiring & Disability Discrimination

How to avoid screening out (ADA violation)

Be prepared to give reasonable accommodations

- Employers should provide enough information about the technology, activities, and evaluation standards that will be in the interview so applicant can determine if they need an accommodation
- Employers should provide and implement clear procedures for applicants to request reasonable accommodations for interviews



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2024 Dep't of Labor's AI Best Practices (Rescinded)

- Biden Dep't of Labor issued "Artificial Intelligence and Worker Well-Being: Principles and Best Practices for Developers and Employers." (No longer available on DoL website.)
 - Pursuant to Biden EO 14110: "Executive Order on Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence"
 - EO 14110 was rescinded and superseded by Trump EO 14179
- This guidance is worth examining for its general best practices a guide to prepare for future government regulation/scrutiny



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Dep't of Labor's AI Best Practices (cont.)

- Employers should establish AI governance and human oversight
 - Provide appropriate training about AI to as broad a range of employees as possible (e.g., how to use AI, what AI should or should not be used for, information to not share with AI)
 - Do not rely solely on AI (or information collected through electronic monitoring) to make significant employment decisions



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Dep't of Labor's AI Best Practices (cont.)

- Employers should establish AI governance and human oversight
 - Identify and document significant employment decisions informed by AI and automated systems: let employees and applicants know the role these systems are playing
 - Document and implement procedures for appealing (to a human) significant employment decisions made by AI
 - Ensure worker-impacting AI systems are independently audited



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Dep't of Labor's AI Best Practices (cont.)

- Employers should provide transparency about AI use
 - Provide employees and their representatives advanced notice and disclosure of worker-impacting AI
 - Provide clear disclosures about what information will be collected, how long it will be stored, and what it will be used for
 - Where feasible, allow workers to request, view, and submit corrections for individually-identifiable data used to make significant employment decisions



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Dep't of Labor's AI Best Practices (cont.)

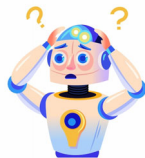
- Employers should protect labor and employment rights
 - Do not use AI systems that interfere with or have a chilling effect on protected activities like improving working conditions
 - Worker-impacting AI should not be used to reduce employees' wages, break time, or benefits



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Dep't of Labor's AI Best Practices (cont.)

- Employers should protect labor and employment rights
 - Ensure AI used to prioritize or schedule work is helping to implement fair and predictable scheduling practices (as opposed to creating unpredictable or erratic schedules)
 - Avoid collecting, retaining, or otherwise handling employee data that is not necessary for a legitimate and defined business purpose



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Closing Thoughts

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Closing Thoughts

- Treat AI for what it is: a helpful tool that (like any tool) needs monitoring and upkeep
- AI-driven decisions in HR should always be subject to human oversight
 - Especially true for major decisions
- Scrutinize the AI and its developer
 - Test the AI internally before implementation
 - Audit the AI during use
 - Get employee feedback on AI
 - Check on the about the developer's credibility (e.g., reputation, mission statement, past liabilities)



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Closing Thoughts (cont.)

- Apply best practices
 - Promotes efficiency
 - Reduces liability
 - Prepares your company for future government regulation/oversight
- When in doubt, consult with an employment and labor attorney



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To download a PDF handbook of today's seminar, including presentations and materials, please scan the QR code or visit parsonsbehle.com/idaho-seminar



Thank You



Thank You



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13th Annual Idaho Employment Law Seminar

Wage and Hour: Hot Topics and Real-Life Examples of Employers Running Afoul of the Fair Labor Standards Act

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Wage and Hour: Hot Topics and Real-Life
Examples of Employers Running Afoul of
the Fair Labor Standards Act

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Oct. 14, 2025 | Boise Centre East

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The Fair Labor Standards Act

Susan

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Fair Labor Standards Act

- The FLSA is the primary federal law governing wage and hour standards including minimum wage and overtime pay for most public and private employers
- FLSA requires covered employers to pay nonexempt employees at least:
 - The federal minimum wage for all hours worked
 - Overtime compensation of at 1.5 time the employee's regular rate of pay for all hours worked over 40 in any workweek



Fair Labor Standards Act

- The Wage and Hour Division ("WHD") of the Department of Labor ("DOL") enforces the FLSA by suing or imposing civil monetary penalties on employers
- In 2024, the DOL reported it recovered over \$149.9 million in back wages from employees on behalf of 125,301 employees

VIOLATION	BACK WAGES	NO. OF EMPLOYEES
Overtime	\$126,967,097	101,043
Minimum Wage	\$15,306,067	21,543
Tip Related	\$7,410,410	10,651
Retaliation	\$274,596	60



Back Wages Recovered by Industry



Fair Labor Standards Act

- Employees may bring a private action for unpaid minimum wages, overtime, tip violations, and retaliation
- These actions can be brought individually or as class actions (have your employees sign a [class action waiver](#))
- Prevailing plaintiffs may also be awarded attorney's fees and costs
- In 2024, 5,354 actions related to the FLSA were filed in United States Federal Courts



Preliminary and Postliminary Time

Christina



Compensation for Time Spent Before and After Work

- Whether employees have to be compensated for time spent at work before they start working (preliminary time) or after working (postliminary time)
 - Integral to work
 - More than de minimis



Integral and Indispensable Test

- Activities which are an integral and indispensable part of the principal activities
 - Intrinsic element of those principal activities and an activity the employee **cannot dispense** with if they are to perform their principal activities
 - Whether the activity is **linked to the productive work** the employee is to perform

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De Minimis Time Need Not Be Compensated

- Even if an activity is found to be a principal activity it may not be compensable if it is de minimis
- The de minimis doctrine provides that "insubstantial or insignificant periods of time which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded."
- Courts balance three factors: (1) the practical administrative difficulty of recording the additional time; (2) the size of the claim in the aggregate; and (3) whether the employee performed the work on a regular basis

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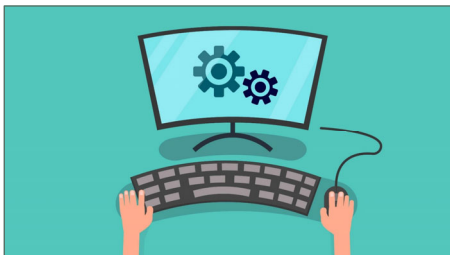
Peterson v. Nelnet Diversified Solutions, LLC, 15 F.4th 1033 (10th Cir. 2021)

- Call center employees whose principal activities included servicing loans and communicating with borrowers were required to boot up their computers and launch software before clocking in each day
 - Is this integral?
- These preshift activities took approximately two minutes per shift
 - Is this de minimis?
- A call center employee filed a class action, which over 350 individuals joined. Total lost wages were alleged to be approximately \$32,000.
- Nelnet argued that these preshift activities were not part of the employee's principal activities and that the time was de minimis

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What Did the Court Decide?



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

On October 8, 2021, the Tenth Circuit held that employees of a call center who spent 2-3 minutes per day booting up their computer needed to be paid for that time.

▪ The costs were **not de minimis** because:

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

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

What did Nelnet have to pay in settlement?

- \$6,000 to class lead
- \$100 to each of 29 opt-in plaintiffs
- Not too bad?

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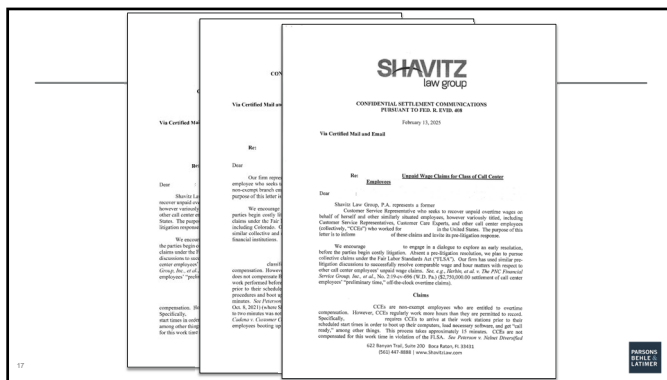
Peterson v. Nelnet Diversified Solutions, LLC, 15 F.4th 1033 (10th Cir. 2021)

What did Nelnet have to pay in settlement?

- \$6,000 to class lead
- \$100 to each of 29 opt-in plaintiffs
- Attorneys' fees of \$1,600,000

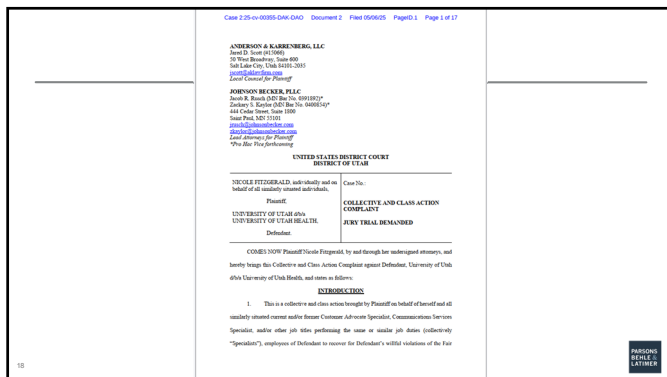
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Independent Contractors

Susan

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Employee or Independent Contractor?

- To be protected by the minimum wage and overtime pay requirements of the FLSA, a worker must be an "employee" of the employer
- Independent contractors are not protected by the FLSA
- Courts use a six-factor "economic reality" test to determine if an employment relationship exists
 - The goal is to determine if the worker is **economically dependent** on the employer for work **or is instead in business for themselves**
 - No single factor is determinative, and courts look to the **totality of the circumstances**

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Economic Reality Test

1. **Opportunity for profit or loss depending on managerial skill**
 - Does the worker earn profits or suffer losses through their own independent effort and decision making?
2. **Investments by the worker and the employer**
 - Does the worker make investments that are capital or entrepreneurial in nature?
3. **Permanence of the work relationship**
 - What is the nature and length of the work relationship?
 - Work that is sporadic or project based with a set end date that allows the worker to take on other jobs favors independent contractor status
 - Work that is continuous, has no end date, or is exclusive favors worker status

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Economic Reality Test

4. Nature and Degree of Control

- What level of control does the employer have over the performance of the work and the economic aspects of the work relationship?
- Does the potential employer control hiring, firing, scheduling, prices, pay rates, supervise the work, have the right to discipline worker, or limit the worker's ability to work for others?

5. Is the work performed integral to the employer's business?

- If the work performed is critical, necessary, or central to the employer's principal business this favor employee status

6. Special Skills and Initiative

- Does the worker use their own specialized skills and efforts to support or grow the business?

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Brant v. Schneider National (7th Cir. 2022)

- Schneider National Inc. ("Schneider") is a freight carrier that owns thousands of trucks
- In 2020, Schneider designated more than a quarter of its drivers as independent contractors
- These independent contractors are known as "owner-operators." They often own their own trucks and drive for carriers of their own choosing.
- Brant was hired as an owner-operator. But Brant did not own his own truck.
- Instead, Brant leased a truck from Schneider and signed (1) a Lease of the truck; and (2) an Operating Agreement.



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Operating Agreement

Brant:	Schneider:
◦ Leased the truck back to Schneider/ Received 65% of the gross revenue for shipments hauled for Schneider ◦ Determined "the manner, means, and methods of performance of all Freight Transportation Services." ◦ Chose which shipments to accept or reject; Could hire other drivers to take some or all responsibility for a shipment ◦ Was responsible for providing his own truck, could select routes, manage his schedule, weigh and inspect shipments, and pay for all his own operating costs	◦ Required Brant to comply with the same operational standards and policies as employee drivers ◦ Right to remotely gather/monitor data about Brant's schedule, use data "for any reason," and terminate the agreement for traffic law violations ◦ Charged a fee if Brant hired another driver ◦ Sole discretion to deny Brant permission to haul for other carriers; Charge for third-party monitoring to haul for other carriers. ◦ Would default lease if Brant terminated Agreement without permission; Brant would be required to pay all remaining sums due on the Lease.

