Montana Employment Law Seminar

for corporate counsel, business owners & human resource professionals

SEPTEMBER 25, 2024 | DOUBLETREE BY HILTON

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Presentations:

The Current Status of DEI and What it Means for Your Business
Christina M. Jepson and Kaleigh C. Boyer

"I Have a Note From My Doctor" - Engaging with Employees' Medical Providers on ADA Accommodation and Fitness for Duty Issues
Susan Baird Motschiedler and Leah Trahan

Handbook Updates – 2024 Policy Pointers and Pitfalls
Liz M. Mellem and Mark D. Tolman

Montana Employment Law Seminar

The Current Status of DEI and What it Means for Your Business

Christina M. Jepson
801.536.6820 | cjepson@parsonsbehle.com

Kaleigh C. Boyer
208.528.5227 | kboyer@parsonsbehle.com

For the past 29 years, Christina has partnered with large and small companies to solve their labor and employment issues. She assists clients with the full spectrum of employment matters, including daily management of employment issues as well as litigation.

Christina M. Jepson

Shareholder | Salt Lake City

Contact information

801.536.6820
cjepson@parsonsbehle.com

Capabilities

Employment & Labor

Employment Litigation

Trade Secret Litigation

Licensed/Admitted

Utah

U.S. Dist. Court, Dist. of Utah

U.S. Court of Appeals, 10th Circuit

U.S. Supreme Court

Biography

Christina has dedicated her career to assisting employers in navigating the complex web of federal and state employment laws. Christina helps companies handle a variety of employment issues including conducting trainings, preparing agreements and policies, counseling regarding complicated employee issues, advising regarding terminations, and defending lawsuits. Christina brings creative approaches to difficult employee issues. Christina previously served as the chair of the firm's Employment & Labor Law department for 10 years and is the past chair of the Labor & Employment Section of the Utah State Bar. Christina is ranked as a top labor and employment lawyer by Chambers and Partners USA (Tier 1), Utah Business Magazine Legal Elite, Intermountain States Super Lawyers, and Best Lawyers in America. Christina was named the 2023 Employment Lawyer of the Year (Defense Side) by the Utah State Bare Labor & Employment Section.

Christina regularly represents employers in lawsuits and counsels employers in a variety of areas including:

- Sex discrimination and sexual harassment
- Age discrimination
- Religious discrimination
- ADA, disability and employee medical issues
- Wrongful termination
- Employment contracts and compensation
- Non-compete, confidentiality, and non-solicitation agreements
- Handbooks
- Social media in the workplace

- Fair Labor Standards Act (FLSA), overtime, exemptions, collective actions and wage and hour issues
- Independent contractor issues
- Drug and alcohol testing
- FMLA and other leave issues
- Terminations and unemployment
- Union issues
- Investigations
- UALD and EEOC charges and audits
- Training for management and employees

Christina has been an adjunct professor of law at the University of Utah S.J. Quinney College of Law for over 15 years. She teaches Labor and Employment Law in the Master of Legal Studies program and a litigation skills class in the Juris Doctor program. She is the past president of the University of Utah S.J. Quinney College of Law Board of Trustees.

Prior to joining Parsons Behle & Latimer, Christina served as a judicial law clerk to the Honorable David K. Winder, then Chief Judge of the United States District Court for the District of Utah, and the Honorable Stephen H. Anderson at the Tenth Circuit Court of Appeals. She graduated first in her class from the University of Utah S.J. Quinney College of law, where she also served on the Utah Law Review and competed for the National Moot Court Team.

Christina is a member of the American Bar Foundation Fellows.

Experience

Wage and Hour Litigation
Christina has represented various companies (including a software company and call center) in wage and hour collective actions.

ERISA Health Care Defense
Christina has represented employer insurance plans in ERISA lawsuits regarding denial of coverage for healthcare claims.

Discrimination Litigation
Christina has represented numerous employers in defending charges of discrimination as well as lawsuits alleging discrimination including sex discrimination, race discrimination, religious discrimination and sexual harassment.

Investigations
Christina has conducted investigations for private employers, public employers and universities.

Employment Training
Christina has conducted employment training for private employers, public employers and universities.

Medical Practices
Christina has represented medical practices and physicians regarding non-competes and other issues.

Employment Contracts
Christina has represented a variety of companies with employment agreements across industries and sectors, including real estate and development, investment, mining, healthcare, dental, agriculture, medical device, tourism, entertainment, nutritional supplements, physician practices, call centers, bio health, manufacturing, software, consumer products and construction.

Accomplishments

Professional
Best Lawyers in America, Employment Law Management, 2014 - 2023

Intermountain States Super Lawyers: Ranked as one of the "Top 50 Women Lawyers," 2019 - 2024; also ranked as a top attorney in Employment & Labor 2013-2014, 2016-2024

Utah Business Magazine, "Legal Elite," Labor & Employment, 2012 - 2023

Defense Research Institute (DRI), Utah Contributor to Fifty State Compendium, 2019 – 2024

Chambers and Partners USA, Tier 1, Labor & Employment Law, 2019 – 2024

Parsons Behle & Latimer

- Chair, Employment & Labor Practice Group, 2011 - 2020
- Lateral Hiring Committee
- Web Design Committee
- Wellness Committee
- Opinion Letter Committee
- Recruiting Committee

Academic
University of Utah, S.J. Quinney College of Law (J.D., 1995)
- Graduated 1st in the class
- Order of the Coif
- Named the Outstanding Woman Law Graduate
- William H. Leary Scholar
- Winner of Law School Moot Court Competition
- Member of National Moot Court Team
- Best Brief and Best Oralist at Regional Moot Court Competition
- Member of Utah Law Review

University of Utah (B.S., 1992)
- Magna Cum Laude
- Phi Kappa Phi, Golden Key, and Pi Sigma Alpha Honor Societies.

Associations

Professional
Member, American Bar Foundation

Utah State Bar Labor and Employment Section

- Chair, 2014 - 2015
- Vice-Chair, 2013 - 2014
- Treasurer, 2012 -2013
- Secretary, 2011 - 2012

Member, Utah State Bar Character and Fitness Committee, 2001 - 2010

Member, Utah State Bar Association Summer Convention Committee 2015

Member, Utah State Bar Association Spring Convention Committees 2013 - 2015

Society for Human Resource Management (SHRM)

Co-President, Utah Center for Legal Inclusion, 2023 to present

Pro Bono Attorney for Domestic Violence Victims, 2000 - 2010

Pre-Litigation Chairperson, Department of Professional Licensing, 2003 - 2005

Judge Pro Tempore, Third District Court Small Claims Court, 1997 – 2007

Community

University of Utah S.J. Quinney College of Law

- Past president, Board of Trustees, 2021 - 2022
- President, Board of Trustees, 2019 - 2021
- President-elect, Board of Trustees, 2017 - 2019
- Member, Board of Trustees, 2008 - present
- Chair, Alumni Relations Committee, 2015 - 2017
- University of Utah Law School Search Committee for Career Development Director
- University of Utah Law School Search Committee for Dean of Academic Affairs

Adjunct Professor of Law, University of Utah Law S.J. Quinney College of Law, 2007 to present

Labor and Employment Law in Master of Legal Studies Program, 2020 to present

Pre-Trial Practice in JD Program, 2007 – present

Adjunct Faculty Service Award 2022

University of Utah Alumni Association Board of Directors Member, 2005 - 2008

- Chairperson and Member, Community Service Committee, 2006 - 2008
- Member, Development Committee, 2007 - 2008
- Member, Scholarships and Awards Committee, 2006 - 2007
- Member, Legislative Affairs Committee, 2005 - 2006
- Member, Athletics Advisory Council, 2005

Member, Visit Salt Lake Human Resource & Compensation Committee, 2021 - present

Member, Board of Directors, LiveOn.org, currently

Member of Board of Trustees, Visit Salt Lake, 2014 - 2018

Member, Board of Directors, Ballet West, 2012 - 2015

Pro Bono Clients

Utah Film Center

Girls on the Run

Megan Blues Studios

Salt Lake City Arts Council

Political

Member Utah Trafficking in Persons Taskforce Legal Subcommittee, 2016 - 2020

Democratic Party Sexual Harassment Committee, 2018 – 2019

Articles

"Background Check Laws: Utah," *Practical Law*, July 2, 2024

"Independent Contractors: Utah," *Practical Law*, August 4, 2023

"Leave Policy Language: Utah (2024)," *Thomson Reuters,* (March 20, 2024)

"Drug Testing Laws – Utah," *Practical Law*, 2014 to present

"Employment Claims in Release Agreements: Utah," *Practical Law,* 2014 to present

"Anti-Discrimination Laws Utah," *Practical Law*, 2014 to present

"Unionization Trending," *Employment Law Update,* Dec. 13, 2022

"Employee Privacy Laws: Utah," *Practical Law,* 2014 to present

"Hiring Requirements: Utah," *Practical Law,* 2014 to present

"Wage and Hour Laws: Utah," *Practical Law,* July 28, 2022

"SCOTUS Rules States Can be Sued Under USERRA," *Employment Law Update,* July 15, 2022

"The Impaired Mobile Employee: What are the CMD's Options?" April 30, 2022

"Drug Testing Laws: Utah," *Practical Law,* Feb. 7, 2022

"Tenth Circuit Court of Appeals Rules that Computer Log-in Time for Certain In-Office Workers is Compensable Under Fair Labor Standards Act," *Employment Law Update,* Jan. 11, 2022

"Workers' Compensation Laws: Utah," *Practical Law* 2021

"DRI Employment Law Compendium, Utah Section," DRI Employment and Labor Law Committee, February 17, 2021

"SCOTUS Rules States Can Be Sued under USERRA Leave Policy Language: Utah," *Practical Law*, November 2020

"Leave Policy Language: Utah," *Practical Law*, Nov. 2020

See more at https://parsonsbehle.com/people/christina-m-jepson

Presentations

"What is Going on with DEI", ACG, June 3, 2024

"Navigating the ADA: Case Studies on Reasonable Accommodation," Public Sector Human Resources Association - Utah Chapter, Feb. 7, 2024

"Navigating the ADA: Case Studies on Reasonable Accommodation," Parsons Behle & Latimer 35th Annual Employment Law Seminar with SL SHRM, May 9, 2023

"Hot Employment Law Topics for 2023," University of Utah S.J. Quinney College of Law, Jan. 13, 2023

"Privacy In the Workplace: How Much Snooping is Legal and Proper?" Parsons Behle & Latimer Annual Employment seminar, Oct. 5, 2022

"Common Mistakes and Horror Stories," WECon Utah SHRM Conference, Aug. 31, 2022

"Independent Contractors or Employees?" 34th Annual Parsons Behle & Latimer Employment Law Seminar, June 16, 2022

"The Impaired Mobile Employee: What are the CMD's Options?" International Corporate Health Leadership Council, April 30, 2022

"Political Speech in the Workplace," 33rd Annual Parsons Behle & Latimer Employment Law Seminar, Oct. 27, 2021

"Onboarding Talent Through Wellbeing and Inclusive Practices," Utah State Bar, May 26, 2021

"Trends in Diversity, Equity & Inclusion Programs," 32nd Annual Parsons Behle & Latimer Employment Law Seminar – Virtual, Nov. 10, 2020

See more at https://parsonsbehle.com/people/christina-m-jepson

Kaleigh is a member of the firm's corporate and litigation practice teams. With more than 10 years of legal experience in both the private and public sectors, Kaleigh offers a unique and pragmatic approach to resolving client matters.

