THANNUAL SMITH ANDERSON EMPLOYMENT LAW UPDATE 2017



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For copies of the 2017 Employment Law Update presentations, visit SmithLaw.com/elu2017

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PROGRAM AGENDA

8:30 – 9:00 Registration and Breakfast		
0.30	Complimentary breakfast	
9:00 – 9:10	Welcome and Introduction of Keynote Speaker Kimberly J. Korando and J. Travis Hockaday	
9:10 – 10:10	The Great Mysterious – CHANGE! Santo J. Costa	
	Why is it that we struggle with change in our personal and professional lives? Keynote speaker Sandy Costa will explain why change is so difficult to accept, but more importantly why proactively dealing with change is essential. Through entertaining stories and real life experiences, Sandy will show you how to be a more effective practitioner and leader, how to promote cultures that embrace change, and why we should never accept the status quo!	
10:10 – 10:50	Recruiting to Onboarding: Leveraging Technology, Minding the Law Kimberly J. Korando and Taylor M. Dewberry	
	21st century technology is allowing for capture and analysis of an ever-increasing amount of information. As the talent acquisition process evolves into a data analytic exercise, it remains regulated by federal legal principles established almost 50 years ago and encounters a growing number of state and local laws seeking to limit what information can be sought, when it can be sought, and most importantly what use can be made of it by employers. In this session, we will explore where technology and big data is taking us, review today's common legal compliance pitfalls in recruiting and hiring, and share some best practices for risk management.	
10:50 – 11:00	Morning Break	
11:00 – 11:40	Wage and Hour Update—DOL Audits, Questions on Salary History, Update on Gender Pay Equity, Status of the Overtime Rule, and 25 Practical Tips, Cautions, and Reminders Susan M. Parrott and Kerry A. Shad	
	Advice on how to avoid an audit or investigation by the Department of Labor and how to respond if you are audited; update on gender pay equity; review of new rules on permissible requests concerning salary history; continued coverage of the rule updating the overtime regulations; and, in honor of the ELU's 25th anniversary, 25 practical tips, cautions, and reminders for complying with wage and hour laws.	

11:40 – 12:20	Employee Handbooks: Best Practices, Common Pitfalls, and Looking Forward in a Changing Legal Landscape Patrick D. Lawler
	Employee handbooks are a vital, yet often overlooked, aspect of every employer's business. This presentation offers eight key drafting tips to best protect the company, navigate problematic areas and craft multi-state policies. In addition, the presentation gives a look forward to issues that may arise in the future due to the constantly-evolving workplace laws and regulations.
12:20 – 1:05	Lunch Complimentary Lunch
	Reflections and Predictions
	Join us during lunch for a fun look back and a pop quiz on the last 25 years, and hear our predictions for what the world will look like on the 50th anniversary of the ELU.
1:05 – 1:45	Health Issues in the Workplace: Hot Topics Under the ADA, FMLA, and More Rosemary Gill Kenyon
	This session will review recent legal updates on employee medical issues in the workplace under the ADA, FMLA and GINA, including hot topics such as employee use of medical marijuana, determining when reasonable accommodations should be considered and how to decide on which ones, and practical tips on avoiding common employer mistakes.
1:45 – 1:50	Transition to Breakout Sessions
1:50 – 2:30	Concurrent Breakout Sessions
	Session A: DOL and IRS Plan Audits: What to Expect and How to Prepare Kara M. Brunk
	The presentation will provide an overview of DOL and IRS enforcement activities and current initiatives, and will also cover issues that may arise during an investigation and best practices for responding.
	Session B: Handling Unemployment Insurance Claims and Appeals Hearings: Employer Do's and Don'ts Patrick D. Lawler and J. Travis Hockaday
	An employer's guide to the unemployment insurance claims and appeals

	process in North Carolina, including the do's and don'ts for preserving the
	company's rights, managing unemployment insurance rates, and
	mitigating risk in dicey cases.
2.20 2.40	
2:30 – 2:40	Afternoon Break
2:40 – 3:20	HR's Role in Preventing and Responding to Data Breaches
	Sarah W. Fox (moderator), Mary Pat Sullivan, Lorie Y. Beam
	Recent high profile data breaches have highlighted the risk of data
	breaches to businesses of every size. Although data breaches may seem
	rampant, preparedness can reduce the risk of a data breach occurring, and
	reduce the harm caused by a data breach should a data breach occur. This
	panel (consisting of lawyers practicing in employment and information
	privacy and security, and Smith Anderson's Director of Technology) will
	explore the impactful role Human Resources can play in preventing and
	responding to data breaches in the workplace.
3:20-4:00	EEO Update
	Zebulon D. Anderson
	A discussion of EEOC enforcement trends and plans, as well as select cases
	representative of recent trends in EEO litigation.
4:00 – 4:40	A Time for Everything (A Time to Hire, and a Time to Fire) – Ten
	Common Sense (But Often Forgotten) Lessons for Complying with the
	Law and Mitigating Risk
	J. Travis Hockaday
	Sometimes things just don't work out. Performance issues, misconduct,
	and the need for restructuring and layoffs require employers to make
	tough decisions about terminating employees. This session will focus on
	ten key lessons learned that should help employers both comply with the
	law and mitigate risk when the time comes to part ways with employees.
4:40	Adjournment

WHO WE ARE

WHO WE ARE

PRACTICE GROUPS

EMPLOYMENT, LABOR AND HUMAN RESOURCES

The intersection of business, employment matters and the law is complex and often difficult to navigate. We approach this challenge with an effort to gain a thorough understanding of your culture and objectives. We bring a deep understanding of the law and a wealth of experience regarding its real-world application. We pride ourselves on being a vital and trusted adviser for our clients, offering responsiveness, keen insights, good judgment and a practical, solution-oriented perspective. Our employment, labor and human resources lawyers have received significant client, peer and business community recognition in such prestigious publications and ranking lists as *Chambers USA: America's Leading Business Lawyers, The Best Lawyers in America**, *U.S. News – Best Lawyers** "Best Law Firms" and *Martindale-Hubbell**.

Our experience with a wide range of employment, labor and human resources issues enables us to work with our clients to assist them in building and maintaining an employer-of-choice reputation. We do this while minimizing the burden of regulatory requirements and the distractions of regulatory investigations and audits, employee disputes and union organizing. In addition to compliance and risk-management counseling, we develop and conduct training programs for human resources professionals and line managers, offering a range of complimentary compliance-support services. We also host an annual client conference that attracts more than 300 attendees each year.

When employers encounter litigation relating to employment discrimination, wrongful discharge or other employment-related issues, and when complaint investigations and compliance audits arise, we represent them with early risk assessment, dispute resolution services and trial advocacy.

Our clients include a wide range of regional, national and multi-national corporations, emerging businesses and regulated industries. We handle employment matters nationwide for many global and publicly-traded companies based in North Carolina and have frequently served as the lead employment counsel on some of their most complex, high-level transactions.

We operate as an employment and labor law boutique within a robust, full-service law firm. This affords us ready access to colleagues who focus their practice in such related areas as Employee Benefits and Executive Compensation; Environmental and OSHA; Government Contracts; Data Use, Privacy & Security; Tax; Corporate Governance; Non-Compete and Trade Secrets; and Intellectual Property.

Services:

- Wage and hour compliance
- Internal investigations
- Protecting employers: relationships and confidential information (non-competition agreements, trade secret protection)
- Employment-related litigation
- Government investigations, audits and administrative proceedings

- FMLA/ADA/Fitness-for-duty/drug-testing/absence-management program administration
- Workforce restructuring, downsizing, plant closings, merger and acquisition integration
- Executive employment and severance agreements
- Workplace harassment, training and investigations
- Human resources audits and risk management
- Affirmative action plans and OFCCP audits/corporate diversity
- Recruiting, hiring and employee selection
- Human resources policies and employee handbooks
- Workplace violence
- Union avoidance
- Temporary employees, agency staffing, independent contractors and telework programs
- Human Resources and manager training

Wage and Hour Compliance

- Enterprise-wide audits of exempt employee and independent contractor classifications for retail, hospitality, pharmaceutical, technology, distribution and other industry employers and development of strategies for reclassifying misclassified employees in ways to maximize compliance and minimize liability exposure
- Audits of time recording practices relating to donning/doffing, automatic clocking/deductions, and
 use of remote devices for work and development of practical solutions to maximize compliance and
 minimize liability exposure
- Enterprise-wide internal compensation analyses, development of processes for enhancing attorneyclient privilege protection of analyses and risk management of such analyses
- Successful defense of wage and hour audits and complaint investigations conducted by the federal
 and state departments of labor involving donning/doffing/overtime, exempt employee classification
 issues and child labor issues
- Assistance with Service Contract Act issues in unionized and non-unionized settings

Internal Investigations

- Retained as special counsel by hospitals, banks, manufacturers, defense contractors and employers in a variety of industries to conduct internal corporate investigations into allegations of:
 - harassment, discrimination and employee misconduct, including allegations of pattern and practice sexual harassment and racial discrimination
 - o employee embezzlement
 - o kick-backs and favoritism in award of vendor contracts
 - o procurement fraud in government contract bid by former employee whistleblower and assistance with self-reporting to government
- Retained in connection with allegations against high-ranking corporate officers and to identify root causes of management failures

Protecting Employers: Relationships and Confidential Information

- Drafted confidentiality, non-solicitation and non-competition agreements for global and national employers
- Developed Bring Your Own Device (BYOD) policies and employee social media policies
- Designed exit procedures to maximize protection of company information upon employee departure

Government Investigations, Audits and Administrative Proceedings

- Successfully represented leading employers before the United States Equal Employment Opportunity Commission (EEOC) and state and local fair employment practices commissions across the country in connection with investigations of single claimant and class allegations
 - These investigations have involved EEOC national priority issues, including challenges to enterprise-wide leave policies, criminal records criteria and testing, and have involved nonemployee class representatives from advocacy groups
- Retained by employers after conclusion of cause findings for representation during the conciliation process and risk management of potential liability exposure
- Successfully represented federal contractors, including Department of Defense contractors, in connection with Office of Federal Contract Compliance Program (OFCCP) pre- and post-award compliance audits (including corporate management reviews) and complaint investigations. The compliance audits have included inquiries into test validation, staffing agency employees and online recruiting processes and, in some cases, have begun with asserted desk audit liability nearing \$1 million which were subsequently closed without any payment by contractor
- Successfully represented manufacturing, restaurant and hospitality, and retail employers in wage
 and hour audits and complaint investigations conducted by the federal and state departments of
 labor throughout the country involving donning/doffing in manufacturing plants, overtime, exempt
 employee classification and child labor issues, and some involving potential class exposure
 exceeding \$1 million

FMLA/ADA/Fitness for Duty/Drug-Testing/Absence Management Program Administration

- Led interdisciplinary publicly-traded Fortune 500 corporate ADA task force charged with identifying
 Title I and Title III compliance issues; reviewing and modifying corporate policies, procedures and
 practices including medical testing, qualification standards and test administration accommodation
- Developed and integrated corporate policies for hospitals, banks and pharmaceutical, manufacturing and technology companies regarding FMLA/STD/ADA reasonable accommodation leave/workers' compensation leave and absence management
- Developed fitness for duty programs including functional capacity testing for manufacturing, healthcare and distribution worksites
- Developed and conducted manager/supervisor ADA/FMLA/absence management training programs
- Reviewed and developed voluntary and mandatory pre-employment, reasonable suspicion and random drug and alcohol testing programs for multi-state employers

Workforce Restructuring, Downsizing, Plant Closings, Merger and Acquisition Integration

- Retained by global and publicly-traded leading employers to design employee selection and staffing
 processes, voluntary separation programs, early retirement incentive programs and group
 termination programs and advise internal corporate task forces charged with such responsibilities
- Developed OWBPA-compliant releases and demographic disclosures, including those involved in complex multi-site rollouts over time
- Assisted numerous companies with determining Worker Adjustment and Retraining Notification (WARN) notice requirements and developing WARN notifications
- Conducted internal adverse impact and EEO risk analyses for pre-rollout adjustments, assisted clients in assessing risk and identifying strategies to minimize the risk associated with the proposed actions
- Advised internal corporate teams charged with developing internal and external communications on reorganization activities
- Developed internal processes for enhancing attorney-client privilege protection of reorganizationrelated corporate documents
- Labor and employment merger and acquisition due diligence

Executive Employment and Severance Agreements

 Negotiated, reviewed and drafted executive employment, non-compete, change in control and severance agreements on behalf of executives and companies

Workplace Harassment, Training and Investigations

- Retained to revise harassment policies and investigation procedures to remedy compliance deficiencies and risk management failures resulting from commonly flawed off-the-shelf policies
- Retained to develop and conduct numerous employee awareness and manager/supervisor training programs or, in some cases, to assist in the evaluation and selection of vendor training programs
- Directed crisis management teams charged with diffusing threats of criminal arrest/prosecution and media disclosure
- Retained as special counsel to conduct internal corporate investigations into allegations of harassment, discrimination and employee misconduct, including allegations of pattern and practice sexual harassment and racial discrimination and allegations against high-ranking corporate officers

Human Resources Audits and Risk Management

- Developed internal process and templates for human resources compliance audits of policies, procedures, practices and records along with processes for enhancing attorney-client privilege protection of audit findings
- Provided advice on options and strategies for handling particular hiring, termination, promotion, reassignment and performance management scenarios, particularly with regard to underperforming employees, employees with health issues and whistleblowers

- Conducted internal adverse impact and EEO risk analyses for pre-reorganization rollout adjustments and internal compensation equity
- Developed and conducted numerous training programs for supervisors on documentation, performance management, discipline and discharge
- Drafted and negotiated numerous severance agreements

Affirmative Action Plans and OFCCP Audits/Corporate Diversity

- Reviewed, developed and updated numerous Executive Order 11246, VEVRAA and Rehab Act
 affirmative action plans and advised companies on all aspects of affirmative action, including
 appropriate statistical analysis for adverse impact calculations
- Successfully represented federal contractors in connection with Office of Federal Contract Compliance Program (OFCCP) pre- and post-award compliance audits (including corporate management reviews) and complaint investigations brought pursuant to Executive Order 11246, Rehabilitation Act of 1973 and the Vietnam Era Veterans Readjustment Assistance Act of 1974
- Successfully defended challenges to test and other selection criteria validation
- Successfully defended class complaints, including those involving non-employee class representatives from advocacy groups
- Provided legal support and general business advice to manufacturers, retail business and pharmaceutical companies on establishing workplace diversity programs

Recruiting, Hiring and Employee Selection

- Advised employers on background and reference checking requirements and procedures, including
 Fair Credit Reporting Act authorization and disclosure requirements and e-Verify
- Advised employers on validation requirements and procedures for employment tests, physical fitness requirements and other selection criteria
- Assisted employers in virtually every industry with developing recruiting and employee selection processes and documentation procedures
- Developed and presented numerous training programs for supervisors on interviewing and employee selection

Human Resources Policies and Employee Handbooks

- Authored leading North Carolina policy and form book
- Reviewed and developed hundreds of employee handbooks, Human Resources policies and procedures manuals and corporate codes of conduct – many for clients with workforces in multiple states
- Developed Bring Your Own Device (BYOD) and employee social media policies
- Developed harassment/investigation and religious accommodations procedures
- Developed and integrated corporate policies regarding FMLA/STD/ADA reasonable accommodation leave/workers' compensation, leave fitness for duty and absence management, and developed corporate leave donation and sharing programs

- Led interdisciplinary corporate ADA task force charged with identifying Title I and Title III compliance
 issues; reviewing and modifying corporate policies, procedures and practices including medical
 testing, qualification standards, and test administration accommodation; and developing and
 conducting corporate manager/supervisor compliance training
- Assisted publicly-traded companies in financial, healthcare, consulting and manufacturing with developing and implementing corporate record retention and destruction policies
- Advised numerous companies on the legal and practical aspects of transitioning to paperless Human Resources policies

Workplace Violence

- Advised numerous companies on handling specific threats of workplace violence
- Developed and reviewed workplace violence prevention programs and conducted related workplace training
- Served as counsel to employers' multi-disciplinary threat assessment teams

Union Avoidance

- Advised manufacturing and retail companies on handling of specific threats of union organization
- Developed union avoidance programs for global companies and conducted related training

Temps, Agency Staffing, Independent Contractors, Telework Programs

- Advised companies on the legal and practical issues of implementing a telecommuting workforce and individual telecommuting arrangements
- Advised companies on the legal and practical issues of creating an internal temporary workforce

Human Resources and Manager Training

- Developed a comprehensive training institute offering more than 50 programs to human resources
 professionals, business managers and line supervisors. Topics include ADA, affirmative action, EEO,
 employee relations, FMLA, harassment, hiring, investigations, policies, union avoidance, workplace
 violence, supervisor/manager responsibilities.
- Developed highly participatory and mock trial training exercise for Human Resources professionals
 and investigators for large global pharmaceutical company in which they experienced first-hand how
 their decisions and actions play out in front of a jury. The program was customized to the client's
 policies and workforce.
- Developed highly participatory and mock trial training exercise for supervisors in which they
 experience first-hand how their decisions and actions play out in front of a jury. The program is
 customized to client's policy and workforce and has been delivered to employers in a wide range of
 industries across the country.

EMPLOYEE BENEFITS AND COMPENSATION

The right employee compensation and benefits are critical to recruiting and retaining top employees. But these programs raise complex business, personnel and legal considerations, and they require careful balancing of cost, employee performance and corporate culture. Our lawyers work with clients to help them establish comprehensive long-term plans and respond effectively to changing conditions and immediate needs.

Our lawyers design, review and implement a wide array of compensation and benefits programs across a full range of industries. We provide counsel regarding the ERISA, tax, securities and accounting considerations applicable to these programs.

Primary Services:

- 401(k) and profit sharing plans
- Employee Stock Ownership Plans (ESOPs)
- Cafeteria plans
- Welfare benefit plans, including group medical plans (insured and self-funded)
- Stock option and stock purchase plans
- Executive compensation
- Incentive plans
- Nonqualified deferred compensation plans
- Severance packages
- Prohibited transaction exemptions

Qualified Retirement Plans: We design, review, and implement 401(k) and profit sharing plans, ESOPs and other qualified retirement plans. We assist clients in complying with the ever-changing tax and ERISA requirements applicable to these plans, represent clients in IRS and DOL audits of their plans, and work with clients in structuring corrections for operational and fiduciary errors.

Welfare Benefit Plans: We provide similar counsel and representation with respect to cafeteria and other welfare benefit plans and issues, including group medical, life and other insurance coverage, health and dependent care flexible spending accounts, education assistance programs, COBRA and HIPAA.

Equity Compensation: We provide stock option and stock purchase plans and assist our clients with the tax, securities and accounting aspects of these plans, including tax reporting and withholding requirements, SEC disclosure and filing requirements, and expensing for financial accounting purposes.

Executive Compensation: We negotiate and prepare executive compensation packages for the officers of companies ranging from venture-backed startups to mature, publicly-traded companies, and we advise compensation committees and boards of directors in developing appropriate compensation programs for their companies. Our experience includes structuring equity compensation, deferred compensation, severance, and golden parachute arrangements.

Mergers and Acquisitions: We represent acquiring and target companies in corporate transactions and have experience negotiating how compensation and benefits programs will be treated in deals, as well as guiding our clients through the difficult issues that arise post-closing when compensation and benefits programs are eliminated or combined.

Controversies and ERISA Litigation: Our ability to provide sophisticated compliance representation is enhanced by our experience with governmental agencies and benefits-related litigation in disputes involving hundreds of millions of dollars in plan assets. We regularly represent large employers in obtaining resolution with the IRS and DOL and have successfully defended employers and fiduciaries in claims ranging from breach of duties to imprudent investing.

Additional Services: Our attorneys work closely with other attorneys at Smith Anderson, especially those who practice in the areas of tax, securities, corporate and employment law, so that our clients have the benefit of a comprehensive analysis of the legal issues related to their benefits and compensation programs.

Our Clients: Our clients range from emerging growth high-tech and biotech companies located in the Research Triangle Park and throughout the Southeast to major North Carolina banks and public utilities and local and regional manufacturing, retail and services businesses.

Our Lawyers: The lawyers in our employee benefits and compensation group have experience counseling and representing clients in all aspects of employee benefits and compensation matters. They actively participate in local and national benefits groups and in the North Carolina and American Bar Associations.

The Great Mysterious – CHANGE!



Santo J. Costa

Of Counsel

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Sandy Costa's professional experience includes over 30 years in executive and senior operating management positions within the pharmaceutical, health care and life sciences industries. In addition to his legal practice, Sandy's experience includes President, Chief Operating Officer and Vice Chairman of Quintiles Transnational Corp. where during his tenure he had responsibility for all operating divisions and worldwide business development. Other executive level experience includes Senior Vice President-Administration, General Counsel and Director, Glaxo Inc.; and U.S. Area Counsel for Merrell Dow Pharmaceuticals.

Sandy is a nationally recognized speaker on leadership, as well as legal and policy issues affecting the pharmaceutical industry.

HONORS & AWARDS

 Recipient, St. John's University Alumni Outstanding Achievement Medal

PROFESSIONAL & COMMUNITY AFFILIATIONS

- Chairman, Board of Directors, Metabolon Inc.
- Member, Board of Directors, MonoSol Rx

PRACTICE AREAS

Life Sciences

Public Companies

Technology

BAR & COURT ADMISSIONS

North Carolina

New York

Ohio

EDUCATION

St. John's University, J.D., 1971 St. John's University, B.S., Pharmacy, 1968



- Member, Board of Directors, Cytokinetics, Inc.
- Member, The Duke Brain Tumor Advisory Committee
- Member, The Duke Cancer Patient Support Program Board
- Member, Board of Trustees, Ravenscroft School

Recruiting to Onboarding: Leveraging Technology, Minding the Law



Kimberly J. Korando

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Kim Korando is recognized as one of North Carolina's leading employment lawyers by *Chambers USA: America's Leading Business Lawyers*, Law and Politics North Carolina *Super Lawyers*, The Best Lawyers in America© and Business North Carolina Legal Elite. She leads Smith Anderson's Employment, Labor and Human Resources practice group.

Kim's advice and representation are sought in matters of financial, reputational and operational significance to leading employers. Her work has led to *Chambers*' client reviews describing her as "simply outstanding on employment law," "a diligent top tier attorney," who does "a first class job" and "has a way of looking at several different sides of a situation to evaluate it clearly," and "is exceedingly bright, capable and practical, and gives current pragmatic advice." She serves as general outside employment, labor and human resources counsel to public and private companies in a wide variety of industries including utilities, pharmaceuticals, biotechnology, hospitals and healthcare, automotive, semiconductor, paper/cellulose and furniture manufacturers, insurance, banking, retail, hospitality, and food and beverage distribution, as well as municipalities and law firms.

Kim is a frequent speaker, trainer and writer on employment and human resources issues in the business and legal community. She regularly collaborates with companies developing in-house training programs, and has trained more than 20,000 supervisors, managers and Human Resources

PRACTICE AREAS

Data Use, Privacy and Security
Employment Litigation
Employment, Labor and Human
Resources
Litigation

BAR & COURT ADMISSIONS

Supreme Court of the United States

U.S. Court of Appeals for the Fourth Circuit

U.S. District Courts for the Eastern, Middle and Western Districts of North Carolina

All North Carolina State Courts

EDUCATION

University of Oklahoma, J.D., with honors, 1986

University of Oklahoma, B.S., in psychology, 1980



professionals in legally compliant employment practices, as well as investigators for the U.S. Equal Employment Opportunity Commission. She served as Chapter Editor for the nation's leading employment discrimination treatise, authored two leading North Carolina workplace guidebooks through the North Carolina Chamber, North Carolina Human Resources Manual and Model Policies and Forms for North Carolina Employers, and is a frequent speaker for nationally recognized organizations.

HONORS & AWARDS

- The Best Lawyers in America©, Employment Law -Management, Labor Law - Management (2007-2018)
- The Best Lawyers in America© "Lawyer of the Year,"
 Raleigh Labor Law Management (2013)
- Business North Carolina Legal Elite (2007, 2009-2010, 2012-2013)
- Chambers USA: America's Leading Business Lawyers, Labor & Employment (2005-2017)
- Martindale-Hubbell AV Preeminent Rated since 1999
- North Carolina Super Lawyers (2006-2017)
- North Carolina Super Lawyers, Top 50 Women (2013-2015)
- Oklahoma Law Review, Note Editor

PROFESSIONAL & COMMUNITY AFFILIATIONS

- ABA Equal Employment Opportunity Committee (1990-present)
- American Bar Association, Labor and Employment Section
- American Employment Law Council
- Fellow, American Bar Foundation



 North Carolina Bar Association, Labor and Employment Section



Taylor M. Dewberry

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Taylor Dewberry joined Smith Anderson in 2017. She is an associate in Smith Anderson's Employment, Labor and Human Resources practice group.

HONORS & AWARDS

- Executive Notes Editor, Washington University Journal of Law and Policy
- Executive Board Member, Black Law Students Association

PRACTICE AREAS

Employment, Labor and Human Resources

BAR & COURT ADMISSIONS

North Carolina

EDUCATION

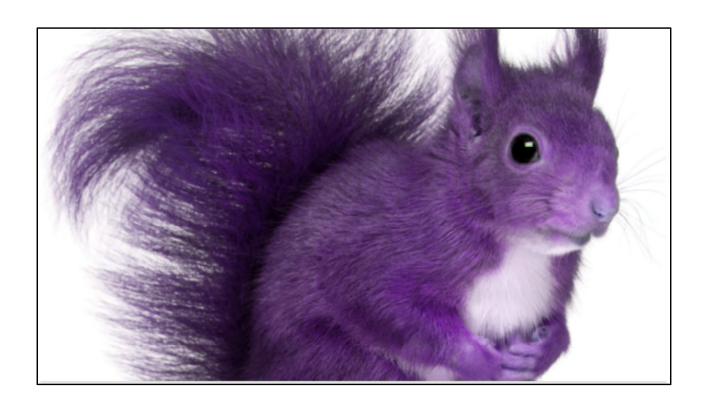
- Washington University School of Law, cum laude, J.D., 2017
- Stanford University, B.A., with honors, American Studies with a minor in African-American Studies, 2014

CLERKSHIPS

- Judicial Intern, Chief Justice Mark Martin, North Carolina Supreme Court
- Judicial Intern, Judge James A. Wynn Jr., United States Court of









Talent acquisition - DIY - Passive Candidates







Social media: LinkedIn, Facebook, Twitter

Work sample sites: Github, Codercred

Job boards: Talentbin, Careerbuilder resume database

Uniform Guidelines on Employee Selection Procedures expressly exclude recruiting practices from the guidelines, Section 2 C, which means that employers are not required to maintain records showing the race, gender or ethnicity or impact of the recruiting practice on these protected classes

Special Rules for Covered Federal Contractors https://www.dol.gov/ofccp/regs/compliance/faqs/iappfaqs.htm#Q9GI

Can a company use a BOT to search an external database to fill a position? [A BOT (short for "robot") is a program that operates as an agent for a user or another program or simulates a human activity. On the Internet, the most ubiquitous bots are the programs, also called spiders or crawlers, that access Web sites and gather their content for search engine indexes].

Yes. BOT searches of external resume databases are treated the same as other methods for searching external resume databases. The BOT may be used to search for basic qualifications for the position without retaining a copy of all resumes reviewed. If the BOT searches beyond the basic qualifications, the company could be found in violation of the Executive Order if it failed to maintain the resumes of each individual that met the basic qualifications. Other records required to be maintained regarding searches of external resume databases also must be maintained for BOT searches of such databases.

A contractor uses software to search a large resume database for job seekers who are the "best fit" for the qualifications required for a particular position. The software uses a "hit" feature that identifies and ranks candidates who best match the job qualification search criteria. Is the software a data management technique such that resumes reviewed by the software have not been considered for a particular position?



No. A job seeker is "considered" for employment in a particular position if the contractor assesses the substantive information provided in the resume with respect to any qualification involved with the particular position. The software reviews job seekers' qualifications and ranks job seekers based not merely on whether they possess the basic qualifications but on an assessment of the extent to which they possess those qualifications vis—à—vis other candidates. Consequently, the resumes of job seekers reviewed by the software have been considered for a particular position under the Internet Applicant rule. Section 60–1.3(3) of the Internet Applicant rule explains that only data techniques that do not depend on an assessment of qualifications, such as random selection, are treated as data management techniques rather than consideration under the Internet Applicant rule.

If a contractor believes that a search of a large external resume database will identify a large number of resumes meeting the basic qualifications for a position, how may the contractor reduce the number of resumes it will be required to retain as a result of the search?