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***Brant v. Schneider National* (7th Cir. 2022)**

- Brant sued Schneider for misclassification as an independent contractor and failure to pay minimum wage.
- Brant argued:
 - He **struggled to haul enough profitable shipments** from Schneider to pay his operating costs and charges
 - He **had to accept as many loads from Schneider as he could** even if they were undesirable.
 - In one week, he **drove over 3,000 miles** but after the expenses Schneider deducted, he **received zero net pay**
 - He **sought to terminate the Agreement** to haul freight for another carrier, **but he could not** because the security deposit sought by Schneider was so high

The trial court dismissed the claim and relied largely on the provisions of the contract, which "gave him considerable control over his business"

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What did the Appeals Court Decide?



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***Brant v. Schneider National*, 43 F.4th 656 (7th Cir. 2022)**

- Court dismissed the idea that the contract on its face controls:

If we looked only at the face of Brant's contracts with Schneider, we would agree with the district court that Brant could not be deemed an employee. It is well established, however, that the terms of a contract do not control the employer-employee issue under the Act. We look instead to the 'economic reality of the working relationship' to determine who is an employee covered by the FLSA.



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Brant v. Schneider National, 43 F.4th 656 (7th Cir. 2022)

- Although the Agreement appeared to give Brant control over the business that the “economic realities were different.”
 - Schneider **controlled advertising, billing, and negotiation** with customers and **required Brant to comply with its internal policies**
 - Schneider remotely **monitored Brant's driving**, and he was **subject to discipline**
 - Even though he was allowed to hire other drivers, **margins were so tight that the additional fee charged under the Agreement made this impossible**
 - Although he was required to supply his own truck, in fact **he was just leasing it from Schneider**
 - Even though he could pick his own routes, **the timeframes for the jobs were so tight that he had little practical control over his route**

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Brant v. Schneider National, 43 F.4th 656 (7th Cir. 2022)

Profit and Loss (Employee)

- Brant could not turn down shipments from Schneider for more profitable options because the risk of defaulting was too high, and Schneider did not provide information on what the alternatives were
- Brant was not allowed to turn down unprofitable shipments and his contract would be terminated if he refused assignments
- The system to request permission to drive for other carriers was so complex and onerous that drivers did not use it and the fact that he had to pay for third-party monitoring would have made it cost-prohibitive.

Investment Factor (Employee)

- Although Brant leased a truck for \$40,000 per year, Schneider offered the truck with no down payment, no payment during the first week of work, and no out of pocket investment. “Thus, Brant was totally dependent on Schneider’s credit.”

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Brant v. Schneider National, 43 F.4th 656 (7th Cir. 2022)

Permanency and Duration Factor (Employee)

- Even though the Agreements were for terms, the Agreements were regularly renewed, and that Schneider sent reminder notices to drivers who failed to sign new contracts

Special Skills (Employee)

- “Commercial truck-driving requires skills beyond those of automobile drivers . . . the skills demanded by Schneider do not set Brant apart from the many other commercial truck drivers whom Schneider treats as employees.”

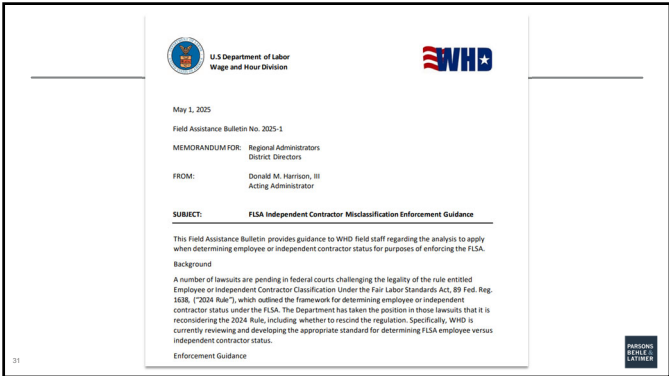
Integral Part of Employer's Business (Employee)

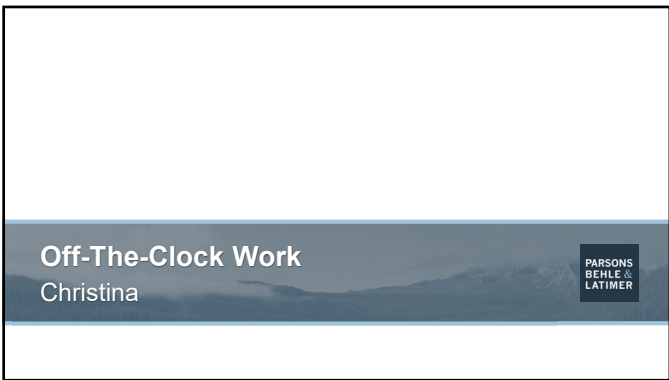
- “Schneider was a freight hauling company and Brant alleges that he hauled shipments for Schneider in the same way as the company's employee-drivers”

Takeaway: Contract language will not outweigh evidence of conflicting economic realities

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Off-The-Clock Work

- Off-the-clock work is time a nonexempt employee spends working for which they are not properly compensated
- Under the FLSA, an employer must pay for all work **it knows about**, even if the employer:
 - **Did not ask** an employee to perform the work
 - **Did not want** an employee to perform the work
 - **Has a rule** against performing unauthorized work
- DOL regulations note that "it is the **duty of the management to exercise its control** and see that the work is not performed if it does not want it to be performed. It **cannot sit back and accept the benefits without compensating for them**. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so." 29 C.F.R. § 785.13.

Off-The-Clock Work

- However, under the FLSA, an employer does not have to pay work **that it does not know about or have reason to know about**
- "An employer has constructive knowledge of an employee's work if it should have acquired knowledge of that work through **reasonable diligence**." *Allen v. City of Chicago*, 865 F.3d 936, 938 (7th Cir. 2017).
- "One way an employer can exercise reasonable diligence is by establishing a **reasonable process for an employee to report uncompensated work time**." *Id.*
- However, "an employer's formal policy or process for reporting overtime will **not protect the employer if the employer prevents or discourages accurate reporting in practice**." *Id.*



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Allen v. City of Chicago, 865 F.3d 936 (7th Cir. 2017)

- The Chicago Police Department's Bureau of Organized Crime investigates gangs, narcotics, and human trafficking
- Due to the nature of their work, employees were sometimes required to work outside their scheduled shift
- To obtain overtime compensation members of the Bureau would submit "**time due slips** to their supervisors"
- The time due slips were small pieces of paper with a spot to write in what work was done
- "Officers usually put a short vague, phrase in the space. The slip does not ask how the work was done, and officers do not typically include that information. **Supervisors approve the time**, and the slips are sent to payroll to process."



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Allen v. City of Chicago, 865 F.3d 936 (7th Cir. 2017)

- The department issued **BlackBerrys** which employees sometimes used in their off-duty work.
- Allen and fifty-one other officers filed a **class-action** lawsuit alleging that they were not paid overtime for off-duty work they did on their BlackBerrys from 2011 to 2014
- The following facts were established at trial:
 - Some work Plaintiffs performed on their BlackBerrys was compensable
 - **Supervisors knew** Plaintiffs sometimes performed off-duty work on their BlackBerrys
 - **Supervisors did not know, or have reason to know, that plaintiffs were not submitting slips** or being paid for that work
 - It would have been impractical for supervisors to check the slips and compare them with what they knew the plaintiff did that day
 - **Plaintiffs never told their supervisors** they were not being paid for such work



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Allen v. City of Chicago, 865 F.3d 936 (7th Cir. 2017)

- Plaintiffs argued the Department had a policy not to compensate them for off-duty work on their BlackBerrys because:
 - (1) A Bureau-Wide **belief that officers should not turn in slips** for BlackBerry work. Evidence on this point was contradictory.
 - (2) There were **written policies** to that effect, including:
 - A General Order stating officers would only be compensated for off-duty use if the officer was on a particular type of assignment or if a superior directed and authorized the overtime. Officers signed a **compliance statement** acknowledging they **would not be compensated** for accessing a device off-duty.
 - A 2013 General Order on the same topic which said that off-duty officers “**will not use**” devices except under the circumstances allowed.
 - The trial court found that these orders were described as “guidelines” and that the “**orders actually had no effect on plaintiffs or their supervisors**” based on uniform testimony to that effect.

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Allen v. City of Chicago, 865 F.3d 936 (7th Cir. 2017)

- (3) **Pressure to reduce overtime** in general. Supervisors would occasionally discuss the topic or send emails to that effect. However, the court noted that “this was not a concerted effort, and it was unsuccessful.”
- (4) **Pressure not to seek compensation for BlackBerry work** specifically. The court found that the examples provided by the plaintiffs concerned overtime generally and that supervisors did not tell officers not to submit slips for BlackBerry work.

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What Did the Court Decide?



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Allen v. City of Chicago, 865 F.3d 936 (7th Cir. 2017)

- The plaintiffs had worked overtime on their Blackberrys. However, the trial court denied the claim because the plaintiffs **failed to show that the “Bureau actually or constructively knew they were not reporting that work.”**
- The Seventh Circuit Court of Appeals **affirmed**. The court explained that an employer did not have a duty to investigate further when an employee “worked time they were scheduled to work, sometimes with their supervisor’s knowledge,” and “**had a way to report that time**, but they did not use it, through no fault of their employer.”
- The court further rejected plaintiff’s argument that the Bureau could have compared time slips to call and email records generated by the Blackberrys. The court explained that the constructive knowledge standard only asks the court to consider what the employer should have known with **reasonable diligence** not what it could have known.

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Allen v. City of Chicago, 865 F.3d 936 (7th Cir. 2017)

▪ Take Aways

- Have a policy whereby employees can report problems with their paychecks or any work that has not been compensated
- You can forbid overtime without approval, but be careful
- Educate supervisors about off the clock work
- If you crack down on overtime, make sure you are not only cracking down on reporting

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Exempt Employees

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Exempt Employees

▪ FLSA exempt categories :

- Administrative Employees
- Commissioned Sales Employees
- Computer Professional Employees
- Executive Employees
- Highly Compensated Employees
- Outside Sales Employees
- Professional Employees

A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations in this part. 29 CFR § 541.2.



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Exempt Employees

▪ In order to be classified as **Administrative Employee** under the FLSA:

- The employee must be compensated on a salary or fee basis at \$684 a week
- 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**
 - include the exercise of discretion and independent judgment on significant matters.

▪ To meet the first requirement "an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment." 29 CFR § 541.201 .

▪ Also known as the "administrative-production dichotomy." *McKeen-Chaplin v. Provident Sav. Bank, FSB*, 862 F.3d 847, 851 (9th Cir. 2017).



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Marcus v. Am. Cont. Bridge League, 80 F.4th 33, 47 (1st Cir. 2023)

- American Contract Bridge League is the largest bridge organization in the world, with over 162,000 members
- ACBL promotes bridge and serves the "bridge-related interests of its members"
- ACBL sanctions bridge tournaments, running National tournaments and providing staff to direct and support regional and sectional tournaments.



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Marcus v. Am. Cont. Bridge League, 80 F.4th 33, 47 (1st Cir. 2023)

Tournament Directors

- "Supervise a duplicate bridge contest"
- Rule on disputes; Maintain discipline; Ensure timely play; Issue penalties

National Tournament Directors

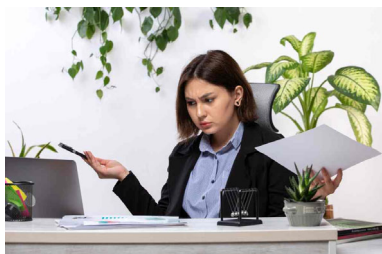
- Also supervise bridge contests
- Additional duties such as training and mentoring other directors; Drafting tournament regulations

Field Supervisors / Area Managers

- Tournament planning/organization, operations, and directing
- Hiring/firing, promotions, recruiting, and training
- Referee game play while supervising direct reports
- Client relations

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Which employees are "Administrative Employees"?