Contact information
208.528.5227
kboyer@parsonsbehle.com

Capabilities
Business & Commercial Litigation

Business Bankruptcy & Restructuring

Trusts, Wills & Estates

Corporate

Employment & Labor

Licensed/Admitted
Delaware

Idaho

U.S. Dist. Court, Dist. of Idaho

U.S. Bankruptcy Court, Dist. of Idaho

District of Columbia

Kaleigh C. Boyer
Associate | Idaho Falls

Biography

Kaleigh Boyer is an associate attorney in the Idaho Falls office of Parsons Behle & Latimer. Her practice is focused on business and commercial litigation and related corporate matters. Kaleigh also represents clients in the resolution of probate and trust-related litigation, including guardianship and conservatorship proceedings.

Prior to joining Parsons, Kaleigh served as a judicial law clerk to the Honorable Paul R. Wallace of the Superior Court of Delaware, where she handled a wide array of matters on the court's civil, criminal and complex commercial litigation dockets. She significantly contributed to the court's opinion addressing the valuation of cryptocurrency tokens in a breach of contract action–a matter of first impression in Delaware. Kaleigh is licensed in Delaware, the District of Columbia and Idaho.

Accomplishments

Professional

Judicial Law Clerk to the Honorable Paul R. Wallace, Superior Court of the State of Delaware (September 2021 – August 2022)

Judicial Extern to the Honorable Henry W. Van Eck, Chief Bankruptcy Judge, United States Bankruptcy Court, Middle District of Pennsylvania (January 2021 – May 2021)

Judicial Extern to the Honorable Martin C. Carlson, Magistrate Judge, United States District Court, Middle District of Pennsylvania (January 2020 – May 2020)

Legal Extern, The Governor's Office of General Counsel, Pennsylvania Commission on Crime & Delinquency (August 2019 – December 2019; May 2020 – August 2020)

As a research assistant to one of her law school professors, Kaleigh assisted extensively with editing *Voting Rights and Election Law* (3d ed. 2021) and the corresponding teacher's manual.

Academic
Pennsylvania State University, B.S., Finance

Pennsylvania State University, Master of Public Administration

Widener University Commonwealth Law School, Juris Doctorate, *magna cum laude*

- CALI Excellence Awards: Civil Procedure, Legal Methods, Property, & Business Organizations

Associations

Professional
Delaware State Bar Association (2022-present)

Idaho State Bar Association (2022-present)

District of Columbia Bar (2022 - present)

Eagle Rock Inn of Court, Executive Board Member (2022-present)

Richard S. Rodney Inn of Court, Member (2021-2022)

Community
Idaho Volunteer Lawyers Program (2022-present)

Volunteer attorney for the Court Appointed Special Advocates (CASA) of Idaho Falls (2022-present)

Presentations

"Common Mistakes Employers Make," Parsons Behle & Latimer 10th Annual Idaho Employment Law Seminar, Oct. 5, 2022 (co-presented with Kelsie A. Kirkham)

**To view additional insights and related news items, visit parsonsbehle.com/people/kaleigh-c-boyer#insights*

Montana Employment Law Seminar

A Different LEGAL PERSPECTIVE
parsonsbehle.com

The Current Status of DEI and What it Means for Your Business

Christina M. Jepson
cjepson@parsonsbehle.com

Kaleigh C. Boyer
kboyer@parsonsbehle.com

Sept. 25, 2024 | DoubleTree by Hilton

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Presenters

Christina M. Jepson
cjepson@parsonsbehle.com

Kaleigh C. Boyer
kboyer@parsonsbehle.com

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Legal Disclaimer

This presentation is based on available information as of Sept. 25, 2024, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

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Introduction – Christina

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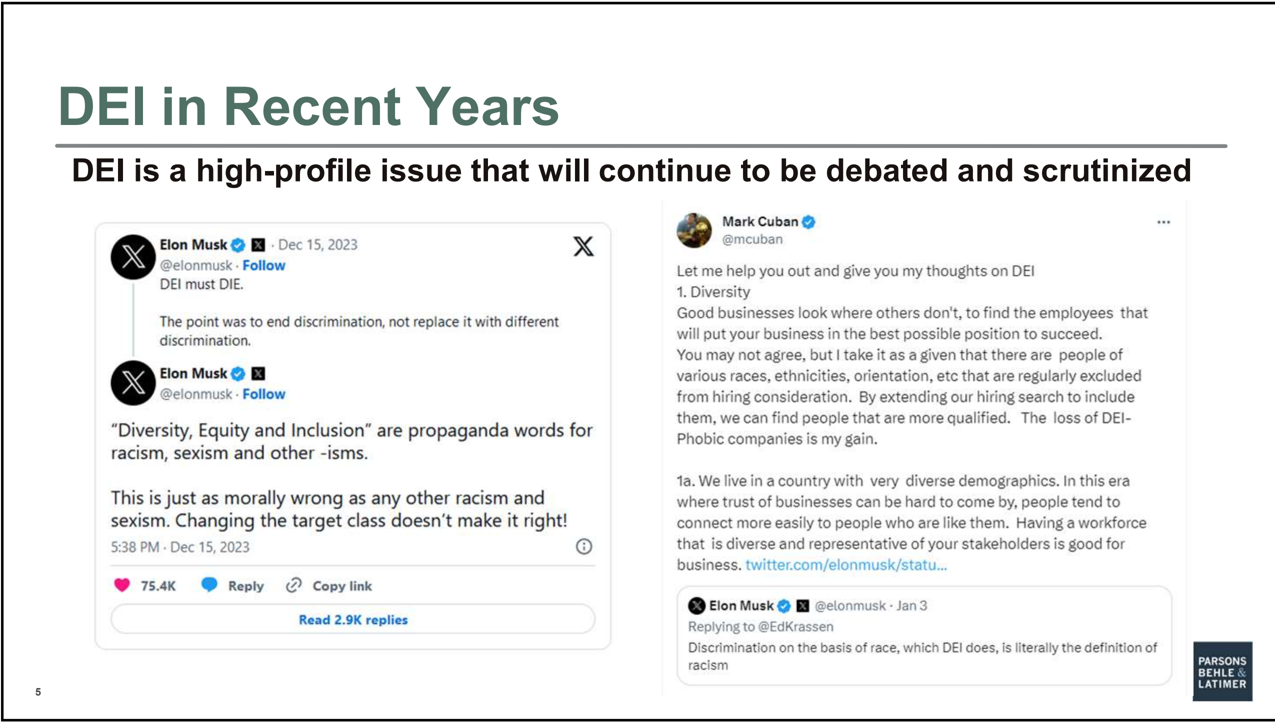
DEI in Recent Years



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DEI in Recent Years

- DEI initiatives have increased over the last several years
- However, DEI initiatives have increasingly come under attack by individuals claiming they are harmful and reverse racism
- Two Montana examples illustrate this trend.
  - Proposed Montana Individual Freedom Act – ban on diversity training for state employees
  - Mont. Code § 2-15-108 – Gender and Racial Balancing Legislation

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Montana Individual Freedom Act

- Sponsored by Montana Rep. Jeremy Trebas in Spring of 2023
  - Proposed legislation would prohibit training aimed at having the employee "believe" that a group of people are responsible for and "must feel guilt, anguish, or other forms of psychological distress" for historical injustices
  - Act died in committee and did not become law
- The Act was based on the Florida "Stop WOKE ACT"
  - Blocked by the 11th Circuit because it targeted speech "the greatest First Amendment sin"

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Gender and Racial Balancing Legislation

- Mont. Code § 2-15-108 requires all state government boards, commissions, and committees to "take positive action to attain gender balance and proportional representation of [minority residents] in Montana to the greatest extent possible."
- On March 12, 2024, Do No Harm, a national group, sued Gov. Greg Gianforte challenging the statute on Equal Protection grounds (*Do No Harm v. Gianforte*, No. 6:24-CV-00024 (D. Mont.))
  - Do No Harm argued the statute imposed a "mandate[ ] for gender balance and racial proportionality" which prevented four of its members from "equal consideration for openings" on Montana's Board of Medical Examiners

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Gender and Racial Balancing Legislation

- Gov. Gianforte responded that he "opposes the ideological tenets of diversity, equity, and inclusion (DEI), as well as quotas and affirmative action. His sole priority in making appointments is that of highly qualified individuals, without respect to immutable traits such as race or sex. Because MCA § 2-15-108 is not mandatory but is instead aspirational, it has posed no obstacle to the Governor satisfying this priority."
- Do No Harm replied that the statute impermissibly "authorizes or encourages unconstitutional consideration of race and gender" and that the Governor's aspirations to achieve race and gender balance "put[s] a thumb on the scales in violation of the Equal Protection Clause."
  - As of August 15, 2024, the court has not yet issued a decision on the Governor's motion to dismiss.

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Today's Presentation

- 2023 Supreme Court Decision Regarding Affirmative Action and Its Effect on Employers (Christina)
- The Current Legal Framework for Employers (Kaleigh)
- An Evolving Legal Landscape (Christina)
- Impact on DEI Programs and Takeaways (Kaleigh)

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

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Governing Law

THE EQUAL PROTECTION CLAUSE

- 14th Amendment provides that "**no state shall deny . . . to any person within its jurisdiction the equal protection of the laws**."
- States and state-run institutions are generally prohibited from enacting racial classifications and such classifications receive a high level of scrutiny
- Public colleges are subject to 14th Amendment

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Governing Law

TITLE VI

- Title VI: "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any program of activity receiving Federal financial assistance."
- "Title VI prohibits a recipient of federal funds from intentionally treating one person worse than another similarly situated person because of his race, color, or national origin."
- Most colleges receive federal funds and Title VI applies

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Governing Law

STRICT SCRUTINY

- **Strict scrutiny**"
- First, the racial classification must "**further compelling government interests**"
- Second, the government's use of race must be "**narrowly tailored to achieve that interest**"
- For 45 years courts have allowed race to be used as a "plus factor" (not quota) in admissions

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SFAA V. Harvard

- A political activist group (led by Edward Blum) called Students for Fair Admissions sued Harvard (private) and UNC (state) regarding these admission practices
- SCOTUS found in favor of SFAA and struck down the two admissions programs overturning 45 years of precedent
- Why did SCOTUS strike down 45 years of precedent?