The Internet Applicant rule provides contractors with the flexibility to design search procedures that may significantly reduce the number of resumes they will need to retain from a search of a large external resume database. First, a contractor may implement data management techniques that do not depend on assessment of qualifications, such as random sampling, to reduce to a manageable number the resumes to be considered and, in turn, to be retained. Second, a contractor may establish a search protocol under which it initially searches the database for resumes indicating an interest in the position (e.g., type of position, location, or salary sought by the job seeker). OFCCP does not view use of information contained in a resume to gauge a job seeker's interest in a particular position to be "consideration" of a resume (that is, an assessment of the substantive information provided in the resume with respect to any qualification involved with the particular position) provided that the contractor has uniformly and consistently applied the same procedure to all similarly situated job seekers. The contractor could then "consider" the subset of job seekers indicating an interest in the position to identify those meeting the basic qualifications for the position. Under the Internet Applicant rule the contractor would need to retain only those resumes considered that meet the basic qualifications for the position. Either method would have the effect of reducing the number of resumes to be retained by initially reducing the number of resumes considered.

For example, assume a contractor is looking for someone with a Bachelor's degree in engineering to work as an engineer in Cleveland, Ohio for \$60,000 per year. The contractor would like to search ManyResumes.com for candidates. Also assume that a nationwide search of ManyResumes.com would produce 5000 resumes of job seekers with a B.S. in engineering, 200 job seekers interested in working as an engineer in Cleveland for \$60,000 a year, and 100 job seekers who both possess a B.S. in engineering and want to work as an engineer in Cleveland for \$60,000 per year. If the contractor's initial search of ManyResumes.com is for anyone meeting the basic qualification of a B.S. in engineering, the search will produce 5000 resumes, all of which would need to be retained under 41 C.F.R. 60–1.12(a). On the other hand, if the contractor initially searches ManyResumes.com for job seekers interested in working as an engineer in Cleveland for \$60,000, the search will produce 200 resumes. If the contractor searches the pool of 200 resumes for the basic qualification of a B.S. in engineering, the search will produce 100 resumes that must be retained.

What records must be maintained from internal and external resume databases?



The Internet Applicant rule requires contractors to maintain any and all expressions of interest through the Internet or related electronic data technologies as to which the contractor considered the individual for a particular position, except for searches of external resume data bases discussed below. Contractors also are to maintain records identifying job seekers contacted regarding their interest in a particular position. In addition, for internal resume databases, the contractor must maintain a record of each resume added to the database, a record of the date each resume was added to the database, the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used and the date of the search. Also, for external resume databases, the contractor must maintain a record of the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used, the date of the search, and the resumes of any job seekers who met the basic qualifications for the particular position who are considered by the contractor. These records must be maintained regardless of whether the individual qualifies as an "Internet Applicant" under 60–1.3. Note that the final rule does not specify the form of the record. The format can be as detailed as a system that automatically stores each search or as basic as a simple screen shot printed out and maintained in a file cabinet.

Are contractors required to keep the resumes of the individuals identified from a database search if they did not consider them?

For searches of external databases, the answer is no. The only records a contractor would be required to maintain would be associated with the search itself. For internal databases, contractors are required to keep records of all individuals added to the databases. A resume downloaded from an external resume database into an internal resume database becomes an internal database resume.

Do contractors need to retain records of searches that do not produce any candidates with basic qualifications?

No. Contractors need to maintain only those search criteria that produce job seekers to be considered further in the selection process, and they do not need to maintain records of futile search criteria.

Some contractors search large, external resume databases that for a fee will maintain, on behalf of the contractor, copies of resumes identified by the contractor as meeting the basic qualifications for a particular position. Is it possible for contractors to comply with Internet Applicant recordkeeping without having resumes maintained on their behalf by the external resume database?

Contractors have several options for retaining copies of resumes identified through large external databases, without having the database company maintain copies of resumes on their behalf. For example, the contractor could: (1) use data management techniques to substantially reduce the pool of resumes meeting basic qualifications that are considered, and download the manageable number of resumes into the contractor's internal resume database; (2) review resumes in the database to identify those meeting basic qualifications for a position and download those resumes into the contractor's internal resume database; or (3) review resumes in the database to identify those indicating an interest in the particular position the contractor is seeking to fill and invite those job seekers to submit their own resume directly to the contractor's internal resume database if the individual is interested in applying for the position. The contractor will need to maintain a record of all job seekers invited to apply for a position.



If a covered employer contracts with an employment agency to screen and refer job seekers using the employer's selection procedures, what records must be maintained?

The contractor's recordkeeping obligations are the same whether it screens job seekers itself or whether it contracts with an employment agency to screen job seekers on its behalf with the employer's selection procedures. If an employer contracts with an employment agency to screen job seekers on its behalf, it would be prudent to address expressly in its contract with the employment agency the records the agency will be expected to maintain regarding searches made on the employer's behalf. The Executive Order recordkeeping obligation belongs to the Federal contractor, not the retained employment agency, and it is the contactor's responsibility to ensure that the agency keeps for it whatever records the contractor will be expected to have.



Big data, big promises Recruiting • Talent acquisition Hiring Selection Assignment • Promotion Optimizing performance and • Improving retention • Improving collaboration and performance Decreasing accidents retention · Reducing unplanned absences · Combating fraud and compliance violations

Talent acquisition -- Robot Recruiters/Artificial Intelligence

Passive candidate search and evaluation

Plus

Active candidate evaluation

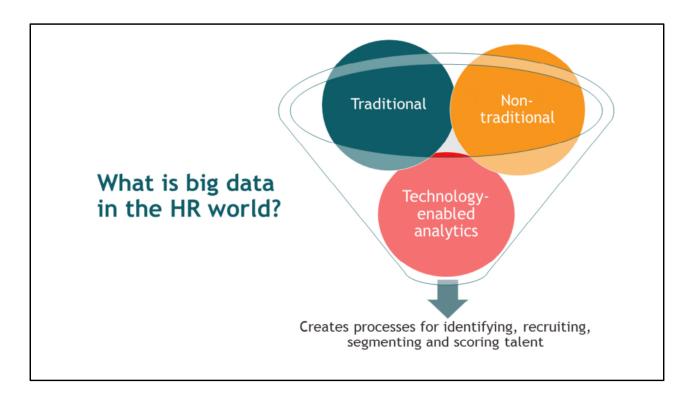
- Vetting online applications
- "Phone" screens
- Analyzing facial expressions in video interviews
- Communication updates with candidates
- Predictive analytics



2017 SHRM Outreach Efforts

HR Magazine		
DECEMBER 2016 / JANUARY 2017	EEOC Looks At "Big Data" Use	
FEBRUARY 2017	Transformative Tech: The Rise of People Analytics	
MARCH 2017	The Promise and Peril of "Big Data"	
APRIL 2017	Robot Recruiters	
MAY 2017	Strategic Talent Sourcing: To maximize recruiting efforts, all companies must become tech companies	
SHRM Conference		
HR Should Understand the Risks and Rewards of Data Analytics		





See Written Testimony of Kelly Trindel, Ph.D. Chief Analyst Office of Research, Information and Planning, EEOC (attached as Appendix A)



Traditional information







Examples Online questionnaire responses Resumes **Applications** Interviews





Examples

Social media activity: Likes, posts, photos, commentary on others' accounts, posting habits Public record information Video interview data scraping Video "game" responses

Excerpt from The Atlantic, They're Watching You at Work December 2013:

Consider Knack, a tiny start-up based in Silicon Valley. Knack makes app-based video games, among them Dungeon Scrawl, a quest game requiring the player to navigate a maze and solve puzzles, and Wasabi Waiter, which involves delivering the right sushi to the right customer at an increasingly crowded happy hour. These games aren't just for play: they've been designed by a team of neuroscientists, psychologists, and data scientists to suss out human potential. Play one of them for just 20 minutes, says Guy Halfteck, Knack's founder, and you'll generate several megabytes of data, exponentially more than what's collected by the SAT or a personality test. How long you hesitate before taking every action, the sequence of actions you take, how you solve problems—all of these factors and many more are logged as you play, and then are used to analyze your creativity, your persistence, your capacity to learn quickly from mistakes, your ability to prioritize, and even your social intelligence and personality. The end result, Halfteck says, is a high-resolution portrait of your psyche and intellect, and an assessment of your potential as a leader or an innovator.



Constructing the algorithm



- Algorithm is given a training dataset containing information about a group of people (current/former employees) from which it uncovers characteristics that can be correlated with job success
- Patterns from diverse variables (e.g., social media behavior, GPA, personality test results) are analyzed, combined and weighted to best predict the characteristics of the high performing group
- The weighted characteristics of the high performing group are used to score candidates and predict their success

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The Risks



- Little empirical research on algorithm validity or adverse impact
- Algorithm developers lack regulatory knowledge about EEO compliance
- Built on previous employee characteristics as viewed by company decision-makers, so if past decisions were biased, the algorithm will replicate the bias
- If the algorithm disproportionately impacts protected class, employer must show algorithm is job-related and consistent with business necessity

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If the algorithm disproportionately impacts protected class, employer must show algorithm is job-related and consistent with business necessity

- No current legal guidance on standard
- Algorithm is based on correlation of data, not cause and effect relationships needed to meet validation standards

Excerpts from EEOC Fact Sheet on Employment Tests and Selection Procedures https://www.eeoc.gov/policy/docs/factemployment procedures.html

Disparate impact cases typically involve the following issues:

- Does the employer use a particular employment practice that has a **disparate impact** on the basis of race, color, religion, sex, or national origin? ... Determining whether a test or other selection procedure has a disparate impact on a particular group ordinarily requires a statistical analysis.
- If the selection procedure has a disparate impact based on race, color, religion, sex, or national origin, can the employer show that the selection procedure is job-related and consistent with business necessity? An employer can meet this standard by showing that it is necessary to the safe and efficient performance of the job. The challenged policy or practice should therefore be associated with the skills needed to perform the job successfully. In contrast to a general measurement of applicants' or employees' skills, the challenged policy or practice must evaluate an individual's skills as related to the particular job in question.
- If the employer shows that the selection procedure is job-related and consistent with business necessity, can the person challenging the selection procedure demonstrate that there is a **less discriminatory alternative** available? For example, is another test available that would be equally effective in predicting job performance but would not disproportionately exclude the protected group?

See 42 U.S.C. § 2000e-2 (k). This method of analysis is consistent with the seminal Supreme Court decision about disparate impact discrimination, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

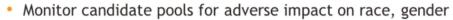


- In 1978, the EEOC adopted the Uniform Guidelines on Employee Selection Procedures or "UGESP" under Title VII. See 29 C.F.R. Part 1607. UGESP provided uniform guidance for employers about how to determine if their tests and selection procedures were lawful for purposes of Title VII disparate impact theory.
- UGESP outlines three different ways employers can show that their employment tests and other selection criteria are job-related and consistent with business necessity. These methods of demonstrating job-relatedness are called "test validation." UGESP provides detailed guidance about each method of test validation.
- The Age Discrimination in Employment Act (ADEA)
 - The ADEA prohibits discrimination based on age (40 and over) with respect to any term, condition, or privilege of employment. Under the ADEA, covered employers may not select individuals for hiring, promotion, or reductions in force in a way that unlawfully discriminates on the basis of age.
 - The ADEA also prohibits employers from using neutral tests or selection procedures that have a discriminatory impact on persons based on age (40 or older), unless the challenged employment action is based on a reasonable factor other than age. Smith v. City of Jackson, 544 U.S. 228 (2005). Thus, if a test or other selection procedure has a disparate impact based on age, the employer must show that the test or device chosen was a reasonable one.



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Tips for managing risk



- Obtain EPLI insurance
- · Off-the-shelf products
- Custom solutions

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Off-the-shelf products:

- o Ask whether vendor conducted tests demonstrating performance was not correlated with gender, race or age; obtain a copy of the test report
- o Obtain legal review of the contract reps and warranties and determine whether indemnification rights exist Custom solutions:
 - o Involve EEO/legal subject matter experts in developing and vetting the product
 - o Conduct tests to assess whether performance is correlated with gender, race or age
 - o Negotiate contractual reps and warranties and indemnification rights



Common compliance pitfalls and risk management best practices

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Multi-state selection process gotchas



One size fits all no longer works

- · Criminal history inquiries and use
- Pay history inquiries
- Medical marijuana disqualification
- Social media screening

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Examples of 2017 State and Local Law Developments

New York City Ban the Box regulations effective August 5, 2017
Oregon enacts Pay Equity law effective January 1, 2019 (phased implementation)
Rhode Island court holds employer refusal to hire medical marijuana user violates state law, *Callaghan v. Darlington Fabrics Corp.*, (R.I. Super. Ct. May 23, 2017)



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Social media screening best practices



- Do not casually check people out
- Have vetting procedures in place
- Conduct checks only on final candidates
- Limit scope of research
- Obtain consent

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- Do not casually check people out
 - o Inform hiring managers of prohibition against individual searches.
 - o Do not allow individuals involved in the selection process to conduct screening.
 - Use third party vendor to research candidate based on employer chosen criteria explicit photos, racist remarks, displays of weapons, illegal drug use, promotion of violence, industry blogs – and filter out protected class information, for instance, race, religion, family status, disability.
 - Third party vendors must comply with the Fair Credit Reporting Act (FCRA).
 - o Alternative: Train designated in-house person to conduct search and separate the search from the decision-making process.
- Must have vetting procedures in place, audit trail to show compliance with vetting procedures, documentation of any social media results/information provided to persons involved in the selection process, and ultimately must show the reasons for selection or non-selection.
 - Vetting process must be consistently applied undertaken at same phase in process. All candidates (at that stage of process) vetted regardless of appearance/perception, etc.
- Conduct online checks only on the final or final few candidates (similar to other background checks).
- Limit scope of the research to particular sites and criteria. Public sites only do not friend candidate to get access or circumvent site terms of use restrictions.
 - o Confirm no applicable state law prohibitions apply (25 states now have laws)
- Give appropriate disclosures to individual and obtain consent



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Background check tips



To avoid common Fair Credit Reporting Act compliance errors

- Do not place liability waiver or other extraneous content on disclosure/authorization forms
- Expressly include authorization for checks during employment, not just pre-hire
- Be sure to send pre-adverse action notice, wait at least 5 business days, then send adverse action notice

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Using Third Parties to Conduct Checks

Companies that use third parties (investigative agencies, credit bureaus, or companies that are in the business of performing background checks for a fee, etc.) to conduct background checks must comply with the federal Fair Credit Reporting Act (FCRA). This law applies to background checks covering all types of information (employment, education, credit, criminal and driving history, character, reputation, mode of living) and all sources of information (public records, social media and informal interviews with friends, neighbors, former employers, etc.).

FCRA has five very specific requirements for companies:

- 1. An employer must provide to the individual a separate written FCRA disclosure that clearly and conspicuously states that the company may obtain a consumer report (FCRA language for background check) for employment purposes. This disclosure cannot be part of any other document, including the employment application. The exact content and timing of the disclosure will depend on whether the check to be performed will involve personal interviews. Disclosures for a check not involving personal interviews must be made before the check is requested. Disclosures for a check involving personal interviews must be made within three days after the check is requested. Special rules apply in connection with inquiries related to applications for certain commercial trucking positions conducted by mail, telephone, computer or other non-personal methods.
- 2. An employer must obtain the individual's written authorization to obtain the report. Special rules apply in connection with inquiries related to applications for certain commercial trucking positions conducted by mail, telephone, computer or other non-personal methods.
- 3. If an employer decides to make an adverse employment decision based wholly or partially on information obtained from the check, it must provide the candidate with a copy of the background report received from the agency along with a written description of the individual's FCRA rights, as prescribed by the Consumer



FCRA has five very specific requirements for companies (cont'd):

Financial Protection Bureau (CFPB), before the adverse action is taken. FCRA does not specify how much time must lapse between sending of the notice and taking the adverse action but the courts have held that five business days would be a reasonable period. Special rules apply in connection with inquiries related to applications for certain commercial trucking positions conducted by mail, telephone, computer or other non-personal methods.

- 4. After taking the adverse action, an employer must provide the following information to the individual:
 - notice of the adverse action
 - name, address, and telephone number of the agency that provided the report
 - a statement that the agency that provided the report did not make the decision to take the adverse action and is unable to provide specific reasons why the action was taken
 - notice of the individual's rights to obtain a free copy of the report from the agency (the request must be made within 60 days) and dispute with the agency the accuracy or completeness of the information
 - if the individual's credit score was used in taking adverse action, specific information about the score as specified by federal law must be provided.

Special rules apply in connection with inquiries related to applications for certain commercial trucking positions carried by mail, telephone, computer or other non-personal methods.

- 5. If the individual requests additional information about the nature and scope of the investigative consumer report, an employer must provide this information in writing within five days of the receipt of the request or date on which the report was requested, whichever occurs later. More information about the company's obligations under FCRA is available on the CFPB website:
 - www.consumerfinance.gov

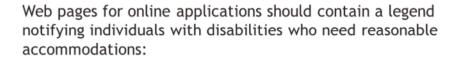
Companies that perform the checks using their own personnel rather than third parties are not required to comply with FCRA. In these cases, an authorization appearing on the employment application will be sufficient in most cases; however, if the checks are being performed because they are required by law (U.S. Department of Transportation, Nuclear Regulatory Commission, North Carolina child care, school and health-care workers, etc.), an employer should confirm that the authorization fully complies with any then-applicable legal requirements. Special rules apply in connection with inquiries related to applications for certain commercial trucking positions carried by mail, telephone, computer or other non-personal methods.

Sample disclosure, authorization, pre-adverse action and adverse action notices are attached as Appendix B.



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Career website accessibility compliance tip



"If you are a qualified individual with a disability and are unable or limited in your ability to use or access the online application system process due to your disability, please contact the [appropriate person] at [insert applicable telephone numbers] to request assistance. The company provides reasonable accommodations to qualified individuals with a disability to enable them to effectively participate in the application process, as required by law."

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Contracts developments



- Multi-state issues
 - · CA outlaws out-of-state choice of law provisions
 - Freelance and commission arrangements may require written contract
- Defend Trade Secret Act disclaimer language is required to preserve rights
- FTC no poaching agreement guidance for HR

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2017 Developments

California-based employee contracts: Effective January 1, 2017, California Labor Code Section 925 prohibits employers from requiring California-based employees to enter into agreements requiring them to: (1) adjudicate claims arising in California in a non-California forum; or (2) litigate their claims under the law of another jurisdiction, unless the employee was represented by counsel in negotiating the contract.

New York City enacts Freelance Isn't Free law requiring written contracts for independent contractors where the value of services is \$800 or more, either in a single contract or in the aggregate over the past 120 days. The law covers all contracts with "freelance workers," which are defined to be individual independent contractors, whether operating as an individual or under a corporate name, such as an LLC. The law does not apply to employees, to contractors that have employees, or to contractors that consist of more than one individual. The law also does not apply to lawyers, doctors, or sales representatives, even if operating as solo independent contractors.

Under the new law, each written contract must include: the name and mailing address of each party; an itemization of services to be provided, their value, and the method and rate of compensation; and the date payment is due, or the mechanism by which the due date will be determined.

Defend Trade Secrets Act:

Employers who seek to assert claims for theft of trade secrets under the Federal Defend Trade Secret Act (DTSA) must provide notice of the DTSA whistleblower protection in all agreements that relate to the use of trade secrets or other confidential information that are entered into or updated on or after May 11, 2016.



FTC and DOJ Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation: Attached as Appendix C.

Red Flags

Agreements and information exchanges among employers that compete to hire or retain employees may be illegal. If you are a manager or human resource (HR) professional, antitrust concerns may arise if you or your colleagues:

- Agree with another company about employee salary or other terms of compensation, either at a specific level or within a range.
- Agree with another company to refuse to solicit or hire that other company's employees.
- Agree with another company about employee benefits.
- Agree with another company on other terms of employment.
- Express to competitors that you should not compete too aggressively for employees.
- Exchange company-specific information about employee compensation or terms of employment with another company.
- Participate in a meeting, such as a trade association meeting, where the above topics are discussed.
- Discuss the above topics with colleagues at other companies, including during social events or in other non-professional settings.
- Receive documents that contain another company's internal data about employee compensation.



Form I-9 updated in 2017



- Revised form dated July 17, 2017 must be used no later than September 18, 2017
- Employer Handbook revised July 14, 2017
- Use Form I-9 Compliance Responsibilities and Acknowledgement memorandum

3	Employment Eligibility Verificat Department of Homeland Securit U.S. Citizenship and Immigration Serv				ity	y Form 1-9			
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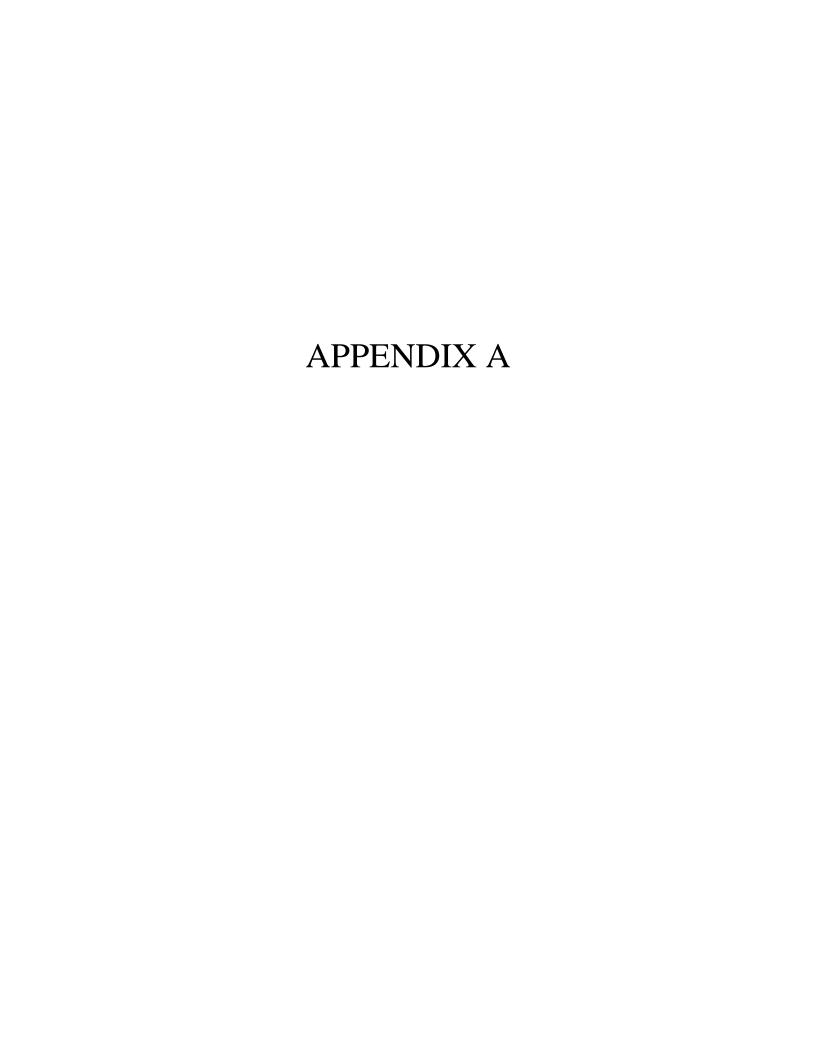
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A good risk management practice is to provide all personnel with responsibilities to complete Form I-9 as the employer representative a Form I-9 Compliance Responsibilities and Acknowledgement memorandum such as the one that is attached in Appendix D.









U.S. Equal Employment Opportunity Commission

Meeting of 10-13-16 Public Meeting on Big Data in the Workplace

Written Testimony of Kelly Trindel, PhD, Chief Analyst Office of Research, Information and Planning, EEOC

Chair Yang and distinguished Commissioners, thank you for the opportunity to speak to you today on the use of big data in employment settings. I am honored and excited to be here to discuss this timely and important topic. My remarks today will focus on (a) defining big data in an employment context (b) current and potential uses of big data in employment settings (c) greater historical and developmental context and (d) discussing opportunities and concerns going forward.

a. What do we mean by 'big data' in an employment context?

'Big data' means different things to different people. One issue that I would like to clarify immediately is that this is not simply about very large datasets, with many columns and rows. Although the size of these datasets is typically quite large this is not what defines big data. Rather, what makes data 'big' has to do with the nature and the source of the data and how it is collected, merged, transformed and utilized. In the employment context, I would define big data as follows: big data is the combination of nontraditional and traditional employment data with technology-enabled analytics to create processes for identifying, recruiting, segmenting and scoring job candidates and employees.

Nontraditional employment data is stored outside of the traditional personnel data landscape. It comes from places like operations and financial data systems maintained by the employer, public records, social media activity logs, sensors, geographic systems, internet browsing history, consumer data-tracking systems, mobile devices, and communications metadata systems. This list is by no means complete, and every day it grows. Even our faces and voices can be reduced to a stream of code so that a computer system can recognize and analyze the information. This is the sea change that we are here today to talk about-everything is data. Everything that we do and say can be coded, quantified and utilized for analytic purposes. For example, written remarks and testimony from this very meeting can be thought of as data as it will be published to EEOC.gov and thus made public. Our written words can then be scraped from the website, tagged, coded, classified and organized into a matrix which will then be available for analysis. The value in doing this would come not from quantifying information about this meeting alone, but from linking it to other information about each of us coded across the internet or within disparate company, vendor, public information or consumer data bases. As more information is collected and organized about each of us, and as it is linked to outcomes of interest observed over time, predictions can be made about our future behaviors.

Employers may utilize their own resources to collect and analyze this type of nontraditional employment data, or they may purchase the data, or insights gleaned from the data, from brokers or vendors. When this type of information is quantified and brought together with traditional employment data like performance appraisals, job tenure, attendance, absenteeism, and salaries, it can be used to uncover patterns of behaviors and outcomes for workers. Those patterns of behaviors and outcomes can be distilled into profiles that can then be used to predict outcomes for similarly-profiled groups of job candidates, applicants, and employees.

b. Current and Potential Uses of Big Data in Employment

In practice, it appears that the primary motivation behind utilizing big data is the ability to profile employees and job seekers. Data scientists, computer scientists, and analysts generally use traditional and nontraditional employment data to create algorithms or statistical models which predict, classify, or cluster workers on outcome variables like job tenure, turnover, satisfaction, performance appraisals, absenteeism and culture fit. Generally speaking, the algorithm is given a training dataset containing information about a group of people, typically current or former employees, from which it uncovers characteristics that can be correlated with some measure of job success. Given the nature of the data included in the training dataset, the factors that emerge as strong predictors of success may be of the traditional (self-report of previous work experience or education) or nontraditional variety (passively-recorded information about choice of internet browser or number of professional connections outside of one's area of expertise), but they are likely to be some combination of the two. The

successful profile can then be used in a number of ways, including seeking out passive job candidates, screening active job applicants, or allocating training resources or incentives for current employees.

Employers might develop a profile of the ideal candidate and search for 'similar' people on social media sites or specialized online communities, then encourage these passive candidates to apply for open positions. Employers or vendors might also develop a test or screen based on the ideal profile and apply it to applicants at any stage in the hiring process. They might use the ideal profile to identify current employees of high potential and target them for training opportunities or even pay increases or bonuses. Keep in mind that 'job success' can be operationally defined in multiple ways, including actual job performance ratings, quantified worker output, tenure, or 'culture fit.'

At the opposite end of the success spectrum, employers can use this profiling technique to identify employees who are likely to have excessive absences, safety incidents, or to turn over within a specified time frame and use that information in conjunction with 'worth' and 'cost' estimates to make employment decisions or choose other subsequent actions. Some specialty vendors have also come onto the scene more recently offering 'matching' type services, where the vendor develops the ideal employee profile for the employer, and creates profiles for job-seekers based on some combination of actively or passively supplied information, then notifies each when a 'match' is made. Finally, some employers have developed talent communities where job seekers can engage with one another, and with current employees of the company, to get to know one another over a period of time. During this time the employer develops a profile for the community member and uses it in a similar manner to that described above.

c. Greater Historical and Developmental Context: How did we get here?

The types of big data analytics that we are seeing in the employment context seem to have naturally developed from other areas of business like marketing and operations. In marketing, analysts seek to segment and identify groups of people for targeting advertisements. The training dataset utilized to develop the algorithm might include information about people who purchase products, and their personal characteristics. This is the type of process that led to Target's now-famous pregnancy prediction score. Data scientist Andrew Pole and his team were able to develop an algorithm that could predict when a shopper was pregnant, as well as her rough due date. This was useful to Target because it allowed the company to focus their advertisement efforts for items that pregnant women need on the right demographic and at the right time (it turns out that gaining the market loyalty of a pregnant woman in her second trimester is considered by some to be the 'holy grail'). The algorithm was trained using data from previous Target shoppers with baby-shower gift registries. Pole and his colleagues were able to determine, by looking backwards in time at shopping behaviors, that women in the early stages of pregnancy tend to purchase certain specific items (toiletries and vitamins) more often than otherwise-similar women. Armed with this knowledge and going forward, the researchers were able to identify subsequent groups of women with a high pregnancy prediction score before the women set up their baby gift registries or purchased necessities. These women were then delivered the relevant advertisements. Andrew Pole started discussing this work in public in 2010¹. Prior to that, Target had been tracking purchases and demographic information about customers to use for marketing purposes for decades, and Target is just one example. Given that fact that the vast-majority of people move about while carrying 'tracking devices' at all times (mobile phones) it is increasingly possible to accurately predict our next movements, as well as our physical locations at specific set points in the future² and retailers, years ago, began to use this type of location and movement data to target the right consumers with the right ads at the right time³.