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Which Employees are "Administrative Employees"?

▪ Tournament Directors?

- **No.** Tournament Directors "provide the service that [ACBL] is in the business to provide" and thus are "producing the good or service that is the primary output of [ACBL's] business."

▪ National Tournament Directors?

- **No.** Although they have additional duties, "these duties all go towards producing an ACBL-sanctioned bridge tournament."

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Which Employees are “Administrative Employees”?

▪ Field Supervisors/Area Managers

- Yes! Although they also direct tournaments “the character of the employee’s job as a whole reveals that their primary duty . . . Relate[s] to ACBL’s management or general business operations.”
- **Keeping clients happy and maintaining the overall reputation of the employer:** They participate in strategic planning, focusing on maintaining the standards of player satisfaction to ensure satisfaction of ACBL’s customers.
- **Focusing on improving customer service and satisfaction:** They engage in “high-level customer service-oriented responsibilities” such as being the first point of contact for issues and establishing and maintaining effective relationships with sponsors.
- **Supervision of other employees:** They have significant supervisory responsibility over employees.
- **Substantial effect on business operations; commit the company in matters that have significant financial impact; and bind the company on significant matters.**

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Liquidated Damages

Christina

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Liquidated Damages

- Double damages
- However, “if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was **in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act**” a Court has the discretion not to award liquidated damages. 29 USC § 260.
- An employer has the burden to show liquidated damages are inappropriate, and “[d]ouble damages are the norm, single damages the exception.” *Chao v. A-One Med. Servs., Inc.*, 346 F.3d 908, 920 (9th Cir. 2003).

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Su v. E. Penn Mfg. Co., No. CV 18-1194, 2023 WL 6849033 (E.D. Pa. Oct. 17, 2023)

- East Penn Manufacturing Company ("East Penn") required most of its hourly employees to wear uniforms and to take post-shift showers, as it manufactured lead batteries, accessories, wires, cables, and related components.
- East Penn paid employees "reasonable" amount of time for showering/donning uniforms but not the actual time.
- Jury unanimously found that East Penn violated the FLSA and **owed \$22,253,087.56 in back wages** for failing to pay actual time.
- The Department of Labor requested an **additional \$22,253,087.56 in liquidated damages**

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Su v. E. Penn Mfg. Co., No. CV 18-1194, 2023 WL 6849033, at *4 (E.D. Pa. Oct. 17, 2023)

- The trial court **declined to award liquidated damages**:
- "East Penn **was not aware** when it adopted its 2003 Policy that it needed to pay for actual, as opposed to 'reasonable,' time employees spend on clothes-changing and showering.
- "East Penn demonstrated that it actually **took affirmative action to ascertain its FLSA obligation** each time an issue on clothes-changing or showering arose, well before Wage and Hour commenced its investigation in 2016. "
- "East Penn **relied in good faith on the advice** of a properly experienced labor and employment attorney who, at East Penn's request, specifically attempted to ascertain whether East Penn's policies regarding donning, doffing, and showering complied with the FLSA."
- East Penn "tailored its policies in response to, and consistent with, the information and guidance it received from its attorney."
- "East Penn submitted evidence that Ms. Snyder and other members of management are members of the Society of Human Resource Management."

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Payroll Audit Independent Determination (PAID)

Resolve FLSA and FMLA Violations Quickly and Avoid Litigation

The Wage and Hour Division (WHD) offers the Payroll Audit Independent Determination (PAID) program to help employers resolve potential minimum wage and overtime violations under the Fair Labor Standards Act (FLSA), as well as certain potential violations under the Family and Medical Leave Act (FMLA). This program allows employers to correct mistakes efficiently and ensure employees receive back wages or other remedies promptly, all while avoiding litigation.

Under PAID, employers are encouraged to conduct audits and, if they discover FLSA or FMLA violations, to self-report those violations. Employers may then work in good faith with WHD to correct their mistakes and to quickly provide 100% of the back wages due or other remedies to their affected employees.

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Thank You



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13th Annual Idaho Employment Law Seminar

One Unlikely Rise, One Potential Demise: The Realities of Reverse Discrimination Claims and DE&I Initiatives in 2025

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One Unlikely Rise, One Potential Demise:
The Realities of Reverse Discrimination
Claims and DE&I Initiatives in 2025

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Oct. 14, 2025 | Boise Centre East

Legal Disclaimer and PDF Handbook

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One More Disclaimer . . .

This presentation is based on recent legal updates, caselaw developments, and breaking news, not Mark or Elena's point of view.

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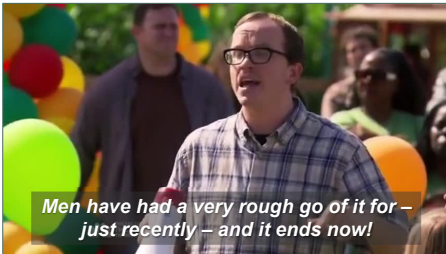
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Rise of Reverse Discrimination Claims

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Rise of Reverse Discrimination Claims



*Men have had a very rough go of it for –
just recently – and it ends now!*

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What even *is* reverse discrimination?

Two Perspectives

- Discrimination against majority-group plaintiffs, e.g., discrimination against a male, white, American, or straight employee.
- "The EEOC's position is that there is no such thing as 'reverse' discrimination; there is only discrimination." What You Should Know About DEI-Related Discrimination at Work.

https://www.eeoc.gov/wysk/what-you-should-know-about-dei-related-discrimination-work#_edn26

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Ames v. Ohio Dep't of Youth Services, 6th Cir. 2023

- Plaintiff Marlean Ames is a heterosexual woman who, after 30 years of public service applied for a promotion to a Bureau Chief position and was instead demoted.
- The promotion to Bureau Chief was given to "gay woman," and her position was given to "gay man."
- The decisionmakers for the promotion/demotion were heterosexual.
- The district court granted summary judgment the employer and appeal was taken to the 6 Circuit.



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Ames v. Ohio Dep't of Youth Services, 6th Cir. 2023



- Reviewing the lower court's decision, the 6th Circuit applied the "background circumstances" test, i.e., it asked whether Ames had established "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority."
- The court observed that "otherwise [i.e., if Ames had alleged that she was gay and that a straight person was promoted] Ames's prima facie case was easy to make."
- Concluding that Ames had not satisfied the higher "background circumstances" test, the 6th Circuit affirmed summary judgment in favor of the employer.

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Reverse Discrimination—Circuit Split

- **The Majority (7 Circuits – applicable in Idaho)**
 - The test to show "reverse discrimination" is the same as any other discrimination
 - Circuits: 1st 2nd 3rd 4th 5th 9th 11th
- **The Minority (5 Circuits – applicable in Utah, Colorado, and Wyoming)**
 - Majority-group plaintiffs had to show something more:
 - "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. 6th 7th 8th 10th

On June 5, 2025, the U.S. Supreme court resolved the split in **Ames v. Ohio Department of Youth Services.**

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Ames v. Ohio Department of Youth Services



In a unanimous U.S. Supreme Court decision, authored by Justice Ketanji Brown Jackson, the background circumstances test for majority-group plaintiffs was rejected.

"Congress left no room for courts to impose special requirements on majority-group plaintiffs alone."

Strategies to Avoid Reverse Discrimination Claims

Does this require a whole different approach?



Strategies to avoid *all* discrimination claims:

- Be clear in all communications, and policies, that all employment decisions are merit-based.
- Include those clear communications in your regular anti-discrimination and anti-harassment training.
- Take allegations of discrimination and harassment by employees seriously.
- As you would with any employee, thoroughly investigate allegations of misconduct against a majority-group employee before moving to discharge, including by interviewing the accused employee.
- Ensure your DEI practices and DEI communications are legal.

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Image credit: Florida Business Journal

The Decline of DE&I?

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What's been going on?



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Let's start with the Executive Orders . . .



. . . there have been a lot of them!

We'll focus on three.

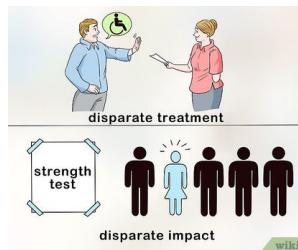


Executive Order 12250

On April 23, 2025, President Trump issued an Executive Order entitled **"Restoring Equality of Opportunity and Meritocracy"**

The Purpose: "eliminate the use of **disparate-impact liability** in all contexts to the maximum degree possible."

The Rationale: Disparate-impact liability "all but requires individuals and businesses **to consider race** and engage in racial balancing to avoid potentially crippling legal liability."



Executive Order 14151

EO (14151), titled **"Ending Radical and Wasteful Government DEI Programs and Preferencing"**, requires the termination of all "discriminatory programs, including illegal [DEI] mandates, policies, programs, preferences and activities in the Federal Government, under whatever name they appear."

It requires that federal agencies and contractors terminate all (i) DEI offices and positions, (ii) "equity" plans, actions, initiatives or programs and "equity-related" grants or contracts, and (iii) DEI "performance requirements for employees, contractors or grantees."



Executive Order 14173

EO (14173), titled "**Ending Illegal Discrimination and Restoring Merit-Based Opportunity**," rescinds a six-decade old EO that required **federal contractors** to adopt affirmative action practices for hiring/promoting women and minorities.

Requires federal contractors to end "illegal DEI" practices and to certify that their DEI programs do not violate anti-discrimination law.

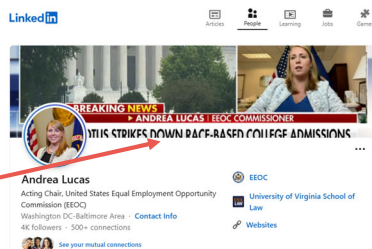
Executive Order 14168

EO (14168), titled "**Defending Women from Gender Ideology Extremism**," defines "sex" as an individual's "immutable biological classification as either male or female," removing any concept of "gender identity."

Directs federal agencies to "remove all statements, policies, regulations," etc., that "inculcate **gender ideology**" and prohibits the use of federal funds to promote gender ideology.

The order instructs the attorney general to (i) clarify that Title VII does not require gender identity-based access to single-sex spaces and (ii) ensure the "freedom to express the binary nature of sex" and right to single-sex spaces.

Meet Andrea Lucas, the Newly Appointed Acting Chair of the Equal Employment Opportunity Commission.



And check out her LinkedIn profile header.

Here's what she says she's hoping to do:

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



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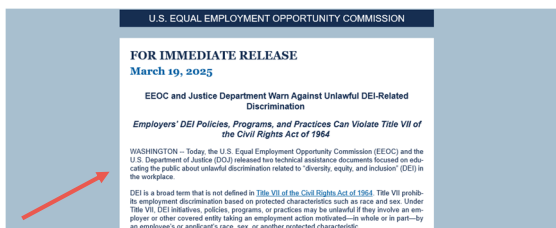
Specifically, she's interested in:

- "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"; and
- "protecting workers from religious bias and harassment, including antisemitism."

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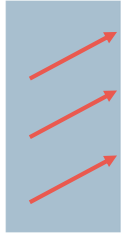
New EEOC Guidance Documents . . .



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Discrimination based on protected classes has long been illegal.



In the past five years, DEI policies, programs, and practices have become increasingly prevalent in many of our nation's largest and most prominent businesses, universities, and cultural institutions. The widespread adoption of DEI, however, does not change longstanding legal prohibitions against the use of race, sex, and other protected characteristics in employment.