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The Court's Ruling

- Court noted universities can still consider "an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise"—personal statements, essays
- Justice Sotomayor dissent: "attempt to put lipstick on a pig."
- Some private employers do something similar—diversity statements or personal essays

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The Effect of the Court's Ruling

- In 1996, California voters passed Prop 209 banning affirmative action at public universities. The first year "enrollment among Black and Latino students at UCLA and UC Berkely fell by 40% immediately." (NPR)
- CA has worked for decades to improve these statistics
- For its 2024-25 enrollment year at MIT the demographics of incoming students changed dramatically:
  - Percentage of Black students decreased from 15% to 5%
  - Percentage of Hispanic students decreased from 16% to 11%
  - Percentage of Asian students increased
  - Percentage of white students remained roughly the same

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The Effect of the Court's Ruling

- For the 2024-25 school year, Amherst college, a selective college in Massachusetts reported similar decreases in its incoming students
  - Black students decreased from 15% to 6%.
  - Hispanic students decreased from 12 % to 8%
- However, at Duke, Yale, and Princeton the percentage of incoming black students held steady
- Moreover, there is some evidence that economic diversity, with more lower income students being admitted, may also be occurring

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The Effect of the Court's Ruling

- Why does this matter? "those schools confer big economic advantages on people who go there according to recent economic research. And they disproportionately create the American elite senators and Supreme Court justices and CEOS disproportionately come form these several dozen schools." (David Leonhardt, N.Y. Times, The Daily Podcast, Sept. 6, 2024).
- What will happen in the future? "I think that we can expect . . . the same folks . . . to be scouring this data and potentially filing suit against schools that report very similar numbers as in the past and accusing them of still taking into account race, while pretending not to. We are almost certainly going to see more legal fights over this issue." (*Id.*)

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Effect on Employers

- The Supreme Court's decision in *SFAA v. Harvard* is unlikely to immediately affect most private employers
- Instead, the current legal framework governing private employers remains the same
- Nonetheless, the decision represents a trend in the law and private DEI programs (which may be viewed as favoring disadvantaged minorities and women) are being challenged on similar grounds

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Effect on Employers

- In a concurring opinion, Justice Neil Gorsuch said there was no reason Title VII (which applies to employers) is any different from Title VI—setting up a bull's eye on private DEI programs

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The Current Legal Framework For Employers – Kaleigh

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Title VII

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

Affirmative Action Under Title VII

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

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Voluntary Affirmative Action Under EEOC Guidelines

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

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Voluntary Affirmative Action Under EEOC Guidelines

- **CAUTION**: The adoption of a voluntary affirmative action plan under the test set forth in *Webber* or the EEOC's guidelines is rare. Thus, it is highly recommended that employers consult with counsel before adopting a voluntary affirmative action plan.
- Also note, that a voluntary affirmative action plan under *Webber* or the guidelines is distinct from DEI policies implemented by many employers

Affirmative Action For Federal Contractors

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

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Affirmative Action For Federal Contractors

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

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Trends and an Evolving Legal Landscape – Christina

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EEOC Response

- Right after the SSFA decision, EEOC Chair Charlotte Burrows, a Biden appointee, issued a press release: the decision "does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers regardless of their background. It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace."
- Why say this if the decision has nothing to do with DEI policies?

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EEOC Response

- Jocelyn Samuels, Vice Chair of the EEOC, a Biden Appointee, wrote an opinion piece: "DEIA initiatives in employment are legally distinguishable from the race-based decisions at issue in the Harvard and UNC cases [and] that [t]hose calling for an end to DEIA efforts due to the court's decisions are wrong."

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EEOC Response

- EEOC Commissioner, Andrea Lucas, a Republican appointee: "[e]ven though the Court's ruling today does not alter federal employment law, now is a good time for employers to review their compliance with existing limitations on race- and sex-conscious diversity initiatives. Companies seriously err if they evaluate their risk under federal employment law by mistakenly referring to (now outdated) standards for higher education admissions which had approved of diversity-motivated affirmative action."

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State Attorney General Response

- On July 13, 2023, Republican AG's from thirteen states sent a joint letter to Fortune 100 CEOs warning them against "discriminating on the basis of race, whether under the label of diversity, equity, and inclusion' or otherwise" and that "the Supreme Court's recent decision should place every employer and contractor on notice of the illegality of racial quotas and race-based preferences in employment and contracting practices."

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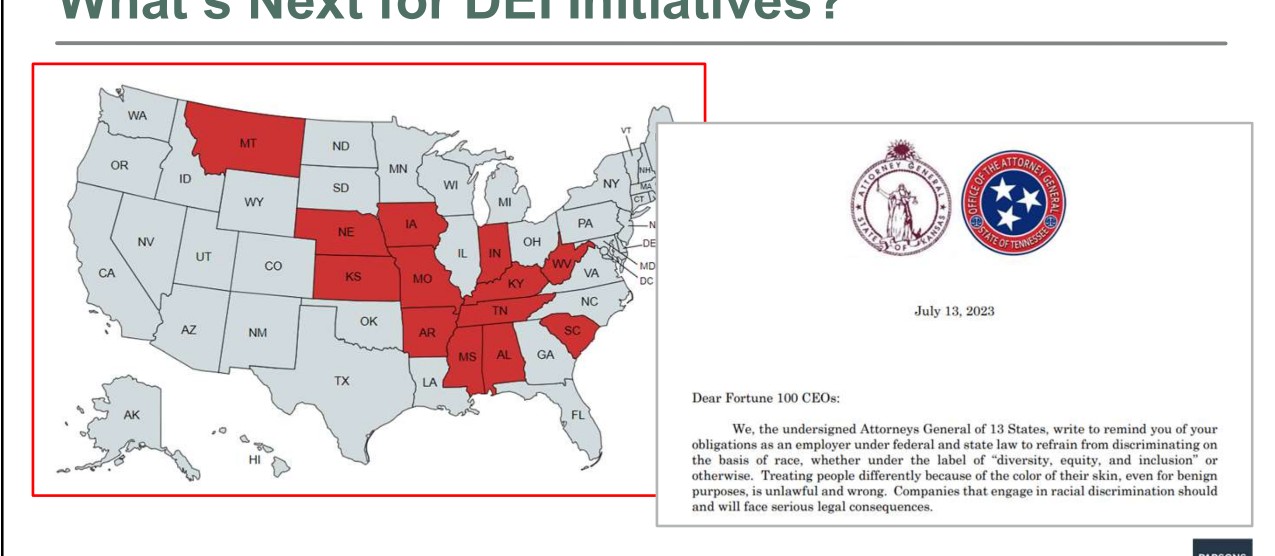
What's Next for DEI Initiatives?



July 13, 2023

Dear Fortune 100 CEOs:

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

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State Attorney General Response

- On July 19, 2023, twenty-one Democratic AG's responded by sending a letter to Fortune 100 CEOs: "[t]he letter received from 13 state attorney generals is intended to intimidate you into rolling back the progress many of you have made" and that the "letter's attempts to equate … permissible diversity efforts with impermissible hiring quotas is a clear effort to block opportunities for women and people of color—especially Black people. Aspirational diversity goals and concerted recruitment efforts to increase the diversity of a company's workforce are not hiring quotas, which were already unlawful…."

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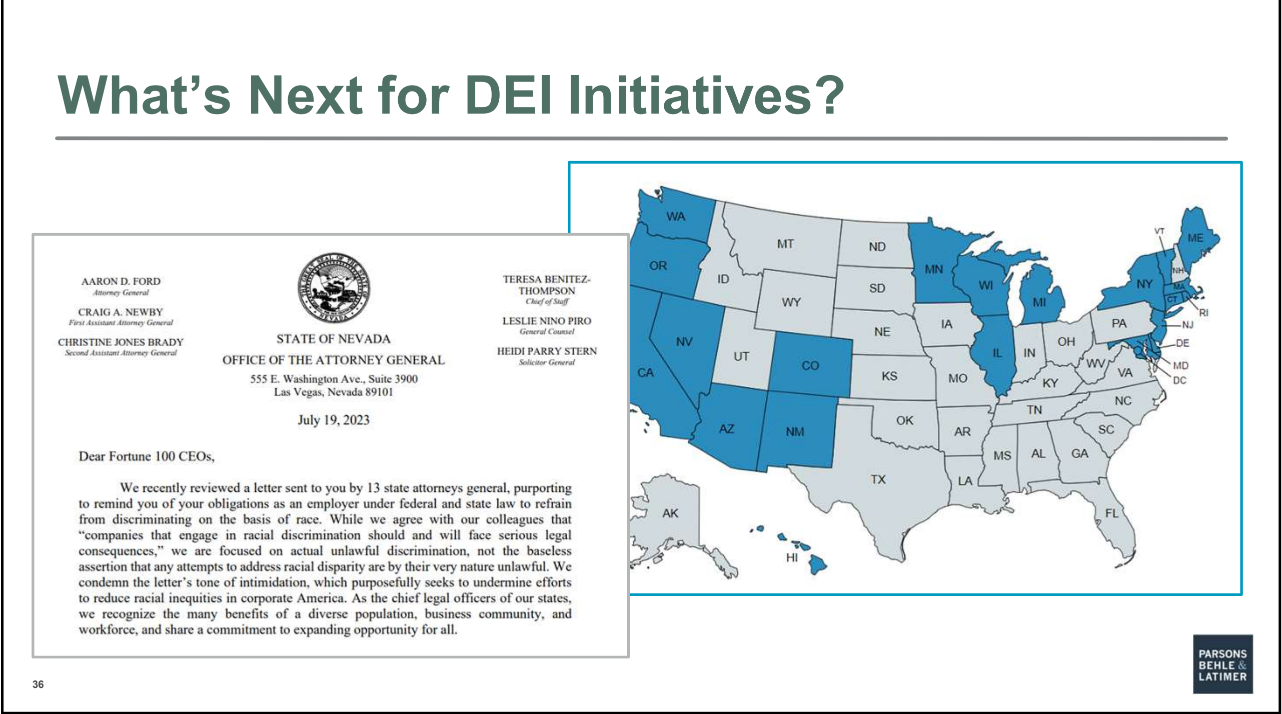
What's Next for DEI Initiatives?