It was somewhat inevitable that this type of work would spill over from marketing to employment, particularly when employers have, or are able to collect, so much information about worker characteristics and performance. Why not optimize hiring and talent management in the same way that we've optimized advertising; particularly when return on investment can be quantified and reported to senior management? Furthermore, the types of software, hardware and skill sets required to do this type of statistical and analytic work are becoming more attainable for the masses thanks to open-source software, cloud computing options, and free online and inperson training opportunities.

This is all happening within a larger context of flourishing artificial intelligence and cognitive computing. Machine learning and natural language processing are already commonly utilized in areas like medicine, banking, wealth-management and even in the criminal justice system. It is expected that within the next five to ten years these types of technologies will impact every important decision that we make in our work and personal lives. Within that time frame self-driving cars are expected to proliferate, 25% of all job tasks will be offloaded to software and 13.6 million jobs will be created for people who know how to work with artificial intelligence tools⁴. All of this is to say that the proliferation of machine learning techniques and predictive analytics in the employment landscape has been coming for some time and its development is expected to continue and accelerate.

d. Opportunities and concerns

Of course employers want to optimize their selection and talent management strategies to best service the goals of the company. To the degree that this optimization leads to innovations that promote objectivity and equal opportunity, those efforts should be commended. However, employers should not lose sight of the fact that when criteria affecting employment decisions-- including those identified by machine-developed algorithms-- have an impact based on characteristics like race, gender, age, national origin, religion, disability status, and genetic information, those criteria require careful scrutiny. It is the employer's responsibility to utilize vendor tests and screens responsibly, to understand the selection products that they are utilizing or purchasing, and to determine whether these screens result in adverse impact on particular demographic groups. Where the use of these algorithms evidence adverse impact, it is the employer's responsibility to maintain validity evidence that supports their use. Part of the validity assessment should be whether the employer can use the selection procedure in a way that would reduce its disparate impact, or whether another procedure would have less disparate impact.

I hope that the issues raised in today's meeting will serve as an important reminder to vendors and employers, especially given that many of the people who build and maintain these algorithms may not be familiar with equal employment opportunity law. Computer and data scientists transitioning from marketing into employment algorithm development, for example, may lack the regulatory and legal background required to make complex decisions about EEO compliance. Employers who choose to purchase or adopt these strategies must be warned to not simply 'trust the math' as the math in this case has been referred to, by at least one mathematician/data scientist, as an 'opinion formalized in code⁵.'

The primary concern is that employers may not be thinking about big data algorithms in the same way that they've thought about more traditional selection devices and employment decision strategies in the past. Many well-meaning employers wish to minimize the effect of individual decision-maker bias, and as such might feel better served by an algorithm that seems to maintain no such human imperfections. Employers must bear in mind that these algorithms are built on previous worker characteristics and outcomes. These statistical models are nothing without the training data that is fed to them, and within that, the definition of 'success' input by the programmer. It is the experience of previous employees and decision-makers that is the source of that training data, so in effect the algorithm is a high-tech way of replicating past behavior at the firm or firms used to create the dataset. If past decisions were discriminatory or otherwise biased, or even just limited to particular types of workers, then the algorithm will recommend replicating that discriminatory or biased behavior.

As an example of the type of EEO problems that could arise with the use of these algorithms, imagine that a Silicon Valley tech company wished to utilize an algorithm to assist in hiring new employees who 'fit the culture' of the firm. The culture of the organization is likely to be defined based on the behavior of the employees that already work there, and the reactions and responses of their supervisors and managers. If the organization is staffed primarily by young, single, White or Asian-American male employees, then a particular type of profile, friendly to that demographic, will emerge as 'successful.' Perhaps the successful culture-fit profile is one of a person who is willing to stay at the job very late at night, maybe all night, to complete the task at hand. Perhaps this profile is one of a person that finds certain perks in the workplace, such as free dry cleaning, snacks, and a happy hour on Fridays preferable to others like increased child-care, medical and life insurance benefits. Finally, perhaps the successful profile is one of a person who does not own a home or a car and rather appears to bike or walk to work. If the decision-makers at this hypothetical firm look to these and other similar results to assist in the recruiting of passive candidates, or to develop a type of screen, giving preference to those future job-seekers who appear to 'fit the culture', the employer is likely to screen out candidates of other races, women, and older workers. In this situation, not only would the algorithm cause adverse impact, but it would likely limit the growth of the firm.

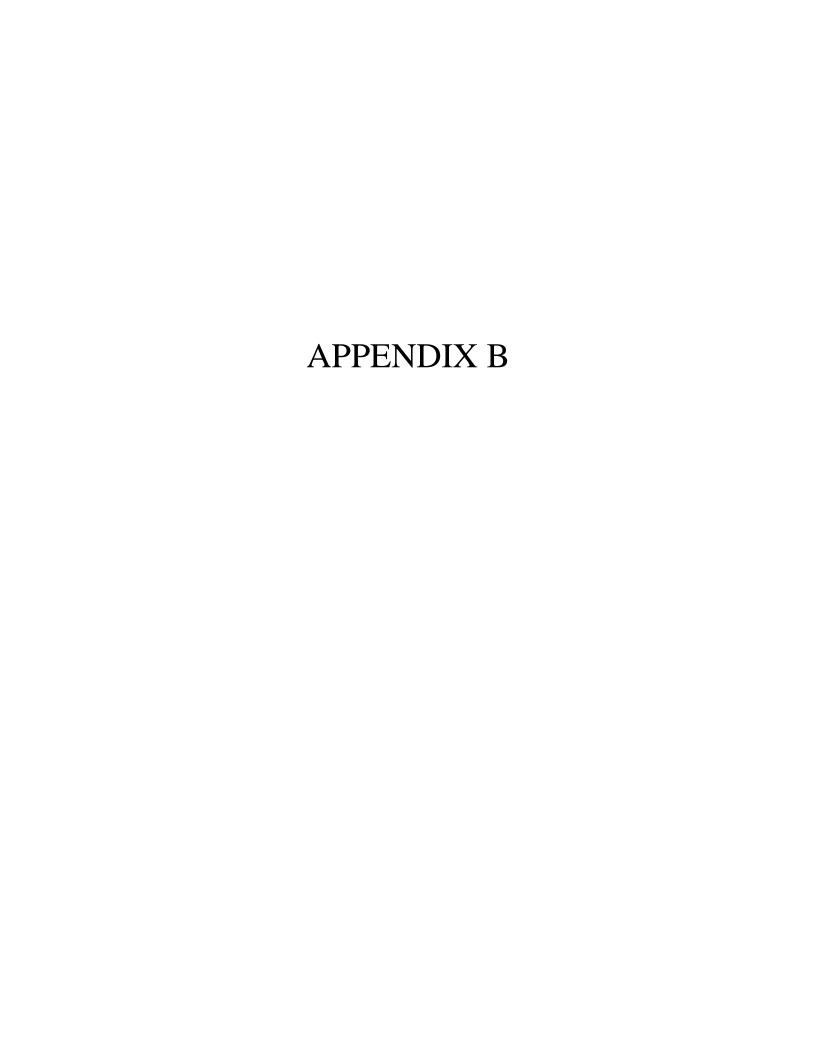
The use of big data algorithms could also potentially disadvantage people with disabilities. Academic research indicates that social media patterns of usage are related to mood disorders, for example⁶. If a machine learning algorithm was to uncover a link between absenteeism and social media posting patterns, its result might suggest that a particular employee, who has recently been posting to social media during certain hours of the night, has a heightened 'absenteeism risk' score. Perhaps when it comes time for performance review, this 'absenteeism risk' score might be reviewed, alongside a heightened 'flight risk' score and the employer may avoid offering certain incentives or career development opportunities to the employee, rather offering those to others with more preferable profiles.

Finally, it merits mention that the relationships among variables that are uncovered by advanced algorithms seem, at this point, exclusively correlational in nature. No one argues that the distance an employee lives from work, or her affinity for curly french fries, the websites she visits, or her likelihood to shop at a particular store, makes her a better or worse employee. The variables and outcomes may be correlated because each is also correlated with other variables that are actually driving the causal aspect of the relationship. For example, with regard to distance from work-it isn't likely that the actual distance causes a different score on the success factor but perhaps the time it takes to commute requires the employee to leave earlier than she otherwise would, or perhaps the commuting increases her stress level thereby reducing some aspect of the quality of her work. It would seem to behoove the employer or vendor uncovering this relationship to do some additional, theory-driven research to understand its true nature rather than to stop there and take distance from work into account when

making future employment decisions. This is true not only because making selections based on an algorithm that includes distance from work, or some other proxy representing geography, is likely to affect people differently based on their race but also because it is simply an uninformed decision. It is an uninformed decision that has real impact on real people. Rather, perhaps selecting on some variable that is causally related to work quality, in conjunction with offering flexible work arrangement options, might represent both better business and equal opportunity for workers. Thank you.

Footnotes

- ¹ How Target gets the most out of its guest data to improve marketing ROI (2010). Keynote address at Predictive Analytics World October 2010 in Washington DC.
- ² See, for example, Ozer et al. (2016). Predicting the location and time of mobile phone users by using sequential pattern mining techniques. The Computer Journal, 59, 908-922
- ³ See, for example MacKenzie et al (2013). How retailers can keep up with consumers. McKinsey.com retail insight report.
- ⁴ Forrester Research (2015). The future of jobs, 2025: Working side by side with robots.
- ⁵ See O'Neil, C. (2016). Weapons of Math Destruction. New York, NY: Crown Publishing.
- ⁶ See, for example Lin et al. (2016). Association between social media use and depression among U.S. young adults. Depression and Anxiety, 33, 323-331



MODEL FAIR CREDIT REPORTING ACT DISCLOSURE

(To be used for checks <u>not</u> involving personal interviews)

The company will undertake any investigation it deems necessary in connection with your application for employment or, if hired, your continued employment. As part of this investigation, a consumer report or other such inquiries relating to information bearing on your creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, mode of living, past employment, education, and criminal history may be obtained from a consumer reporting agency. Such report shall be obtained for employment purposes.

from a consumer reporting agency. S	such report shall be obtained for employment purposes.
AUTHORIZATION	
I, (PRINT FULL NAME)	, have read and understand the above disclosure
•	ompany to obtain a consumer report or to make other ibed above at any time during the application process or, if ent employment.
Signature	

MODEL FAIR CREDIT REPORTING ACT DISCLOSURE

(To be used for checks involving personal interviews)

The company will undertake any investigation it deems necessary in connection with your application for employment or, if hired, your continued employment. As part of this investigation, consumer reports, investigative consumer reports, or other such inquiries relating to information bearing on your creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, mode of living, past employment, education, and criminal history may be obtained from a consumer reporting agency and personal interviews with persons who may have such knowledge may be conducted by the consumer reporting agency. You have the right to make a written request within a reasonable time for a complete and accurate disclosure of the nature and scope of any investigative consumer report that is to be obtained from a consumer reporting agency. A written summary of your rights under the Fair Credit Reporting Act is attached. Such reports shall be obtained for employment purposes.

AUTHORIZATION		
I,(PRINT FUL	, have read and understand the L NAME)	
investigative consumer report	nd hereby authorize the company to obtain a consum t, or to make other inquiries about the information de ation process or, if hired, at any time during my emp	escribed above
Signature		Date

MODEL FCRA PRE-USE LETTER

[Insert Name]
[Insert Address]
[Insert City, State, Zip]
Dear [Insert Name]:
Thank you for expressing interest in employment with [Insert Company Name].
As part of the selection process, we have obtained a consumer report concerning you. Under the federal Fair Credit Reporting Act, we are required to provide you with a copy of the consumer report that we have obtained along with a summary of your rights under that law. Accordingly, copies of both are enclosed.
Sincerely,
[Insert Name of Company Official]

MODEL FCRA POST-USE LETTER

[INSERT NAME]
[INSERT ADDRESS]
[INSERT CITY, STATE, ZIP]

Dear [Insert Name]:

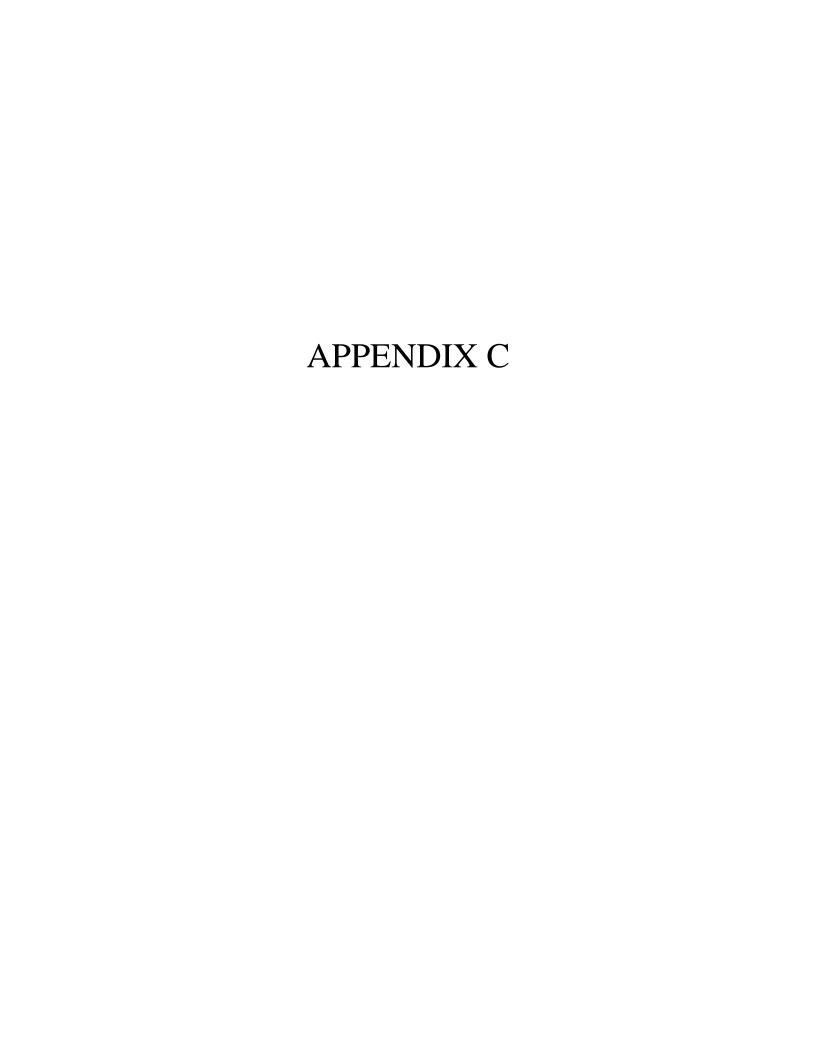
Thank you for expressing interest in employment with [Insert Company Name].

We have decided to take no further action with regard to your application for employment.

As you know, as a part of the application process, we obtained a consumer report concerning you. Federal law requires that we notify you of the name, address, and telephone number of the consumer-reporting agency that provided the report to us. That information is as follows: [Insert Name, Address, & Telephone Number of Consumer Reporting Agency]. You have the right to obtain a free copy of the report from the consumer reporting agency if you request the report within 60 days. You also have the right to dispute directly with the consumer-reporting agency the accuracy or completeness of any information provided by that agency. Please understand that the consumer reporting agency did not make any decision in connection with our consideration of your application for employment and is not able to explain the reason any such decisions were made.

Sincerely,

[Insert Name of Company Official]







ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS

DEPARTMENT OF JUSTICE ANTITRUST DIVISION

FEDERAL TRADE COMMISSION

OCTOBER 2016

This document is intended to alert human resource (HR) professionals and others involved in hiring and compensation decisions to potential violations of the antitrust laws. The Department of Justice Antitrust Division (DOJ or Division) and Federal Trade Commission (FTC) (collectively, the federal antitrust agencies) jointly enforce the U.S. antitrust laws, which apply to competition among firms to hire employees. An agreement among competing employers to limit or fix the terms of employment for potential hires may violate the antitrust laws if the agreement constrains individual firm decisionmaking with regard to wages, salaries, or benefits; terms of employment; or even job opportunities. HR professionals often are in the best position to ensure that their companies' hiring practices comply with the antitrust laws. In particular, HR professionals can implement safeguards to prevent inappropriate discussions or agreements with other firms seeking to hire the same employees.

The antitrust laws establish the rules of a competitive employment marketplace.

Free and open markets are the foundation of a vibrant economy. Just as competition among sellers in an open marketplace gives consumers the benefits of lower prices, higher quality products and services, more choices, and greater innovation, competition among employers helps actual and potential employees through higher wages, better benefits, or other terms of employment. Consumers can also gain from competition among employers because a more competitive workforce may create more or better goods and services.

From an antitrust perspective, firms that compete to hire or retain employees are competitors in the employment marketplace, regardless of whether the firms make the same products or compete to provide the same services. It is unlawful for competitors to expressly or implicitly agree not to compete with one another, even if they are motivated by a desire to reduce costs. Therefore, HR professionals should take steps to ensure that interactions with other employers competing with them for employees do not result in an unlawful agreement not to compete on terms of employment. Any company, acting on its own, may typically make decisions regarding hiring, soliciting, or recruiting employees. But the company and its employees should take care not to communicate the company's policies to other companies competing to hire the same types of employees, nor ask another company to go along.

The federal antitrust agencies have taken enforcement actions against employers that have agreed not to compete for employees. Based on those cases, here are some general principles to help HR professionals and the companies they represent avoid running afoul of the antitrust laws as they relate to agreements and communications among employers. Note that this guidance does not address the legality of specific terms contained in contracts between an employer and an employee, including non-compete clauses.

Violations of the antitrust laws can have severe consequences. Depending on the facts of the case, the DOJ could bring a criminal prosecution against individuals, the company, or both. And both federal antitrust agencies could bring civil enforcement actions. In addition, if an employee or another private party were injured by an illegal agreement among potential employers, that

party could bring a civil lawsuit for treble damages (i.e., three times the damages the party actually suffered).

Agreements among employers not to recruit certain employees or not to compete on terms of compensation are illegal.

An HR professional should avoid entering into agreements regarding terms of employment with firms that compete to hire employees. It does not matter whether the agreement is informal or formal, written or unwritten, spoken or unspoken.

An individual likely is breaking the antitrust laws if he or she:

- agrees with individual(s) at another company about employee salary or other terms of compensation, either at a specific level or within a range (so-called wage-fixing agreements), or
- agrees with individual(s) at another company to refuse to solicit or hire that other company's employees (so-called "no poaching" agreements).

Even if an individual does not agree orally or in writing to limit employee compensation or recruiting, other circumstances – such as evidence of discussions and parallel behavior – may lead to an inference that the individual has agreed to do so.

Naked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are per se illegal under the antitrust laws. That means that if the agreement is separate from or not reasonably necessary to a larger legitimate collaboration between the employers, the agreement is deemed illegal without any inquiry into its competitive effects. Legitimate joint ventures (including, for example, appropriate shared use of facilities) are not considered per se illegal under the antitrust laws.

The DOJ filed a <u>civil enforcement action against the Arizona Hospital & Healthcare Association</u> for acting on behalf of most hospitals in Arizona to set a uniform bill rate schedule that the hospitals would pay for temporary and per diem nurses. The case resulted in a <u>consent judgment</u>. And in the past few years, the DOJ brought three civil enforcement actions against

technology companies (eBay and Intuit, Lucasfilm and Pixar, and Adobe, Apple, Google, Intel, Intuit, and Pixar) that entered into "no poach" agreements with competitors. In all three cases, the competitors agreed not to cold call each other's employees. In two cases, at least one company also agreed to limit its hiring of employees who currently worked at a competitor. All three cases ended in consent judgments against the technology companies. The FTC has brought two cases relating to competition for employment. One was against Debes Corp. for entering into agreements to boycott temporary nurses' registries in order to eliminate competition among the nursing homes for the purchase of nursing services. The FTC also brought a case against the Council of Fashion Designers of America and the organization that produces the fashion industry's two major fashion shows for attempting to reduce the fees and other terms of compensation for models. Both cases ended in consent judgments.

Going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements. These types of agreements eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct. Accordingly, the DOJ will criminally investigate allegations that employers have agreed among themselves on employee compensation or not to solicit or hire each others' employees. And if that investigation uncovers a naked wage-fixing or no-poaching agreement, the DOJ may, in the exercise of its prosecutorial discretion, bring criminal, felony charges against the culpable participants in the agreement, including both individuals and companies.

Avoid sharing sensitive information with competitors.

Sharing information with competitors about terms and conditions of employment can also run afoul of the antitrust laws. Even if an individual does not agree explicitly to fix compensation or other terms of employment, exchanging competitively sensitive information could serve as evidence of an implicit illegal agreement. While agreements to share information are not per se illegal and therefore not prosecuted criminally, they may be subject to civil antitrust liability when they have, or are likely to have, an anticompetitive effect. Even without an express or implicit agreement on terms of compensation among firms, evidence of periodic exchange of current wage

information in an industry with few employers could establish an antitrust violation because, for example, the data exchange has decreased or is likely to decrease compensation. For example, the DOJ <u>sued the Utah Society for Healthcare Human Resources Administration</u>, a society of HR professionals at Utah hospitals, for conspiring to exchange nonpublic prospective and current wage information about registered nurses. The exchange caused defendant hospitals to match each other's wages, keeping the pay of registered nurses in Salt Lake County and elsewhere in Utah artificially low. The case ended in a <u>consent judgment</u> so that registered nurses could benefit from competition for their services.

Even if participants in an agreement are parties to a proposed merger or acquisition, or are otherwise involved in a joint venture or other collaborative activity, there is antitrust risk if they share information about terms and conditions of employment.

However, not all information exchanges are illegal. It is possible to design and carry out information exchanges in ways that conform with the antitrust laws. For example, an information exchange may be lawful if:

- a neutral third party manages the exchange,
- the exchange involves information that is relatively old,
- the information is aggregated to protect the identity of the underlying sources, and
- enough sources are aggregated to prevent competitors from linking particular data to an individual source.

Also, in the course of determining whether to pursue a merger or acquisition, a buyer may need to obtain limited competitively sensitive information. Such information gathering may be lawful if it is in connection with a legitimate merger or acquisition proposal and appropriate precautions are taken.

For more information on information exchanges, you can review the DOJ's and FTC's <u>specific guidance to the healthcare industry</u> on when written surveys of wages, salaries, or benefits are less likely to raise antitrust concerns (see Statement 6).

If your company is considering sharing specific information or otherwise collaborating with competitors regarding compensation or other terms of employment, and you have questions regarding the legality of the activity, the federal antitrust agencies are available to offer further guidance. The Division has a <u>business review process</u> that enables businesses to determine how the Division may respond to proposed joint ventures or other business conduct. The FTC has a similar process for obtaining an <u>advisory opinion</u> for future conduct. When the federal antitrust agencies are able to analyze and comment on the possible competitive impact of proposed business conduct *before* that conduct is implemented, companies are more likely to avoid enforcement investigations and lawsuits.

Questions and Answers

Question: I work as an HR professional in an industry where we spend a lot of money to recruit and train new employees. At a trade show, I mentioned how frustrated I get when a recent hire jumps ship to work at a competitor. A colleague at a competing firm suggested that we deal with this problem by agreeing not to recruit or hire each other's employees. She mentioned that her company had entered into these kinds of agreements in the past, and they seemed to work. What should I do?

Answer: What that colleague is suggesting is a no-poaching agreement. That suggestion amounts to a solicitation to engage in serious criminal conduct. You should refuse her suggestion and consider contacting the Antitrust Division's Citizen Complaint Center or the Federal Trade Competition to report the behavior of your colleague's company. If you agree not to recruit or hire each other's employees, you would likely be exposing yourself and your employer to substantial criminal and civil liability.

Question: My friend and I are both managers at different companies in an industry where employee wage growth seems to be out of control. Over lunch, my friend proposed that we could solve this problem by reaching out to other industry leaders to establish a more reasonable pay scale for our employees. Is this legal?

Answer: An agreement among competitors to set wages or establish a pay scale is an illegal wage-fixing agreement. If you take your friend's suggestion and form such an agreement on behalf of your company with your

friend or others acting on behalf of their companies, you would likely be exposing yourself and your employer to substantial criminal and civil liability. The DOJ could open a criminal investigation, and if it determines that your agreement is a naked wage-fixing agreement, it could bring criminal charges against you, your employer, your friend, and other individuals or companies that participate in the agreement. Participants could also be subject to substantial civil liability.

Additionally, merely inviting a competitor to enter into an illegal agreement may be an antitrust violation – even if the invitation does not result in an agreement to fix wages or otherwise limit competition. In antitrust terms, an "invitation to collude" describes an improper communication to an actual or potential competitor that you are ready and willing to coordinate on price or output or other important terms of competition. For instance, the FTC took action after an online retailer emailed a competitor to suggest that both companies sell their products at the same price, which was higher than either company was charging. The competitor declined the invitation and notified the FTC. Be aware that private communications among competitors may violate the FTC Act if (1) the explicit or implicit communication to a competitor (2) sets forth proposed terms of coordination (3) which, if accepted, would constitute a per se antitrust violation.

Question: I work as a senior HR professional at a nonprofit organization that works hard to keep costs down so we can serve more people. One idea we had is to cap wage increases for certain employee groups, but we are worried that we might lose employees to other nonprofit organizations that don't cap wage increases. So, I would like to call other nonprofit organizations in my region to ask them if they would consider a cap on wage growth rates as well. Should I do that? What if, instead of reaching out to other nonprofit organizations directly, we all agree to hire the same consultant who communicates the pay scale to the nonprofit organizations?

Answer: No. You would likely violate antitrust law if you and the other nonprofit organizations agreed to decrease wages or limit future wage increases. A desire to cut costs is not a defense. Your nonprofit organization and the others are competitors because you all compete for the same employees. It does not matter that your employer and the other organizations are not-for-profit; nonprofit organizations can be criminally or civilly liable for antitrust law violations. It also makes no difference if you propose to hire a consultant who will determine and set the pay scale; employing a third-

party intermediary does not insulate you or your organization from liability under the antitrust law.

Question: I work in the HR department of a university that sometimes gets into bidding wars to attract faculty from rival institutions. Those efforts rarely succeed, but they take up a lot of time, energy, and resources. Recently someone in the Dean's office told me that we now had a "gentleman's agreement" with another university not to try to recruit each other's senior faculty. There isn't a written agreement, and efforts to hire each other's faculty were rarely successful. Is this okay?

Answer: No. An illegal agreement can be oral; it need not be written down on paper. This conduct is similar to the conduct challenged by the Division in its recent no-poaching cases involving <u>eBay</u>, <u>Lucasfilm</u>, and <u>Adobe</u>, and the FTC in its cases against <u>Debes Corp.</u> and the <u>Council of Fashion Designers</u>. If the no-poaching agreement is naked, that is, separate from or not reasonably necessary to a larger legitimate collaboration between the universities, it is conduct that the Division will criminally investigate and may decide to criminally prosecute, charging institutions or individuals or both.

If you stopped recruiting and bidding for faculty from another university due to a gentleman's agreement, you have become a member of that no-poaching agreement and could be subject to criminal liability. You should take no further action to comply with that agreement, and notify your university's legal counsel of the university's participation in this illegal agreement. The university may wish to report the conduct to the Division under its Corporate Leniency Policy, which provides that the first qualifying corporation (including universities and other non-profit entities) to report the antitrust offense and cooperate with the Division's investigation will not be criminally charged for the reported antitrust offense. If you have already participated in the illegal agreement, you may wish to report the conduct to the Division under its Leniency Policy for Individuals, which provides that the first qualifying individual to report the antitrust offense and cooperate with the Division's investigation will not be criminally charged for the reported antitrust offense. For more information on these policies, see this link.

Question: I am the CEO of a small business. In my industry, firms traditionally offer gym memberships to all employees. Gym membership fees are increasing, so I would like to stop offering memberships, but I am worried

that current employees will become disgruntled and move to other companies. I would like to ask other firms in the industry to stop offering gym memberships, as well. Can I do that?

Answer: No, you would likely violate antitrust law if you and the other companies agreed to cease offering gym memberships. Job benefits such as gym membership, parking, transit subsidies, meals, or meal subsidies and similar benefits of employment are all elements of employee compensation. An agreement with a competitor to fix elements of employee compensation is an illegal wage-fixing agreement.