To help educate the public about how well-established civil rights rules apply to employment policies, programs, and practices—including those labeled or framed as "DEI"—the EEOC and the DOJ today released a joint one-page technical assistance document, "What You Should Know About DEI-Related Discrimination at Work." Both documents are based on Title VII, existing EEOC policy guidance and technical assistance documents and Supreme Court precedent.

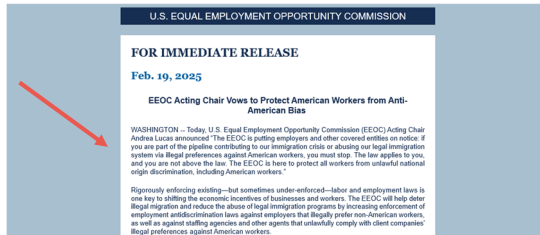
"Far too many employers defend certain types of race or sex preferences as good, provided they are motivated by business interests in 'diversity, equity, or inclusion.' But no matter an employer's motive, there is no 'good,' or even acceptable, race or sex discrimination," said EEOC Acting Chair Andrea Lucas. "In the words of Justice Clarence Thomas in his concurrence in *Students for Fair Admissions*, two discriminatory wrongs cannot make a right."

Lucas emphasized, "While the public may be confused about what rules apply to DEI, the law itself is clear. And there are some serious implications for some very popular types of DEI programs. These technical assistance documents will help employees know their rights and help employers take action to avoid unlawful DEI-related discrimination."

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More EEOC Press Releases . . .



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What does the new guidance say?

Under Title VII, DEI policies, programs, or practices may be unlawful if they involve an employer or other covered entity taking an employment action **motivated**—in whole or in part—by an employee's race, sex, or another protected characteristic.

In addition to unlawfully using quotas or otherwise "balancing" a workforce by race, sex, or other protected traits, DEI-related discrimination in your workplace might include the following:

- Disparate treatment (exclusion from training or fellowships, hiring, or promotion)
- Limiting membership in workplace groups, or separating employees into groups based on protected class
- Harassment
- Retaliation

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Case Studies: How Not to DE&I

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Duvall v. Novant Health, Inc. (4th Circuit 2024)

- 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 . . .



- Novant adopted a DEI plan that included an express commitment to add diversity to the executive and senior leadership teams, including with quotas and targets.
- Novant adopted this philosophy: "Our team members should reflect our communities. Our leadership should reflect our team members."
- In 2019, Novant's DEI Council celebrated its achievement of increasing Black representation in leadership.

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Duvall continued . . .

- In July 2018, Novant fired Duvall and replaced him with a white woman and two Black women
- 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"
- But that testimony stood in stark contrast to statements the supervisor made in December 2018 to a recruiter, when he praised Duvall's performance

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Duvall continued . . .

- The jury awarded Duvall \$10 million in punitive damages
- The *Duvall* court highlighted several things
 - The use of racial quotas
 - The race of the individuals who replaced Duvall
 - The supervisor's "shifting, conflicting, and unsubstantiated explanations for Duvall's termination" were "merely 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 and be consistent.
- When terminating an employee, provide the actual reason—don't say "not a good fit" or "going in a different direction"

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

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



DEI QUOTA

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Dill continued . . .

Reuters World • Business • Markets • Sustainability • Legal • Entrepreneurship • Technology • Investigations • More

IBM must face white worker's lawsuit over diversity goals

By David Weaver

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



D Aa <

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

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Dill continued . . .

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

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Lessons from *Dill*

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

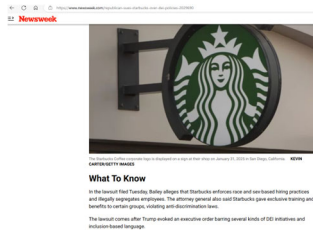
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What does effective and legal DE&I look like—i.e. how to advance DE&I without provoking claims by majority groups?

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For starters . . . no quotas



In February, Tennessee AG sued Starbucks. The company had published goals of achieving 30% BIPOC (Black, Indigenous, and People of Color) representation at corporate levels, and 40% at retail and manufacturing levels by 2025.

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What to do:

- Get decisionmakers together, and start making a plan
- Review existing materials and programs to ensure legal compliance
- Think about messaging—especially public-facing materials, which may create the highest legal risk
- Think outside the box: DE&I is a buzzword, but each of its independent components may not be. And think about these alternatives:
 - fairness, belonging, inclusion, respect, tolerance, thoughtfulness

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What to do:

- Document your approach to DE&I in writing
 - How do you define that acronym (or any new terms you've adopted)?
 - What are your practices for outreach, recruitment, retention, training, promotion?
 - What data collection do you do—if any?
- Train managers on how to communicate about—and implement—your initiatives
- Work with your legal team
- Watch for updates

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Harvard Business Review Tip:

Diversity And Inclusion

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

by Kenji Yoshino, David Grogan and Christina Joseph
February 11, 2020



David Grogan Images

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

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Think About Your Messaging

- Re: your DE&I initiative, instead of “DEI uplifts historically disadvantaged groups to ensure equal outcomes,” try:
 - “Talent is everywhere but opportunity is not. DEI closes the gap.” (HBR)
 - “DEI enables people of all identities and backgrounds to feel welcome and do their best work.” (HBR)
 - We value the unique perspective each individual brings to our organization.
 - We believe anyone, from any background, is capable of excellence.

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Think About Your Messaging

- In messaging about hiring and promotion, instead of “We use diversity hiring to recruit people from underrepresented racial and ethnic backgrounds,” use:
 - “While we strive for a diverse mix of candidates, all employment decisions are made without regard to race, sex, or other protected characteristics.” (HBR)
 - “We look for candidates of any background who will advance our culture.” (HBR)
 - We hire and promote based on individual excellence.

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What *not* to do:

- Set quotas or targets about employees or leaders hired or promoted based on protected classes
- Require a “diverse slate” of interview or final round candidates
- Give incentives—either carrots or sticks—based on recruiting candidates with certain protected-class profiles
- Make specific benefits, grants, or participation in groups available only to employees of certain protected classes
- Panic, and call the whole thing off

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What about affinity groups?

- Make sure groups are inclusionary, not exclusionary
- Set a focus on creating an atmosphere of respect, good communication, and dignity at work
- Watch out for benefits or training available *only* to members of certain protected classes . . .
 - In *Muldrow v. City of St. Louis*, a 2024 SCOTUS decision, the court lowered the standard for the degree of harm an employee must experience to claim Title VII discrimination from “material” or “significant” harm to “some harm.”

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What about diversity training?

- Set goals:
 - To help foster an atmosphere of respect
 - To help create an environment where everyone feels valued
 - To help identify unconscious motivations, so that your awareness helps you make conscious decisions
 - To help provide tools and tips to make the workplace more respectful and productive
- Make it inclusionary, not exclusionary
- Share the science behind it
- Base the training on behaviors, not beliefs
- Don't make broad statements about any groups of people

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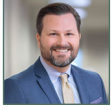
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Thank You



Thank You



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Policy Evolution: Changing Your Company's Policies to Keep Up With Changing Times

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Policy Evolution: Changing Your Company's
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Oct. 14, 2025 | Boise Centre East

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Nothing Lasts

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You Can't Spell "Poetry" Without Corporate Policy

ORIGINAL POETRY.

OZYMANIAS.

I met a Traveller from an antique land,
Who said, "Two vast and trunkless legs of stone
Stand in the desert. Near them, on the sand,
Half sunk, a shattered visage lies, whose frown,
And wrinkled lip, and sneer of cold command,
Tell that its sculptor well those passions read,
Which yet survive, stamped on these lifeless things,
The hand that mocked them, and the heart that fed:
And on the pedestal these words appear:
"My name is Ozymias, King of Kings;"
Look on my works ye Mighty, and despair!
Nothing beside remains. Round the decay
Of that colossal Wreck, boundless and bare,
The lone and level sands stretch far away.

CHILTON.



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You Can't Spell "Poetry" Without Corporate Policy

NOTHING GOLD CAN STAY

NATURE'S first green is gold,
Her hardest hue to hold.
Her early leaf 's a flower;
But only so an hour.
Then leaf subsides to leaf.
So Eden sank to grief,
So dawn goes down to day.
Nothing gold can stay.



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You Can't Spell "Poetry" Without Corporate Policy

Both poems were actually written by poets desperate to excuse their 90s fashion faux pas.



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Corporate Pioneers: Visionaries or Wafflers?

Big tech firms ramp up remote working orders to prevent coronavirus spread

By Clara Duffy CNN Business
5 minutes read · Updated 4:48 PM EDT, Thu March 12, 2020

Amazon Extends Work From Home Policy Until January

Richard Bradley Senior Staff
From the world's richest

WASH. POST/OUTLOOK



Amazon now says remote work OK 2 days a week

by The Associated Press | Thu, June 10th 2021 at 5:54 PM

Amazon Softens Return-to-Office Policy, Says Remote Work Is Fine

- CEO says managers will decide when employees return to office
- Company wanted workers to resume office work in January

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Corporate Pioneers: Visionaries or Wafflers?

Amazon tells staff to get back to office five days a week

17 September 2020
Written by Andy Stone, Staff Writer
September 16, 2020
6 min read

The message below was shared with Amazon employees today.

Hey team, I wanted to send a note on a couple changes we're making to further strengthen our culture and team.

First, for perspective, I had good about the progress we're making together. Since AWS, and advertising continue to grow on very large teams, there's a lot of progress to report, and new investment across the board. Support, Healthcare, and internal offices are working really hard. And all of the ways that we're growing and learning, we're also continuing to make progress on our cost structure and operating leverage, which isn't easy to do. Overall, I like the direction in which we're heading and appreciate the hard work and ingenuity of our team globally.

When I think about my time at Amazon, I never imagined I'd be at the company for 27 years. My plan (which my wife and I agreed to on a bar napkin in 1983) was to be here a few years and move back to NY. Part of why I've stayed has



Most Amazon workers considering job hunting due to 5-day in-office policy: Poll

Who would this poll be good for?

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Corporate Pioneers: Visionaries or Wafflers?



Facebook executive: We're trying to double our diverse workforce in 4 years, even if it doesn't work

Published Mon, Feb 10 2020-9:01 AM EST · Updated Mon, Feb 10 2020-10:12 AM EST

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Corporate Pioneers: Visionaries or Wafflers?

Jan 10, 2020 - Technology



Exclusive: Meta kills DEI programs

State of play: Friday's memo by Gale — announcing changes to "our hiring, development and procurement practices" — was posted for Meta employees in Workplace, the company's internal communications tool.

- "The legal and policy landscape surrounding diversity, equity and inclusion efforts in the United States is changing," Gale wrote.
- "The Supreme Court of the United States has recently made decisions signaling a shift in how courts will approach DEI ... The term DEI has also become charged, in part because it is understood by some as a practice that suggests preferential treatment of some groups over others."

Illustration: Sarah Orloff/Arca

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Policy Fads vs. Law-Based Changes

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Corporate Fads

Remember when everyone was promising **unlimited PTO**?

It sounds nice on paper. . .

but administering it is a nightmare.

What about FMLA?

What about states that require PTO payout on separation?

What about employees who abuse the system?

What about **remote work**?

What about **marijuana use**?

Sometimes companies really try to **force** things that just aren't going to happen...



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Corporate Fads

Why do we chase corporate-policy fads?

- Do we just assume big companies know what's best?
- Are we doing it to stay competitive with recruiting? Which policies actually make a difference?
- How disruptive will the policy be to our company?

Don't assume that big companies know what they're doing—especially that there's a legal requirement driving their policies

Recognize that changes based on corporate fads aren't the same as changes based on legal requirements/changes



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Fads in the Law

Sometimes it's not corporations that drive policy changes...

... it's the **government**

These changes sometimes come from **congressional** action

For example: the PWFA, the PUMP Act

But because Congress can almost never get anything done...the changes usually come from government **agencies—and increasingly (recently) from Executive Orders**

...Even when they might not be in the right **place** to make those changes...