AARON D. FORD
Attorney General

CRAIG A. NEWBY
First Assistant Attorney General

CHRISTINE JONES BRADY
Second Assistant Attorney General

STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL
555 E. Washington Ave., Suite 3900
Las Vegas, Nevada 89101

TERESA BENITEZ-THOMPSON
Chief of Staff

LESLIE NINO PIRO
General Counsel

HEIDI PARRY STERN
Solicitor General

July 19, 2023

Dear Fortune 100 CEOs,

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

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Lawsuits and Other Legal Actions

- A number of legal actions have recently been brought or threatened against companies based on the allegations that their DEI initiatives violate Title VII or other laws
- These lawsuits have been brought by employees, former employees, anti-affirmative action activists, and shareholders of companies
- An August 9, 2024, Washington Post article reported that there are 59 ongoing cases across the United States challenging DEI initiatives, including six cases specifically challenging DEI training programs

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Legal Actions

- Employees and former employees have brought lawsuits alleging DEI programs constitute reverse discrimination or harassment under Title VII
- "Courts addressing the issue have stated that an employer's efforts to promote diversity and inclusion in the workplace are permitted under Title VII and support the statute's purpose." Joyce, Practical Law The Journal (June 2024).
- In addition, courts have recognized that "merely being required to attend across-the-board diversity training is not a discriminatory practice under Title VII." *Vavra v. Honeywell Int'l Inc.,* 688 F.Supp.3d 758, 770 (N.D. Ill. 2023).
- If an "otherwise legitimate DEI policy or program is applied in an unlawful manner" issues may arise. Joyce, *supra*.
- Extreme training programs could be a problem

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Lawsuits and Other Legal Actions

- In *DiBendetto v. AT&T Services, Inc.*, 2022 WL 168420 (N.D. Ga May 19, 2022), a white male alleged he was terminated as a result of AT&T's Diversity & Inclusion Plan ("DIP"). The court denied defendant's motion to dismiss holding that the only question was "whether AT&T's DIP—however laudable in theory—was unlawfully applied in *this* case. . . . Whether . . . decisionmakers unlawfully considered his race and gender when terminating him under the pretext of financial strain."
- In *Diemert v. City of Seattle*, 2023 WL 5530009 (W.D. Wash. Aug. 28, 2023), Plaintiff alleged he was subjected to a hostile work environment following Seattle's implementation of a Race and Social Justice Initiative ("RSJI"). The court denied defendant's motion to dismiss stating he had stated plausible facts to survive a motion to dismiss. He alleged that "he was the target of potentially offensive comments and other abusive actions" and that he was retaliated against for filing an EEOC charge.

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Lawsuits and Other Legal Actions

- In *Young v. Co. Dept. of Corrections*, 94 F.4th 1242 (10th Cir.), a white male corrections officer sued the Colorado Department of corrections alleging that DEI training he was forced to take subjected him to a hostile work environment.
  - Glossary of terms stating that all "whites are racist, that white individuals created the concept of race in order to justify the oppression of people of color, and that 'whiteness' and 'white supremacy' affect all 'people of color within a U.S. context." "White fragility" and "white exceptionalism" imputed that he "promotes racist principles merely by dint of the color of his skin."
  - Racially hostile environment" by forcing him "to hear and absorb statements that were facially based on race," with "sweeping generalizations about white individuals" which "indicated that the workplace is permeated with discrimination, ridicule, and insult."
- The Tenth Circuit upheld dismissal of Young's claims on the grounds that the alleged harassment was not severe or pervasive.
  - Nonetheless, the Tenth Circuit warned that "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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Lawsuits and Other Legal Actions

- Edward Blum who founded Students for Fair Admissions has formed The American Alliance for Equal Rights to sue law firms and other employers
- Sued three law firms (Morrison & Foerster, Perkins Coie, and Winston Strawn LLP) alleging that their diversity fellowships for summer associates from underrepresented communities violated Title VII
- All three lawsuits were dropped after the firms changed the language of their fellowships
- The Blum group which sued the law firms is considering more suits and has sent warning letters to other law firms

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Lawsuits and Other Legal Actions

- Morrison & Foerster fellowship for students “who are members of historically underrepresented groups in the legal industry.”
  - Changed to “students with a demonstrated commitment to diversity and inclusion in the legal profession” and who “bring a diverse perspective to the firm”
- Perkins Coie fellowship was for students “from communities historically underrepresented in the legal industry.”
  - Changed to students “in good standing in their first year at an ABA accredited law school.”
- Winston and Strawn LLP’s fellowship required students to belong to a “disadvantaged and/or historically underrepresented group in the legal profession.”
  - This requirement was eliminated.

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Lawsuits and Other Legal Actions

- Pfizer, Inc. was sued by an activist group called Do No Harm alleging that its Breakthrough Fellowship Program violated Title VII
  - Applicants "must meet the program's goals of increasing the pipeline for Black/African American, Latino Hispanic, and Native Americans."
  - Pfizer revised this criteria: applicants can apply "regardless of whether you are of Black/African American, Latino/Hispanic, or Native American descent."
  - Case dismissed because of plaintiff's failure to specifically name any of its members who had been harmed by Pfzier's policy.

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Lawsuits and Other Legal Actions

- America First Legal has filed EEOC complaints against nearly two dozen companies it identifies as "woke corporations"
- The complaints allege that the companies' DEI policies constitute unfair employment practices
- The EEOC has not yet publicly opened an investigation or filed charges related to the actions

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

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Lawsuits and Other Legal Actions

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

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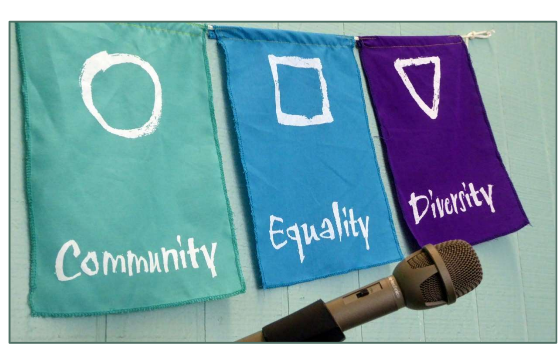

Impact on DEI Programs and Takeaways – Kaleigh

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OVERVIEW

- **"It's a very odd place to be, to be in corporate America and trying to do something that they think is the right thing, and yet being worried about whether that's legal or not."** Ann McGinley, an employment law professor at the William S. Boyd School of Law at the University of Nevada, Las Vegas." (Bloomberg Law, October 10, 2023)

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Benefits v. Costs

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

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Review of DEI Policies – General

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

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Review of DEI Policies – Legal

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

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Review of DEI Policies – Legal

Permissible Actions

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

Potentially Impermissible Actions

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

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Future Legal Developments

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

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Takeaways

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

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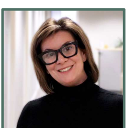
Thank You

For more information, and to get on the mailing list for Parsons' free employment law email updates, contact:



Christina M. Jepson
cjepson@parsonsbehle.com

Kaleigh C. Boyer
kboyer@parsonsbehle.com

Special thanks to **Aaron Muranaka**, Parsons' Research Manager, for his great assistance in preparing this presentation.

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Montana Employment Law Seminar

“I Have a Note From My Doctor” - Engaging with Employees’ Medical Providers on ADA Accommodation and Fitness for Duty Issues

Susan Baird Motschiedler
801.536.6923 | smotschiedler@parsonsbehle.com

Leah Trahan
406.317.7244 | ltrahan@parsonsbehle.com

Susan Motschiedler provides deep employment and labor experience primarily to medium and small businesses on routine and crisis administrative matters; long-term growth planning and protection; and employment litigation. Her collaboration with multidisciplinary teams benefits clients in matters of business structure; acquisition; acquisition planning and more.

Contact information

801.536.6923
smotschiedler@parsonsbehle.com

Capabilities

Employment & Labor

Employment Litigation

Business & Commercial Litigation

Licensed/Admitted

Utah

U.S. Court of Appeals, 10th Circuit

Susan Baird Motschiedler

Of Counsel | Salt Lake City

Biography

Susan Baird Motschiedler is a member of Parsons Behle & Latimer's employment and labor law and litigation practice groups. With an eye toward avoiding litigation, she excels at providing up-front advice and counsel to business owners and management regarding employment discrimination, harassment and retaliation; disciplinary action and documentation; disability accommodation issues; benefits; employment policies and practices; employee leave laws; layoffs; protection of trade secrets and other confidential and proprietary information through the use of confidentiality, noncompetition and nonsolicitation agreements; wage and hour laws; and other employment-related issues. Susan also regularly conducts real world client training programs for employers on topics including harassment and discrimination, disability accommodation, hiring and firing, conducting investigations, record keeping and coaching/disciplining employees. When disputes arise, Susan confidently defends clients in litigation, administrative proceedings and alternative dispute resolution forums.

Susan regularly counsels and represents employers in lawsuits in a variety of areas including:

- Sex discrimination and sexual harassment
- Age discrimination
- Religious discrimination
- Americans with Disabilities Act, disability and employee medical issues
- Wrongful termination

- Employment contracts and compensation
- Non-compete, confidentiality, and non-solicitation agreements
- Handbooks
- Social media in the workplace
- Fair Labor Standards Act (FLSA), overtime, exemptions, and wage issues
- Independent contractor issues
- Drug and alcohol testing
- Family Medical Leave Act and other leave issues
- Terminations and unemployment
- Union issues
- Investigations
- UALD and EEOC charges and audits
- Training for management and employees

Ms. Motschiedler also maintains a practice of black lung defense counsel in workers' compensation claims brought under the federal Black Lung Benefits Reform Act.

She has represented employers with coal mine or other non-coal mine operations in Utah, Colorado, Kentucky, West Virginia, Tennessee, and Alabama before the Department of Labor Office of Administrative Law Judges, the Benefits Review Board, and in appellate proceedings before the United States Court of Appeals for the Tenth Circuit.

Experience

Racial Discrimination Defense
Defending client against claims of race discrimination and national origin discrimination under Title VII, Section 1981 and breach of contract, breach of duty of good faith and fair dealing.

Accomplishments

Professional
Recognized in Utah Legal Elite, 2013, 2014, 2017, 2018, 2019, 2020, 2021

Recognized by *Mountain States Super Lawyers* as Rising Star in Business Litigation, 2012, Employment & Labor, 2015

Academic
University of Utah, S.J. Quinney College of Law (J.D., 2005)

Rhodes College (B.A., 1994)

- Major: Anthropology/Sociology
- Major: German

Universität Tübingen, Germany (1992-1993)

Associations

Professional
Utah State Bar
Ethics Advisory Committee
Member

Women Lawyers of Utah
Past President
Co-author, "The Utah Report: The Initiative on the Advancement and Retention of Women in Law Firms"
(October 2010)

David K. Watkiss Sutherland II Inn of Court
Member

Salt Lake County Bar Association
Member

Articles

Employment Law Update, April 13, 2023

Did Twitter's Mass Layoff Violate Federal (and State) Law?, November 17, 2022

Employment Law Update, June 15, 2022

DOL Issues Proposed Rule Easing Factors for Classifying Workers as Independent Contractors for Purposes of the FLSA, October 6, 2020

Looking Forward: How to Manage Your Workforce In 2020 and Beyond, June 30, 2020

OSHA Issues New Enforcement Policies Regarding Workplace Inspections And Employer Recording Requirements For Covid-19, May 22, 2020

Re-opening for Business: Employers Should Begin Planning Now, April 14, 2020

Top Nine Takeaways from New FFCRA Regulations, April 3, 2020

Presentations

Parsons Attorneys to Present at SHRM Annual Employment Update, February 14, 2023
Salt Lake SHRM

Employee Discipline and Termination: Avoiding Problems Through Effective Communication and Documentation, June 16, 2022
34th Annual Parsons Behle & Latimer Employment Law Seminar

Conducting an Effective Internal Investigation, October 27, 2021
33rd Annual Parsons Behle & Latimer Employment Law Seminar

Conducting an Effective Internal Investigation, September 22, 2021
Parsons Behle & Latimer Ninth Annual Boise Employment Law Seminar

COVID-19 Vaccinations in the Workplace: Mandatory, Voluntary or None at Al,l February 10, 2021

Trends in Employment Law Cases Related to COVID-19, November 10, 2020
32nd Annual Parsons Behle & Latimer Employment Law Seminar - Virtual

Getting Your Company Ready for a Sale or Acquisition: How to Get Your Employment House in Order, November 10, 2020
32nd Annual Parsons Behle & Latimer Employment Law Seminar - Virtual

What Every Employer Should Know Before Resuming Business in Utah, May 12, 2020
Visit Salt Lake

Moving Forward: Resuming Business in a Changed Environment, May 7, 2020
Missoula Economic Partnership

Employer Considerations To Successfully Reopen A Business, May 5, 2020
South Valley Chamber

Leah Trahan is a member of the firm's Litigation Group. With more than eight years' legal experience in both the public and private sector, Leah brings her varied experience to the table to provide practical solutions to complex problems for her clients.