Question: I am an HR professional who serves on the board of our industry's professional society. We are interested in determining current and future trends in industry wages. Can we distribute a survey asking companies within the industry about current and future wages?

Answer: It may be unlawful for you, a member of the industry, to solicit a competitor's company-specific response to a wage survey that asks about current or future wages, or to respond to a competitor's request to provide such information. In addition, it may be unlawful for the professional society to distribute company-specific information about past, current, and future wages. Competitors' exchange of nonpublic, company-specific information about current and future wages may violate antitrust law, unless certain survey procedures are followed to mitigate the risk of competitive harm.

For more guidance on the antitrust treatment of information exchanges among competitors, see Statement 6 of the DOJ's and FTC's guidance to the healthcare industry.

Question: I am a new HR professional, and I am attending my first professional conference next week. What should I watch out for to avoid violating antitrust law?

Answer: You should not enter into agreements about employee compensation, other terms of employment, or employee recruitment with other HR professionals who work at competitors, meaning other companies that compete for the same types of employees. Also, avoid discussing specific compensation policies or particular compensation levels with HR professionals who work for competitors.

Other resources are available.

The federal antitrust agencies have prepared <u>a list of red flags</u> that HR professionals and others should look out for in employment settings.

When in doubt, seek legal assistance.

If HR professionals have questions regarding whether particular conduct violates the antitrust laws, they should consider seeking legal advice.

Report potential violations.

If HR professionals or other interested parties have information about a possible antitrust violation regarding agreements among competitors to fix wages, salaries, benefits, or other terms of employment, or agreements not to compete for employees in hiring decisions, the federal antitrust agencies encourage them to report such conduct.

Reports can be made to the Division through the Citizen Complaint Center by e-mail (antitrust.complaints@usdoj.gov), phone (1-888-647-3258, toll free in the U.S. and Canada, or 202-307-2040), or mail (Citizen Complaint Center, 950 Pennsylvania Avenue, NW, Room 3322, Washington, DC 20530).

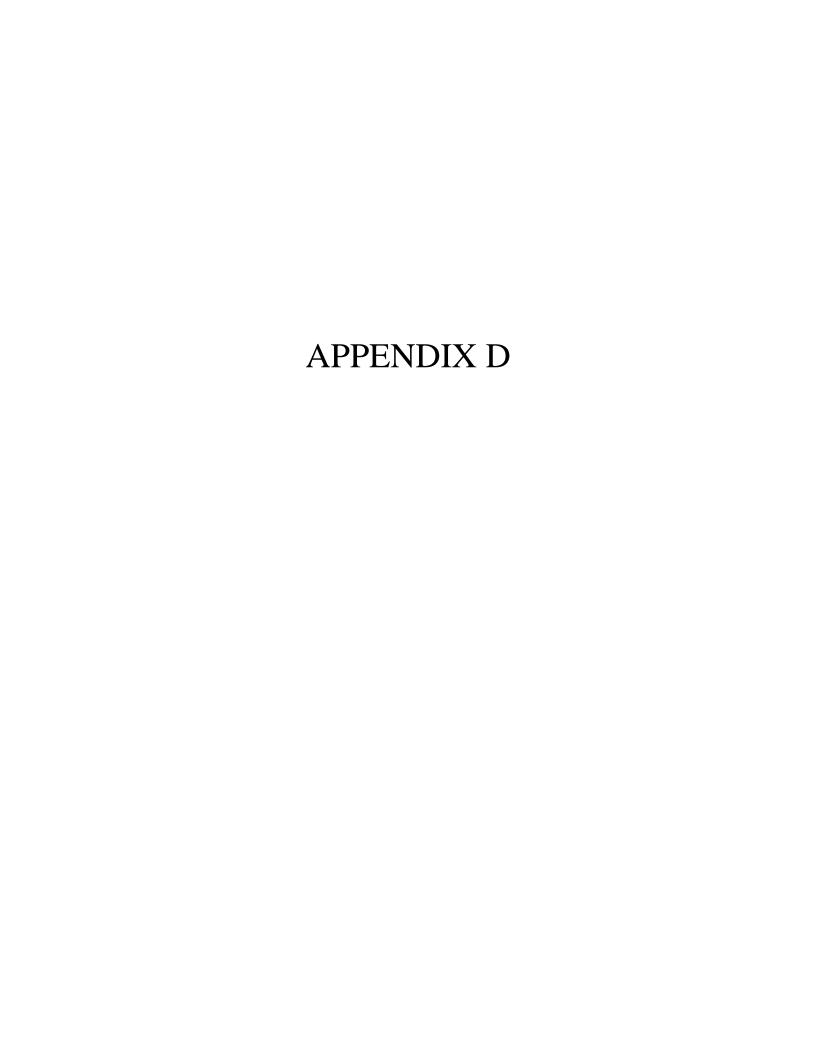
Reports can be made to the FTC through the Bureau of Competition's Office of Policy and Coordination by email (antitrust@ftc.gov), phone (202-326-3300), or mail (Office of Policy and Coordination, Room CC-5422, Bureau of Competition, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580).

The federal antitrust agencies encourage HR professionals or others with information to use the following questions as a guideline to describe your complaint.

- What are the names of companies, individuals, or organizations that are involved?
- In what manner have these companies, individuals, or organizations potentially violated the federal antitrust laws?

- What examples can you give of the conduct that you believe may violate the antitrust laws? Please provide as much detail as possible.
- Who is affected by this conduct?
- How do you believe competition may have been harmed?
- What is your role in the situation?

With respect to potential criminal violations, in particular, it can be beneficial to report personal involvement in an antitrust violation quickly. Through the Division's leniency program, corporations can avoid criminal conviction and fines, and individuals can avoid criminal conviction, prison terms, and fines, by being the first to confess participation in a criminal antitrust violation, fully cooperating with the Division, and meeting other specified conditions. Additional information about the leniency program is available here.



MEMORANDUM

TO: [insert name]

FROM: [insert name]

DATE: [insert date]

RE: Form I-9 Compliance Responsibilities and Acknowledgement

The purpose of this memorandum is to remind you of important responsibilities you have in performing your duties with the company in connection with completion of Form I-9 and verification of documents establishing authorization to work in the U.S.

Here is a summary of these responsibilities:

- 1. It has been, and continues to be, our company's policy to comply with all laws applicable to our business, including the federal immigration laws. Compliance with the immigration laws is reviewed not only by government agencies but, as you know, our customers.
- 2. Our company has in place procedures to ensure that we remain in compliance with these laws.
- 3. It is your responsibility to fully comply with these laws and the related company procedures. Simply put, you will face termination of your employment and, possibly, civil and/or criminal penalties, if you:
 - Hire a worker knowing s/he is not authorized to work in the U.S.
 - Continue to employ a worker after learning s/he is not authorized to work in the U.S., or
 - Fail to properly complete the Form I-9 and/or other employment verification requirements
- 4. One of your responsibilities in completing the Form I-9 is to physically examine the original (not a photocopy) document(s) presented by the individual and make a good faith determination that the document(s):
 - Appear to relate to the worker
 - Appear to be genuine (pictures of acceptable documents are shown in the Handbook for Employers), and
 - Appear on the List of Acceptable Documents shown on the Form I-9

Note: A Form I-551 (Permanent Resident Card) should not be accepted from an individual who attests to being a US citizen or non-citizen national and a US Passport should not be accepted from an alien because these documents are inconsistent with the status attested to and, therefore, do not reasonably relate to the individual who presented them

- 5. It is equally important that you do not unlawfully discriminate or engage in other inappropriate acts against individuals who look or sound foreign. Examples of INAPPROPRIATE acts include:
 - Requesting that the individual present more documents than are required by the Form I-9

Example: If an individual presents a document on List A, then it is NOT permissible for you to require them to present a social security card or any other document on List B or C

 Requesting that the individual present a particular document, rather than allowing him/her to choose among those on the Form I-9 List of Acceptable Documents

Note: Providing a social security number on Form I-9 is STRICTLY VOLUNTARY. You may NOT request that the individual provide this number on the Form I-9 or request that they provide you with a specific document with his/her social security number on it (Note: This provision does not apply if employer uses e-Verify)

Similarly, you may NOT ask an individual who writes down an Alien or Admission number in section 1 to see a document with that number on it

- Requiring the individual to complete the Form I-9 before s/he is offered, and accepts, the job
- Rejecting document(s) that appear on their face to be genuine and related to the individual
- Treating different groups differently when completing the Form I-9 simply because they look or sound foreign
- 6. It is never permissible for you to falsify, backdate, alter or destroy a Form I-9.

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- 7. Do not white-out or block out any information that is written on the Form I-9. If an error needs to be corrected, then draw a single line through the erroneous entry so that the original entry remains readable, write in the correct entry, and initial and date the correction.
- 8. If the individual needs assistance with completing the form (e.g., does not read or write English), then it is permissible to have someone read the form to the individual, assist the individual in completing section 1 and have the individual sign the form in the appropriate place in Section 1 PROVIDED THAT THE PERSON WHO PROVIDES THE ASSISTANCE COMPLETES THE PREPARER/TRANSLATOR CERTIFICATION BLOCK ON FORM I-9.
- 9. **[Optional]** Do NOT make or retain a photocopy of the documents presented by the individual, and do NOT retain a photocopy of the completed Form I-9 on site.
- 10. If you ever have any question about your responsibilities or how to properly handle a particular situation, you should immediately contact human resources at the corporate office.

To assist you in properly carrying out your duties, additional information that you should review and follow is provided in the USCIS Handbook for Employers (M-274) which is attached and can be accessed online at www.uscis.gov.

We greatly appreciate your attention to this important responsibility of your job. Please let us know if there is any other assistance we can provide you in this area.

I HAVE READ THE ABOVE MEMORANDUM and I UNDERSTAND, AND AGREE TO ABIDE BY, ITS TERMS:

Employee signature	Date
Print name:	

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Wage and Hour Update—DOL Audits,
Questions on Salary History, Update on
Gender Pay Equity, Status of the
Overtime Rule, and 25 Practical Tips,
Cautions, and Reminders



Kerry A. Shad

Partner

Wells Fargo Capitol Center 150 Fayetteville Street, Suite 2300 Raleigh, North Carolina 27601 Phone: 919.821.6672

Fax: 919.821.6800 kshad@smithlaw.com



Kerry's practice focuses on representing employers in all types of employment related litigation. Much of Kerry's practice in the last several years has focused on United States Department of Labor wage and hour investigations and related disputes. Kerry was part of the defense team that successfully represented GlaxoSmithKline in a case that went all the way to the United States Supreme Court where the issue was whether pharmaceutical sales representatives are exempt as outside sales people under the FLSA. She also regularly defends employers against EEOC charges and lawsuits in federal and state courts involving alleged discrimination, harassment and retaliation.

Kerry has been recognized as a leading employment lawyer by Chambers USA, Best Lawyers, Legal Elite and Super Lawyers. She is a graduate of Florida State University and received her law degree from UNC Chapel Hill.

Within the Firm, Kerry holds key leadership roles, including Chair of the Compensation Committee and Co-Chair of the Diversity Committee.

HONORS & AWARDS

 The Best Lawyers in America©, Employment Law-Management, Litigation - Labor & Employment (2009-2018)

PRACTICE AREAS

Complex Contract Disputes
Employment Litigation
Employment, Labor and Human
Resources
Litigation

BAR & COURT ADMISSIONS

Supreme Court of the United States

United States Court of Appeals for the Fourth Circuit

United States District Courts for the Eastern, Middle and Western Districts of North Carolina

All North Carolina State Courts

EDUCATION

University of North Carolina, J.D., with honors, 1991

 Editorial Board, North Carolina Law Review



- Business North Carolina's Legal Elite, Employment
- Chambers USA: America's Leading Business Lawyers, Labor & Employment (2012-2017)
- Martindale-Hubbell AV Preeminent Rated
- North Carolina Super Lawyers (2012-2017)
- Triangle Business Journal's "Women in Business Award" (2015)

Florida State University, B.S., 1985

Order of the Coif

PROFESSIONAL & COMMUNITY AFFILIATIONS

- American Bar Association, Employment and Litigation
- North Carolina Bar Association, Employment and Litigation Sections
- North Carolina Association of Defense Attorneys, Employment and Commercial Litigation
- Director and Secretary, The Chordoma Foundation (2015 - Present)
- Wake County Bar Association



Susan Milner Parrott

Partner

Wells Fargo Capitol Center 150 Fayetteville Street, Suite 2300 Raleigh, North Carolina 27601 Phone: 919.821.6664

Fax: 919.821.6800 sparrott@smithlaw.com



Susan Parrott has extensive experience in identifying and managing employment-related issues in mergers, acquisitions and reorganizations. She is frequently called upon to develop and interpret employment, non-competition, confidentiality, and severance agreements. In addition, she routinely advises clients on wage and hour matters, and assists in conducting internal compliance audits and responding to Department of Labor investigations.

HONORS & AWARDS

- Martindale-Hubbell AV Preeminent Rated
- Fellow, American Bar Association

PROFESSIONAL & COMMUNITY AFFILIATIONS

- American Bar Association
- North Carolina Bar Association, Labor & Employment Section
- North Carolina Bar Association
 - Personnel Committee, Member
- North Carolina State Bar
 - Board of Continuing Legal Education, Past Member

PRACTICE AREAS

Appellate Advocacy

Employee Benefits and Executive Compensation

Employment, Labor and Human Resources

Litigation

BAR & COURT ADMISSIONS

Supreme Court of the United States

U.S. Court of Appeals for the Fourth Circuit

U.S. District Court for the Eastern
District of North Carolina

All North Carolina State Courts

EDUCATION

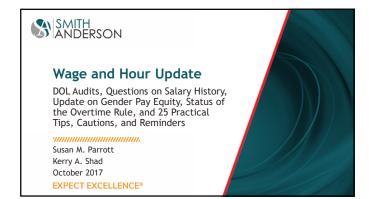
University of North Carolina and Vermont Law School, J.D., with honors. 1981



- Wake County Bar Association
 - Professionalism Committee, Past Member
- Community Foundation
 - Wake County Advisory Board, Past Member
- White Memorial Presbyterian Church
 - Elder

University of North Carolina, M.P.H., 1978

Duke University, B.A., with honors 1974



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The Demise of the New Overtime Rule



- November 22, 2016 Federal court enjoins implementation of the Rule (8 days before effective date)
- December 2016 Obama-led DOL appeals the ruling to the 5th Circuit
- January 2017 New Administration takes office
- June 2017 Trump-led DOL tells 5th Circuit it will not seek to reinstate the just over \$47k salary threshold, but seeks to overturn lower court's finding that DOL cannot use any salary test

EXPECT EXCELLENCE

SMITH ANDERSON

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The Demise of the New Overtime Rule



- July 2017 DOL issues RFI seeking feedback on revisions
 - September 25 response deadline

EXPECT EXCELLENCE



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The Demise of the New Overtime Rule	
 August 31, 2017 - Federal court grants summary judgment and invalidates the Rule 	-
DOL exceeded its authority Rule made "overtime status primarily dependent on a	
minimum salary level" and "supplanted an analysis of duties"	
 Salary level test not necessarily precluded - can't be so high that it renders duties irrelevant 	
• September 6, 2017 - DOL drops appeal to 5 th Circuit	
EXPECT EXCELLENCE® 4 SMITH ANDERSON	
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The Demise of the New Overtime Rule	
 So what now?? 2004 Rule and salary level stays in place, for now 	
Current DOL's position - Has authority to use a salary level test	
Indications are that it will issue a revised rule with a new level of around \$32k	
Employers sit tight	
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DOL Investigations - Do They Lead to	
Lawsuits?	



• FLSA Litigation in North Carolina

 56 lawsuits filed in federal court the last year
 Only 3 filed by the USDOL
 Rest filed on behalf of individuals/classes by private Plaintiff's counsel

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	DOL Investigations - Targets	
	 Construction 	
VAN	 Farming/Agricultural 	
	Home health	
43	 Landscaping 	
	 Manufacturing 	
	Hospitality	
EXPECT	EXCELLENCE® 7	SMITH ANDERSON

DOL Investigations - Don't Panic

• How/why do investigations typically start?

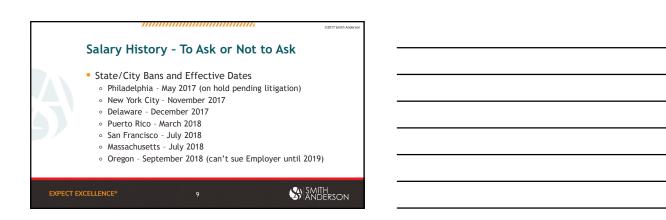
• What will DOL ask for?

• How should you respond?

• Do not hand over materials you have not reviewed/analyzed

• Ask for more time

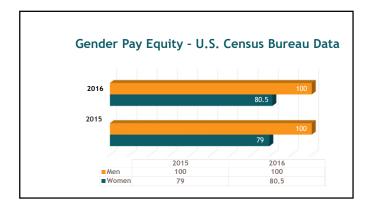
• Try to learn what the underlying issue is

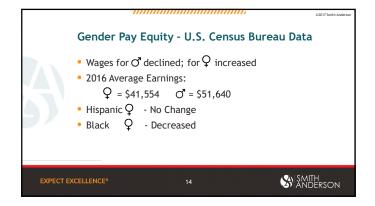


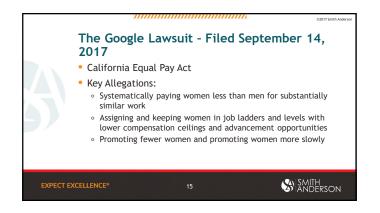


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Gender Pay Equity - 2017 EEO-1 Report		C2017 Smith Auderson	1
Office of Management and Budget ("OMP") issued stay			
Office of Management and Budget ("OMB") issued stay August 29, 2017		August 29, 2017	
 No collection of aggregate W-2 pay and hours worked data Report still due March 31, 2018 		 Report still due March 31, 2018 	
Actually initiated by EEOC Acting Chair Victoria Lipnic New report the "poster child for the kind of regulation that the president campaigned against"	7/	- New report the "poster child for the kind of regulation that the	











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	I. Coverage of the FLSA	
	Enterprise Coverage:	
	 A covered enterprise has 2 or more employees 	
	"engaged in commerce or the production of goods for commerce" or has "employees handling, selling, or	
	otherwise working on goods or materials that have	
	been moved in or produced for commerce" (29 USC \$203 (r)(1)), and	-
	Gross annual business dollar volume of at least	
	\$500,000	
EXPECT E	XCELLENCE* 16 SMITH ANDERSON	
24 201 2	ANDERSON	
	c2017 Smith Anderson	
	I. Coverage of the FLSA	-
	Individual Coverage:	
	Individual Coverage. Individually engage in interstate commerce	
	Determined on workweek basis	
	Determined on Horitinean pasis	
		-
EXPECT E	XCELLENCE* 17 SMITH ANDERSON	-
Du cor c	" IANDERSON	-
1	. <u>Caution</u> : Subdivisions or affiliates may be ggregated into a single enterprise for dollar volume	
if	f unified operations, common control, or common	
b	ousiness purpose exists.	
1		



II. Independent Contractor or Employee • Factors for distinguishing include: • exclent to which services rendered are integral part of a permanency of the relationship • nature and degree of control by hiring entity III. Independent Contractor or Employee • Factors for distinguishing include: • worker's opportunity for profit or loss • permanency of the relationship • worker's investment in equipment for materials ISchultr w Capital International Security, Inc. 440 F3d 595 8th Cir. 2006 Security guards were not independent contractors) Security guards were not independent contractors) Security		- CAST Sents A
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	III. Intern/Trainee or E	
		imployee
	Six Criteria for Interns internship is similar to what would be given in an educational environment experience is for intern's benefit intern doesn't displace regular employees	 employer derives no immediate advantage intern not entitled to job at conclusion of internship mutual understanding that intern not entitled to wages
EXPECT E	EXCELLENCE® 22	SMITH ANDERSON
	,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,	©2017 Smith Anders
	III. Intern/Trainee or E	
	 Trainees - focus on who is the the arrangement McLaughlin (4th Cir. 1989) (snack food of that trainees assisted regular shelves, driving trucks) 	ne primary beneficiary of n v. Ensley, 877 F.2d 1207 istributors benefited in
	(DOL Fact Sheet #71)	
EXPECT E	EXCELLENCE® 23	SMITH ANDERSON
	3. <u>Caution</u> : A trainee for a "wh position is not exempt when no	
	the duties for such position.	J



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	IV. Bona Fide Volunteers Can Be Excluded from FLSA Coverage	
	nom i zoverage	
	4. <u>Reminder</u> : If the person is "volunteering" the same services he/she performs as an employee of the entity, he/she may not be a bona fide volunteer.	
	nersie may not be a bona nue votunteer.	
EXPECT E	xcellence* 25 SMITH	
	S ANDERSON	
	c2017 Smith Anderson	1
	V. Joint Employment	
	 New decision from 4th Circuit Court of Appeals holds joint employment exists when two or more entities co- determine the essential terms and conditions of 	
	employment and their combined influence over such renders the worker an employee rather than an independent contractor	
EXPECT E	xcellence ² 26 SMITH ANDERSON	
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	V. Joint Employment • Six-factor test:	
	 Do the employers jointly determine, share, or allocate power to direct, control, or supervise the worker; Do they jointly determine, allocate, or share (directly or 	
	indirectly) the power to hire or fire the worker;Degree of permanency and duration of the relationship of the putative joint employers;	
	 Whether, through shared management or direct or indirect ownership interest, one putative joint employer controls, is controlled by, or is under common control with the other; 	
EXPECT E	XCELLENCE® 27 SMITH ANDERSON	



7111111111
V. Joint Employr
• Six-factor test:
 Whether the work controlled by one of independently or in
 Whether, formally joint employers joint responsibility over employer such as paying payroll taxe
Salinas v. Commercial Inte 360542 (4 th Cir. Jan. 25, 20

ment

- is performed on a premises owned or or more of the putative joint employers, in connection with one another; and
- or as a matter of practice, the putative $% \left(1\right) =\left(1\right) \left(1\right$ ointly determine, share, or allocate functions ordinarily carried out by an payroll, workers' compensation insurance, es, or providing facilities, tools or materials

eriors, Inc., No. 15-1915, ____ F.3d ____, 2017 WL



5. <u>Reminder</u>: If there is joint employment, hours worked for each employer are aggregated and overtime may be due on the total, but each employer can take credit for payments made by the other.

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VI. Salary Basis

- Must receive full salary for any week in which he/she performs work unless:
 - o Employee is absent for one or more full days for personal reasons (other than sickness or disability)
 - o Employee is absent for one or more full days because of sickness or disability and the deduction is made in accordance with a plan, policy, or practice of providing compensation for loss of salary in such circumstance
 - Employer imposes penalty for violations of safety rule of major significance





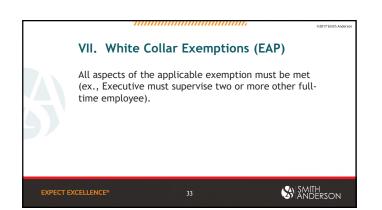
	7//	,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,	©2017 Smith Anderson
	VI. Salary I	Basis	
	performs wor • Employer in days for wor • Employee ta	nposes unpaid suspension rkplace conduct rule akes unpaid leave under F s absent for the entire we	for one or more full
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6. Reminder: Deductions from leave banks, even if made by the hour, will not jeopardize salary basis.

7. Reminder: Employer can require that exempt employee use his/her accrued vacation time for any absence, even absence caused by employer's plant shutdown, without affecting salary basis so long as he/she receives payment equal to the guaranteed salary.

(Wage-Hour Opinion Letter FLSA2009-2 (Jan. 14, 2009))

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		,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,		mm	
	8. <u>Tip</u> : Focus works as both	office assist	tant and	as a mana	iger -
	determining w determine who	ther exemp	are "prir pt or not	mary" will ·	
EXPE	ECT EXCELLENCE*		34		SMITH ANDERSON
				/	ANDERSON
		,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,	,,,,,,,,,,	mm	
	9. <u>Caution</u> : H	ighly compe	ensated e	mployee ((HCE)
	(greater than is only exempt or non-manual	t if his/her p	orimary o	duty includ	les office
	\$150,000/year because his/he	r can never l	be exem	pt as a HC	E
	manual work.	er primary o	July is fic	or office of	i iloli-
				/	(C) ICANTH
EXPE	CT EXCELLENCE*		35		SMITH ANDERSON
			,,,,,,,,,,,,	IIIIII	/
	10. <u>Reminder</u>				
	ownership inte an executive (without regard	if <u>actually i</u>	nvolved i	<u>in manage</u>	ment)
	(29 C.F.R. §541		equil elli	-11C3 TOT (E)	стрион
EXPE	CT EXCELLENCE*		36		SMITH



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	VIII. Admii	nistrative Exempt	ion
	Staff varsus n	roductions dichotomy -	the "production
	worker" probl		the production
	Ex., Direct ma	arketing company's copy	editors were not
		ely exempt because thei	
	"squarely on t	the production side." (W r, FLSA 2006-45, Dec. 21	/age and Hour
	opinion Letter	, , LUA 2000-43, DEC. 21	, 2000/
	(DOL Field Operation	ons Handbook 22e01(e))	
EXPECT E	EXCELLENCE*	37	SMITH ANDERSON

		Consider whether the a	
	employee is per	forming "production" w	ork. The
		t dispositive, but aids in ork is "directly related to	
	management po	olicies or general busine	
	operations."	-	
EXPECT E	EXCELLENCE*	38	SMITH ANDERSON
			ANDERSON
	7/	,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,	"
		ployee in the computer-	
		risfy the requirements to	
		employee but "whose pruch as planning, schedule	
		tivities required to deve	
	to solve comple	x business, scientific or	engineering
		employer or the emplo	
		meet the duties requir	ements for
	the administrati	ivo ovomption	
	the administrati	ive exemption.	



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	IX. Computer E	mployees		
	"Primary duty" for e including for examp	exemption is det	ailed and specific,	
	documentation, ana	lvsis, creation, t	testing or	
	modification of com	puter systems of	r programs, including	
	prototypes, based o	n and related to	user or system	
	design specifications	s." (29 C.F.R. §5	41.400(b))	
			HTIM21001	
EXPECT E	EXCELLENCE*	40	SMITH ANDERSON	
	minim			
	13. <u>Caution</u> : The abb			
	highly compensated e	xemption canno	t be used for	
	computer employees detailed primary duty	because of the s	pecific,	
	exemption of compute	er employees. (2	29 C.F.R.	
	§541.700; DOL Field O	perations Handb	oook 222e01(f))	
EXPECT E	XCELLENCE*		SMITH ANDERSON	
			J ANDERSON	
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	14. <u>Reminder</u> : Compu	iter employee e	xemption can	
	apply to employees pa			
	least \$27.63. (Note: S	tate law may re	quire a higher	
	rate per hour; <u>e.g.</u> , co	urrently \$42.35 i	in California)	
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	X. Sales Employees	
	An inside sales employee is generally non-exempt.	
3/		
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	15. <u>Reminder</u> : An outside sales employee's primary	
	duty is making sales or obtaining orders or contracts	
	for services and the employee must be "customarily and regularly" engaged away from the employer's	
	place of business.	
	(29 C.F.R. §541.500)	
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	X. Sales Employees	
	A. Jaies Employees	
TAX.	• Section 207(i) of the FLSA provides an overtime (but	
VAA	not minimum wage) exemption for commissioned sales employees if:	
	 employees ir: employee is employed by a retail or service establishment; 	
9)	 the employee's regular rate of pay exceeds 1.5 times the 	
	minimum wage; and o more than one-half of the employee's compensation for a	
	representative period is commissions	
l		

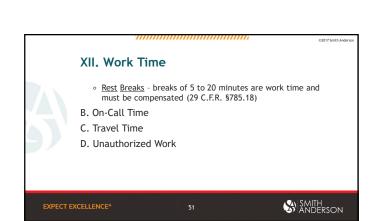


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	·
 Caution: The Section 207(i) exemption is difficult to satisfy and requires careful analysis. 	
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XI. Other Exemptions	
 Motor Carrier Act Exemption (preserves DOT's jurisdiction to set maximum work hours for certain 	
workers) o employee is employed by a "motor carrier or motor private	
carrier" (defined in 49 U.S.C. §13102) employee is a "driver, driver's helper, loader, or mechanic" whose duties affect the safety of operation of motor vehicles	
on public highways in interstate or foreign commerce the small vehicle exception (vehicle weighs less than 10,000	
pounds) does not apply	
EXPECT EXCELLENCE® 47 SMITH ANDERSON	
	_
 Reminder: Consider possibly applicable exemptions in addition to the "white collar 	
exemptions."	