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Fads in the Law

Agency-level change = Big swings in the policy pendulum



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Changes to Title VII-Related Issues

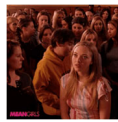
Expansion of protected classes (hairstyles, age (not just over 40), marital status, nepotism)

Anti-DEI (EEOC encouraging plaintiffs to bring reverse discrimination claims)

Mandatory anti-harassment training

Religious Discrimination (*Groff v. DeJoy*; undue hardship no longer means something more than *de minimis* cost, now it's "substantial increased costs")—Many employers have ignored religious accommodations because the burden for avoiding the obligation was so low... NOT ANYMORE!

Adverse Action (now just "some harm")—Could impact internal investigations, how we train managers, etc., because it's easier for plaintiffs to establish discrimination and retaliation



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Changes to Employment and Post-Employment Agreements

Ban on mandatory arbitration in harassment cases (Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFASASHA))

Ban on confidentiality provisions related to sexual misconduct (federal Speak Out Act (pre-dispute agreements); Utah Employment Confidentiality Amendments (condition of employment))



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Section 7 Activity

Stericycle

Under the new standard, the Board analyzes whether an employee “**would reasonably construe**” the applicable rule or policy as **chilling protected conduct** under Section 7 of the National Labor Relations Act.

To avoid a violation, employers must now show that workplace conduct rules are **narrowly tailored** to special circumstances justifying any infringement on employee rights.

Miller Plastics

The Board overruled a 2019 decision that established a checklist of easy-to-follow factors to determine whether complaints raised by an individual are tantamount to group activity protected under the NLRA.

The Board found the checklist unduly narrowed the scope of legally protected conduct, returning to a broad and ambiguous standard where the question of whether an employee has engaged in concerted activity is a factual one based on the “**totality of the record evidence.**”

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Wage-and-Hour Issues

FLSA-exemption threshold (from \$35,568 to \$58,656; for Highly Compensated Employees, from \$107,432 to \$151,164—stayed by federal courts)

Donning and doffing (time must be paid if “integral” and “indispensable”)

State rest/meal break laws (meal break premiums, 20 states require meal breaks, 10 states require rest breaks, MN most recent (1/1/2026), HW contemplating)



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Miscellaneous Changes

PUMP Act (*non-bathroom* space to pump milk)

PWFA (protections for pregnancy, childbirth, related medical conditions; not the same as ADA)

Ban the box (restricting employers from asking about criminal history on initial job applications; federal level: only for fed. Contractors; state level: 37 states + DC, 150 municipalities)

ADA (focus on interactive process / reasonableness of accommodation)

Noncompetes

- State specific
- FTC and NLRB



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SO MANY CHANGES!!!

Doesn't keeping up with all these changes sometimes feel like....



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A Question Before We Move On...

Why do we even have company policies?

- Communicating expectations to workforce and establishing culture
- Promoting consistency
- Recruiting tool
- Assisting in administering discipline
- Providing protection in litigation (legitimate business reasons for termination, avoiding liability, etc.)
- Complying with legal mandates



½ are about communication
½ are about legal protection

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For Communication Purpose...

Do your policies effectively communicate expectations / impact culture?

- How many employees even know about your policies?
- Is the first time an employee finds out about a policy when they're getting disciplined for violating the policy?
- Can't count on employees actually reading the handbook during onboarding
- How are you telling employees about your policies?

Do your policies make a difference for recruiting? Which ones matter?



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A Few “Must-Haves” for Your Policies:

- Robust anti-harassment / discrimination policy + complaint procedure and provide training
- No Section 7 violations (don't prohibit complaining or discussions about wages)
- Pregnancy/childbirth/lactation policies that comply with the PWFA and the PUMP Act (especially lactation breaks)
- No contractual language in your handbook (including in the acknowledgement)
- Leave policies (PTO, FMLA, state-specific requirements)
- Code of Conduct (what do you want to be able to reference in disciplinary meetings and unemployment-benefits hearings?)
- Well crafted job descriptions



Some Things to Consider...

Where do you want to fall on the stingy-vs-generosity spectrum?

- Just provide the bare minimum?
- Or do you want to be the “cool company”?

When are you going to change your policies

- In real time (e.g., as changes in the law come out)?
 - Especially when you move into a new state—might be as simple as having a remote worker in that states
- According to some fixed schedule (e.g., annually)?
- Some combination of the two?

Do you even need the policy? Does it promote a proper purpose?



Best Practices: How to Make a Change



Five Rules for Effective Policy Changes



1. Reckon with your motivation. Be honest about what's driving the policy change.
2. Build on an existing foundation. Identify and incorporate established values and policies.
3. Secure buy-in, in advance. Gather input, especially for complex changes.
4. Get the writing right. Ensure that a policy is clearly written and properly shared.
5. Pre-plan your next check-in. Decide what success looks like and plan for refinement.



Rule 1: Reckon with Your Motivation

Be honest about what's driving your policy change.

~~“Theory E” – Economic Value~~

~~“Theory L” – Potential Liability~~

“Theory O” – Organizational Capability



Dimensions of Change	Theories E and O Combined
Purpose	Explicitly embrace the paradox between economic value and organization capability driven change.
Leadership	Set direction from the top and engage the people below.
Focus	Focus simultaneously on the hard (structures and systems) and the soft (corporate culture).
Planning	Plan for spontaneity.
Motivation	Involvement is used to motivate; compensation is used to recognize, not motivate.
Constraints	Constraints are expert resources who empower employees.

Michael Beer, “Transforming Organizations,” HBR Handbook of Organizational Development (2007).



Rule 1: Reckon with Your Motivation

Be honest about what's driving your policy change.

Ask:

Are we simply trying to reduce the risk of litigation?

Or are we trying to create a policy that attracts or retains employees?

The answer to that question dictates what benefits you're weighing against the cost of the program—and also how that policy is framed.



Example: Parental leave policies



Rule 2: Build on an Existing Foundation

Identify and incorporate established values and policies.



One reason “borrowed policy approaches” fail is that they don’t account for a “borrowing” company’s strengths.

For marketing purposes, your company has a value proposition and points of differentiation. That understanding should drive the way you craft policies, as well.



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Rule 2: Build on an Existing Foundation

Identify and incorporate established values and policies.

Example: Drug-testing policies

What considerations would drive a drug-testing policy for a transportation company?

A medical-services provider?

A tech company?

A retailer?

Note: Don’t start with a blank slate if you don’t have to—rely on existing handbooks or value statements.



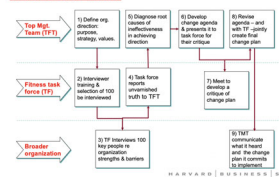
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Rule 3: Secure Buy-in, in Advance

Gather input, especially for complex changes.



The Nine-step SFP Process



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Michael Beer, “Combating Organizational Silence,” Open Access Government (2024).

Rule 3: Secure Buy-in, in Advance

Gather input, especially for complex changes.



Solicit input early in the process—aim for “joint diagnosis of the problem” rather than trying to sell a preset solution to a captive audience.

Example: Remote work (with “bonus risks”)



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Rule 4: Get the Writing Right

Ensure that a policy is clearly written and properly shared.



Unwritten policies and inconsistently enforced policies create real headaches for employers—they’re fodder for discrimination claims and they rankle employees.

Consider not only “writing” that announces the policy, but also the “writing” that managers use to track implementation of the policy.



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Rule 5: Pre-plan Your Next Check-in

Decide what success looks like and plan for refinement.

Consider: *Muldrow v. City of St. Louis* (2024)
BUT!!: *Groff v. DeJoy* (2023)



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Root Causes: When Change Isn't Enough

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Workshop Time: Employee Churn



Imagine we've launched a business. We're hiring U.S. Supreme Court justices to sell snow-removal services, door to door.

We've even created hoodie robes for the occasion.

The justices will receive a \$100 commission for each home that buys a season-long "dry sidewalks" subscription.

We immediately encounter a problem.
Three competitors quickly launch and begin recruiting our justices.

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Workshop Time: Employee Churn



Competition is intense. Justice Kavanaugh's phone is ringing off the hook with job offers from those competitors...

...and he hasn't even figured out what shovel people use to shovel their walks yet.

The good news is, the justices all signed non-compete agreements.

In an all-hands meeting, we tell the justices that if they leave to join a competitor, we'll see them in court.

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Workshop Time: Employee Churn

But those threats don't seem to be working. The next morning, Justice Thomas tells us, sullenly, that competitors have been wining and dining Justice Kagan. They took her bowling!



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Workshop Time: Employee Churn

The first domino falls the next day. Justice Sotomayor doesn't show up for work. And later that same morning, Justice Barrett sees Justice Sotomayor driving a brand-new snowblower—and using it to clear the driveway of one of the company's prize customers.



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Workshop Time: Employee Churn



Morale is low. Not even the arrival of American flag beanies can cheer up Justice Alito.

So . . . *now what?*

And **maybe** your issue isn't noncompetes...

Maybe its increasing complaints about **harassment**

Maybe its more requests for **remote work**

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Workshop Time: Employee Churn

What options does our company have with respect to **policy changes**?

Stricter policies? Less strict? Better benefits?

But what if it's not a problem with our policies?
What if it's a **culture** issue?

Better communication?

What might be going on? And what might we do to fix the problem . . . before it's too late?

Maybe it's a "bad apple" issue....



Conclusion



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Thank You



Thank You



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13th Annual Idaho Employment Law Seminar

The Next Right Thing: Choosing Your Path Through the ADA Minefield

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The Next Right Thing: Choosing Your Path Through the ADA Minefield

Susan Baird Motschiedler
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Oct. 14, 2025 | Boise Centre East

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Americans with Disabilities Act: A Brief Overview

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The ADA

- Title I of the ADA prohibits discrimination in the terms and conditions of employment based on an employee's (or an applicant's) disability
- Law passed in 1990 and went into effect in 1992, amended in 2008
- Applies to private employers (and others) with 15 or more employees
 - Be aware of State equivalents of the ADA – the threshold application levels may be different (e.g., Montana's version of the ADA applies to businesses with **one or more** employees)
- In 2024, EEOC filed 48 ADA cases (nearly *half* the merits litigation filed by agency)



The Relevant Language of the ADA

"No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other, terms, conditions, and privileges of employment"

- Let's break that down:
 - What is a disability?
 - What is an "essential function"?
 - What is a "reasonable accommodation"?



What is a "disability" under the ADA?