Leah Trahan

Associate | Missoula

Contact information

406.317.7244
ltrahan@parsonsbehle.com

Capabilities

Business & Commercial Litigation
Civil Rights Including Title VII and Title IX
Employment & Labor
Employment Litigation
Insurance Litigation
Medical Malpractice and Hospital Negligence
Plaintiffs Litigation

Licensed/Admitted

Montana

Biography

Leah Trahan is a member of the firm's Litigation and Employment & Labor practice teams. Since 2014, Leah has worked in various legal roles in both the public and private sector. During this time, Leah gained valuable experience in a wide variety of practice areas, including Title VII and Title IX defense, administrative proceedings, insurance defense, tribal tax law and employment counseling for both private and government employers. Leah's current practice focuses on civil litigation, including employment litigation and commercial litigation.

In 2022, Leah earned her J.D. with high honors from the Alexander Blewett III School of Law. During law school, Leah mentored new law students as a member of the school's Academic Success Program and was a Constitutional Law teaching assistant.

When not in the office, Leah enjoys traveling with her family, gardening, and experimenting with new recipes.

Accomplishments

Academic

Associate Dean of Students Award for Highest Academic Achievement in Legal Writing, Legal Analysis, Administrative Law, and Business Transactions.

Montana Employment Law Seminar

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

Susan Baird Motschiedler
smotschiedler@parsonsbehle.com

Leah Trahan
ltrahan@parsonsbehle.com

Sept. 25, 2024 | DoubleTree by Hilton

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Presenters

Susan Baird Motschiedler
smotschiedler@parsonsbehle.com

Leah Trahan
ltrahan@parsonsbehle.com

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Legal Disclaimer

This presentation is based on available information as of Sept. 25, 2024, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

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Introduction

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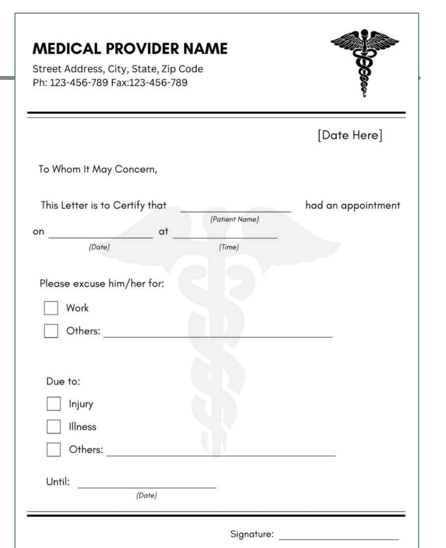
Common Scenario

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


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

[Date Here]

To Whom It May Concern,

This Letter is to Certify that ______ (Patient Name) had an appointment on ______ (Date) at ______ (Time)

Please excuse him/her for:
- ☐ Work
- ☐ Others: ______

Due to:
- ☐ Injury
- ☐ Illness
- ☐ Others: ______

Until: ______ (Date)

Signature: ______

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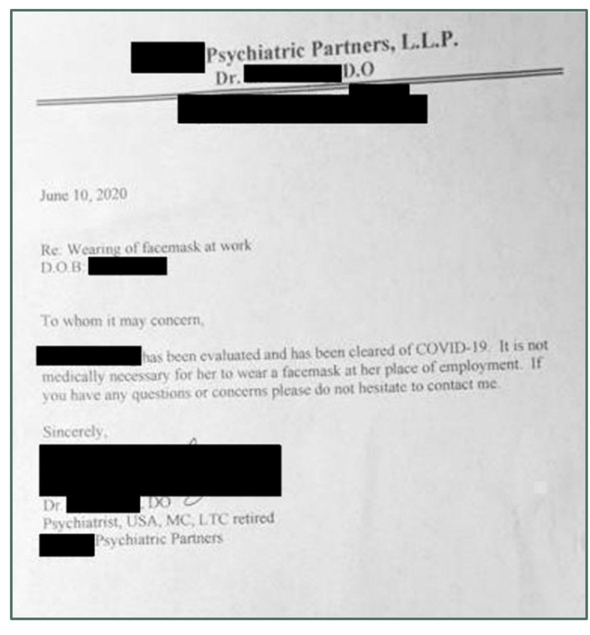
The signing physician is a psychiatrist and a relative of the patient.


Psychiatric Partners, L.L.P.
Dr. D.O

June 10, 2020

Re: Wearing of facemask at work
D.O.B.

To whom it may concern,

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

Sincerely,

Dr. DO
Psychiatrist, USA, MC, LTC retired
Psychiatric Partners

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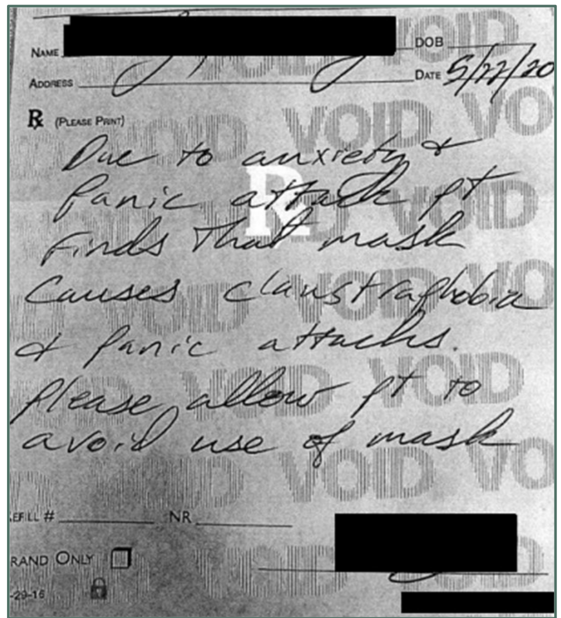
"Due to anxiety and panic attacks, patient finds that mask causes claustrophobia and panic attacks. Please allow patient to avoid use of mask."

(Written by the patient's chiropractor.)



NAME

DOB

ADDRESS

DATE 5/22/20

℞ (PLEASE PRINT)

Due to anxiety & panic attack pt finds that mask causes claustraphobia & panic attacks. Please allow pt to avoid use of mask

REFILL # NR

BRAND ONLY

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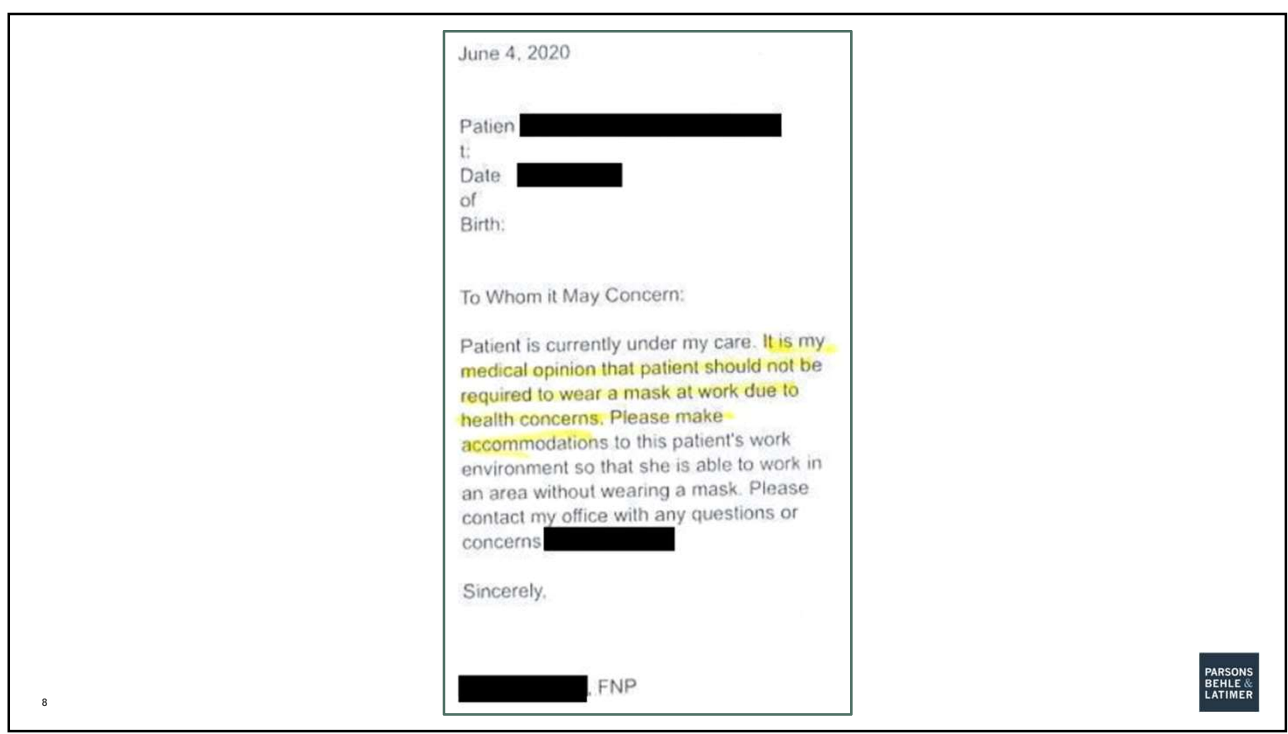

June 4, 2020

Patient:

Date of Birth:

To Whom it May Concern:

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

Sincerely,

, FNP

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

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Title I of the ADA

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

(© Barry Thumma/AP Images)

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Title I of the ADA (cont.)

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

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Title I of the ADA (cont.)

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

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Title I of the ADA (cont.)