Will the state of	mmmmmmmmm			
19 Caution Mot	or Carrior Act avamptic	un is not		
applicable to dispunloaders.	or Carrier Act exemptio patcher or office person	nel or		
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XII. Work Time A. Break Time • Meal Breaks not work time if: • The break is generally at least 30 minutes • Employee is free to leave work site • Employee is completely relieved from duty during the meal break (29 C.F.R. \$785.19; Roy v. County of Lexington, 141 F.3d 533 (4th Cir. 1998) ("predominant benefit standard" - employees use meal time for their own or employer's benefit))





<i>19. <u>Reminder</u>:</i> FLSA doesn't require meal or rest break but state law may.	
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20. <u>Caution</u> : Payments made for the inconvenience of being on call (ex., \$100/shift) will need to be	
included in the regular rate calculation for overtime purposes.	
EXPECT EXCELLENCE® 53 SMITH	
24. Tim Have an average with a state of	
21. <u>Tip</u> : Have non-exempt workers travel outside of regular work hours, because time spent in travel outside of regular work hours as a passenger on an airplane, train, boat, bus, or car is <u>not</u> work time. (29 C.F.R. §785.39)	
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22. <u>Reminder</u> : If the employer "suffers or permits" the employee to work, the employee must be paid, thus, even if the work or overtime was not authorized, the employee is entitled to compensation.	
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COSTT Antith Anderson	
XIII. OvertimeInclude non-discretionary bonuses	
Payments made to employees when they don't use sick leave may be an attendance bonus that must be included in the regular rate. (Wage and Hour Opinion Letter, FLSA 2009-19 (Jan. 16, 2009)	
EXPECT EXCELLENCE® 56 SMITH ANDERSON	
23. <u>Reminder</u> : The "regular rate" must include "all	
remuneration for employment paid to, or on behalf of, the employee."	
EXPECT EXCELLENCE* 57 SMITH	



-minin				
Half-Time method of o careful implementation	e Fluctuating Workweek vertime calculation requ n and is not possible unc states (AL, CA, HI, KY, I	uires der the		
EXPECT EXCELLENCE	58	S SMITH S ANDERSON	 	
unnun	annannannan (1)	/	 	
25. <u>Tip</u> : Always check	state laws.			
		(C) SAAITH		



Employee Handbooks:
Best Practices, Common Pitfalls,
and Looking Forward in a Changing
Legal Landscape



Patrick D. Lawler

Associate

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Patrick Lawler is an associate in Smith Anderson's Employment, Labor and Human Resources practice group. Patrick advises clients in a variety of industries on a broad range of employment issues, including developing effective policies and procedures and providing risk management advice. He assists in identifying and managing employment-related issues in mergers, acquisitions, reorganizations, and other corporate transactions. In addition, Patrick defends employers from claims of discrimination, retaliation, wrongful termination, breach of contract, unfair trade practices, and other business-related claims.

Prior to joining Smith Anderson, Patrick was an associate in the Raleigh office of a global labor and employment law firm.

HONORS & AWARDS

- Aycock-Poe Scholarship
- North Carolina Law Review (2012-2013)

PROFESSIONAL & COMMUNITY AFFILIATIONS

- North Carolina Bar Association
- Wake County Bar Association

PRACTICE AREAS

Employment Litigation

Employment, Labor and Human Resources

Litigation

BAR & COURT ADMISSIONS

North Carolina

U.S. District Court, Eastern, Middle and Western Districts of North Carolina

EDUCATION

University of North Carolina, J.D., with honors, 2014

University of North Carolina, B.A., 2009

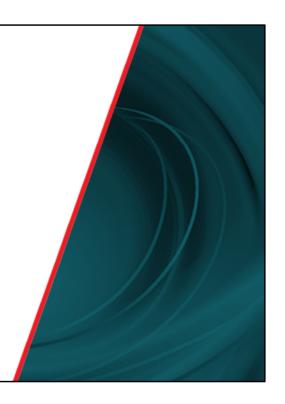


Employee Handbooks

Best Practices, Common Pitfalls, and Looking Forward in a Changing Legal Landscape

Patrick Lawler October 2017

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TIP 1 - Require, and Retain, Employee Acknowledgements



- Helps with legal defense
- "I had no idea!"
- Online handbooks
- Multi-state employers

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2



Sample acknowledgement for online handbooks:

To ensure that all employees have ready access to information about the company's Human Resources policies (including the workplace harassment and drug/alcohol policies), these policies are stored online [insert location/access information]. This statement acknowledges that I have physical access and the necessary authorization and training to access the policies and that it is my responsibility to read and understand these policies and to keep current with all future revisions and additions.

Multi-state employers:

Additionally, the company employees in a number of states. In many cases, one state's law may differ from another state's law, especially with regard to wages, hours, vacation and leave. Accordingly, there may be circumstances where an applicable state's law requires action other than what is described in this handbook. In those cases, action will be taken as required by applicable law.



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TIP 2 - Multi-State Employers - Commit to an Approach



- State-specific in each jurisdiction
- All-encompassing?
- · Base, with state-specific addenda

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3





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TIP 3 - Craft Expansive "Core" EEO Policies



- EEO Policy
- Anti-harassment
- Anti-retaliation
- Disability accommodations
- Religious accommodations

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4





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EEO Policy



- Provides legal defense
- Revisit protected classes
 - Gender identity or expression
 - Sexual orientation
- Looking ahead pregnancy discrimination (state)
- "Or any other bases protected by state, local, or municipal law"

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Model EEO Policy

The company is an equal opportunity employer. As such, we offer equal employment opportunities without regard to race, color, religion, sex (including pregnancy and gender identity), national origin, age, disability, genetic information, veteran status, and other protected class characteristics. These opportunities include all terms, conditions, and privileges of employment, including but not limited to hiring, job placement, training, compensation, discipline, advancement, and termination.

Employees who believe they are being or have been unlawfully discriminated against must immediately report the incident to Human Resources. Retaliation against employees who report perceived discrimination or who participate in investigations as witnesses or in other capacities also is prohibited and must be reported as set forth above. The company does not authorize or condone unlawful discrimination or retaliation. If any employee is found to have unlawfully discriminated or retaliated against any other employee, appropriate disciplinary action up to and including termination will be taken.

Reasonable Accommodation. The company will provide reasonable accommodations to qualified individuals with known disabilities unless such accommodations would pose an undue hardship to the company. Reasonable accommodations will be made to allow individuals to participate in the application process, perform essential job functions, and enjoy equal benefits and privileges of employment. Individuals with disabilities are responsible for requesting reasonable accommodations by completing an Employee Request for Accommodation for Disability form (available in Human Resources) and providing all medical documentation appropriate to verify the existence of the disabilities and to identify and assess potential reasonable accommodations. Requests should be directed to Human Resources.

The company will provide reasonable accommodation of an individual's sincerely held religious belief if the accommodation would resolve a conflict between the individual's religious beliefs or practices and a work requirement unless such accommodations would pose an undue hardship to the company. Individuals who believe they need an accommodation are responsible for requesting reasonable accommodations by submitting a written request to Human Resources.



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Anti-Harassment Policy



- Faragher-Ellerth defense
- All-encompassing not just sex
- Transgender issues
- Reporting do not require reporting to supervisor/manager, but instead to HR official/higher level executive
- · "Or any other bases protected by state, local, or municipal law"

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Model language regarding transgender employees:

Harassment includes . . . the intentional or persistent failure to respect an individual's gender identity (e.g., intentionally referring to the individual by a name or pronoun that does not correspond to the individual's gender identity)



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Anti-Retaliation Policy



- Include provisions in anti-harassment and EEO/nondiscrimination policies
- Consider stand-alone anti-retaliation provision, covering more than just discrimination/harassment
- · Wage/hour complaints, workers' comp filings

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7



Model retaliation language:

Retaliation against employees who report perceived unlawful discrimination or harassment, or who participate in investigations as witnesses or in other capacities, also violates the law and company policy. Such retaliation is prohibited and will not be tolerated and must be reported immediately according to the reporting procedure below.



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Disability and Religious Accommodations

- Specify HOW employees may make requests
 - Regardless, don't ignore oral requests!

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Model religious accommodation policy language:

The Company respects the religious beliefs, practices and observances of all of its employees and applicants for employment, and will, upon request, make reasonable efforts to accommodate an employee or applicant whose sincerely held religious belief, practice or observance conflicts with a work requirement, unless doing so would pose an undue hardship on the Company's business.

If you need an accommodation because of your sincerely held religious beliefs, practices or observances, it is your responsibility to make the Company aware of both your need for an accommodation and that it is being requested due to a conflict between religion and work by submitting this written request for the accommodation to Human Resources.

Model disability accommodation policy language:

The Company will provide reasonable accommodations to qualified individuals with known disabilities unless such accommodations would pose an undue hardship to the Company. Reasonable accommodations will be made to allow individuals to participate in the application process, perform essential job functions, and enjoy equal benefits and privileges of employment. Individuals with disabilities are responsible for requesting reasonable accommodations and providing all medical documentation appropriate to verify the existence of the disabilities and to identify and assess potential reasonable accommodations. All requests for reasonable accommodations should be directed to human resources.



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TIP 4 - Beware the NLRA



- Not just for unionized workforces
- Essentially, gives non-supervisory employees the "right to communicate" about pay and other terms and conditions of employment
- Prohibits rules that could be read to prohibit these rights

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9



See Report of the General Counsel Concerning Employer Rules, Memorandum GC 15-04 (March 18, 2015) ("GC Memo") attached as Appendix A providing lawful and unlawful rules governing:

- Confidentiality
- Conduct toward the Company and Supervisors
- Conduct toward Fellow Employees
- Interaction with Third Parties
- Use of Company Logos, Copyrights and Trademarks
- Photography and Recording
- Employees Leaving Work
- Conflict of Interest Rules



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Photography/Recording Policies



- Right to photograph and/or record in furtherance of concerted activity
- Policy cannot place <u>total ban</u> on photography and recording in the workplace

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10



Unlawful Policies

See GC Memo Part 1 F for the following handbook provisions found unlawful by NLRB because they would be reasonably interpreted as interfering with employee rights to engage in protected activity:

- "Taking unauthorized pictures or video on company property is prohibited"
- "No employee shall use any recording device including but not limited to, audio, video, or digital for the purpose of recording any employee or operation of the employer"

See also:

<u>T-Mobile USA Inc. v. NLRB</u>, 865 F.3d 265 (5th Cir. July 25, 2017) ("No recording" policy prohibited employees from taking pictures or making audio or video recordings in the workplace (prohibiting "sound records of work-related or workplace discussions" unless obtaining permission))

Whole Foods Market Grp., Inc. v. NLRB, 691 Fed. App'x 49 (2d Cir. June 1, 2017) (no-recording policy prohibited all recording without management approval; even though stated purpose for the ban was to promote employee communication in the workplace, court held the policy was overbroad and that employees would reasonably construe the language to prohibit recordings protected by Section 7)

BCG Partners Inc. d/b/a Newmark Grubb Knight Frank, 28-CA-178893 (May 10, 2017) (policy barring workers from recording video, audio or images of the workplace without company permission "unlawfully and over-broadly encompasses recordings made for one's own mutual aid and protection" which could include images of protected picketing, documenting unsafe conditions or publicizing discussions about terms and conditions of employment)



AT&T Mobility LLC, 05-CA-178637 (April 25, 2017) (policy stating "employees may not record telephone or other conversations they have with their co-workers, managers or third parties unless such recordings are approved in advance by the legal department" was overbroad; among other things, the policy was "not limited to work time and/or conversations in work areas, or even conversations on respondent's premises.")

Lawful policies (GC Memo Part 1 F)

In contrast, photography bans that are appropriately limited to narrowly defined privacy interests not related to protected concerted activity will be upheld:

• "The use of cameras for recording images of patients and/or hospital equipment, property, or facilities is prohibited." Flagstaff Medical Center, Inc., 357 NLRB No. 65 (Aug. 25, 2011)



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Confidentiality Policy



- Don't prohibit disclosure of "employee information" or "personnel information" or any terms/conditions of employment
- Define protected information so as not to encompass employee information

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Unlawful Policies

See GC Memo Part 1 A for the following handbook provisions found unlawful by NLRB because they would be reasonably interpreted as interfering with employee rights to engage in protected activity:

- "Do not discuss customer or employee information outside of work, including phone numbers and addresses"
- "Never publish or disclose the employer's or another's confidential or other proprietary information. Never publish or report on conversations that are meant to be private or internal to the employer."
- "If something is not public information, you must not share it."
- "Discuss work matters only with other employees who have a specific business reason to know or have access to such information . . . Do not discuss work matters in public places.

See also

Insight Global, LLC, 15-CA-161491 (Nov. 23, 2016) (confidentiality rule ("All information relating to the business operations of Insight Global or Customer shall be held in strict confidence and not disclosed without the prior written consent of Insight Global or Customer, whichever is appropriate.") struck down as overbroad because employees would reasonably believe the policy proscribed discussions about the terms and conditions of employments (wages, hours, working conditions, etc.))



Lawful policies (GC Memo Part 1 A)

The following policies were found lawful because they did not include a definition of confidential information that referenced employee or employment information and, in some cases, were located in policies dealing with compliance with SEC or other legally protected information:

- "Do not disclose business secrets or other confidential information"
- "Misuse or unauthorized disclosure of confidential information not otherwise available to persons outside of the employer is cause for disciplinary action, including termination."

See also <u>T-Mobile USA Inc. v. NLRB</u>, 865 F.3d 265 (5th Cir. July 25, 2017) ("Acceptable use" policy prohibited "nonapproved individuals" from accessing nonpublic company information; court found policy was lawful because it was limited to the exchange of "nonpublic" information and didn't specify that the ban included wage information)



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Must Allow Criticism of Company and Management



- Don't prohibit criticism of policies, treatment of employees
- Don't prohibit "rude" or "disrespectful" conduct towards management
- Employers MAY prohibit insubordination/failure to cooperate toward management

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Unlawful Policies

See GC Memo Part 1 B for the following handbook provisions found unlawful by NLRB because they would be reasonably interpreted as interfering with employee rights to engage in protected activity:

- "Be respectful to the company, other employees, customers, partners, and competitors"
- "Do not make fun of, denigrate, or defame your co-workers, customers, franchisees, suppliers, the Company, or our competitors."
- "Be respectful of others and the Company."
- "Disrespectful conduct or subordination, including, but not limited to, refusing to follow orders from a supervisor or a designated representative"

Per NLRB, a rule that prohibits employees from engaging in "disrespectful," "negative," "inappropriate," or "rude" conduct toward the employer or management, absent sufficient clarification or context, will usually be found unlawful.

See also:

Quicken Loans v. NLRB, 830 F.3d 542 (D.C. Cir. July 29, 2016) (non-disparagement rule, barring employees from "publicly criticizing, ridiculing, disparaging or defaming Quicken Loans or its products, services and policies," was unlawful because this "sweeping gag order would significantly impede [the workers'] exercise of their Section 7 rights because it directly forbids them to express negative opinions about the company, its policies, and its leadership in almost any public forum.")



Lawful policies (GC Memo Part 1 B)

- "No rudeness or unprofessional behavior toward a customer, or anyone in contact with the company"
- "Employees will not be discourteous or disrespectful to a customer or any member of the public while in the course and scope of company business."
- "Each employee is expected to work in a cooperative manner with management/supervision, coworkers, customers and vendors."

Per NLRB, a rule that requires employees to be respectful and professional to coworkers, clients or competitors but not to the employer or management generally will be lawful because employers have a legitimate business interest in having employees act professionally and courteously in their dealings with coworkers, customers, business partners and other third parties. Policies against insubordination also are lawful.

See also:

T-Mobile USA Inc. v. NLRB, 865 F.3d 265 (5th Cir. July 25, 2017) ("Workplace conduct" policy encouraged employees to "behave in a professional manner" that "promotes efficiency, productivity, and cooperation" and required employees "to maintain a positive work environment . . . conducive to effective working relationships with internal and external customers, clients, coworkers, and management" found lawful by court because reasonable employee should understand the policy was a general civility policy; "Commitment to integrity" policy required employees to "act in a professional manner" and listed 17 nonexclusive examples of misconduct, like "failing to treat each other with respect" and "failing to demonstrate appropriate teamwork" court also found lawful because reasonable employee would be fully capable of engaging in debate over union activity or working conditions, even vigorous or heated debate" without engaging in conduct prohibited by the policy. Important Note: NLRB found these policies unlawful; court reversed NLRB).



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Social Media Policy



- Make sure policies are narrowly tailored and not overbroad
- Do not prohibit employees from posting disparaging content or criticism about the employer or management
- Do not restrict the use of the employer's name, trademark, or other intellectual property (logo)
- Potential FTC issue: Require employees to disclose employment relationship whenever discussing the company's products/services online, and to state they are not a spokesperson.

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Unlawful Policies

See GC Memo Part 1 B and E for the following handbook provisions found unlawful by NLRB because they would be reasonably interpreted as interfering with employee rights to engage in protected activity:

- "Do "not use any Company logos, trademarks, graphics or advertising materials" in social media.
- Do not make "insulting, embarrassing, hurtful or abusive comments about other company employees online" and "avoid use of offensive, derogatory, or prejudicial comments."
- Information posted on the internet may be there forever, and employees would be well advised to refrain from posting information or comments about the company, company clients, employees or employees' work that have not been approved by the company . . . The company will use every means available to hold persons accountable for disparaging, negative, false or misleading information or comments involving the company or company employees and associates on the internet and may take corrective action."

See also:

Georgia Auto Pawn, 10-CA-132943 (Oct. 21, 2015) (policy stating "social media should never be used in a way that defames or disparages the company" and that workers were not permitted to mention the company or anything about it on social media was unlawful because employees would likely see this as requiring them to "refraining from engaging in certain protected communications such as those critical of the employer or its agents" and as "prohibiting employees from discussing and/or disclosing information regarding their own conditions of employment")



Lawful policies (GC Memo Part 1 F and Memorandum OM 12-59 (May 30,2012) Report of Acting General Counsel on Social Media Cases)

- "Respect all copyright and other intellectual property laws. For [the Employer's] protection as well as your own, it is
 critical that you show proper respect for the laws governing copyright, fair use of copyrighted material owned by
 others, trademarks and other intellectual property, including [the Employer's] own copyrights, trademarks and
 brands."
- "[Employer] believes that individuals are more likely to resolve concerns about work by speaking directly with coworkers, supervisors or other management-level personnel than by posting complaints on the Internet."
- "Any harassment, bullying, discrimination, or retaliation that would not be permissible in the workplace is not permissible between co-workers online, even if it is done after hours, from home and on home computers."
- "Avoid posts that could be viewed as malicious, obscene, threatening or intimidating. Prohibited "harassment or bullying" includes "offensive posts meant to intentionally harm someone's reputation" or "posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy."



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TIP 5 - Address Five Core Payroll Issues



- Payroll schedules
- Final Paychecks
- Deductions
- "Off the clock" work
- Breaks

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Payroll Schedule



- 1st and 15th? Exempt/non-exempt distinction?
- NC may be daily, weekly, biweekly, semi-monthly, or monthly
- · CA:
 - Non-exempt employees must be paid twice monthly
 - Wages earned 1st-15th of month = paid no later than 26th
 - Wages earned 16th-end of month = paid no later than 10th
 - If based on other earnings period, must be paid within 7 days of end of period

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Final Paychecks

- Determined by state law
 - NC- must be paid all wages due on or before next payday. Must pay undisputed amount
 - CA must pay *immediately* at involuntary termination
 - Resignation with 3+ days' notice = pay on final day
 - Resignation with <3 days' notice = pay within 72 hours of final day

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Deductions



- Handbook should describe mandatory and voluntary payroll deductions
- Helps preserve employer's rights under salary basis test
 "Salary basis safe harbor"
- Allows employees to identify improper deductions
- Do not deduct used but unearned PTO may jeopardize exemption status of employee
- State law dictates

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Model safe harbor policy:

It is company policy to comply with federal Fair Labor Standards Act (FLSA) requirements, including salary basis requirements applicable to exempt employees. The company prohibits improper deductions from exempt employee salary. Deductions are permissible to the extent permitted by applicable law: 1) one or more full day absences for personal reasons other than sickness or disability [note: if the company provides sick, disability or other pay for absences due to illness, then deductions also can be made for full day absences due to sickness in which case this provision should read: one or more full day absences for personal reasons including sickness or disability]; 2) amounts to offset pay employee has received as jury, witness or military pay; and 3) full day absences due to approved disciplinary suspension imposed in good faith for workplace conduct rule infractions. Additionally, partial or full day deductions are permissible from exempt employee salary: 1) during the first and last weeks of employment; 2) for unpaid FMLA absences; and 3) penalties imposed in good faith for infractions of major safety rules.



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"Off the clock" work



- Work-related tasks are compensable
- Policy should prohibit "off the clock" work for non-exempt employees
 - Prep time, administrative duties
 - Responding to phone calls, texts, emails

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Model language:

Employees are prohibited from performing any "off-the-clock" work. "Off-the-clock" work means work you may perform but that is not reported. Any employee who fails to report or inaccurately reports any hours worked will be subject to disciplinary action, up to and including discharge.

Nonexempt Employees. Nonexempt employees are not permitted to use their devices for work purposes during nonworking hours without prior written authorization from their supervisor. Nonexempt employees using their own devices under this policy must record all time spent working, including time spent working on devices during nonworking hours.



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Rest and meal breaks



- Breaks = state law
 - NC no rest/meal breaks required
 - CA 5 hours of work = 30 minute unpaid break (waivable)
- Generally, short (<20 minutes) breaks are paid
- Longer (30+ minutes) may be unpaid (non-exempt only), but you must ensure employees perform no work during these breaks
- Lactation breaks:
 - Covered by FLSA (unpaid), but some states prescribe more

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Model meal breaks language (non-exempt):

During an unpaid mead period, employees: i) must be relieved of all duties, active or inactive; ii) must not be interrupted with responding to calls, pages or requests for assistance; and iii) must take the meal period away from his/her work area.

Employees are not authorized to miss a meal period, respond to calls, pages or requests for assistance or remain in the work area during the meal period, except with the express authorization of, or direction by, the supervisor.



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TIP 6 - Emphasize the Importance of a Substance-Free Workplace



- Substance abuse policy should specify substances that are banned on premises
- Where medical/recreational marijuana is legal, employers may still discipline for on-duty impairment
 - In some states, employer may not discipline for positive test

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Medical/Recreational Marijuana

- · State-specific addenda best way to address
- · Where applicable:
 - "While the use of marijuana has been legalized under state law for medicinal/recreational uses, it remains an illegal drug under federal law and its use as it impacts the workplace is prohibited."

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Drug Testing Policy



- Heavily regulated by states
 - "One size fits all" policies are difficult
 - Differ on (1) who may be tested, (2) under what circumstances, (3) how it is conducted, and (4) technical testing standards
- May not automatically drug test post-injury or accident; employer must have reason to believe prohibited substance played a role
- State-specific addenda is easiest

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TIP 7 - Minimize Expectation of Privacy



- Policy should do more than state employer reserves the right to conduct searches - state that employer will exercise that right
 - "Employee emails will be monitored", etc.
- No expectation of privacy but be wary of invasion of privacy under state law
- Explain areas controlled by employer subject to search

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Model language:

Users should not consider any information or activities to be personal information, communication or property, even when stored under personal access codes marked personal and confidential. All information transmitted on or from, received or accessed by or residing on the system is monitored and read by the company at its discretion, even information that is understood by the user to be private and confidential. Use of the system constitutes express consent to the company's monitoring of and access to the information.



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TIP 8 - Leave Policies: The More Detailed, the Better



- FMLA policies are required, but you should include policies for other leaves, too
- Jurisdiction-specific: State FMLA policies may apply

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FMLA: DOL guidance



- Many employers fail to even reach this level
- FMLA policy should provide <u>more</u> detail than the DOL's guidance suggests

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See a model FMLA policy attached as Appendix B.



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FMLA: 12-month period



- o Calendar year, fiscal year, anniversary year
- Looking forward
- Rolling backwards
- · State law may dictate
- Concurrent with other accrued leave

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FMLA-Servicemember leave



- Many policies fail to address military family leave provisions of FMLA
- 12 (qualifying exigency) or 26 (military caregiver) weeks of unpaid leave
- Measured looking forward

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FMLA: Eligibility and Notification



- Misrepresentation = potential interference claim
- Explain preferred notification method
 - Request 30 days' prior written notice, if possible
- Intermittent leave employee must specify absence is for certified reason
- · Reserve right to require medical certification
- Require periodic status updates

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State mandatory PTO/sick leave laws

- Rapidly changing area of law
- Local laws and municipal laws

ΑZ	CA	ст	DC	IL	LA	MD
NJ	NY	OR	PA	VT	WA	

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All PTO/sick policies: Who can accrue? How to request usage?



- Probationary period?
- · Encourage advance notice
- · Hourly increments? Half-day increments?
- Preferred/permissible times to use PTO?

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All PTO/sick policies: Accrual Method



- Most state paid sick leave/PTO laws require 1 hour accrual per 30/40 hours worked
- · NC Policy must specify how and when time off is earned
- Tiered approach?

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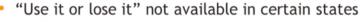
North Carolina requires vacation policies include details on:

- (1) How and when vacation is earned so that the employees know the amount of vacation to which they are entitled;
- (2) Whether or not vacation time may be carried forward from one year to another, and if so, in what amount;
 - (3) When vacation time must be taken;
 - (4) When and if vacation pay may be paid in lieu of time off; and
 - (5) Under what conditions vacation pay will be forfeited upon discontinuation of employment for any reason.

13 NCAC 12.0306



All PTO/sick policies: Carryover? Cap?



- In these states, institute maximum accrual cap. Employees will not forfeit time accrued, but instead will no longer accrue time after a certain point.
- Encourages employees to use PTO/vacation time
- Prevents accumulation of large amounts of PTO
- · Mandatory vacation policy?
- Front-load? Use prior to accrual?

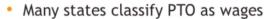
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PTO/sick pay termination issues



- Must pay out accrued but unused
- Policy must be clear
 - Many states use this as default
- "Unless otherwise required by state law, accrued but unused PTO will be forfeited upon termination"

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Questions?						
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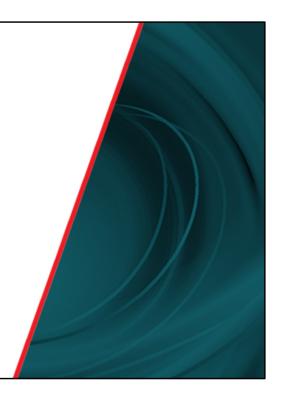


Employee Handbooks

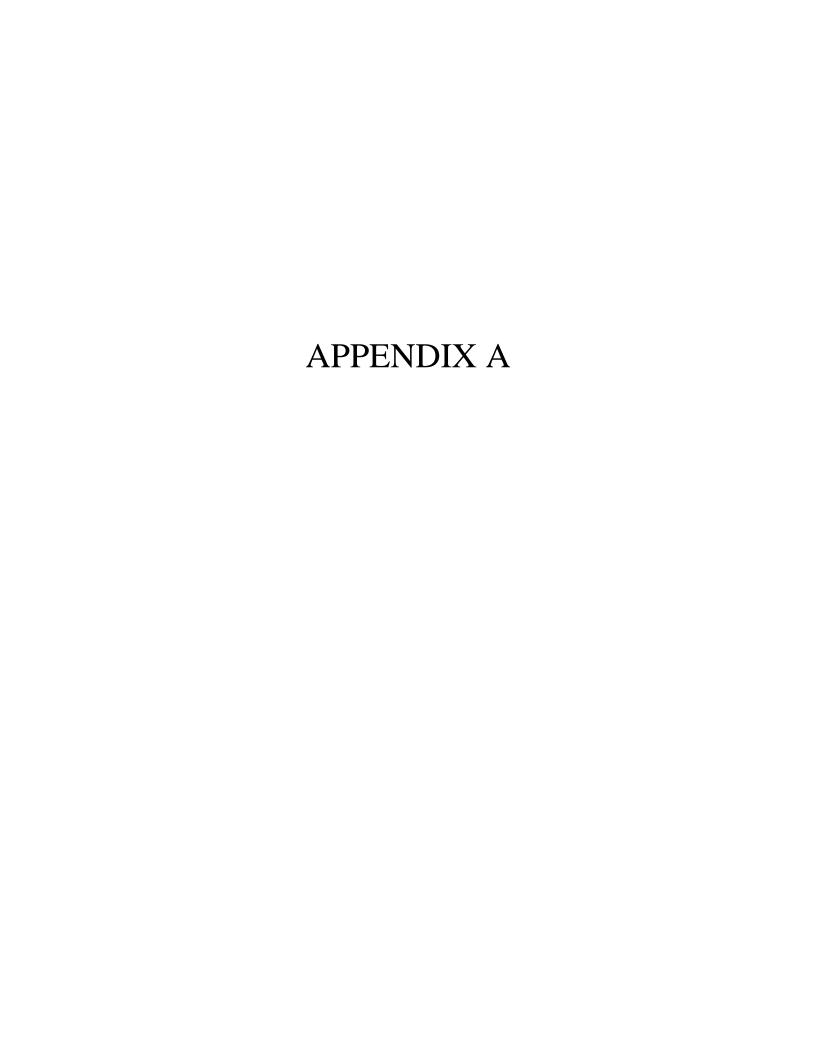
Best Practices, Common Pitfalls, and Looking Forward in a Changing Legal Landscape

Patrick Lawler October 2017

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OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 15-04

March 18, 2015

TO:

All Regional Directors, Officers-in-Charge,

and Resident Officers

FROM:

Richard F. Griffin, Jr., General Counsel

SUBJECT: Report of the General Counsel

Concerning Employer Rules

Attached is a report from the General Counsel concerning recent employer rule cases.