Disability is:

- A physical or mental impairment that substantially limits one or more major life activities of a person;
 - "major life activities" = caring for oneself, seeing, hearing, eating, sleeping, walking, lifting, speaking, breathing, learning, concentrating, communicating...
 - Includes major bodily functions – immune system functioning, digestive system, bowel, bladder, neurological, endocrine, reproductive, circulatory...
- A record of such impairment; or
- Being regarded as having such an impairment
 - An actual or perceived physical/mental impairment whether or not that impairment limits or is perceived to limit a major life activity
 - Does not apply to minor/transitory impairment – impairment that lasts 6 months or less

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Example: Stomach Bug is NOT a Disability

Cook v. Warren Screw Products, Inc. (6th Cir. March 27, 2025)

- Paul Cook hired to be a delivery truck driver for Warren
- Six days after starting work, he called in sick because of a stomach bug
 - Diarrhea and stomach cramps
 - Cook described his situation as being "in and out of the bathroom" between deliveries
- Cook obtained antibiotics and two different notes from his Doctor saying he couldn't return to work for a total of two weeks

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Cook v. Warren continued

- Warren's HR representative called Cook asking if he could work part time to get a few "mandatory runs" completed
- Cook rejected the proposal
- Cook returned to work two weeks later and was informed he was fired
- Cook sued alleging disability discrimination and retaliation for seeking a reasonable accommodation
- District Court granted summary judgment to Warren. Cook appealed

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6th Circuit: Stomach Bug Not a Disability

- Sixth Circuit affirmed District Court
 - Stomach bug is too transitory to be considered a disability despite possibly affecting a major life function (working) in minor ways
 - Cook presented no evidence that he could not perform “an entire class of jobs or a broad range of jobs,” only that he could not perform this delivery job
 - “a plaintiff is not disabled simply because he cannot perform a discrete task or a specific job”

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But . . . Some temporary conditions CAN be a disability

Shields v. Credit One Bank, (9th Cir. 2022)

- Karen Shields hired as an HR Generalist I for Credit One Bank
- After suspecting she had bone cancer, Shields had bone biopsy surgery and was hospitalized for 3 days
- Shields could not perform several major life activities – couldn’t use her right arm, shoulder, and hand to lift, pull, push, type, write, tie her shoes or use a hair dryer
- She also was substantially limited in “sleeping, lifting, writing, pushing, pulling, and manual tasks”

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Shields v. Credit One Bank continued

- Shields was unable to return to work for several months
- Credit One fired her while she was out on medical leave and her healthcare coverage was terminated one week later. Credit One claimed her position was being eliminated.
- Shields sued for disability discrimination under the ADA claiming Credit One had failed to reasonably accommodate her disability
- District Court dismissed her complaint because she failed to allege any “permanent or long-term effects for her impairment”

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Shields v. Credit One Bank continued

- 9th Circuit reversed and remanded concluding even though Shields was impaired for approximately two months, her impairment qualified as an actual disability
- Take Away: an impairment does not need to be “permanent or long-term” to constitute a disability

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What is an “essential function” under the ADA?

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Essential Function is:

- Essential functions are the fundamental job duties that you must be able to perform on your own or with the help of a reasonable accommodation
- Determined by:
 - Employer's judgment about which functions are essential
 - Job descriptions that were written before a job was posted
 - Amount of time spent performing the function
 - Consequences of not requiring the person to perform the function
 - Terms of a collective bargaining agreement
 - Work experience of other employees who worked in same/similar positions

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Brown v. Advanced Concept Innovations (11th Cir. 2022)

- Brown worked as a customer service representative
- She had a major health condition that caused severe nausea and vomiting
- While on leave for this condition, she learned to manage the symptoms by spitting regularly into a cup
- Upon return from leave, she requested an accommodation to bring the spit cup to work
- Most of her job functions were **clerical** and **performed in an administrative area**



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Brown v. Advanced Concept Innovations continued

- Did the Company grant her request for accommodation?
 - No.
 - Brown performed approximately **20% of her time** performing her job duties in a clean production area
 - Company asserted the sanitation requirements could not be met if they accommodation were granted
 - Granting accommodation would require removing an essential function of her job
- Brown sued in Florida Federal District Court
 - Jury found in her favor



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Brown v. Advanced Concept Innovations continued

- Eleventh Circuit looked at whether the clean area work was an essential function of Brown's job:
 - Position was primarily clerical and **unrelated to production**
 - **She spent no more than 20% of her time in the production area**
 - Her job description did not **list being in the production area** among the job's "Essential Duties and Responsibilities"
 - Her work team (customer service) had a system where production area duties could be shared
 - She could still do the job's essential functions, **including those normally done in the production area**, from her desk in the administrative area



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Brown v. Advanced Concept Innovations continued

- Eleventh Circuit affirmed jury's verdict
- Takeaways:
 - 20% is – apparently – potentially not that significant
 - Look at what is important
 - Actual work or location of work
 - How does it fit with the employee's job position
 - Look at how employee teams split or share work
 - Put it in the job description!



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What is a reasonable accommodation?



Reasonable Accommodation is:

- Any modification or adjustment to a job or the work environment that
 - enables a qualified individual with a disability to participate in the application process,
 - perform essential job functions, **or**
 - enjoy benefits and privileges of employment equal to those of employees without disabilities,
 - **as long as it doesn't cause undue hardship for the employer.**



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Tudor v. Whitehall Central School District (2nd Cir. 2025)

- Angel Tudor was a HS teacher with PTSD and anxiety that arose from sexual harassment and assault at a former workplace
- Tudor's disability caused neurological function problems, a stutter, severe nightmares, and impaired ability to perform daily tasks
- Workplace was a trigger for the symptoms
- School granted accommodation to leave school campus for 15 minutes in morning and afternoon to manage her symptoms

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Tudor v. Whitehall Central School District continued

- After a change in school administrations, teachers were prohibited from leaving school during prep periods
- Tudor did anyway because she thought she had an accommodation
 - Was disciplined
- Took FMLA leave to participate in outpatient program to treat PTSD
- Upon return, the district allowed a morning break off campus and an addition break in the afternoon – provided a librarian could watch her students during study hall
- Eventually, nobody could cover the afternoon and Tudor left anyway

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Tudor v. Whitehall Central School District continued

- Tudor said that taking the breaks away worsened her anxiety because she knew she was violating school policy
- She sued the school district for failure to accommodate her disability as required under the ADA
- During discovery, Tudor **admitted that she could perform the essential functions of her job, regardless of whether she received an accommodation**, but only "under great distress and harm"
- School District filed for summary judgment, alleging that because she could do the job without an accommodation, it was fatal to her failure to accommodate claim

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Tudor v. Whitehall Central School District continued

▪ Second Circuit disagreed:

A straightforward reading of the ADA confirms that an employee may qualify for a reasonable accommodation even if she can perform the essential functions of her job without the accommodation. Ability to perform the essential functions is relevant to a failure-to-accommodate claim, but it is not dispositive.

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Tudor v. Whitehall Central School District continued

▪ Second Circuit continued:

This inference [that if an employee can perform the essential functions of the job without an accommodation] cannot be squared with the ADA's plain text.

▪ And added:

[A]n employee with a disability is qualified to receive a reasonable accommodation under the ADA even if she can perform the essential job functions without one. The text of the ADA is unambiguous and affords no other reasonable interpretation. . . . If Congress had wanted employers to make only necessary accommodations, rather than reasonable ones, it would have said so.

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Tudor v. Whitehall Central School District continued

▪ Takeaway:

- A reasonable accommodation does not need to be tied to an essential function of the job
- A reasonable accommodation is any modification or adjustment to a job or the work environment that
 - enables a qualified individual with a disability to participate in the application process,
 - perform essential job functions, **or**
 - **enjoy benefits and privileges of employment equal to those of employees without disabilities,**
 - as long as it doesn't cause undue hardship for the employer.

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Undue Burden and Reasonable Accommodation

Searls v. John Hopkins Hospital (D. Maryland 2016)

- Searls was deaf prospective employee; applied and was offered job of nurse
- Johns Hopkins Hospital (JHH) Nurse job description/essential job functions:
 - highly effective verbal communication and interpersonal skills to establish working relationships
 - "communication"
 - "listening actively to opinions, ideas and feelings expressed by others and responding in a courteous and tactful manner"
 - "communicating unresolved issues to appropriate personnel"
 - "general physiologic monitoring and patient care equipment such as defibrillator and glucometer monitor"

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Searls v. John Hopkins Hospital continued

- Offer contingent on health screening and clearance by Office of Occupational Health Services (OHS)
 - Requested a full time ASL interpreter from OHS
 - Request was forwarded to ADA/Accessibility Consultant
 - Investigation of requirement and costs
 - 1 or 2 full time interpreters?
 - \$40,000-\$60,000/interpreter annually
 - Hiring unit (annual budget = \$3.4 million) was part of JHH's Department of Medicine (annual budget = \$88 million)
 - Internal conversations (email) with radiology Director, ADA consultant, VP of nursing, OHS

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Searls v. John Hopkins Hospital continued

- Emails:
 - "I know we can't afford this"
 - "They are expecting the department pay for this. Why isn't the hospital responsible"
 - Searls "is qualified" but given the cost and financial issues "first response to this . . . is to respond that I cannot accommodate this."
 - Concerns that having an interpreter could create scheduling issues; interpreter might tell nurse to give wrong medicine in an emergency situation
 - Searls "is bright and would be a good hire other than this hearing issue."
 - "I want to be sure we have thoroughly investigated all avenues as [she] is a qualified applicant, and we are part of the larger JHH"
 - "try to include as much [info] to illustrate **hardship** on the organization" and "demonstrate we have shown a good effort"

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Searls v. John Hopkins Hospital continued

- Offer rescinded; Searls sued
- Searls hired by another hospital and was provided a FT interpreter
 - Supervisor testimony: Searls' deafness and use of interpreter never affected patient care, response to alarms, or participation in codes
 - Searls exceeded standards on performance reviews and had received several promotions
- District Court found ASL interpreter was reasonable accommodation and looked at whether it would impose an undue burden.

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Searls v. John Hopkins Hospital continued

- Because JHH had relied primarily on the cost as the reason for undue burden, Court considered budgets of JHH, department, and hiring unit
- Cost of providing American Sign Language interpreter for deaf prospective nurse employee = \$120,000/year
 - Hospital budgeted \$0 for reasonable accommodations
 - Hospital's operational budget was **\$1.7 billion**
 - **\$120,000/\$1,700,000,000 = 0.0007% of annual hospital operating budget**
- Court found this was not an undue burden on the hospital

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Searls v. John Hopkins Hospital continued

- Takeaways for undue burden:
 - Consider all financial sources (including up the chain) and demonstrate why is an undue burden
 - Do not limit consideration of accommodation budget or HR budget
 - Court specifically found that JHH relied on the \$0 accommodation budget and "did not consider" larger \$1.7 billion budget

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***I Have Seen This Movie Before . . . But
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The Thing About Sequels

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There are sequels . . .



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. . . and there are *sequels*.



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Today's topic: A political sequel.



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Agenda

- Immigration.** How can employers prepare for increased immigration enforcement?
- Workplace discrimination.** Will a new type of workplace-discrimination claim emerge?
- The OBBB and tax at work.** What has tax reform meant for how workers get paid?
- Identity and culture at work.** How can employers manage culture-war issues at work?
- Other policies—retreat and chaos.** What should employers expect later this year—and beyond?



Trump 2.0: Immigration



Preparing for ICE Audits -- Call your Lawyer!

- When ICE arrives at the worksite, direct the receptionist/managers to contact legal counsel.
- The receptionist should state "Our company policy is to call our lawyer, and I am doing that now."



Basic Rule—Searching/Access to Private Areas Requires a Warrant

- ICE can mill about public areas (lobbies/parking lots/common areas) etc. without any kind of warrant.
- In order to access an area normally reserved for employees or otherwise not accessible to the public, they have to have a warrant.

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Understand Different Types of Warrants – Judicial Warrant

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

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Understand Different Types of Warrants – Judicial Warrant

- You can accept the warrant but not consent to the search. If you do not consent to the search, the search will proceed, but you can later challenge it if there are grounds to do so.
- Examine the search warrant to ensure that it is signed by the court, that it is being served within the permitted timeframe, and that the search is within the scope of the warrant (the area to be searched and the items to be seized).

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Understand Different Types of Warrants – Administrative Warrant

- Conversely, an “administrative warrant” is a formal written document authorizing a law enforcement officer from a designated federal agency, such as an ICE agent, to usually ask for documents.
- Sometimes it is served with I-9 audit notice (this is a completely different animal than an ICE raid).
- An administrative warrant is issued by a federal agency such as DHS and can be signed by an “immigration judge” or an “immigration officer.” Unlike a judicial warrant, an administrative warrant **does not** authorize a search. Therefore, an ICE agent who has only an administrative warrant **may not** conduct a search based on the warrant, though, in certain circumstances, the administrative warrant would authorize the agent to make a seizure or arrest.
- Compare I-9 Audit Notice (which requires 3 days for compliance)—warrants can require immediate compliance.

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What Can ICE Do?