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

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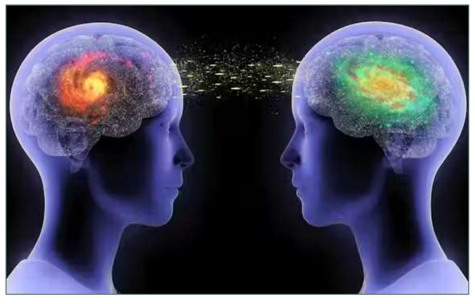
Title I of the ADA (cont.)

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



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Title I of the ADA (cont.)

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

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Obtaining Necessary Information to Provide an Accommodation

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Guidelines for Obtaining Disability Documentation

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

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Guidelines for Obtaining Disability Documentation (cont.)

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

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Guidelines for Obtaining Disability Documentation (cont.)

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

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Guidelines for Obtaining Disability Documentation (cont.)

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

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Step 1: Informal Discussion

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

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Step 2: Requesting Information from the Employee's Doctor

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

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

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

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

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

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Requests for Accommodation under PWFA

- Pregnant employee qualifies for accommodation is employee has a "known limitation," which is "a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee…has communicated to the covered entity[.]"
- "…may be modest, minor, and/or episodic…includes when an employee is seeking health care related to pregnancy, childbirth, or a related medical condition itself. The physical or mental condition can be a limitation whether or not such condition meets the definition of disability specified in [the ADA]."

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Limitations on Documentation

- Employer may only request supporting documentation if it is reasonable under the circumstances
- Can only request documentation that is reasonable

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When asking for documentation is not reasonable

- Employee requests:
  - Carry or keep water nearby and to drink
  - Take additional restroom breaks
  - Take additional breaks to eat and drink
  - Sit in jobs that require standing or vice versa
  - Accommodation for lactation/pumping at work

- Or if:
  - Limitations are "obvious" (ex. a 7-month pregnant woman may need larger safety gear) + employee self-confirms
  - Accommodations are available to employees without known limitations under PWFA pursuant to policies/practices

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When documentation is not reasonable

- The physical or mental condition is obvious
- The employer already has sufficient information to conclude the employee needs an adjustment due to a limitation
- Is more than the minimum that is sufficient to:
  - Confirm the physical/mental condition
  - Confirm the condition is related to pregnancy/childbirth, or
  - Describe the adjustment/change needed

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In Montana…

- Montana requires "reasonable maternity leave."
- Montana Department of Labor has provided guidance that:
  - In the case of normal pregnancy and delivery, medical providers typically consider a reasonable leave to be six to eight weeks after delivery…necessary leave may be longer than normally required. **If the employer and the employee cannot agree in establishing a reasonable period of time for the leave, the employer should rely on the judgment of the employee's physician or other medical provider who has actually examined the employee**… As a condition of maternity leave, an employer may require the employee to provide medical verification that the employee is unable to perform her employment duties."

https://erd.dli.mt.gov/_docs/human-rights/Posters/PregnancyBrochure2018.pdf

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Takeaways on PWFA

- Do not make documentation the default for pregnant employees.
- Be careful with using ADA/FMLA forms for pregnant employees because the limitation can be modest or minor and does not need to be a diagnosis.
- For maternity leave in Montana, if the employee and employer disagree on the length of leave, the HRB will defer to the medical provider's determination so long as the physician examined the patient.

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Case Studies

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Case Study #1: Disclosing Therapy

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

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Case Study #1: Disclosing Therapy (cont.)

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

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Case Study #1: Disclosing Therapy (cont.)

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

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Case Study #1: Disclosing Therapy (cont.)

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

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Case Study #1: Disclosing Therapy (cont.)

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

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Takeaways from Case Study #1

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

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Takeaways from Case Study #1 (cont.)

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

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Case Study #2, "Stressors from Work"

- Employee reports IBS and Fatty Liver Disease to employer
- About six months in, employee complains about being excluded from a meeting and states she would be filing a formal grievance and "taking a mental health day today and tomorrow and using PTO."
- Employee promises to return to work a few days later.

Alfonso v. Community Bridges, Inc., No. CV-21-01305-PHX-DWL, 2024 WL 1071159, at *7 (D. Ariz. Mar. 12, 2024)

Case Study #2, "Stressors from Work"

- When employee returns to work, she meet with her supervisor to discuss employee's complaint.
- During the discussion, employee speaks about the significance of her bracelet, which was part of her non-Christian faith (ifa).
- Employee claims her (Christian) manager was hostile to her after that meeting.

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Case Study #2, "Stressors from Work" (cont.)

- A few weeks later, employee did not report to work.
- Employee claims she began to suffer "extreme emotional distress leading to an urgent care visit, multiple ER visits"
- Employee provided a few doctor's notes excusing absences, for "illness or injury" without elaboration.
- Employee told employer "I am unable to return to work at this time due to health reasons" and "I would like to request a medical leave of absence," also requested information on disability benefits

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Case Study #2, “Stressors from Work” (cont.)

- Employer granted temporary leave and repeatedly requested medical documentation inquiring about what reasonable accommodation would be possible and when the employee would be able to return to work.
  - Requested physician fill out medical inquiry several times
  - Requested medical documentation
  - Repeatedly attempted to set up meetings to discuss situation
- Employee refused to provide more information, stated “**I’m unsure why you keep harassing me during my medical leave regarding petty paperwork**”

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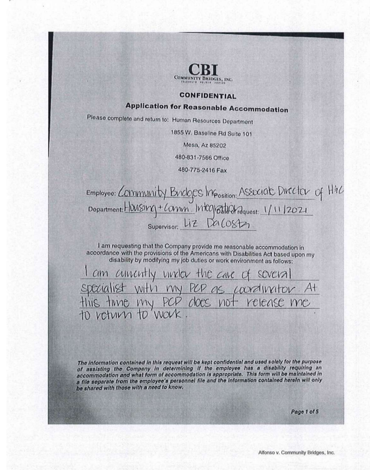
Case Study #2, “Stressors from Work” (cont.)


Case 2:21-cv-01305-DWL Document 44 Filed 12/06/22 Page 38 of 56

CBI
Community Bridges, Inc.

CONFIDENTIAL

Application for Reasonable Accommodation

Please complete and return to: Human Resources Department
1855 W. Baseline Rd Suite 101
Mesa, Az 85202
480-831-7566 Office
480-775-2416 Fax

Employee: Community Bridges Inc Position: Associate Director of H&C
Department: Housing + Comm Integration Date of request: 1/11/2021
Supervisor: Liz DaCosta

I am requesting that the Company provide me reasonable accommodation in accordance with the provisions of the Americans with Disabilities Act based upon my disability by modifying my job duties or work environment as follows:

I am currently under the care of several specialist with my PCP as coordinator. At this time my PCP does not release me to return to work.

The information contained in this request will be kept confidential and used solely for the purpose of assisting the Company in determining if the employee has a disability requiring an accommodation and what form of accommodation is appropriate. This form will be maintained in a file separate from the employee's personnel file and the information contained herein will only be shared with those with a need to know.

Page 1 of 5

Alfonso v. Community Bridges, Inc.

Case 2:21-cv-01305-DWL Document 44 Filed 12/06/22 Page 39 of 56

CBI
Community Bridges, Inc.

Describe the essential functions of your job that you are unable to perform based upon your disability. You should supply as much specific detail as possible and provide examples of the essential job duties you are unable to perform.

Unknown at this time.

Nature of disability (includes or attach any information that will help us understand the nature of your disability and the limits it places upon your ability to perform the essential functions of your current job):

diagnosis in process. (Cardiovascular disease, Diabetes, CNS disease, fatty liver + IBS)

If necessary, I authorize my health care provider to release information necessary to evaluate my accommodation request: (Note: Your request may be denied if the Company does not have sufficient medical information to consider your request.)

Yes ____ No ✓

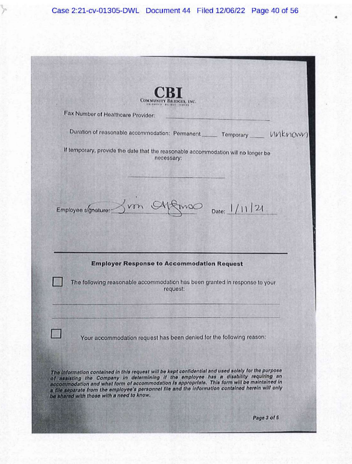
Name of Healthcare Provider: Stripes Primary Care

Phone Number of Healthcare Provider: (480) 246-3411

The information contained in this request will be kept confidential and used solely for the purpose of assisting the Company in determining if the employee has a disability requiring an accommodation and what form of accommodation is appropriate. This form will be maintained in a file separate from the employee's personnel file and the information contained herein will only be shared with those with a need to know.

Page 2 of 5

Alfonso v. Community Bridges, Inc.


Case 2:21-cv-01305-DWL Document 44 Filed 12/06/22 Page 40 of 56

CBI
Community Bridges, Inc.

Fax Number of Healthcare Provider: ____

Duration of reasonable accommodation: Permanent ____ Temporary ____ unknown

If temporary, provide the date that the reasonable accommodation will no longer be necessary:

Employee signature: ____ Date: 1/11/21

Employer Response to Accommodation Request

☐ The following reasonable accommodation has been granted in response to your request:

☐ Your accommodation request has been denied for the following reason:

The information contained in this request will be kept confidential and used solely for the purpose of assisting the Company in determining if the employee has a disability requiring an accommodation and what form of accommodation is appropriate. This form will be maintained in a file separate from the employee's personnel file and the information contained herein will only be shared with those with a need to know.

Page 3 of 5

Alfonso v. Community Bridges, Inc.

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Case Study # 2, "Stressors from Work" (cont.)

- Court concluded:
  - It was a "close call," but jury could conclude that employer regarded employee as impaired based on what she had communicated to her employer
  - BUT employer attempted to engage in the interactive process to determine reasonable accommodations and employee's failure to engage meant employer could not be held liable.
  - "Generic notes were not responsive to [employer's] request for medical documentation because they did not describe Plaintiff's disabilities or provide a diagnosis."

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Takeaways from Case Study # 2

- Even vague information from employee about diagnosis might trigger employer's obligation to engage in interactive process
  - i.e. request for "medical leave," request for information on disability, or self reports regarding medical treatment
- But employers can avoid liability by showing they made every effort to engage in the interactive process
  - Offer easy to use forms to employee to have physician complete
  - Offer meeting with employee to discuss
  - Offer to request and review medical records
  - Keep thorough records of attempt to engage in interactive process and communicate with employee in writing

Hypo # 1 Employee on the Precipice of Termination

- Employee hired on the recommendation of a company manager who had worked with the person before.
- Employee's job duties are both outward and inward facing; though company wants an "in-office" work culture.
- Company does not allow remote access to its systems post-covid.

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Hypo # 1 (cont.)

- Within first few weeks of hiring, employee is late or left early multiple times with various excuses, such as picking daughter up from daycare, putting down pet, or forgetting things at home.
- Employer has conversation with employee about attendance issues.
  - Employee claims issues at home.
  - Employee promises to be better going forward.