Attachment

cc: NLRBU

Release to the Public

Report of the General Counsel

During my term as General Counsel, I have endeavored to keep the labor-management bar fully aware of the activities of my Office. As part of this goal, I continue the practice of issuing periodic reports of cases raising significant legal or policy issues. This report presents recent case developments arising in the context of employee handbook rules. Although I believe that most employers do not draft their employee handbooks with the object of prohibiting or restricting conduct protected by the National Labor Relations Act, the law does not allow even well-intentioned rules that would inhibit employees from engaging in activities protected by the Act. Moreover, the Office of the General Counsel continues to receive meritorious charges alleging unlawful handbook rules. I am publishing this report to offer guidance on my views of this evolving area of labor law, with the hope that it will help employers to review their handbooks and other rules, and conform them, if necessary, to ensure that they are lawful.

Under the Board's decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the mere maintenance of a work rule may violate Section 8(a)(1) of the Act if the rule has a chilling effect on employees' Section 7 activity. The most obvious way a rule would violate Section 8(a)(1) is by explicitly restricting protected concerted activity; by banning union activity, for example. Even if a rule does not explicitly prohibit Section 7 activity, however, it will still be found unlawful if 1) employees would reasonably construe the rule's language to prohibit Section 7 activity; 2) the rule was promulgated in response to union or other Section 7 activity; or 3) the rule was actually applied to restrict the exercise of Section 7 rights.

In our experience, the vast majority of violations are found under the first prong of the *Lutheran Heritage* test. The Board has issued a number of decisions interpreting whether "employees would reasonably construe" employer rules to prohibit Section 7 activity, finding various rules to be unlawful under that standard. I have had conversations with both labor- and management-side practitioners, who have asked for guidance regarding handbook rules that are deemed acceptable under this prong of the Board's test. Thus, I am issuing this report.

This report is divided into two parts. First, the report will compare rules we found unlawful with rules we found lawful and explain our reasoning. This section will focus on the types of rules that are frequently at issue before us, such as confidentiality rules, professionalism rules, anti-harassment rules, trademark rules, photography/recording rules, and media contact rules. Second, the report will discuss handbook rules from a recently settled unfair labor practice charge against Wendy's International LLC. The settlement was negotiated following our initial

determination that several of Wendy's handbook rules were facially unlawful. The report sets forth Wendy's rules that we initially found unlawful with an explanation, along with Wendy's modified rules, adopted pursuant to a informal, bilateral Board settlement agreement, which the Office of the General Counsel does not believe violate the Act.

I hope that this report, with its specific examples of lawful and unlawful handbook policies and rules, will be of assistance to labor law practitioners and human resource professionals.

Richard F. Griffin, Jr. General Counsel

Part 1: Examples of Lawful and Unlawful Handbook Rules

A. Employer Handbook Rules Regarding Confidentiality

Employees have a Section 7 right to discuss wages, hours, and other terms and conditions of employment with fellow employees, as well as with nonemployees, such as union representatives. Thus, an employer's confidentiality policy that either specifically prohibits employee discussions of terms and conditions of employment—such as wages, hours, or workplace complaints—or that employees would reasonably understand to prohibit such discussions, violates the Act. Similarly, a confidentiality rule that broadly encompasses "employee" or "personnel" information, without further clarification, will reasonably be construed by employees to restrict Section 7-protected communications. See Flamingo-Hilton Laughlin, 330 NLRB 287, 288 n.3, 291–92 (1999).

In contrast, broad prohibitions on disclosing "confidential" information are lawful so long as they do not reference information regarding employees or anything that would reasonably be considered a term or condition of employment, because employers have a substantial and legitimate interest in maintaining the privacy of certain business information. See Lafayette Park Hotel, 326 NLRB 824, 826 (1998), enforced, 203 F.3d 52 (D.C. Cir. 1999); Super K-Mart, 330 NLRB 263, 263 (1999). Furthermore, an otherwise unlawful confidentiality rule will be found lawful if, when viewed in context, employees would not reasonably understand the rule to prohibit Section 7 protected activity.

Unlawful Confidentiality Rules

We found the following rules to be unlawful because they restrict disclosure of employee information and therefore are unlawfully overbroad:

• Do not discuss "customer or employee information" outside of work, including "phone numbers [and] addresses."

In the above rule, in addition to the overbroad reference to "employee information," the blanket ban on discussing employee contact information, without regard for how employees obtain that information, is also facially unlawful.

 "You must not disclose proprietary or confidential information about [the Employer, or] other associates (if the proprietary or confidential information relating to [the Employer's] associates was obtained in violation of law or lawful Company policy)."

Although this rule's restriction on disclosing information about "other associates" is not a blanket ban, it is nonetheless unlawfully overbroad because a reasonable employee would not understand how the employer determines what constitutes a "lawful Company policy."

 "Never publish or disclose [the Employer's] or another's confidential or other proprietary information. Never publish or report on conversations that are meant to be private or internal to [the Employer]."

While an employer may clearly ban disclosure of its own confidential information, a broad reference to "another's" information, without further clarification, as in the above rule, would reasonably be interpreted to include other *employees*' wages and other terms and conditions of employment.

We determined that the following confidentiality rules were facially unlawful, even though they did not explicitly reference terms and conditions of employment or employee information, because the rules contained broad restrictions and did not clarify, in express language or contextually, that they did not restrict Section 7 communications:

- Prohibiting employees from "[d]isclosing... details about the [Employer]."
- "Sharing of [overheard conversations at the work site] with your coworkers, the public, or anyone outside of your immediate work group is strictly prohibited."
- "Discuss work matters only with other [Employer] employees who have a specific business reason to know or have access to such information.... Do not discuss work matters in public places."
- "[I]f something is not public information, you must not share it."

Because the rule directly above bans discussion of all non-public information, we concluded that employees would reasonably understand it to encompass such non-public information as employee wages, benefits, and other terms and conditions of employment.

• Confidential Information is: "All information in which its [sic] loss, undue use or unauthorized disclosure could adversely affect the [Employer's] interests, image and reputation or compromise personal and private information of its members."

Employees not only have a Section 7 right to protest their wages and working conditions, but also have a right to share information in support of those complaints. This rule would reasonably lead employees to believe that they cannot disclose that kind of information because it might adversely affect the employer's interest, image, or reputation.

Lawful Confidentiality Rules

We concluded that the following rules that prohibit disclosure of confidential information were facially lawful because: 1) they do not reference information regarding employees or employee terms and conditions of employment, 2) although they use the general term "confidential," they do not define it in an overbroad manner, and 3) they do not otherwise contain language that would reasonably be construed to prohibit Section 7 communications:

- No unauthorized disclosure of "business 'secrets' or other confidential information."
- "Misuse or unauthorized disclosure of confidential information not otherwise available to persons or firms outside [Employer] is cause for disciplinary action, including termination."
- "Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors or customers."

Finally, even when a confidentiality policy contains overly broad language, the rule will be found lawful if, when viewed in context, employees would not reasonably understand the rule to prohibit Section 7-protected activity. The following confidentiality rule, which we found lawful based on a contextual analysis, well illustrates this principle:

• Prohibition on disclosure of all "information acquired in the course of one's work."

This rule uses expansive language that, when read in isolation, would reasonably be read to define employee wages and benefits as confidential information. However, in that case, the rule was nested among rules relating to conflicts of interest and compliance with SEC regulations and state and federal laws. Thus, we determined that employees would reasonably understand the information described as encompassing customer credit cards, contracts, and trade secrets, and not Section 7-protected activity.

B. Employer Handbook Rules Regarding Employee Conduct toward the Company and Supervisors

Employees also have the Section 7 right to criticize or protest their employer's labor policies or treatment of employees. Thus, rules that can reasonably be read to prohibit protected concerted criticism of the employer will be found unlawfully overbroad. For instance, a rule that prohibits employees from engaging in "disrespectful," "negative," "inappropriate," or "rude" conduct towards the employer or management, absent sufficient clarification or context, will usually be found unlawful. See Casino San Pablo, 361 NLRB No. 148, slip op. at 3 (Dec. 16, 2014). Moreover, employee criticism of an employer will not lose the Act's protection simply because the criticism is false or defamatory, so a rule that bans false statements will be found unlawfully overbroad unless it specifies that only maliciously false statements are prohibited. Id. at 4. On the other hand, a rule that requires employees to be respectful and professional to coworkers, clients, or competitors, but not the employer or management, will generally be found lawful, because employers have a legitimate business interest in having employees act professionally and courteously in their dealings with coworkers, customers, employer business partners, and other third parties. In addition, rules prohibiting conduct that amounts to insubordination would also not be construed as limiting protected activities. See Copper River of Boiling Springs, LLC, 360 NLRB No. 60 (Feb. 28, 2014). Also, rules that employees would reasonably understand to prohibit insubordinate conduct have been found lawful.

Unlawful Rules Regulating Employee Conduct towards the Employer

We found the following rules unlawfully overbroad since employees reasonably would construe them to ban protected criticism or protests regarding their supervisors, management, or the employer in general.

- "[B]e respectful to the company, other employees, customers, partners, and competitors."
- Do "not make fun of, denigrate, or defame your co-workers, customers, franchisees, suppliers, the Company, or our competitors."
- "Be respectful of others and the Company."
- No "[d]efamatory, libelous, slanderous or discriminatory comments about [the Company], its customers and/or competitors, its employees or management.

While the following two rules ban "insubordination," they also ban conduct that does not rise to the level of insubordination, which reasonably would be understood

as including protected concerted activity. Accordingly, we found these rules to be unlawful.

- "Disrespectful conduct or insubordination, including, but not limited to, refusing to follow orders from a supervisor or a designated representative."
- "Chronic resistance to proper work-related orders or discipline, even though not overt insubordination" will result in discipline.

In addition, employees' right to criticize an employer's labor policies and treatment of employees includes the right to do so in a public forum. See Quicken Loans, Inc., 361 NLRB No. 94, slip op. at 1 n.1 (Nov. 3, 2014). Accordingly, we determined that the following rules were unlawfully overbroad because they reasonably would be read to require employees to refrain from criticizing the employer in public.

- "Refrain from any action that would harm persons or property or cause damage to the Company's business or reputation."
- "[I]t is important that employees practice caution and discretion when posting content [on social media] that could affect [the Employer's] business operation or reputation."
- Do not make "[s]tatements "that damage the company or the company's reputation or that disrupt or damage the company's business relationships."
- "Never engage in behavior that would undermine the reputation of [the Employer], your peers or yourself."

With regard to these examples, we recognize that the Act does not protect employee conduct aimed at disparaging an employer's product, as opposed to conduct critical of an employer's labor policies or working conditions. These rules, however, contained insufficient context or examples to indicate that they were aimed only at unprotected conduct.

Lawful Rules Regulating Employee Conduct towards the Employer

In contrast, when an employer's handbook simply requires employees to be respectful to customers, competitors, and the like, but does not mention the company or its management, employees reasonably would not believe that such a rule prohibits Section 7-protected criticism of the company. The following rules, which we have found lawful, are illustrative:

- No "rudeness or unprofessional behavior toward a customer, or anyone in contact with" the company.
- "Employees will not be discourteous or disrespectful to a customer or any member of the public while in the course and scope of [company] business."

Similarly, rules requiring employees to cooperate with each other and the employer in the performance of their work also usually do not implicate Section 7 rights. See Copper River of Boiling Springs, LLC, 360 NLRB No. 60, slip op. at 1 (Feb. 28, 2014). Thus, we found the following rule was lawful because employees would reasonably understand that it is stating the employer's legitimate expectation that employees work together in an atmosphere of civility, and that it is not prohibiting Section 7 activity:

• "Each employee is expected to work in a cooperative manner with management/supervision, coworkers, customers and vendors."

And we concluded that the following rule was lawful, because employees would reasonably interpret it to apply to employer investigations of workplace misconduct rather than investigations of unfair labor practices or preparations for arbitration, when read in context with other provisions:

 "Each employee is expected to abide by Company policies and to cooperate fully in any investigation that the Company may undertake."

As previously discussed, the Board has made clear that it will not read rules in isolation. Even when a rule includes phrases or words that, alone, reasonably would be interpreted to ban protected criticism of the employer, if the context makes plain that only serious misconduct is banned, the rule will be found lawful. See *Tradesmen International*, 338 NLRB 460, 460–62 (2002). For instance, we found the following rule lawful based on a contextual analysis:

• "Being insubordinate, threatening, intimidating, disrespectful or assaulting a manager/supervisor, coworker, customer or vendor will result in" discipline.

Although a ban on being "disrespectful" to management, by itself, would ordinarily be found to unlawfully chill Section 7 criticism of the employer, the term here is contained in a larger provision that is clearly focused on serious misconduct, like insubordination, threats, and assault. Viewed in that context, we concluded that employees would not reasonably believe this rule to ban protected criticism.

C. Employer Handbook Rules Regulating Conduct Towards Fellow Employees

In addition to employees' Section 7 rights to publicly discuss their terms and conditions of employment and to criticize their employer's labor policies, employees also have a right under the Act to argue and debate with each other about unions, management, and their terms and conditions of employment. These discussions can become contentious, but as the Supreme Court has noted, protected concerted speech will not lose its protection even if it includes "intemperate, abusive and inaccurate statements." Linn v. United Plant Guards, 383 U.S. 53 (1966). Thus, when an employer bans "negative" or "inappropriate" discussions among its employees, without further clarification, employees reasonably will read those rules to prohibit discussions and interactions that are protected under Section 7. See Triple Play Sports Bar & Grille, 361 NLRB No. 31, slip op. at 7 (Aug. 22, 2014); Hills & Dales General Hospital, 360 NLRB No. 70, slip op. at 1 (Apr. 1, 2014). For example, although employers have a legitimate and substantial interest in maintaining a harassment-free workplace, anti-harassment rules cannot be so broad that employees would reasonably read them as prohibiting vigorous debate or intemperate comments regarding Section 7-protected subjects.

Unlawful Employee-Employee Conduct Rules

We concluded that the following rules were unlawfully overbroad because employees would reasonably construe them to restrict protected discussions with their coworkers.

• "[D]on't pick fights" online.

We found the above rule unlawful because its broad and ambiguous language would reasonably be construed to encompass protected heated discussion among employees regarding unionization, the employer's labor policies, or the employer's treatment of employees.

 Do not make "insulting, embarrassing, hurtful or abusive comments about other company employees online," and "avoid the use of offensive, derogatory, or prejudicial comments."

Because debate about unionization and other protected concerted activity is often contentious and controversial, employees would reasonably read a rule that bans "offensive," "derogatory," "insulting," or "embarrassing" comments as limiting their ability to honestly discuss such subjects. These terms also would reasonably be construed to limit protected criticism of supervisors and managers, since they are also "company employees."

• "[S]how proper consideration for others' privacy and for topics that may be considered objectionable or inflammatory, such as politics and religion."

This rule was found unlawful because Section 7 protects communications about political matters, e.g., proposed right-to-work legislation. Its restriction on communications regarding controversial political matters, without clarifying context or examples, would be reasonably construed to cover these kinds of Section 7 communications. Indeed, discussion of unionization would also be chilled by such a rule because it can be an inflammatory topic similar to politics and religion.

• Do not send "unwanted, offensive, or inappropriate" e-mails.

The above rule is similarly vague and overbroad, in the absence of context or examples to clarify that it does not encompass Section 7 communications.

• "Material that is fraudulent, harassing, embarrassing, sexually explicit, profane, obscene, intimidating, defamatory, or otherwise unlawful or inappropriate may not be sent by e-mail"

We found the above rule unlawful because several of its terms are ambiguous as to their application to Section 7 activity—"embarrassing," "defamatory," and "otherwise . . . inappropriate." We further concluded that, viewed in context with such language, employees would reasonably construe even the term "intimidating" as covering Section 7 conduct.

Lawful Employee-Employee Conduct Rules

On the other hand, when an employer's professionalism rule simply requires employees to be respectful to customers or competitors, or directs employees not to engage in unprofessional conduct, and does not mention the company or its management, employees would not reasonably believe that such a rule prohibits Section 7-protected criticism of the company. Accordingly, we concluded that the following rules were lawful:

- "Making inappropriate gestures, including visual staring."
- Any logos or graphics worn by employees "must not reflect any form of violent, discriminatory, abusive, offensive, demeaning, or otherwise unprofessional message."
- "[T]hreatening, intimidating, coercing, or otherwise interfering with the job performance of fellow employees or visitors."
- No "harassment of employees, patients or facility visitors."

No "use of racial slurs, derogatory comments, or insults."

With respect to the last example, we recognized that a blanket ban on "derogatory comments," by itself, would reasonably be read to restrict protected criticism of the employer. However, because this rule was in a section of the handbook that dealt exclusively with unlawful harassment and discrimination, employees reasonably would read it in context as prohibiting those kinds of unprotected comments toward coworkers, rather than protected criticism of the employer.

D. Employer Handbook Rules Regarding Employee Interaction with Third Parties

Another right employees have under Section 7 is the right to communicate with the news media, government agencies, and other third parties about wages, benefits, and other terms and conditions of employment. Handbook rules that reasonably would be read to restrict such communications are unlawfully overbroad. See Trump Marina Associates, 354 NLRB 1027, 1027 n.2 (2009), incorporated by reference, 355 NLRB 585 (2010), enforced mem., 435 F. App'x 1 (D.C. Cir. 2011). The most frequent offenders in this category are company media policies. While employers may lawfully control who makes official statements for the company, they must be careful to ensure that their rules would not reasonably be read to ban employees from speaking to the media or other third parties on their own (or other employees') behalf.

Unlawful Rules Regulating Third Party Communications

We found the following rules were unlawfully overbroad because employees reasonably would read them to ban protected communications with the media.

• Employees are not "authorized to speak to any representatives of the print and/or electronic media about company matters" unless designated to do so by HR, and must refer all media inquiries to the company media hotline.

We determined that the above rule was unlawful because employees would reasonably construe the phrase "company matters" to encompass employment concerns and labor relations, and there was no limiting language or other context in the rule to clarify that the rule applied only to those speaking as official company representatives.

• "[A]ssociates are not authorized to answer questions from the news media When approached for information, you should refer the person to [the Employer's] Media Relations Department."

• "[A]ll inquiries from the media must be referred to the Director of Operations in the corporate office, no exceptions."

These two rules contain blanket restrictions on employees' responses to media inquiries. We therefore concluded that employees would reasonably understand that they apply to *all* media contacts, not only inquiries seeking the employers' official positions.

In addition, we found the following rule to be unlawfully overbroad because employees reasonably would read it to limit protected communications with government agencies.

• "If you are contacted by any government agency you should contact the Law Department immediately for assistance."

Although we recognize an employer's right to present its own position regarding the subject of a government inquiry, this rule contains a broader restriction. Employees would reasonably believe that they may not speak to a government agency without management approval, or even provide information in response to a Board investigation.

Lawful Rules Regulating Employee Communications with Outside Parties

In contrast, we found the following media contact rules to be lawful because employees reasonably would interpret them to mean that employees should not speak on behalf of the company, not that employees cannot speak to outsiders on their own (or other employees') behalf.

• "The company strives to anticipate and manage crisis situations in order to reduce disruption to our employees and to maintain our reputation as a high quality company. To best serve these objectives, the company will respond to the news media in a timely and professional manner *only* through the designated spokespersons."

We determined that this rule was lawful because it specifically referred to employee contact with the media regarding non-Section 7 related matters, such as crisis situations; sought to ensure a consistent company response or message regarding those matters; and was not a blanket prohibition against all contact with the media. Accordingly, we concluded that employees would not reasonably interpret this rule as interfering with Section 7 communications.

• "Events may occur at our stores that will draw immediate attention from the news media. It is imperative that one person speaks for the Company to deliver an appropriate message and to avoid giving misinformation in any media inquiry. While reporters frequently shop as customers and may ask questions about a matter, good

reporters identify themselves prior to asking questions. Every . . . employee is expected to adhere to the following media policy: . . . 2. Answer all media/reporter questions like this: 'I am not authorized to comment for [the Employer] (or I don't have the information you want). Let me have our public affairs office contact you."

We concluded that the prefatory language in this rule would cause employees to reasonably construe the rule as an attempt to control the company's message, rather than to restrict Section 7 communications to the media. Further, the required responses to media inquiries would be non-sequiturs in the context of a discussion about terms and conditions of employment or protected criticism of the company. Accordingly, we found that employees reasonably would not read this rule to restrict conversations with the news media about protected concerted activities.

E. Employer Handbook Rules Restricting Use of Company Logos, Copyrights, and Trademarks

We have also reviewed handbook rules that restrict employee use of company logos, copyrights, or trademarks. Though copyright holders have a clear interest in protecting their intellectual property, handbook rules cannot prohibit employees' fair protected use of that property. See Pepsi-Cola Bottling Co., 301 NLRB 1008, 1019–20 (1991), enforced mem., 953 F.2d 638 (4th Cir. 1992). For instance, a company's name and logo will usually be protected by intellectual property laws, but employees have a right to use the name and logo on picket signs, leaflets, and other protest material. Employer proprietary interests are not implicated by employees' non-commercial use of a name, logo, or other trademark to identify the employer in the course of Section 7 activity. Thus, a broad ban on such use without any clarification will generally be found unlawfully overbroad.

Unlawful Rules Banning Employee Use of Logos, Copyrights, or Trademarks

We found that the following rules were unlawful because they contain broad restrictions that employees would reasonably read to ban fair use of the employer's intellectual property in the course of protected concerted activity.

- Do "not use any Company logos, trademarks, graphics, or advertising materials" in social media.
- Do not use "other people's property," such as trademarks, without permission in social media.
- "Use of [the Employer's] name, address or other information in your personal profile [is banned].... In addition, it is prohibited to use [the Employer's] logos, trademarks or any other copyrighted material."

• "Company logos and trademarks may not be used without written consent"

Lawful Rules Protecting Employer Logos, Copyrights, and Trademarks

We found that the following rules were lawful. Unlike the prior examples, which broadly ban employee use of trademarked or copyrighted material, these rules simply require employees to respect such laws, permitting fair use.

- "Respect all copyright and other intellectual property laws. For [the Employer's] protection as well as your own, it is critical that you show proper respect for the laws governing copyright, fair use of copyrighted material owned by others, trademarks and other intellectual property, including [the Employer's] own copyrights, trademarks and brands."
- "DO respect the laws regarding copyrights, trademarks, rights of publicity and other third-party rights. To minimize the risk of a copyright violation, you should provide references to the source(s) of information you use and accurately cite copyrighted works you identify in your online communications. Do not infringe on [Employer] logos, brand names, taglines, slogans, or other trademarks."

F. Employer Handbook Rules Restricting Photography and Recording

Employees also have a Section 7 right to photograph and make recordings in furtherance of their protected concerted activity, including the right to use personal devices to take such pictures and recordings. See Hawaii Tribune-Herald, 356 NLRB No. 63, slip op. at 1 (Feb. 14, 2011), enforced sub nom. Stephens Media, LLC v. NLRB, 677 F.3d 1241 (D.C. Cir. 2012); White Oak Manor, 353 NLRB 795, 795 (2009), incorporated by reference, 355 NLRB 1280 (2010), enforced mem., 452 F. App'x 374 (4th Cir. 2011). Thus, rules placing a total ban on such photography or recordings, or banning the use or possession of personal cameras or recording devices, are unlawfully overbroad where they would reasonably be read to prohibit the taking of pictures or recordings on non-work time.

Unlawful Rules Banning Photography, Recordings, or Personal Electronic Devices

We found the following rules unlawfully overbroad because employees reasonably would interpret them to prohibit the use of personal equipment to engage in Section 7 activity while on breaks or other non-work time. "Taking unauthorized pictures or video on company property" is prohibited.

We concluded that employees would reasonably read this rule to prohibit all unauthorized employee use of a camera or video recorder, including attempts to document health and safety violations and other protected concerted activity.

• "No employee shall use any recording device including but not limited to, audio, video, or digital for the purpose of recording any [Employer] employee or [Employer] operation"

We found this rule unlawful because employees would reasonably construe it to preclude, among other things, documentation of unfair labor practices, which is an essential part of the recognized right under Section 7 to utilize the Board's processes.

- A total ban on use or possession of personal electronic equipment on Employer property.
- A prohibition on personal computers or data storage devices on employer property.

We determined that the two above rules, which contain blanket restrictions on use or possession of recording devices, violated the Act for similar reasons. Although an employer has a legitimate interest in maintaining the confidentiality of business records, these rules were not narrowly tailored to address that concern.

• Prohibition from wearing cell phones, making personal calls or viewing or sending texts "while on duty."

This rule, which limits the restriction on personal recording devices to time "on duty," is nonetheless unlawful, because employees reasonably would understand "on duty" to include breaks and meals during their shifts, as opposed to their actual work time.

Lawful Rules Regulating Pictures and Recording Equipment

Rules regulating employee recording or photography will be found lawful if their scope is appropriately limited. For instance, in cases where a no-photography rule is instituted in response to a breach of patient privacy, where the employer has a well-understood, strong privacy interest, the Board has found that employees would not reasonably understand a no-photography rule to limit pictures for protected concerted purposes. See Flagstaff Medical Center, 357 NLRB No. 65, slip op. at 5 (Aug. 26, 2011), enforced in relevant part, 715 F.3d 928 (D.C. Cir. 2013). We also found the following rule lawful based on a contextual analysis:

 No cameras are to be allowed in the store or parking lot without prior approval from the corporate office.

This rule was embedded in a lawful media policy and immediately followed instructions on how to deal with reporters in the store. We determined that, in such a context, employees would read the rule to ban *news* cameras, not their own cameras.

G. Employer Handbook Rules Restricting Employees from Leaving Work

One of the most fundamental rights employees have under Section 7 of the Act is the right to go on strike. Accordingly, rules that regulate when employees can leave work are unlawful if employees reasonably would read them to forbid protected strike actions and walkouts. See Purple Communications, Inc., 361 NLRB No. 43, slip op. at 2 (Sept. 24, 2014). If, however, such a rule makes no mention of "strikes," "walkouts," "disruptions," or the like, employees will reasonably understand the rule to pertain to employees leaving their posts for reasons unrelated to protected concerted activity, and the rule will be found lawful. See 2 Sisters Food Group, 357 NLRB No. 168, slip op. at 2 (Dec. 29, 2011).

Unlawful Handbook Rules Relating to Restrictions on Leaving Work

We found the following rules were unlawful because they contain broad prohibitions on walking off the job, which reasonably would be read to include protected strikes and walkouts.

- "Failure to report to your scheduled shift for more than three consecutive days without prior authorization or 'walking off the job' during a scheduled shift" is prohibited.
- "Walking off the job . . ." is prohibited.

Lawful Handbook Rules Relating to Restrictions on Leaving Work

In contrast, the following handbook rule was considered lawful:

 "Entering or leaving Company property without permission may result in discharge."

We found this rule was lawful because, in the absence of terms like "work stoppage" or "walking off the job," a rule forbidding employees from leaving the employer's property during work time without permission will not reasonably be read to encompass strikes. However, the portion of the rule that requires employees to

obtain permission before *entering the property* was found unlawful because employers may not deny off-duty employees access to parking lots, gates, and other outside nonworking areas except where sufficiently justified by business reasons or pursuant to the kind of narrowly tailored rule approved in *Tri-County Medical Center*, 222 NLRB 1089, 1089 (1976).

 "Walking off shift, failing to report for a scheduled shift and leaving early without supervisor permission are also grounds for immediate termination."

Although this rule includes the term "walking off shift," which usually would be considered an overbroad term that employees reasonably would understand to include strikes, we found this rule to be lawful in the context of the employees' health care responsibilities. Where employees are directly responsible for patient care, a broad "no walkout without permission" rule is reasonably read as ensuring that patients are not left without adequate care, not as a complete ban on strikes. See Wilshire at Lakewood, 343 NLRB 141, 144 (2004), vacated in part, 345 NLRB 1050 (2005), enforcement denied on other grounds, Jochims v. NLRB, 480 F.3d 1161 (D.C. Cir. 2007). This rule was maintained by an employer that operated a care facility for people with dementia. Thus, we found that employees would reasonably read this rule as being designed to ensure continuity of care, not as a ban on protected job actions.