- ICE may demand that equipment be shut down and that no one leave the premises without permission. You should comply.
- ICE may move employees into a contained area for questioning.

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Employer’s Best Practices

- Write down the name of the supervising agent (and identifying badge number) and the name of the U.S. attorney assigned to the case.
- Have at least one company representative follow each agent around the facility. That representative may take notes or videotape the officer but must not interfere with the search. The person should note any items seized and ask if copies can be made before they are taken.
- If agents have a valid search warrant covering locked areas, give them access to those areas if they request.

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Employer's Best Practices

- If agents insist on taking a document that is vital to your business operations, explain why it is vital and ask for permission to photocopy it before the original is seized.
- Do not block or interfere with the agents' activities. But, again, you are not required to give the agents access to non-public areas if they did not present a valid search warrant for those areas.
- Object to a search outside the scope of the warrant. However, do not engage in a debate or argument with the agent about the scope of the warrant. Simply state your objection to the agent and make note of it.

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Employer's Best Practices

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

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Employer's Best Practices

- Company representatives should not give any statements to ICE or allow themselves to be interrogated before consulting with an attorney.
- You may inform employees that they may choose whether to talk with ICE during the raid, but **do not** direct them to refuse to speak to agents when questioned.
- Do not hide employees or assist them in leaving the premises without permission.

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Employer's Best Practices

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

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Employee Rights

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

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Employee Rights

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

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Make a Plan!

- Be proactive in preparing for an ICE visit.
- Discuss with management the protocols that the company will follow based on the above points. Think of every logistical issue that could arise ("clean room" areas, logistics of turning off equipment, where employees can gather if requested, etc.)
- Create a plan/template to follow so that you are not making decisions clouded by stress.

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Make a Plan!

- I-9 audit/e-verify
 - Directive – each agent, 5 I-9 audits per week
 - Penalties for I-9 mistakes
 - New employees
 - Existing employees (only under certain circumstances)
 - Note that e-verify is actual knowledge.

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Trump 2.0: Workplace Discrimination

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Agency Rosters in Flux

DIVE BRIEF

Andrea Lucas renominated to EEOC, pledges 'evenhanded' civil rights enforcement

The acting chair's new five-year term, if approved by the U.S. Senate, would still leave the civil rights agency without a quorum.

Published March 26, 2025

Split D.C. Circuit Panel Rules Trump Can Remove Wilcox from NLRB – NLRB to Stay Without a Quorum

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EEOC Promise: “Evenhanded Enforcement”



What does “evenhanded enforcement” mean?

EEOC moves to drop transgender discrimination cases to comply with Trump's order

"I am honored to be nominated by President Trump to serve a second term at the EEOC, our nation's premier civil rights agency enforcing federal employment antidiscrimination laws," Lucas said. "I appreciate the opportunity, if confirmed, to further our work of restoring evenhanded enforcement of employment civil rights laws for all Americans. Part of that work is simply clarifying longstanding civil rights rules that have been obscured by unequal enforcement in recent years."

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EEOC Promise: “Evenhanded Enforcement”



What does “evenhanded enforcement” mean?

Jan. 27, 2025, 9:09 AM MST

Trump DOJ Retreats From Defense of EEOC Gender Identity Guidance

5. Defendants respectfully suggest that these developments warrant vacating the oral argument. The position of the United States is reflected in the President's Executive Order, notwithstanding any prior position taken by the Defendants in this case. In light of that position, the President has directed the EEOC to rescind the Guidance.

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Timeout: What about *Bostock*?

Though the Trump administration has retreated from EEOC positions regarding treatment of LGBTQ employees, *Bostock* remains good law.

Under *Bostock*, discrimination based on sexual orientation or gender identity constitutes sex discrimination under Title VII.

Bostock therefore protects employees from adverse action based on those characteristics.

Open issue: Sex-segregated bathrooms, locker rooms, dress codes.

SUPREME COURT OF THE UNITED STATES

Syllabus

BOSTOCK v. CLAYTON COUNTY, GEORGIA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 17–1518. Argued October 8, 2018—Decided June 15, 2020*

In each of these cases, an employer allegedly fired a long-time employee simply for being homosexual or transgender. Clayton County, Georgia, fired Gerald Bostock for conduct “unbecom[ing] a male employee” shortly after he began participating in a gay recreational softball league. Altitude Express fired Donald Zarda after he mentioned being gay. And R. G. & G. R. Harris Funeral Homes fired Aimee Stephens, who presented as a male when she was hired, after she informed her employer that she planned to “live and work full-time as a woman.” Each employee sued, alleging sex discrimination under Title VII of the Civil Rights Act of 1964. The Eleventh Circuit held that Title VII does not prohibit employers from firing employees for being gay and so Mr. Bostock’s suit could be dismissed as a matter of law. The Second and Sixth Circuits, however, allowed the claims of Mr. Zarda and Mr. Stephens, respectively, to proceed.

Held: An employer who fires an individual merely for being gay or transgender violates Title VII. Pp. 4–23.

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What “DEI Enforcement” May Look Like

Principles

The RSJ Division’s work is grounded by five principles. We use principles pillars to guide our decision-making and strategies.

- Center those most impacted.
- Justice should be the first consideration, not the last.
- Healing is a necessary pathway to justice.
- Inclusion is intersectional.
- Reflection is a means of r/evolution.

RACE & SOCIAL JUSTICE INITIATIVE



What We Do

RSJI embeds racial equity and social justice principles into the City’s programs, budgets, and culture. Our holistic work focuses on organizing for racial justice, capacity building, foundational knowledge about race, and personal accountability to advancing equity.

RSJI’s strategies for change focus on Culture Shift, Gatherings, and Partnerships.

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What “DEI Enforcement” May Look Like



COLORADO
Department of Corrections



**Diversity, Equity, Inclusion &
Belonging and the GRAACE Alliance**

Projects and Initiatives:

The fundamental values of DEI-B touch every aspect of the department’s mission, goals, and vision. This is reflected in our strategic plan.

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What “DEI Enforcement” May Look Like

The Setup

2025 WL 446753
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington,
at Seattle.

Joshua A. DIEMERT, Plaintiff,
v.
CITY OF SEATTLE, Defendant.

CASE NO. 2:22-cv-1640
J
Signed February 10, 2025

Plaintiff Joshua Diemert, a white man, alleges that his employer, Defendant City of Seattle (“City”), discriminated against him because of his race. He argues that the City’s Race and Social Justice Initiative (“RSJI”)—the City’s D.E.I. program—created a hostile-work environment by “infusing race into *all* City functions” and “reduc[ing] [him] to an embodiment of his race.” Dkt. No. 67 (emphasis in original). He also alleges the City retaliated against him when he opposed the supposed harassment.

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What “DEI Enforcement” May Look Like

The Setup

94 F.4th 1242
United States Court of Appeals, Tenth Circuit.

Joshua F. YOUNG, Plaintiff - Appellant,
v.

COLORADO DEPARTMENT OF
CORRECTIONS; Dean Williams; Jill
Hunsaker Ryan, Defendants - Appellees.

No. 23-1063

J

FILED March 11, 2024

While Joshua Young was an employee for the Colorado Department of Corrections, he alleges that the Department implemented mandatory Equity, Diversity, and Inclusion training that subjected him to a hostile work environment. After resigning from the Department because of the training program, Mr. Young sued, asserting claims under Title VII and the Equal Protection Clause. In his complaint, he alleged that the training program violated Title VII by creating a hostile work environment and violated the Equal Protection Clause by promoting race-based policies. In particular, he alleged the training demeaned him because of his race and promoted divisive racial and political theories that would harm his interaction with other corrections’ personnel and inmates. At the motion-to-dismiss stage, the district court dismissed both claims without prejudice.

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What “DEI Enforcement” May Look Like

The Conduct

Diemert:

during the 2019 Undoing Institutionalized Racism presentation, one of the co-trainers went “off into a rant about ... white people, [and] [Christopher] Columbus and being cannibals.” Dkt. No. 73-2 at 20. According to Diemert, the co-trainer stated that “there was a lie that Christopher Columbus went to the Caribbean and that [the indigenous people living there] were cannibals” when “the real truth is that all white people are cannibals[.]” *Id.* Diemert also testified in his declaration that the trainers said, “racism is in white people’s DNA” and that “white people are like the devil.” Dkt. No. 69 ¶ 42. After the training, Diemert heard second-hand from his supervisor that his co-workers called him a “white supremacist” and “racist” in response to his comments during the training. *Id.*

Young:

One of the recommended videos had one of the interviewees using the N-word in the context of describing discriminatory housing practices. *Id.* ¶ 31. The training advises trainees to be careful of exclusionary “white norms,” *id.* ¶ 41, and critiques “white exceptionalism,” *id.* ¶ 24(d), a “fakequity” belief that “white allies” are “an exception to white racism” that “perpetuates white supremacy.” *Id.*

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What “DEI Enforcement” May Look Like

The Critiques

Diemert:

At least some of the comments that Diemert takes issue with were made during RSI trainings. Racially charged comments made in this setting, while still potentially harmful, are better framed as attempts to express perspectives or challenge ideas within the training's scope. Such comments made in the presence of a skilled facilitator can be addressed constructively, turning the moment into a learning opportunity, not a personal attack. This is very different than comments made, for example, on a production room floor that serve no educational purpose.

Even viewed cumulatively, comments about Diemert being a “colonist” or “white people being cannibals” were too infrequent to surpass the type of “joking or teasing [the Ninth Circuit] [has] held to be part of the ordinary tribulations of the workplace.”

Young:

If not already at the destination, this type of race-based rhetoric is well on the way to arriving at objectively and subjectively harassing messaging. Taken seriously by managers and co-workers, the messaging could promote racial discrimination and stereotypes within the workplace. It could encourage racial preferences in hiring, firing, and promotion decisions. Moreover, employees who object to these types of messages risk being individually targeted for discriminatory treatment—especially if employers explicitly or implicitly reward discriminatory outcomes.

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What “DEI Enforcement” May Look Like

The Outcome

Diemert:

The claim that efforts to address racism in the workplace—such as DEI initiatives—are themselves racist presents a striking paradox. According to their proponents, these programs aim to promote fairness and inclusion by acknowledging and addressing racial disparities—they are designed to ensure that all individuals have access to opportunities. Critics, however, argue that explicitly focusing on race or addressing racial inequalities perpetuates division and unfairness. For them, the cure is worse than the disease. The tension between these views underscores the complexity employers face when talking about race and equity.

While such conversations may prompt discomfort or spark debate, they do not necessarily violate anti-discrimination laws. Multiple courts in recent years have reached the same conclusion.

Young:

True, the racial rhetoric contained in the Department of Public Health & Environment's online training materials echoes the racist views espoused by the co-workers and supervisors in *Lounds and Talamy*. But the lack of racial animus manifesting itself in Mr. Young's day-to-day work environment distinguishes his case from those that have ratified a racially-hostile workplace claim. In short, Mr. Young has not plausibly alleged severe or pervasive harassment that altered the terms or conditions of his employment to create an abusive work environment.

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Trump 2.0: The OBBB and Tax at Work

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"No" Tax on Tips – Cheat Sheet

New deduction for certain tip income

Available Tax Years	2025-2028
Deduction Amount	Up to \$25,000/year
Phase Out	Above the line deduction Begins phasing out at \$150k for SF; \$300k for MFJ Full phase out at \$400k for SF; \$550k for MFJ
Qualified Tips	"Cash tips (includes credit transactions) received by an individual in an occupation which customarily and regularly received tips on or before December 31, 2024, as provided by the Secretary."