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Hypo # 1 (cont.)

- Employee continues to have attendance issues and employer speaks to employee about the importance of attendance and being on time. Employee uses all PTO with 5 months left in the year.
- After months, employer gives employee a final written warning.
- As part of the final warning, employer offers employee additional PTO but states that, if the employee uses the additional PTO by the end of the year and still misses more work, she will be terminated.
- After much of the additional PTO is used up, employee begins to miss work without notifying employer

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Hypo # 1 (cont.)

- Employee then sends email informing employer she is pregnant.
- She continues to be late or absent without notifying the employer.
- She does not provide a note from her doctor, but states her absences and tardiness should be accommodated because of her pregnancy.
  - *What are the potential legal issues?*
  - *What can the employer do?*

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Recap

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

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Recap (cont.)

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

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Thank You

Susan Baird Motschiedler
smotschiedler@parsonsbehle.com

Leah Trahan
ltrahan@parsonsbehle.com

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Montana Employment Law Seminar

Handbook Updates – 2024 Policy Pointers and Pitfalls

Liz M. Mellem
406.317.7240 | amellem@parsonsbehle.com

Mark D. Tolman
801.536.6932 | mtolman@parsonsbehle.com

Liz Mellem is a skilled litigator and an experienced neutral investigator regarding employment claims. Her experience with an array of complex commercial issues, including significant employment counseling and litigation, helps guide her clients toward effective and satisfactory resolutions both in and out of court.

Liz M. Mellem

Director, Vice President and Secretary | Shareholder | Missoula | Helena | Salt Lake City

Contact information

406.317.7240
amellem@parsonsbehle.com

Capabilities

Employment & Labor Counseling

Employment Litigation

Business & Commercial Litigation

Licensed/Admitted

Utah

U.S. Dist. Court, Dist. of Utah

Montana

U.S. Dist. Court, Dist. of Montana

Biography

Liz Mellem represents companies in a wide range of employment and commercial issues including:

- Neutral investigations of internal claims of harassment, discrimination, and ethical violations
- Harassment and discrimination defense
- Wrongful termination defense
- Handbook review and revision
- Employment practices training including harassment and discrimination training of management and non-management employees
- General commercial litigation including breach of contract, trade secret misappropriation, and ownership disputes
- Pre-litigation negotiation and resolution of disputes

Liz focuses on creating innovative business solutions for her clients and zealously advocates for their interests from the beginning of a matter through resolution, including through trial.

Liz has spent much of her career representing clients in both Utah and Montana by traveling between the two states. She is active in the local running and biking communities in Missoula.

Experience

Racial Discrimination Defense

Defending client against claims of race discrimination and national origin discrimination under Title VII, Section 1981 and breach of contract, breach of duty of good faith and fair dealing.

Nonsolicitation or Noncompete Contracts

Successfully resolved numerous cases alleging violations of non-solicitation and non-competition contract provisions.

Employee Handbooks

Worked with both large and small companies to revise and improve employee handbooks.

Wrongful Termination

Successfully defended company in alleged wrongful termination case.

Defending Client in FLSA Claims

Defending call center client against claims of violation of the Fair Labor Standards Act, Utah Wage Payment Act and Montana Wage Payment Act.

Provide Counsel in Copper and Molybdenum Mining Activities

Representing client on matters related to ongoing copper and molybdenum mining activities, including cleanup of legacy impacts and future water treatment process.

Defending a Large Gold Mine Against Royalty Claims

Representing an international gold mining company's mine against royalty claims by another world-class gold mine.

Fiduciary Duty Trial

Obtained six-figure jury verdict for plaintiff in breach of fiduciary duty case

Fraudulent Misrepresentation

Obtained defense verdict in fraudulent misrepresentation case involving allegedly hidden assets.

UCC Product Dispute

Successfully resolved UCC “battle of the forms” dispute in pre-litigation, saving client time and expenses of litigation.

Accomplishments

Professional

Parsons Behle & Latimer, Director, Vice President and Secretary 2024 – 2026

Admissions:

Utah State Bar, 2010

United States District Court, District of Utah, 2010

State Bar of Montana, 2013

United States District Court, District of Montana, 2014

Mountain States Super Lawyers Rising Star: 2014, 2018, 2019, 2020

Academic
University of Utah, S.J. Quinney College of Law (2010, J.D.)

Montana State University (2004, B.S.) Major: Sociology

Associations

Professional
Utah State Bar Labor & Employment Section, Chairperson, 2017 - 2018

American Bar Association, Member, (2010 - Present)

Community
Missoula Economic Partnership, Board of Directors member, 2023 – present

Humane Society of Western Montana

- Board of Directors (2017 - 2023)
- President of Board (2020 - 2023)

Run Wild Missoula, member (2013 - present)

Articles

“New COVID Relief Statute: Second Round of PPP Loans, Extension of FFCRA Leave Rights, and Tax Code Changes,” December 23, 2020

“Montana Face Coverings Mandates,” July 21, 2020

“Montana Civil Cases Can Resume, But With Significant Restrictions,” May 18, 2020

“Strategies on acing the SBA’s new PPP Loan Forgiveness Application,” May 18, 2020

“Beware the Whistleblower: Avoiding Fraud Liability under the PPP,” May 12, 2020

“Montana’s Employers Can Open for Business – Sort Of,” April 28, 2020

“Re-opening for Business: Employers Should Begin Planning Now,” April 14, 2020

“Top Nine Takeaways from New FFCRA Regulations,” April 3, 2020

Additional Guidance from the Department of Labor Including the Frequently Asked Question: “What is the ‘small business exemption’ under the Families First Coronavirus Response Act? March 30, 2020

“Montana’s ‘Stay at Home’ Directive from Governor Bullock” March 30, 2020

“CARES ACT: Emergency Appropriations,” March 27, 2020

“Emerging Questions for Employers Under The Families First Coronavirus Response Act And Other Coronavirus Employment Issues,” March 24, 2020

Presentations

Regulatory Hot Topics, May 9, 2023
Parsons Behle & Latimer 35th Annual Employment Law Seminar in partnership with Salt Lake SHRM

Preventing and Responding to Workplace Violence and new HB 324, May 9, 2023
Parsons Behle & Latimer 35th Annual Employment Law Seminar in partnership with Salt Lake SHRM

Hiring and Firing Employees, January 23, 2023
National Business Institute (NBI) Seminar – Montana Employment Law 2023

Employee Discipline and Termination: Avoiding Problems with Effective Communication and Documentation, October 5, 2022
Parsons Behle & Latimer 10th Annual Idaho Employment Law Seminar

Hot Employment Topics Sessions #1 and #2, October 28, 2021
33rd Annual Parsons Behle & Latimer Employment Law Seminar

Hot Employment Topics Session #1 and #2, September 22, 2021
Parsons Behle & Latimer Ninth Annual Boise Employment Law Seminar

COVID-19 Vaccinations in the Workplace: Mandatory, Voluntary or None at All, February 10, 2021

Remote Working Considerations in the ERA of COVID-19, November 10, 2020

Strategies on Acing the SBA's New PPP Loan Forgiveness Application, May 20, 2020

Back in Business: Information Every Idaho Employer Should Know, May 13, 2020

Moving Forward: Resuming Business in a Changed Environment, May 7, 2020

**To view additional insights and related news items, visit parsonsbehle.com/people/liz-m-mellem#insights*

Mark is co-chairperson of the firm's Employment and Labor practice team. Mark helps his employer clients avoid disputes through preventative practices, policies and training, and advocates for them in litigation when disputes cannot be avoided.

Mark D. Tolman

Employment & Labor Practice Area Co-chairperson | Shareholder | Salt Lake City

Contact information

801.536.6932
mtolman@parsonsbehle.com

Capabilities

Appeals
Healthcare
Employment & Labor
Trade Secret Litigation
Employment Litigation

Licensed/Admitted

Utah
Idaho
Wyoming

Biography

Mark practices employment law and commercial litigation in matters before state and federal courts, the Utah Labor Commission and Equal Employment Opportunity Commission. He was recognized by the Utah State Bar as the 2018 Labor & Employment Attorney of the Year. Mark litigates cases involving complex factual and legal matters, including employment discrimination, harassment and retaliation, breach of fiduciary duty, covenants not to compete, solicit, or disclose confidential information, interference with contract, trade secrets and defamation. Mark has tried cases before state and federal courts and before the Adjudication Division of the Utah Labor Commission. He has also argued cases to the Utah Supreme Court, the Utah Court of Appeals and to the United States Tenth Circuit Court of Appeals. Most importantly, Mark helps his clients avoid litigation by daily counseling on employment law problems, developing preventative practices and policies and providing regular inhouse training.

Mark is an experienced independent investigator. He has conducted dozens of fact investigations involving matters of alleged harassment and abuse, discrimination and retaliation. Mark regularly trains HR professionals and others on how to conduct effective investigations.

Mark also volunteers as the Director of Legal Affairs for the Utah SHRM State Council and as Co-Director of Legal Affairs for Salt Lake SHRM. Mark is a regular presenter at SHRM events and provides a monthly *Ask a Lawyer* webinar for members of Salt Lake SHRM.

Experience

Utah's Workplace Violence Protective Order Law

Mark lobbied on behalf of Salt Lake SHRM and Utah SHRM for passage of House Bill 324, Workplace Violence Protective Order Amendments. This bill allows an employer to seek a protective order against individuals who harm, or threaten to harm, its employees or property. The bill passed and took effect July 1, 2023. For additional information on how to obtain a Workplace Violence Protective Order, please contact Mark or visit the Utah Court's website here: Protective Orders (utcourts.gov)

Independent Investigation of Sexual Harassment

Conducted an independent investigation of sexual harassment claims against Senator Gene Davis by a legislative intern.

ADA Discrimination Defense

Represented a Utah city regarding discrimination charges under the ADA and in retaliation for filing worker's compensation claims.

FMLA and ADA Discrimination Defense

Represented a large Intermountain region bank in two discrimination claims in U.S. District Court concerning FMLA and ADA.

Nondisclosure, Nonsolicitation, Noncompetition Defense of Solar Sales Company

Defending a solar sales company in several lawsuits in Utah state and federal courts and Texas state court for competitive claims including nonsolicitation, nondisclosure and noncompetition claims.