H. Employer Conflict-of-Interest Rules

Section 7 of the Act protects employees' right to engage in concerted activity to improve their terms and conditions of employment, even if that activity is in conflict with the employer's interests. For instance, employees may protest in front of the company, organize a boycott, and solicit support for a union while on nonwork time. See HTH Corp., 356 NLRB No. 182, slip op. at 2, 25 (June 14, 2011), enforced, 693 F.3d 1051 (9th Cir. 2012). If an employer's conflict-of-interest rule would reasonably be read to prohibit such activities, the rule will be found unlawful. However, where the rule includes examples or otherwise clarifies that it is limited to legitimate business interests, employees will reasonably understand the rule to prohibit only unprotected activity. See Tradesmen International, 338 NLRB 460, 461–62 (2002).

Unlawful Conflict-of-Interest Rules

We found the following rule unlawful because it was phrased broadly and did not include any clarifying examples or context that would indicate that it did not apply to Section 7 activities:

• Employees may not engage in "any action" that is "not in the best interest of [the Employer]."

Lawful Conflict-of-Interest Rules

In contrast, we found the following rules lawful because they included context and examples that indicated that the rules were not meant to encompass protected concerted activity:

• Do not "give, offer or promise, directly or indirectly, anything of value to any representative of an Outside Business," where "Outside Business" is defined as "any person, firm, corporation, or government agency that sells or provides a service to, purchases from, or competes with [the Employer]." Examples of violations include "holding an ownership or financial interest in an Outside Business" and "accepting gifts, money, or services from an Outside Business."

We concluded that this rule is lawful because employees would reasonably understand that the rule is directed at protecting the employer from employee graft and preventing employees from engaging in a competing business, and that it does not apply to employee interactions with labor organizations or other Section 7 activity that the employer might oppose.

As an employee, "I will not engage in any activity that might create a
conflict of interest for me or the company," where the conflict of
interest policy devoted two pages to examples such as "avoid outside
employment with a[n Employer] customer, supplier, or competitor,
or having a significant financial interest with one of these entities."

The above rule included multiple examples of conflicts of interest such that it would not be interpreted to restrict Section 7 activity.

• Employees must refrain "from any activity or having any financial interest that is inconsistent with the Company's best interest" and also must refrain from "activities, investments or associations that compete with the Company, interferes with one's judgment concerning the Company's best interests, or exploits one's position with the Company for personal gains."

We also found this rule to be lawful based on a contextual analysis. While its requirement that employees refrain from activities or associations that are inconsistent with the company's best interests could, in isolation, be interpreted to include employee participation in unions, the surrounding context and examples ensure that employees would not reasonably read it in that way. Indeed, the rule is in a section of the handbook that deals entirely with business ethics and includes requirements to act with "honesty, fairness and integrity"; comply with "all laws,

rules and regulations"; and provide "accurate, complete, fair, timely, and understandable" information in SEC filings.

Part 2: The Settlement with Wendy's International LLC

In 2014, we concluded that many of the employee handbook rules alleged in an unfair labor practice charge against Wendy's International, LLC were unlawfully overbroad under *Lutheran Heritage*'s first prong. Pursuant to an informal, bilateral Board settlement agreement, Wendy's modified its handbook rules. This section of the report presents the rules we found unlawfully overbroad, with brief discussions of our reasoning, followed by the replacement rules, which the Office of the General Counsel considers lawful, contained in the settlement agreement.

A. Wendy's Unlawful Handbook Rules

The pertinent provisions of Wendy's handbook and our conclusions are outlined below.

Handbook disclosure provision

No part of this handbook may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or information storage and retrieval system or otherwise, for any purpose without the express written permission of Wendy's International, Inc. The information contained in this handbook is considered proprietary and confidential information of Wendy's and its intended use is strictly limited to Wendy's and its employees. The disclosure of this handbook to unauthorized parties is prohibited. Making an unauthorized disclosure of this handbook is a serious breach of Wendy's standards of conduct and ethics and shall expose the disclosing party to disciplinary action and other liabilities as permitted under law.

We concluded that this provision was unlawful because it prohibited disclosure of the Wendy's handbook, which contains employment policies, to third parties such as union representatives or the Board. Because employees have a Section 7 right to discuss their wages and other terms and conditions of employment with others, including co-workers, union representatives, and government agencies, such as the Board, a rule that precludes employees from sharing the employee handbook that contains many of their working conditions violates Section 8(a)(1).

Social Media Policy

Refrain from commenting on the company's business, financial performance, strategies, clients, policies, employees or competitors in any

social media, without the advance approval of your supervisor, Human Resources and Communications Departments. Anything you say or post may be construed as representing the Company's opinion or point of view (when it does not), or it may reflect negatively on the Company. If you wish to make a complaint or report a complaint or troubling behavior, please follow the complaint procedure in the applicable Company policy (e.g., Speak Out).

Although employers have a legitimate interest in ensuring that employee communications are not construed as misrepresenting the employer's official position, we concluded that this rule did not merely prevent employees from speaking on behalf of, or in the name of, Wendy's. Instead, it generally prohibited an employee from commenting about the Company's business, policies, or employees without authorization, particularly when it might reflect negatively on the Company. Accordingly, we found that this part of the rule was overly broad. We also concluded that the rule's instruction that employees should follow the Company's internal complaint mechanism to "make a complaint or report a complaint" chilled employees' Section 7 right to communicate employment-related complaints to persons and entities other than Wendy's.

Respect copyrights and similar laws. Do not use any copyrighted or otherwise protected information or property without the owner's written consent.

We concluded that this rule was unlawfully overbroad because it broadly prohibited *any* employee use of copyrighted or "otherwise protected" information. Employees would reasonably construe that language to prohibit Section 7 communications involving, for example, reference to the copyrighted handbook or Company website for purposes of commentary or criticism, or use of the Wendy's trademark/name and another business's trademark/name in a wage comparison. We determined that such use does not implicate the interests that courts have identified as being protected by trademark and copyright laws.

[You may not p]ost photographs taken at Company events or on Company premises without the advance consent of your supervisor, Human Resources and Communications Departments.

[You may not plost photographs of Company employees without their advance consent. Do not attribute or disseminate comments or statements purportedly made by employees or others without their explicit permission.

We concluded that these rules, which included no examples of unprotected conduct or other language to clarify and restrict their scope, would chill employees

from engaging in Section 7 activities, such as posting a photo of employees carrying a picket sign in front of a restaurant, documenting a health or safety concern, or discussing or making complaints about statements made by Wendy's or fellow employees.

[You may not u]se the Company's (or any of its affiliated entities) logos, marks or other protected information or property without the Legal Department's express written authorization.

As discussed above, Wendy's had no legitimate basis to prohibit the use of its logo or trademarks in this manner, which would reasonably be construed to restrict a variety of Section 7-protected uses of the Wendy's logo and trademarks. Therefore, we found this rule unlawfully overbroad.

[You may not elmail, post, comment or blog anonymously. You may think it is anonymous, but it is most likely traceable to you and the Company.

Requiring employees to publicly self-identify in order to participate in protected activity imposes an unwarranted burden on Section 7 rights. Thus, we found this rule banning anonymous comments unlawfully overbroad.

[You may not m]ake false or misleading representations about your credentials or your work.

We found this rule unlawful, because its language clearly encompassed communications relating to working conditions, which do not lose their protection if they are false or misleading as opposed to "maliciously false" (i.e., made with knowledge of falsity or reckless disregard for the truth). A broad rule banning merely false or misleading representations about work can have a chilling effect by causing employees to become hesitant to voice their views and complaints concerning working conditions for fear that later they may be disciplined because someone may determine that those were false or misleading statements.

[You may not c]reate a blog or online group related to your job without the advance approval of the Legal and Communications.

We determined that this no-blogging rule was unlawfully overbroad because employees have a Section 7 right to discuss their terms and conditions of employment with their co-workers and/or the public, including on blogs or online groups, and it is well-settled that such pre-authorization requirements chill Section 7 activity.

Do Not Disparage:

Be thoughtful and respectful in all your communications and dealings with others, including email and social media. Do not harass, threaten, libel, malign, defame, or disparage fellow professionals, employees, clients, competitors or anyone else. Do not make personal insults, use obscenities or engage in any conduct that would be unacceptable in a professional environment.

We found this rule unlawful because its second and third sentences contained broad, sweeping prohibitions against "malign[ing], defam[ing], or disparag[ing]" that, in context, would reasonably be read to go beyond unprotected defamation and encompass concerted communications protesting or criticizing Wendy's treatment of employees, among other Section 7 activities. And, there was nothing in the rule or elsewhere in the handbook that would reasonably assure employees that Section 7 communications were excluded from the rule's broad reach.

Do Not Retaliate:

If you discover negative statements, emails or posts about you or the Company, do not respond. First seek help from the Legal and Communications Departments, who will guide any response.

We concluded that employees would reasonably read this rule as requiring them to seek permission before engaging in Section 7 activity because "negative statements about . . . the Company" would reasonably be construed as encompassing Section 7 activity. For example, employees would reasonably read the rule to require that they obtain permission from Wendy's before responding to a co-worker's complaint about working conditions or a protest of unfair labor practices. We therefore found this rule overly broad.

Conflict-of-Interest Provision

Because you are now working in one of Wendy's restaurants, it is important to realize that you have an up close and personal look at our business every day. With this in mind, you should recognize your responsibility to avoid any conflict between your personal interests and those of the Company. A conflict of interest occurs when our personal interests interfere—or appear to interfere—with our ability to make sound business decisions on behalf of Wendy's.

We determined that the Conflict-of-Interest provision was unlawfully overbroad because its requirement that employees avoid "any conflict between your personal interests and those of the Company" would reasonably be read to encompass Section 7 activity, such as union organizing activity, demanding higher

wages, or engaging in boycotts or public demonstrations related to a labor dispute. Unlike rules that provide specific examples of what constitutes a conflict of interest, nothing in this rule confined its scope to legitimate business concerns or clarified that it was not intended to apply to Section 7 activity.

Moreover, we concluded that the Conflict-of-Interest provision was even more likely to chill Section 7 activity when read together with the handbook's third-party representation provision, located about six pages later, which communicated that unions are not beneficial or in the interest of Wendy's: [b]ecause Wendy's desires to maintain open and direct communications with all of our employees, we do not believe that third party/union involvement in our relationship would benefit our employees or Wendy's.

Company Confidential Information Provision

During the course of your employment, you may become aware of confidential information about Wendy's business. You must not disclose any confidential information relating to Wendy's business to anyone outside of the Company. Your employee PIN and other personal information should be kept confidential. Please don't share this information with any other employee.

We concluded that the confidentiality provision was facially unlawful because it referenced employees' "personal information," which the Board has found would reasonably be read to encompass discussion of wages, hours, and terms and conditions of employment.

Employee Conduct

The Employee Conduct section of the handbook contained approximately two pages listing examples of "misconduct" and "gross misconduct," which could lead to disciplinary action, up to and including discharge, in the sole discretion of Wendy's. The list included the following:

Soliciting, collecting funds, distributing literature on Company premises without proper approvals or outside the guidelines established in the "No Solicitation/No Distribution" Policy.

The blanket prohibition against soliciting, collecting funds, or distributing literature without proper approvals was unlawfully overbroad because employees have a Section 7 right to solicit on non-work time and distribute literature in non-work areas.

Walking off the job without authorization.

We found that this rule was unlawfully overbroad because employees would reasonably construe it to prohibit Section 7 activity such as a concerted walkout or other strike activity. As discussed in Part 1 of this report, the Board has drawn a fairly bright line regarding how employees would reasonably construe rules about employees leaving work. Rules that contain phrases such as "walking off the job," as here, reasonably would be read to forbid protected strike actions and walkouts.

Threatening, intimidating, foul or inappropriate language.

We found this prohibition to be unlawful because rules that forbid the vague phrase "inappropriate language," without examples or context, would reasonably be construed to prohibit protected communications about or criticism of management, labor policies, or working conditions.

False accusations against the Company and/or against another employee or customer.

We found this rule unlawful because an accusation against an employer does not lose the protection of Section 7 merely because it is false, as opposed to being recklessly or knowingly false. As previously discussed, a rule banning merely false statements can have a chilling effect on protected concerted communications, for instance, because employees reasonably would fear that contradictory information provided by the employer would result in discipline.

No Distribution/No Solicitation Provision

[I]t is our policy to prohibit the distribution of literature in work areas and to prohibit solicitation during employees' working time. "Working time" is the time an employee is engaged, or should be engaged, in performing his/her work tasks for Wendy's. These guidelines also apply to solicitation and/or distribution by electronic means.

We concluded that this rule was unlawful because it restricted distribution by electronic means in work areas. While an employer may restrict distribution of literature in paper form in work areas, it has no legitimate business justification to restrict employees from distributing literature electronically, such as sending an email with a "flyer" attached, while the employees are in work areas during non-working time. Unlike distribution of paper literature, which can create a production hazard even when it occurs on nonworking time, electronic distribution does not

produce litter and only impinges on the employer's management interests if it occurs on working time.

Restaurant Telephone; Cell Phone; Camera Phone/Recording Devices Provision

Due to the potential for issues such as invasion of privacy, sexual harassment, and loss of productivity, no Crew Member may operate a camera phone on Company property or while performing work for the Company. The use of tape recorders, Dictaphones, or other types of voice recording devices anywhere on Company property, including to record conversations or activities of other employees or management, or while performing work for the Company, is also strictly prohibited, unless the device was provided to you by the Company and is used solely for legitimate business purposes.

We concluded that this rule, which prohibited employee use of a camera or video recorder "on Company property" at any time, precluded Section 7 activities, such as employees documenting health and safety violations, collective action, or the potential violation of employee rights under the Act. Wendy's had no business justification for such a broad prohibition. Its concerns about privacy, sexual harassment, and loss of productivity did not justify a rule that prohibited all use of a camera phone or audio recording device anywhere on the company's property at any time.

B. Wendy's Lawful Handbook Rules Pursuant to Settlement Agreement

Handbook Disclosure Provision

This Crew Orientation Handbook . . . is the property of Wendy's International LLC. No part of this handbook may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or information storage and retrieval system or otherwise, for any business/commercial venture without the express written permission of Wendy's International, LLC. The information contained in this handbook is strictly limited to use by Wendy's and its employees. The disclosure of this handbook to competitors is prohibited. Making an unauthorized disclosure of this handbook is a serious breach of Wendy's standards of conduct and ethics and shall expose the disclosing party to disciplinary action and other liabilities as permitted under law.

Social Media Provision

• Do not comment on trade secrets and proprietary Company information (business, financial and marketing strategies) without the advance approval of your supervisor, Human Resources and Communications Departments.

- Do not make negative comments about our customers in any social media.
- Use of social media on Company equipment during working time is permitted, if your use is for legitimate, preapproved Company business. Please discuss the nature of your anticipated business use and the content of your message with your supervisor and Human Resources. Obtain their approval prior to such use.
- Respect copyright, trademark and similar laws and use such protected information in compliance with applicable legal standards.

Restrictions:

YOU MAY NOT do any of the following:

- Due to the potential for issues such as invasion of privacy (employee and customer), sexual or other harassment (as defined by our harassment /discrimination policy), protection of proprietary recipes and preparation techniques, Crew Members may not take, distribute, or post pictures, videos, or audio recordings while on working time. Crew Members also may not take pictures or make recordings of work areas. An exception to the rule concerning pictures and recordings of work areas would be to engage in activity protected by the National Labor Relations Act including, for example, taking pictures of health, safety and/or working condition concerns or of strike, protest and work-related issues and/or other protected concerted activities.
- Use the Company's (or any of its affiliated entities) logos, marks or other protected information or property for any business/commercial venture without the Legal Department's express written authorization.
- Make knowingly false representations about your credentials or your work.
- Create a blog or online group related to Wendy's (not including blogs or discussions involving wages, benefits, or other terms and conditions of employment, or protected concerted activity) without the advance approval of the Legal and Communications Departments. If a blog or online group is approved, it must contain a disclaimer approved by the Legal Department.

Do Not Violate the Law and Related Company Policies:

Be thoughtful in all your communications and dealings with others, including email and social media. Never harass (as defined by our antiharassment policy), threaten, libel or defame fellow professionals, employees, clients, competitors or anyone else. In general, it is always wise to remember that what you say in social media can often be seen by anyone. Accordingly, harassing comments, obscenities or similar conduct that would violate Company policies is discouraged in general and is never allowed while using Wendy's equipment or during your working time.

Discipline:

All employees are expected to know and follow this policy. Nothing in this policy is, however, intended to prevent employees from engaging in concerted activity protected by law. If you have any questions regarding this policy, please ask your supervisor and Human Resources before acting. Any violations of this policy are grounds for disciplinary action, up to and including immediate termination of employment.

Conflict of Interest Provision

Because you are now working in one of Wendy's restaurants, it is important to realize that you have an up close and personal look at our business every day. With this in mind, you should recognize your responsibility to avoid any conflict between your personal interests and those of the Company. A conflict of interest occurs when our personal interests interfere – or appear to interfere – with your ability to make sound business decisions on behalf of Wendy's. There are some common relationships or circumstances that can create, or give the appearance of, a conflict of interest. The situations generally involve gifts and business or financial dealings or investments. Gifts, favors, tickets, entertainment and other such inducements may be attempts to "purchase" favorable treatment. Accepting such inducements could raise doubts about an employee's ability to make independent business judgments and the Company's commitment to treating people fairly. In addition, a conflict of interest exists when employees have a financial or ownership interest in a business or financial venture that may be at variance with the interests of Wendy's. Likewise, when an employee engages in business transactions that benefit family members, it may give an appearance of impropriety.

Company Confidential Information Provision

During the course of your employment, you may become aware of trade secrets and similarly protected proprietary and confidential information about Wendy's business (e.g. recipes, preparation techniques, marketing plans and strategies, financial records). You must not disclose any such information to anyone outside of the Company. Your employee PIN and other similar personal identification information should be kept confidential. Please don't share this information with any other employee.

Employee Conduct Provision

- Soliciting, collecting funds, distributing literature on Company premises outside the guidelines established in the "No Solicitation/No Distribution" Policy.
- Leaving Company premises during working shift without permission of management.
- Threatening, harassing (as defined by our harassment/discrimination policy), intimidating, profane, obscene or similar inappropriate language in violation of Company policy.
- Making knowingly false accusations against the Company and/or against another employee, customer or vendor.

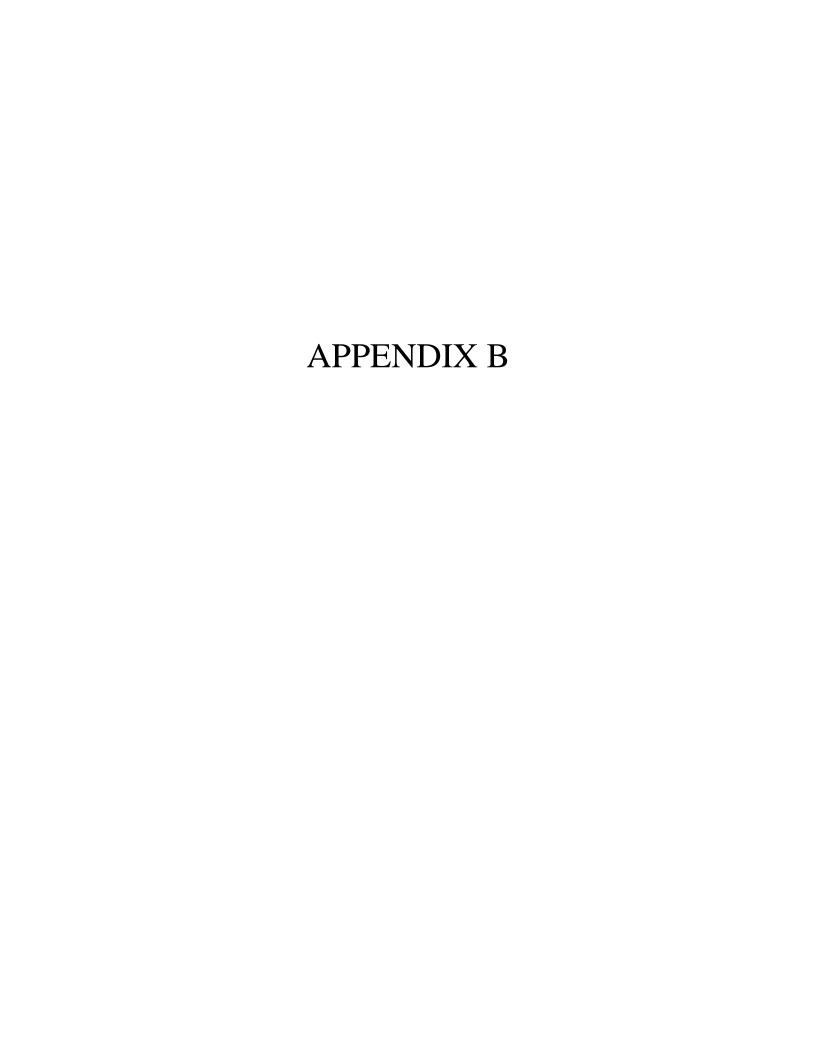
No Distribution/No Solicitation Provision

Providing the most ideal work environment possible is very important to Wendy's. We hope you feel very comfortable and at ease when you're here at work. Therefore, to protect you and our customers from unnecessary interruptions and annoyances, it is our policy to prohibit the distribution of literature in work areas and to prohibit solicitation and distribution of literature during employees' working time. "Working Time" is the time an employee is engaged or should be engaged in performing his/her work tasks for Wendy's. These guidelines also apply to solicitation by electronic means. Solicitation or distribution of any kind by non-employees on Company premises is prohibited at all times. Nothing in this section prohibits employees from discussing terms and conditions of employment.

Restaurant Telephone/Cell Phone/Camera Phone/Recording Devices Provision

Due to the potential for issues such as invasion of privacy (employee and customer), sexual or other harassment (as defined by our harassment /discrimination policy), protection of proprietary recipes and preparation techniques, Crew Members may not take, distribute, or post pictures, videos, or audio recordings while on working time. Crew Members also may not take pictures or make recordings of work areas. An exception to the rule concerning pictures and recordings of work areas would be to engage in

activity protected by the National Labor Relations Act including, for example, taking pictures of health, safety and/or working condition concerns or of strike, protest and work-related issues and/or other protected concerted activities.



MODEL FAMILY AND MEDICAL LEAVE ACT POLICY

Under the Family and Medical Leave Act of 1993, as amended (FMLA), eligible employees may be granted up to a total of 12 weeks of unpaid leave per 12-month period, as determined below, for any of the following reasons:

- the birth of employee's child and to care for the newborn child;
- placement with the employee of a child for adoption or foster care;
- care for employee's parent (in-laws not included), spouse, or child (under age 18, or age 18 or older and incapable of self-care because of a disability) with a serious health condition:
 - serious health condition that renders employee unable to perform the job; or
- any qualifying exigency arising from the fact that employee's spouse, child, or parent is on, or has been notified of an impending call to, covered active duty status in the National Guard or Reserves, or a regular component of the Armed Forces (or as a retired member of the regular Armed Forces or Reserves) during deployment to a foreign country ("Active Duty Leave"). The following reasons may constitute qualifying exigencies: short notice deployment; attendance at certain military programs related to active duty assignment; change in childcare or parental care obligations due to active duty assignment; attendance at appointments related to financial or legal planning as a result of active duty assignment; attendance at counseling sessions that are needed as a result of an active duty assignment; short-term temporary rest and recuperation leave of a covered servicemember during a time of deployment; attendance at certain other post-deployment activities; and other activities as agreed by the company and employee.

Additionally, under the FMLA, eligible employees may be granted up to a total of 26 weeks of unpaid leave during a single 12-month period to care for a spouse, child, parent (in-laws not included), or next of kin (nearest blood relative) who is a current member or qualified veteran of the Armed Forces (including the National Guard or Reserves) and has incurred or aggravated a qualifying serious injury or illness in the line of duty while on active duty in the Armed Forces, provided that:
(a) in the case of a current member, such injury or illness renders the servicemember medically unfit to perform the duties of the servicemember's office, grade, rank or rating and for which the servicemember is undergoing medical treatment, recuperation or therapy, or the servicemember is in outpatient status, or is on the temporary disability retired list; or (b) in the case of a qualified veteran (discharged for other than dishonorable reasons), the veteran was a member of the Armed Forces at any time during the five years preceding the date of such treatment, recuperation, or therapy for a qualifying serious injury or illness. This type of leave is referred to in this policy as "Servicemember Family Leave." During the single 12-month

period in which Servicemember Family Leave may be taken, eligible employees are limited to a combined total of 26 weeks of unpaid leave for any reason under the FMLA; however, no more than 12 of those weeks may be taken for non-Servicemember Family Leave.

All qualifying leave will be administered in accordance with the FMLA, as amended.

Eligible Employees

Eligible employees are employees with at least 12-months cumulative service with the company who have worked at least 1,250 hours during the preceding 12 months and who work at a site with at least 50 employees employed within a 75-mile radius of the work site.

Leave Requests/Extensions

Employees requesting leave must obtain the appropriate forms from human resources and submit the completed forms no less than 30 days before the requested leave is to begin when the need for leave is foreseeable. In circumstances when 30-days notice is not possible, then employees must provide notice as soon as practicable and in most cases must comply with the company's normal call-in procedures. If the leave is for planned medical treatment (whether for employee or covered family member), employees must consult with the company in advance and make a reasonable effort to schedule the treatment so as to avoid any undue burden on the company or disruption to the business. Failure to provide proper notice in accordance with this provision may result in the delay or denial of FMLA leave.

Employees must provide sufficient information for the company to determine if the leave may qualify for FMLA protection, and the anticipated timing and duration of the leave. Employees must also inform the company if the requested leave is for a reason for which FMLA leave was previously taken or certified.

Employees who fail to return to work upon the expiration of any approved period of FMLA leave will be subject to termination. Employees who cannot return to work at such time due to the continuation of the circumstances that necessitated the approved FMLA leave or the onset of other FMLA qualifying circumstances must request an extension of the FMLA leave as soon as the need for the extension is known or in no event later than the expiration of the approved leave period.

Certifications

Upon request, employees requesting leave because of their own sickness or that of a parent, child, or spouse must provide medical certification or recertification from an appropriate health-care provider. Employees requesting Servicemember Family Leave because a spouse, child, parent, or next of kin has incurred or aggravated a serious injury or illness in the line of duty while on active duty in the Armed Forces, also must provide medical certification from an appropriate healthcare provider of

the servicemember. Employees must contact human resources to obtain certification forms.

Employees are responsible for paying for any certification or recertification. The company, at its own cost, may require a second or third opinion in the case of employee's own health condition or that of a parent, child or spouse or certification of a servicemember's serious injury or illness that was certified by a non-DOD/VA/DOD TRICARE network or non-network provider. Upon request, employees must provide a physician's statement certifying their ability to return to work and perform the essential functions of their job. Failure to provide timely or complete certifications may result in denial of leave or return to work.

Upon request, employees requiring leave because a spouse, child, or parent is on, or has been notified of an impending call to, covered active duty in the Armed Forces during deployment to a foreign country, must provide a certification of such duty or call to duty, including a copy of the active duty orders or other military issued documentation.

Periodic Status Report

Upon request, employees on FMLA leave will be required to report periodically, as directed, on their status and intention to return to work. Failure to report, as directed, may result in discontinuation of leave approval, denial of return to work or other disciplinary action, including termination.

Intermittent or Reduced Leave

Intermittent leave (leave taken in separate blocks of time) or reduced schedule leave (leave taken on a part-time basis) may be taken when medically necessary or in the case of Active Duty Leave or Servicemember Family Leave. Upon request, employees must provide medical certification that intermittent or reduced schedule leave is medically necessary, the expected duration of the leave and, if the leave is necessary for planned medical treatment, the dates on which such treatment is expected to be given and the duration of such treatment. Employees must make a reasonable effort to schedule leave for planned medical treatment so as not to unduly disrupt the company's operations. Employees taking such leave for planned medical treatment (whether their own or covered family member's) may be required to transfer temporarily to an alternative position with equivalent pay and benefits for the duration of the leave.

Newborn, Adoption, and Foster Care Leave

This leave must be completed within one year of the child's birth or placement and may not be taken on an intermittent or reduced schedule.

Spouse's Combined Leave

Employees who are married to one another are limited to a combined total of 12 weeks of leave during the 12-month period if the leave is taken for: (1) birth of employee's child or to care for the newborn child; (2) placement with the employee

of a child for adoption or foster care; or (3) care of the employee's parent with a serious health condition.