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"No" Tax on Tips – Deeper Dive

■ New above-the-line deduction for certain tip income

- There *is* some tax on tips—name is misleading
- Service providers must claim deduction
- Available tax years 2025 through 2028
- Married taxpayers must file jointly
- SSN required

■ Max deduction = \$25,000/year of qualified tips

- Beware of phase out thresholds: \$150,000 for SFs; \$300,000 for MFJ

■ "Qualified tips" means cash tips received by an individual in an occupation which "**customarily and regularly received tips**" on or before December 31, 2024

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Proposed Regulations—Occupations List

*Proposed Treasury Regulations published September 22, 2025

Beverage / Food	Bartenders; Wait Staff; Food Servers; Dining Room Attendants; Chefs; Dishwashers; Host Staff; Bakers
Entertainment / Events	Gambling Dealers; Change Persons; Cage Workers; Dancers (Club Dancer, Dance Artist); Musician; Singers; Disc Jockeys; Entertainers (Comedian, Clown, Magician); Content Creators; Ushers; Locker Room Attendant; Dressing Room Attendant
Hospitality	Bellhops; Concierges; Hotel Clerk; Housekeeping
Home Services	Home Maintenance/Repair Workers; Landscaping/Groundskeeping Workers; Electricians; Plumbers; Heating and Air Mechanics; Appliance Installers; Home Cleaners; Locksmiths; Roadside Assistance Workers
Personal Services	Personal Care Workers (Butler, House Sitter); Private Event Planners; Private Photographers; Videographers; Event Officials (Wedding Official); Pet Caretakers; Tutors; Nannies / Babysitters

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Proposed Regulations—Occupations List

Personal Appearance / Wellness	Skincare Specialists; Massage Therapists; Hairdressers; Manicurist / Pedicurist; Makeup Artists; Personal Trainer / Group Fitness Instructors; Tattoo Artists; Tailors; Shoe Repairers
Recreation / Instruction	Golf Caddies; Self-Enrichment Teachers (Piano Teacher, Dance Teacher, Knitting Instructors); Recreational / Tour Pilots; Tour Guides; Travel Guides; Sports / Recreation Instructors
Transportation / Delivery	Valet Attendants; Rideshare Drivers; Goods Delivery Drivers; Personal Vehicle / Equipment Cleaners; Private / Charter Bus Drivers; Charter Boat Workers; Home Movers

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“No” Tax on Tips—Ineligible Workers

- Excludes workers in “specified trades or businesses” under IRC 1202(e)(3)(A), except engineers and architects
- Specified trades or businesses:

Health	Legal
Accounting	Actuarial Science
Performing Arts	Consulting
Athletics	Financial Services
Brokerage Services	Any trade or business where the principal asset is the reputation or skill of 1+ employees

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“No” Tax on Overtime – Cheat Sheet

New deduction on certain overtime pay

Available Tax Years	2025-2028
Deduction Amount	Up to \$12,500/year (\$25,000/year for MFJ) Above the line deduction
Phase Out	Begins phasing out at \$150k for SF; \$300k for MFJ Full phase out at \$400k for SF; \$550k for MFJ
Qualified Overtime Compensation	Portion of pay that exceeds the employee’s regular rate of pay, as required under the Fair Labor Standards Act, excluding any amounts already treated as “qualified tips.”

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Trump 2.0: Identity and Culture at Work

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Bostock -- Background

- Gerald Bostock, was fired for conduct “unbecoming” a county employee right after he joined a gay recreational softball league.
- Bostock sued, alleging sex discrimination under Title VII of the Civil Rights Act of 1964.
- In a 6-3 ruling in Bostock v. Clayton County, Georgia, the Court held that an employer who fires an individual merely for being gay or transgender violates the law.

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Bostock -- Background

- The Court explained, “It is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer’s mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague.”

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Bostock -- Background

- The Court continued, "By discriminating against homosexuals, the employer intentionally penalizes men for being attracted to men and women for being attracted to women. By discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today. Any way you slice it, the employer intentionally refuses to hire applicants in part because of the affected individuals' sex, even if it never learns any applicant's sex."
- The Court concluded with these words, "Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: **An employer who fires an individual merely for being gay or transgender defies the law.**"



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Biden EEOC Guidance

- "Harassing conduct based on sexual orientation or gender identity includes epithets regarding sexual orientation or gender identity; physical assault due to sexual orientation or gender identity; outing (disclosure of an individual's sexual orientation or gender identity without permission); harassing conduct because an individual does not present in a manner that would stereotypically be associated with that person's sex; **repeated and intentional** use of a name or pronoun inconsistent with the individual's known gender identity (**misgendering**); or the denial of **access to a bathroom** or other sex-segregated facility **consistent** with the individual's gender **identity**."



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Trump EEOC Responds

- Trump has issued an executive order titled "Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government"
- The order mandates the federal government to recognize two "biological sexes" as determined "at conception." Among other things, the order requires the EEOC and DOL to prioritize litigation related to these issues
- The executive order conflicts with Biden EEOC guidance and potentially *Bostock* (note: **Bostock says it was not deciding bathroom issue**)



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Trump EEOC Signals Disapproval

- The EEOC guidance remains on the EEOC website but with this statement: "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."
- Further, a Texas federal district court vacated the gender identity portions of the Biden DOL guidance saying that the EEOC exceeded its statutory authority by expanding the definition of sex under Title VII "beyond the biological binary." *Texas, et al. v. EEOC*, 2:24-CV-173 (N.D. Tex. May 15, 2025)

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Bathrooms

- When EEOC guidance under the Biden administration was initially passed, Andrea Lucas said, while voting against the guidance, "Every female worker has privacy and safety rights that necessitate access to single-sex workplace bathrooms limited to biological women"
- Whether an employer should abide by the existing guidance is unclear. (It is ultimately going to go away, I believe; its just a matter of time)
- Moreover, it is unclear whether EEOC guidance has any value regardless of what it says. Last year, the Supreme Court overruled Chevron deference toward agency interpretations. *Loper Bright v. Ramondo*, 603 U.S. 369 (2024)
- This means that any agency's interpretation about the laws it enforces (such as the EEOC and anti-discrimination laws), no longer has to be given deference by a court

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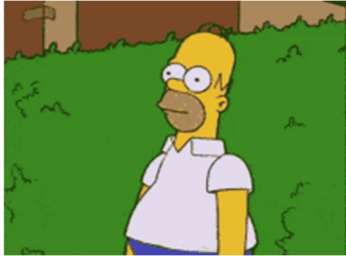
Bathrooms—It's a Three Body Problem

- Supreme Court – *Bostock* – transgender status and sexual orientation is protected
- Trump EEOC – that does not mean bathrooms (or pronouns)
- Supreme Court – *Loper Bright* – courts don't have to defer to what agencies, including the EEOC, think about the laws they enforce
- So, a court can give two hoots about what the Trump EEOC says about Title VII, ADA, ADEA, etc.
- What is a law-abiding, well meaning employer supposed to do?

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What's an Employer Supposed to Do?



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Pronouns

- Another issue is religion and gender identity
- The EEOC's current harassment guidance states that employers do not need to grant religious accommodations if the accommodations would create a hostile environment for other employees
- For instance, employers did not have to grant an accommodation to allow an employee to deliberately misgender people because of their religious beliefs
- But, as noted in the earlier slide, that guidance is in limbo and will likely go away

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Pronouns

- Possible solution? Don't use employee's pronoun when there is a conflict; refer to employee by name

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Trump 2.0: Policies in Retreat or Chaos

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Impact of “Efficiency Wars”

Whatever its ideological aims, DOGE's budget-slashing impacts agencies' ability to handle the accustomed workload.

Pressing responsibilities to the state level makes rulings less predictable and risks overloading those agencies.

The speed of these changes also leaves many agencies in limbo.

Department of Government Efficiency

Estimated Savings

\$140B

Amount Saved Per Taxpayer

\$869.57

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Impact of “Efficiency Wars”

Uncertainty at the NLRB and the EEOC, in particular, affects employers.

Judge finds Trump's firing of member of National Labor Relations Board was illegal

Resolution Concerning the Commission's Authority to Commence or Intervene in Litigation and the Commission's Interest in Information Concerning Appeals

mike ginn

@shutupmikeginn

My “Not involved in human trafficking” T-shirt has people asking a lot of questions already answered by my shirt.

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Loper Bright and Agency Influence

(Slip Opinion)

OCTOBER TERM, 2022

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Syllabus

NOTE: Where it is feasible, a syllabus (Slip Opinion) will be released, as it usually does in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 300 U. S. 315, 317.

SUPREME COURT OF THE UNITED STATES

Syllabus

LOPER BRIGHT ENTERPRISES ET AL. v. RAIMONDO,
SECRETARY OF COMMERCE, ET AL.
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

No. 22–451. Argued January 17, 2024—Decided June 28, 2024*
The Court granted certiorari in these cases limited to the question whether *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, should be overruled or clarified. Under the *Chevron* doctrine, courts have sometimes been required to defer to “permissible” agency interpretations of the statutes those agencies administer—even when a reviewing court reads the statute differently. *Id.*, at 843. In such cases before, the reviewing courts applied *Chevron*’s framework to resolve in favor of the Government challenges by petitioners to a rule promulgated by the National Marine Fisheries Service pursuant to the Magnuson-Stevens Act, 16 U. S. C. §1801 *et seq.*, which

The recent overruling of *Chevron* means that agency influence was set to decrease even *before* the 2024 elections.

With some exceptions, this administration’s appointees seem determined to reduce their respective agencies’ policymaking roles.

But that power has to go *somewhere*—and turning this power over to courts makes enforcement less predictable, and likely more time-consuming (and costly).

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Loper Bright and Agency Influence

The administration has also sought greater control over what remains of agency decisionmaking—including at the NLRB and FTC.

Trump Issues Order to Expand His Power Over Agencies Congress Made Independent

The president has already challenged statutory protections against summarily firing officials overseeing such agencies without cause.

Those agencies include the Securities and Exchange Commission, the Federal Trade Commission, the Federal Communications Commission and the National Labor Relations Board. Still, the order applies only partly to one particularly powerful agency, the Federal Reserve, covering issues related to its supervision and regulation of Wall Street, but exempting its decisions related to monetary policy, like raising and lowering interest rates.

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Legislative Balance Adds to Uncertainty

Party Breakdown

Party Breakdown		U.S. Congress
279	REPUBLICANS	OTHER VACANCIES
213	DEMOCRATS	

*Rep. Sylvester Turner (D-TX) died 03/06/2025.

*Rep. Raul Grijalva (D-AZ) died 03/13/2025.

*Rep. Mark Green (R-TN) resigned 07/21/2025.

Administration’s quick action in 2025 reflects, in some degree, concern about legislative balance.

A flipped house—or even the size of the R margin—has serious impact on how aggressive the administration can be in pressing its agenda.

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Rollback Candidate: PWFA

Position of Acting Chair Lucas Regarding the Commission's Final Regulations Implementing the Pregnant Workers Fairness Act

Acting Chair Lucas voted against the Final Rule when it came up for a vote in April 2024. Consistent with the views she expressed last April, Acting Chair Lucas remains opposed to the Commission's construction of the phrase "pregnancy, childbirth, or related medical conditions" described in the Final Rule. However, the Office of the Chair cannot unilaterally rescind or modify this (or any other) Final Rule under the APA, in whole or in part. Once a quorum is re-established at the Commission, Acting Chair Lucas intends for the Commission to reconsider portions of the Final Rule that she believes are unsupported by law.



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Lurking Surprises: Competition

Perhaps-unexpected warmth towards FTC, including its prior efforts at instituting a noncompete ban.

Conflict between populism and corporate ties makes it tough to predict administration's approach to competition.



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Lurking Surprises: Labor



What are the odds of Republican-driven labor reform?

Note connection between Trump administration and national labor leaders, particularly with respect to automation and manufacturing.

Keep an eye on the "PRO Act" (for organizing). But independent-contractor test and joint-employer rule may be targets in the *other* direction.

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Thank You



Thank You



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HR: Culture Coach or Compliance Cop?

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