Accomplishments

Professional

Utah Business Magazine's Legal Elite, Labor and Employment

Recognized in *Chambers USA*, Labor & Employment – Utah

Mountain States Super Lawyers (Employment & Labor)

2015 "Outstanding Mentor Award," Utah State Bar

Academic

University of North Carolina at Chapel Hill (J.D., with honors, 2004)

Weber State University (B.S., *summa cum laude*, Economics, 2001)

Associations

Professional

Member, Society for Human Resource Management (SHRM)

Director of Legal Affairs, Utah State SHRM Council

Co-Director of Legal Affairs, Salt Lake Chapter of the Society for Human Resource Management (SHRM)

Community

Weber State University Business Advisory Council

Articles

"Congress Passes the Speak Out Act, Outlawing the Use of NDAs to Silence Victims of Sexual Harassment and Assault," (November 30, 2022)

"*Employment Law Update*," (June 29, 2022)

Presentations

"Parsons Attorneys to Present at SHRM Annual Employment Update," (February 14, 2023)
Salt Lake SHRM

"Everything You Want to Ask Your Lawyer But Are Afraid to Ask," (October 5, 2022)
Parsons Behle & Latimer 10th Annual Idaho Employment Law Seminar

"Common Mistakes and Horror Stories," (August 31, 2022)
WECon Utah SHRM Conference

"2022 Legislative and Regulatory Update," (June 16, 2022)
34th Annual Parsons Behle & Latimer Employment Law Seminar

"Key Employment Laws Every New HR Professional Must Know," (August 30, 2022)
WECon Utah SHRM Conference

"Everything You Want to Ask Your Lawyer But Are Afraid to Ask," (June 16, 2022)
34th Annual Parsons Behle & Latimer Employment Law Seminar

"The ADA, FMLA and Other Leave Essentials," (June 16, 2022)
34th Annual Parsons Behle & Latimer Employment Law Seminar

"Emerging Employment Law Issues and Trends for Municipal Employers," (June 3, 2022)
Utah Municipal Attorneys Association

Montana Employment Law Seminar

Handbook Updates – 2024 Policy Pointers and Pitfalls

Liz M. Mellem
amellem@parsonsbehle.com

Mark D. Tolman
mtolman@parsonsbehle.com

Sept. 25, 2024 | DoubleTree by Hilton

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Presenters

Liz M. Mellem
amellem@parsonsbehle.com

Mark D. Tolman
mtolman@parsonsbehle.com

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Legal Disclaimer

This presentation is based on available information as of Sept. 25, 2024, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

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Must-Have Montana Handbook Policies

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Montana-Specific Probationary Policy

- Every Montana employee is "at-will" only during their probationary period
  - If your handbook does not define the probationary period, it defaults to **12 months** (but you can make it shorter, though you shouldn't)
- The initial 12-month probationary period can be extended one time for no more than **6 months**, but the employee must be notified of the extension before the initial probationary period expires
- Policy Suggestion: "All new employees are subject to a 12-month probationary period, during which their employment can be terminated by them or the Company for any reason or no reason at all. In some circumstances, and in the Company's sole discretion, the initial probationary period may be extended up to 6 months for no more than a total of 18 months' probation. The employee will be notified by the Company if the probationary period is being extended."

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Grievance Policy

- In Montana, if you have a grievance (complaint) policy, a terminated employee must follow the internal grievance policy before they can file a wrongful termination lawsuit.
  - You must give the employee a copy (electronic or paper) of the grievance policy within 14 days of their termination
- Policy Suggestion: "Employees are encouraged to bring all concerns and issues directly to their supervisor. If an employee wishes to dispute disciplinary action, including termination of employment, the following procedure is available: . . ."
  - Include timelines, specific people to contact, and deadlines for information gathering and decisions

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Social Media Protection for Employees

- MT's 2023 Legislature enacted new protection for employees: "An employer may not discharge, discipline, threaten to discharge or discipline, or otherwise retaliate against an employee or job applicant for: . . . legal expressions of free speech by the employee or job applicant . . . made on personal social media."
- Employers have an exemption → they can terminate an employee for a private social media post **IF** that post violates a written policy or a written employment contract
- Policy Suggestion: In your conduct standards, include a catch-all provision that any social media post that violates any of your specified conduct can result in discipline, up to and including termination of employment, in the sole discretion of the Company
  - **BUT** beware of the NLRB – more on this later

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Case Study: liability for harassment that takes place online, outside work and after hours.

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Case Study: *Okonowsky v. Garland* (9th Circuit, July 25, 2024)

Lindsay Okonowsky worked as a psychologist for a federal prison.

Her coworker, Steven Hellman, was a supervisor, but did not supervise Lindsay.

Instagram "suggested" that Lindsay follow Steven's page, "8_and_hitthe_gate."

Steven's posts were awful

Steven's posts were "overtly sexist, racist, anti-Semitic, homophobic, and transphobic memes" that expressly or impliedly referred to the prison's employees and inmates.

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

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

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When Lindsay complained, the prison was dismissive.

Lindsay complained to Robert Grice, Acting Safety Manager.

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

"Sorry, not sorry."

Making matters worse, the HR Manager dismissed Lindsay's concerns too, concluding that her complaint did not involve the workplace.

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As a result, Steven's behavior got worse.

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

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

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

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Ninth Circuit drops the gavel.

The Court held that "even if discriminatory or intimidating conduct occurs wholly offsite, it remains relevant to the extent it affects the employee's working environment."

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Ninth Circuit added…

"Social Media posts are permanently and infinitely viewable and re-viewable by any person with access to the page or site on which the posts appear. No matter where [Steven] was or what *he* was doing when he made his posts, [coworkers] who followed the page were free to, and did, view, 'like,' comment, share, screenshot, print, and otherwise engage with or perceive his abusive posts from anywhere. The Instagram page also served as a record of which co-workers subscribed to the page and commented on posts, showed their comments and their 'likes,' and could be seen at any time or at any place—including from the workplace."

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Multi-state considerations

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Multi-state legal differences, just in the West:

- California employment laws…enough said.
- Lots of variation in entitlement to unused PTO upon termination.
- Ever-increasing paid sick/safe laws (e.g., AZ, CA, CO, WA, etc.).
- Other unpaid or paid leave laws, including state medical/pregnancy protections, bone marrow donation leave, bereavement leave, voting/jury leave, and others.
- Discrimination/harassment laws
- Wage and hour laws (overtime, meal/rest breaks, etc.)
- “At will” employment and handbook contract disclaimers outside Montana.

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Policy takeaways for multi-state employers

- Balance goals for consistency against state-specific compliance.
- The lowest common denominator approach (apply the laws of the state with the most employee-friendly requirements).
- State-specific policies, e.g., a supplement for each state that identifies material policy differences or where you need to provide notice of policies/right.
- Disclaimer approach, e.g., “To the fullest extent allowed by the law in the state where you reside,…” Or other disclaimers that make clear that when the law in the employee’s state varies from the policy, we will follow the law.

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Update your harassment policies to comply with fresh EEOC guidance

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NEW EEOC enforcement guidance on harassment

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

- Found here: https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace
- Why now? EEOC says between 2016-2022, more than a third of all EEOC charges included harassment allegations.

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Harassment policy updates: race-based mistreatment

Race-based harassment can be complex, and may include situations that are not expressly tied, or limited to, to race.

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

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Harassment policy updates: sexual orientation and gender identity

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

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

Harassment policy updates: remote work and virtual meetings

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

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

Other highlights from the EEOC's guidance

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

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PWFA: pregnancy accommodations

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PREGNANT WORKERS FAIRNESS ACT

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

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

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PREGNANT WORKERS FAIRNESS ACT (PWFA)

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

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

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

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PWFA final regulations

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

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

Unlike the ADA, the PWFA provides an express timeline for accommodation: essential job functions must be modified or eliminated on temporary basis, "generally 40 weeks" (absent showing of undue hardship).

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PWFA final regulations

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

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

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

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Basic PWFA policy example

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

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Lactation Policies: compliance with the federal PUMP Act

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PUMP Act

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

- This law requires employers provide new birthmothers with reasonable breaktime to express breastmilk for the employee's nursing child for one year after childbirth.
- Employers also must provide a private place (other than a bathroom) to express breastmilk.
- In MT: public employers were already required to do this; private employers were encouraged to do it

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Basic lactation policy example (from SHRM.org)

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

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

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

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What is the NLRB?

The National Labor Relations Board enforces the National Labor Relations Act

- It's a five-member panel, that tends to take on the political leanings of the President.
- It enforces laws related to union formation and activity, but not just that!
- **Section 7 of the NLRA** guarantees employees the right to "engage in . . . **concerted activities** for the purpose of collective bargaining or other **mutual aid or protection**."

What does it mean to act in concert?

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NLRB issues *Stericycle* decision in 2023 – changing the standard for employer conduct rules

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The handbook provision at issue. . .

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

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Have you checked your handbook lately?

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

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

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

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

Facially neutral rules about professionalism and civility were presumptively valid.

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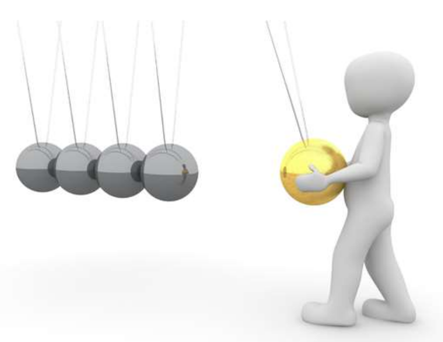
Pendulum swings in favor of employees



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

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

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

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

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Conduct policy takeaways

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

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

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

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Another handbook provision to consider . . .

Investigation Confidentiality Policies

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

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Confidentiality instructions to non-supervisors

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

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Investigation confidentiality policy example

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

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

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FLSA exemptions: executive, administrative, and professional

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The FLSA in a Nutshell

- The federal Fair Labor Standards Act requires that employers pay at least minimum wage and overtime (for weekly hours over 40).
- But the FLSA has several "exemptions" to these minimum wage and overtime requirements.
- The most common exemptions are known as the "Executive, Administrative, and Professional" exemptions.
- These exemptions require two things:
  - Salary Basis Test: The employee must be paid a minimum salary.
  - Job Duties Test: The employee must perform certain job tasks (e.g., supervising other employees, making important decisions for the business, etc.)

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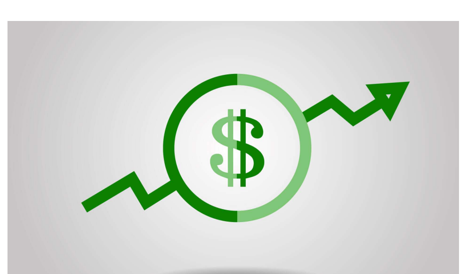
Increase of the FLSA salary threshold

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

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



Prior to this change, the minimum salary for the EAP exemptions was $684 per week (or $35,568 per year).

A relaxed job duties test applies to "highly compensated employees." Prior to this change, the minimum salary for the highly compensated employee exemption was $107,432 per year.

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Rolling increases in 2024, 2025, and beyond.

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

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

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

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Policy Takeaways

The FLSA salary hike presents you with two policy choices: (1) increase salaries to comply with the new thresholds (consider holding back ten percent for end-of-year bonuses); or (2) reclassify workers making less than the new thresholds as non-exempt.

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

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Thank You

Liz M. Mellem
amellem@parsonsbehle.com

Mark D. Tolman
mtolman@parsonsbehle.com

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