Employees who are married to one another are limited to a combined total of 26 weeks of leave during the single 12-month period during which Servicemember Family Leave may be taken if either Servicemember Family Leave or a combination of Servicemember Family Leave and FMLA leave for the birth, adoption or foster placement of a child or care for the child after birth or placement, or care of the employee's parent with a serious health condition, is taken. If the leave taken by the husband and wife includes FMLA leave other than Servicemember Family Leave, the 12-week limitation described above will apply to that non-Servicemember Family Leave.

12-Month Period

For the purposes of determining available FMLA leave for reasons other than Servicemember Family Leave, the 12-month period during which employees may be eligible for FMLA leave will be calculated on a 12-month period measured backward from the date the FMLA leave is requested to begin. For purposes of Servicemember Family Leave, the single 12-month period during which Servicemember Family Leave may be taken begins on the first day the eligible employee takes such leave to care for a covered servicemember and ends 12 months after that date.

For the purposes of determining available Servicemember Family Leave, the 12-month period during which employees may be eligible for Servicemember Family Leave will be calculated on a 12-month period measured forward from the date the employees' leave to care for the covered servicemember begins.

Substitution of Paid Leave

The company will substitute the employee's accrued paid leave (including sick leave, vacation leave, or other paid time off) for part or all of the unpaid leave. In order to use paid leave for FMLA leave, employees must comply with the company's normal paid leave policies.

Benefits Continuation

During leave, employees may continue health-care coverage under the group health plan. Employees must pay the premium at the same time as it would be made if paid by payroll deduction (i.e., per applicable pay period) or, if the employee elects, the premiums may be paid in advance. During the leave, the same terms and conditions would apply had the employee not taken the leave. Failure of the employee to pay his or her share of the premiums may result in loss of coverage.

Employees must reimburse the company for its payment of any benefits premiums during leave as follows: (1) employees who do not return to work for at least 30-days may be required to reimburse the company for its share of group health premiums paid during the leave; and (2) employees will be required to reimburse the

company for any payments made by the company toward the employee's share of benefit costs during the leave. Any amounts paid by the company toward the employee's or company's share of employee benefit costs during leave will be treated as an advance in wages with reimbursement to the company made through payroll deduction or vacation pay deduction or forfeiture and, to the extent necessary to achieve full reimbursement, any other available means. Employees will not accrue sick or vacation leave or other employee benefits during the leave.

Reinstatement

Under most circumstances, employees who return to work immediately after the expiration of this leave and who do not exceed the amount of leave permitted under the FMLA will be reinstated to either the same or equivalent job, with equivalent pay and benefits. Certain highly compensated employees may be denied reinstatement.

Information about FMLA Leave

Employees who desire to take family or medical leave should contact human resources for information concerning their eligibility for such leave under the Family and Medical Leave Act of 1993, as amended. For more information regarding employee rights under the FMLA, employees may also refer to the U.S. Department of Labor's Notice to Employees of Rights Under FMLA, attached to this Handbook as _______.

MODEL FMLA POLICY

Supervisor's/Manager's Information

Employee notification - When an employee is absent or requests leave, the supervisor is responsible for determining whether the absence or leave may potentially qualify for FMLA leave and notifying human resources so that the required Notice of Eligibility and Rights & Resposibilities can be issued and appropriate certifications can be requested. Notification to human resources should be made within 24 hours of learning of the employee's absence which may potentially qualify. Employees are not required to expressly request FMLA leave.

Health Issues in the Workplace: Hot Topics Under the ADA, FMLA, and More



Rosemary G. Kenyon

Partner

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Rose Kenyon's practice involves all aspects of employment and labor law counseling and litigation, across a wide variety of industries and companies, both public and private. She has extensive experience advising companies on their most strategic and high risk employment issues. Rose also works with companies on employment matters in mergers and acquisitions, and has extensive experience drafting complex employment agreements and separation agreements on behalf of both companies and executives. Rose is a frequent speaker on emerging employment and labor law trends and regularly conducts training for human resources professionals and executive management. Rose also serves as a mediator to resolve disputes outside of litigation.

Prior to joining Smith Anderson, Rose served for 13 years as in-house counsel for Carolina Power & Light Company (now known as Duke Energy), having served as Deputy General Counsel.

Rose serves as Chair of the Firm's Pro Bono Committee.

Early in her career, Rose practiced with the Christian Barton firm in Richmond, Virginia.

PRACTICE AREAS

Complex Contract Disputes

Employment Litigation

Employment, Labor and Human Resources

Litigation

BAR & COURT ADMISSIONS

U.S. Court of Appeals for the Fourth Circuit

U.S. District Courts for the Eastern, Middle and Western Districts of North Carolina

U.S. District Courts for the Eastern and Western Districts of Virginia

North Carolina, 1986

Virginia, 1980

Michigan, 1979

EDUCATION

University of Notre Dame, J.D., 1979



HONORS & AWARDS

- Fellow, College of Labor and Employment Lawyers, Inducted 2015
- Chambers USA: America's Leading Business Lawyers, Labor & Employment (2008-2017)
- The Best Lawyers in America©, Employment Law-Management (2016-2018)
- Women of Justice Award, Business Practitioner, North Carolina Lawyers Weekly (2012)
- North Carolina Super Lawyers (2012-2017)
- North Carolina Super Lawyers, Top 50 Women (2014)
- Academy of Women of the YWCA of the Greater Triangle, Inducted 2004
- Martindale-Hubbell AV Preeminent Rated
- Fellow, American Bar Foundation

PROFESSIONAL & COMMUNITY AFFILIATIONS

- North Carolina Bar Association
 - o Board of Governors (2005-08)
 - Chair, Strategic Planning and Emerging Trends Committee (2008-11)
 - Chair, Women in the Profession Committee (2001-04)
 - o Chair, Dispute Resolution Section (1995-96)
 - Council Member, Corporate Counsel Section (1989-97)
 - Sections of Labor and Employment, Litigation and Dispute Resolution
- American Bar Association

Saint Mary's College (Notre Dame, IN), B.A., *magna cum laude*, 1976

CLERKSHIPS

Volunteer clerk for the Honorable W. Earl Britt, District Court Judge for the Eastern District of North Carolina



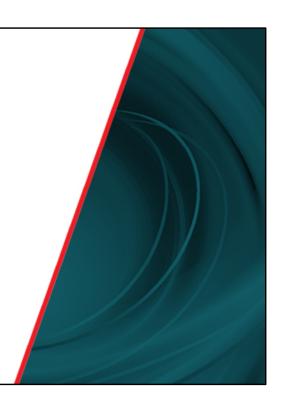
- Sections of Labor and Employment,
 Litigation and Dispute Resolution
- Wake County Bar Association and Tenth Judicial District Bar
 - Grievance Committee (2013-present)
 - Strategic Planning Committee (2015-present)
- Saint Mary's College Alumnae Association, Board of Directors (Notre Dame, IN) (2015-present)
- Community Music School of Wake County, Board of Directors (2014-present)
- Habitat for Humanity of Wake County
 - o Board Chair (2011-13)
 - Board of Directors (2005-13)
 - o Honorary Co-Chair, Women's Build (2014)
- Pines of Carolina Girl Scout Council
 - o President (1992-95)
 - Board of Directors (1986-95)



Health Issues in the Workplace:

Hot Topics Under the ADA, FMLA, and More

Rosemary Gill Kenyon October 2017





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"I get high with a little help from my friends" — The Beatles, 1967

- Medical Marijuana 90% of states allow use for medical treatment
 - o 29 states, DC and 2 territories have comprehensive laws
 - 17 states allow for low THC, high cannabidiol products
- Recreational use 8 states and DC allow

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Data as of March, 2017, Congressional Research Service, *The Marijuana Policy Gap and the Path Forward* (March 10, 2017); National Conference of State Legislatures, State Medical Marijuana Laws (2017), http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx [https://perma.cc/9VYY-YMP8]

Obligation to accommodate -- ADA versus state disability laws

Barbuto v. Advantage Sales and Marketing, Supreme Judicial Court of Massachusetts, July 17, 2017. Court rejected employer's argument that federal criminalization of marijuana meant that employer had no duty under state disability law to accommodate use of medical marijuana. Found that lawful off-site use of medically prescribed marijuana was a facially reasonable accommodation.

Callaghan v. Darlington Fabrics, Superior Court of Rhode Island, May 23, 2017. Court found that employer violated state disability law and the state medical marijuana law by withdrawing offer from candidate for employment after she disclosed that she had a medical marijuana card.

Coats v. Dish Network, Colorado Supreme Court (2015). Court held that marijuana use was still criminal under federal law, and employer could discharge under drug policy.

EEOC V. Pines of Clarkston, E.D. Michigan (April 2015). Nurse with epilepsy failed drug test due to presence of marijuana (with prescription) during first week on the job. She was interviewed by superiors, who openly questioned her about her seizures, frequency, and openly raised concern about whether she could perform job due to epilepsy. Nurse discharged. EEOC claims drug test was pretext, and real reason is her condition. Court denied summary judgment motion filed by employer.

Braska v. Challenge Mfg., Michigan Court of Appeals (October 2014). Employees who were discharged for use of marijuana for medical purposes are able to collect unemployment. No evidence that they were under the influence at work.



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Testing the Limits of Drug Testing

- Determining if an employee is under the influence at work
 - Current drug testing technology is lacking
- Opioid Use lawful and unlawful
 - Obligation to accommodate individualized assessment

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Approximate values for detection periods - Wikipedia

Substance	Urine	Hair	Blood/Oral Fluid	
Alcohol	6-24 hours / Note: Alcohol tests may measure EtG which ca stay in urine for up to 80 hours	•	12 to 24 hours	
Amphetamines (except Methamphetamine)	1 to 3 days	Up to 90 days	12 hours	
Methamphetamine	3 to 5 days	Up to 90 days	1 to 3 days	
MDMA (Ecstasy)	3 to 4 days	Up to 90 days	3 to 4 days	
Barbiturates (Except Phenobarbital)	1 day	Up to 90 days	1 to 2 days	
Phenobarbital	2 to 3 weeks	Up to 90 days	4 to 7 days	
Benzodiazepines	Therapeutic use: up to 7 days. Chronic use (over one year): 4 to 6 weeks	Up to 90 days	6 to 48 hours	



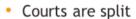
Substance	Urine	Hair	Blood/Oral Fluid
Cannabis	Passive inhalation: up to 22 minutes. Infrequent users: 7 to 10 days; Heavy users: 30 to 100 days	Up to 90 days	2 to 3 days in blood, up to 2 weeks in blood of heavy users. However, it depends on whether actual THC or THC metabolites are being tested for, the latter having a much longer detection time than the former. THC (found in marijuana) may only be detectable in saliva/oral fluid for 2 to 24 hours in most cases.
Cocaine	2 to 5 days (with exceptions for heavy users who can test positive up to 7 to 10 days, and individuals with certain kidney disorders)	Up to 90 days	2 to 10 days
Codeine	2 to 3 days	Up to 90 days	1 to 4 days
Morphine	2 to 4 days	Up to 90 days	1 to 3 days
Tricyclic Antidepressants (TCA's)	7 to 10 days	Undetectable	Detectable but dose relationship not established
Methadone	7 to 10 days	Up to 90 days	24 hours
PCP	3 to 7 days for single use; up to 30 days in chronic users	Up to 90 days	1 to 3 days

Source: Wikipedia, Drug Test, https://en.m.wikipedia.org/wiki/Drug test (Citations and footnotes omitted)



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Obesity - Is it a Disability?



- EEOC position
- Situations:
 - Safety related positions where BMI is used
 - Bias real or perceived

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Holding that obesity, including morbid obesity, <u>without</u> the presence of an underlying physiological condition, <u>is not a</u> disability under the ADA

Morriss v. BNSF Railway, 817 F.3d. 1104, No. 14-3858 (8th Cir. 2016), cert denied, 137 S. Ct. 256 (2016). Melvin Morriss was given a conditional job offer for a machinist position, pending a medical review because the position was safety sensitive. Two physician examinations revealed that Morriss weighed 285 lbs. (with a BMI of 40.9) and 281 lbs. (with a BMI of 40.4). No medical condition was identified to explain or contribute to Morriss' weight. BNSF had a policy of not hiring new applicants for a safety-sensitive position if the BMI was over 40. Morriss argued that weight that is outside normal bounds, or "morbid obesity," is a disability under the ADA, even if there is not underlying medical cause for it. The 8th Circuit rejected this position, and held that "morbid obesity" is not a "disability" under the ADA unless it is the result of a physiological condition.

See also: *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d. 436 (6th Cir. 2006); *Francis v. City of Meriden*, 129 F.3d. 281 (2nd Cir. 1997).

Holding that morbid obesity with the presence of an underlying physiological condition is a disability under the ADA

Cook v. Rhode Island Depart. of Mental Health, 10 F.3d. 17 (1st Cir. 1993).



Using BMI to identify individuals at risk and subject to further testing.

Parker v. Crete Carrier Corp., 839 F.3d. 717 (8th Cir. 2016). Crete Carrier hired Robert Parker as an over-the-road truck driver. Under regulations issued by the U.S. Department of Transportation's Federal Motor Carrier Safety Administration (FMCSA), commercial motor vehicle drivers must get medical examinations every 2 years. Two FMCSA advisory committees – the Medical Review Board (MRB) and Motor Carrier Safety Advisory Committee (MCSAC) – had recommended revisions to certification standards to reduce the risk of drivers with sleep apnea, which is believed to be responsible for an increasing number of accidents. The MRB then recommended that drivers with a BMI of over 35 receive only conditional DOT certification, pending additional examinations for obstructive sleep apnea. By 2016, the MRB revised its recommendation to recommend further sleep studies for drivers: (i) who have BMIs of 40 or above, or (ii) who have BMIs of 33 or above plus another risk factor.

In 2010, Crete Carrier began a sleep apnea program based primarily on these recommendations, and required sleep studies if: (i) the driver's BMI was 35 or above, or (ii) the driver's physician recommended a sleep study. In 2013, Parker's facility came under the program. At his next physical examination, Parker's BMI was 35. Parker obtained a note from a certified physician not affiliated with Crete saying that he did not believe that Parker needed the sleep study. Crete ordered Parker to have the study, and Parker refused. Crete took Parker out of service, and did not reinstate Parker. Parker filed a lawsuit claiming that: (i) the sleep study was an unlawful examination under the ADA, and (ii) Crete unlawfully discriminated against him under the ADA because it regarded him as having a disability.

The court rejected Parker's contentions and held:

The sleep study was not an unlawful medical examination. The court held that it was job-related and consistent with business necessity. Crete was not required to consider the individual characteristics of each individual in the class of employees required to undergo a sleep study, since Crete was able to show a reasonable basis for concluding that individuals within the parameters it defined presented a genuine safety risk and the exam allowed Crete to mitigate that risk effectively. Crete had plenty of medical and accident data to support its position.

Parker was not discriminated against under the ADA. The court assumed without deciding that Parker would be able to show that he was "regarded" as being disabled, but then found that parker was terminated because he refused to undergo a lawful medical exam.

Trump Administration withdrew from rulemaking to address risk of sleep apnea for CDL drivers: On August 4, 2017, the Federal Motor Carrier Safety Administration and the Federal Railroad Administration, part of the U.S. Department of Transportation, announced that they would not be pursuing rule making, as planned by the Obama administration, ending a long term effort by these agencies to seek better ways to diagnose truckers and railroad workers who have sleep apnea, a health condition linked to deadly accidents.



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Mental Health and "Invisible" Disabilities



- EEOC focus
- Unique issues
 - Notice of disability often subtle or ambiguous
 - Entangled with performance issues
 - Common accommodations involve: flexibility in schedule, leave, absences

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Data:

"The National Institute of Mental Health estimates that one in five people will experience a psychiatric disability in their lifetime, and one in four Americans currently knows someone who has a psychiatric disability. It is likely that most employers have at least one employee with a psychiatric disability."

U.S. Department of Labor, Office of Disability Employment Policy, Mental Health. http://www.dol.gov/odep/pubs/fact/psychiatric.htm.

EEOC Resource Documents:

The Mental Health Provider's Role in a Client's Request for a Reasonable Accommodation at Work, U.S. Equal Employment Opportunity Commission, December 12, 2016.

https://www.eeoc.gov/eeoc/publications/ada_mental_health_provider.cfm

Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights, U.S. Equal Employment Opportunity Commission, December 12, 2016. https://www.eeoc.gov/eeoc/publications/mental_health.cfm



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Trending



- Transgender under the ADA
 - Courts wrestling with coverage
- Service animals
 - Requested as a reasonable accommodation

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Transgender: Most transgender cases have been pursued under the federal sex discrimination laws.

The ADA (42 U.S.C. §12211) excludes from coverage:

"homosexuality"

"bisexuality"

"transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders"

Novel recent decision:

Blatt v. Cabela's Retail, Inc., 2017 BL 166978 (E.D. PA May 18, 2017). Kate Blatt was diagnosed in October 2005 with "Gender Dysphoria, also known as Gender Identity Disorder," which she alleged in her complaint substantially limited one or more of her major life activities, including, but not limited to, "interacting with others, reproducing, and social and occupational functioning." Blatt was hired by Cabela in September 2006, and she alleges that Cabela's began to discriminate against her on the basis of her condition, later retaliated against her for opposing discrimination under the ADA (and Title VII), eventually terminating her in February 2007. Cabela, the employer, filed a motion to dismiss under the ADA, relying on the statutory exclusion of "gender identity disorders not resulting from physical impairments." Blatt argued: (i) that the exclusion did not apply to her condition, and (ii) if it did, the exclusion is unconstitutional (denial of equal protection). In order to avoid having to decide the constitutional issue, the court first attempted to interpret the ADA exclusion narrowly, and in doing so, held that the exclusion did not apply to Blatt's condition. The court said: "it is fairly possible to interpret the term gender identity disorders narrowly to refer to simply the condition of identifying with a different gender, not to exclude from ADA coverage disabling conditions that persons who identify with a different gender may have —such as Blatt's gender dysphoria, which substantially limits her major life activities of interacting with others, reproducing, and social and occupational functioning.... Accordingly, Blatt's condition is not excluded by § 12211 of the ADA, and Cabela's motion to dismiss Blatt's ADA claims on this basis is denied." This is a very preliminary ruling.



FMLA – Reminder that medical leave related to transgender issues are covered.

Duane v. IXL Learning, Inc., 2017 BL 160191 (N.D. CA May 12, 2017). Adrian Duane was fired shortly after returning from FMLA leave to under phalloplasty surgery. The court rejected the employer's motion to dismiss, holding that Duane has alleged facts sufficient to state a claim for interference of the FMLA given the proximity between his return from leave and his termination.

Note: this case was also complicated by the fact that Duane posted an anonymous review of IXL on the Glassdoor website. This review stated: "If you're not family-oriented white or Asian straight or mainstream gay person with 1.7 kids who really likes softball — then you'll likely find yourself on the outside. Treatment in the workplace, in terms of who gets flexible hours, interesting projects, praise, promotions, and a big yearly raise, is different and seems to run right along these characteristics." Duane was confronted by his supervisor about this, and then fired. Duane also filed a complaint with the National Labor Relations Board, resulting in a decision by an Administrative Law Judge that found that Duane's action was not protected concerted activity, but was Duane's "individual gripes posted to hurt [IXL's] ability to recruit prospective employees" that constituted a "reckless and impetuous reaction to [IXL's] hesitation to immediately accepting Duane's regular fifty percent remote work privilege" (citation omitted). The NLRB adopted the ALJ's order in June 2016, dismissing Duane's complaint. IXL also argued that this ruling precluded a finding that Duane was terminated for taking protected FMLA leave. The court rejected this argument, holding that unlawful retaliation under the FMLA could have been part of the reason for IXL's action.

Service Animals:

Subject to the same interactive process to determine if allowing the service animal to come to work is a reasonable accommodation.

Employer must set ground rules for service animals, if allowed.

Educate co-workers and customers about service animal, but note that an employer may not disclose medical information or the disability.

EEOC enforcement: EEOC filed a lawsuit against CRST International, in federal court in the Middle District of Florida on March 2, 2017, alleging that the employer violated the ADA when it withdrew an offer to a truck driver who wanted to bring his service animal on his drives due to his PTSD. *EEOC v. CRST Int.*, No. 3:17-cv-00241.



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Leave - Including Intermittent Absences



- Important to separate performance issues from absences due to FMLA leave or ADA accommodations
- Proliferation of paid leave laws at state and local level
- FMLA Avoid common pitfalls
 - Employer fails to recognize trigger for employer notice
 - Lack of attention to details of process and overlap with ADA
 - Issues with fitness for duty upon return to work

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Acosta v. General Motors, N.D. Ohio (filed on September 6, 2017). DOL enforcement action. DOL claims that GM violated the FMLA because it only gave the employee 14 days to respond to its request for information about his leave. The FMLA regulations require at least 15 days, or more if necessary. According to the complaint, after not receiving a response within 14 days, GM classified some of the days he was absent as unexcused, and disciplined him. This case is still pending.



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Challenges



- Failure to recognize triggers for request for accommodation or for FMLA notice
- Lack of process around interactive process
 - Need actual medical assessment of underlying condition
 - Individualized assessment and flexibility around rules
- Ending an accommodation that you wish you never began
- Lack of training for managers and supervisors (or it just doesn't take) so they hear and say too much without getting HR involved





	Questions?	
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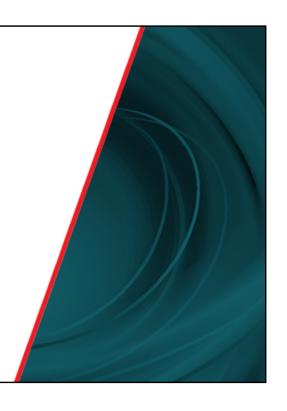




Health Issues in the Workplace:

Hot Topics Under the ADA, FMLA, and More

Rosemary Gill Kenyon October 2017





DOL and IRS Plan Audits: What to Expect and How to Prepare



Kara Brunk

Associate

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Kara's practice is focused in the areas of Employee Benefits and Executive Compensation. She represents public, private, governmental and non-profit employers in designing and documenting retirement plans, welfare benefit plans, fringe benefit plans and executive compensation plans.

Prior to joining Smith Anderson, Kara was an associate in the Raleigh office of a regional law firm. Previously, Kara was an intern for Justice Timmons-Goodson at the North Carolina Supreme Court. During law school, she was a merit scholarship recipient and a recipient of the 2010 Gressman-Pollitt Award for Oral Advocacy.

HONORS & AWARDS

 Staff Member and Contributing Editor, North Carolina Law Review, 2010-2012

PROFESSIONAL & COMMUNITY AFFILIATIONS

- Board Member, Food Runners Collaborative, 2017-Present
- Board Member, Raleigh Kiwanis Foundation, 2016-Present
- President, Triangle Benefits Forum, 2016-Present

PRACTICE AREAS

Employee Benefits and Executive Compensation

BAR & COURT ADMISSIONS

North Carolina

EDUCATION

University of North Carolina School of Law, *high honors*, J.D., 2012

Order of the Coif

University of North Carolina at Chapel Hill, *with distinction*, B.A. in Political Science, 2009

Phi Beta Kappa





- North Carolina Bar Association, YLD Community Relations Committee, 2016-2017
- Board Member, Domestic Violence Action Project, 2010-11
- Member, Civil Legal Assistance Clinic, 2011-12
- North Carolina Bar Association
 - o Membership Committee, 2017-Present
- Wake County Bar Association



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Agenda

- Overview of Employee Benefit Plan InvestigationsDOL Investigations
- 3
- IRS Audits
- Best Practices





Overview of Employee Benefit Plan Investigations

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What types of plans are audited?



- Retirement Plans
 - 401(k) Plans
 - 403(b) Plans
 - Profit Sharing/Stock Bonus Plans
 - o ESOPs
 - Defined Benefit Plans
- Health and Welfare Plans





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Which agencies conduct employee plan audits?

IRS

- Reviews retirement plans and health & welfare plans
- Primary jurisdiction over the qualification of retirement plans

DOL

- Reviews retirement plans and health & welfare plans
- Primary jurisdiction over fiduciary standards, ACA reporting and disclosure requirements, and non-qualification matters

• Limited to health & welfare plans

• Enforcement over HIPAA privacy, security and breach notification requirements, and ACA market reform requirements (for health insurance issuers and nonfederal governmental plans)

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Department of Labor Investigations





Background

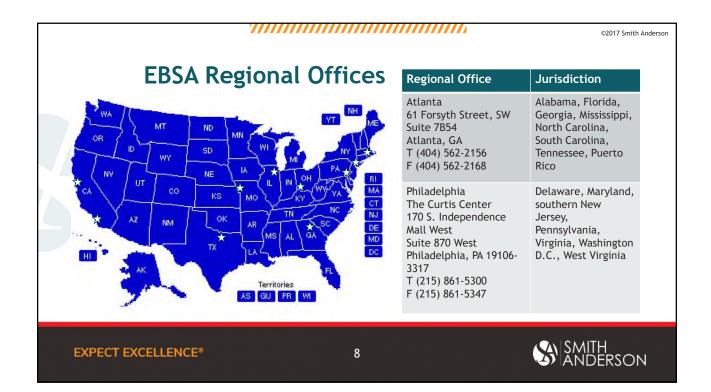


- Employee Benefits Security Administration (EBSA)
 - Charged with investigating ERISA violations with subpoena power!
 - Most EBSA investigations are civil, but EBSA also has authority to conduct criminal investigations
- Coordination with Other Agencies
 - Department of Justice
 - Internal Revenue Service
 - Dept. of Treasury and Health and Human Services
 - Securities and Exchange Commission

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EBSA 2016 Enforcement Statistics

Total Monetary Recoveries								
Total Recoveries	11000101	ries from ent Actions	VFCP	Abandoned Plans Programs		Monetary Benefit Recoveries from Informal Complaint Resolution		
\$777.5M	\$35	2.0M	\$9.5M	\$21.8M		\$394.M		
Civil Investigations								
Civil Investigation Closed		vestigations with Results	Percent C Investigations with Resi	Closed	Civil Investigations Referred for Litigation			Civil Cases with Litigation Filed
2,002		1,356	67.7%		144			62
Criminal Investigations								
Criminal Investigations Criminal with Guilty Pleas or Convictions Closed Investigations Closed		ctions	Number of Individuals Indicted					
333		75		96				

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An audit may occur as a result of:



- Referral from the IRS
- Service provider referrals
- Participant Complaints
 - o In 2016 there were 193,669 complaints leading to 662 investigations

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- DOL Targeted Initiatives
- Form 5500 Red Flags





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EBSA Enforcement Projects



- National Office Enforcement Projects
 - Health Benefits Security (ERISA Part 7)
 - Abandoned Plans
 - Delinquent Filer Voluntary Compliance Program (DFVCP)
 - Contributory Plans Criminal Project
 - Plan Investment Conflicts
 - ESOPs
 - Employee Contributions
 - Bankruptcy (REACT)
 - Voluntary Fiduciary Correction Program (VFCP)

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Form 5500 Red Flags and Compliance Questions (Schedules H and I)



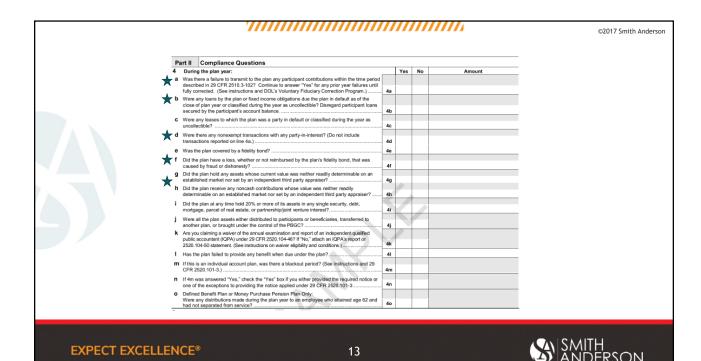
- Must file annually
 - ∘ Failure to file → civil penalties up to \$2,067 fine per day

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- Red Flag Topics that can trigger an audit
 - Late deposits for 401(k) and 403(b) contributions
 - Non-qualifying plan assets
 - High expenses
 - Loans or leases







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Examples of Common Violations



- Failing to operate the plan prudently and for the exclusive benefit of participants;
- Using plan assets to benefit certain related parties to the plan, including the plan administrator, the plan sponsor, and parties related to these individuals;
- Failing to properly value plan assets at their current fair market value, or to hold plan assets in trust;

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Examples of Common Violations



- Failing to follow the terms of the plan (unless inconsistent with ERISA);
- Failing to properly select and monitor service providers;
- Taking any adverse action against an individual for exercising his or her rights under the plan (e.g., firing, fining, or otherwise discriminating against);
- Failure to comply with ERISA Part 7 and the Affordable Care Act (welfare plans only).

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Investigative Process



- Investigative Procedure and Process
 - EBSA Enforcement Manual available on DOL website
 - Investigation can last only days or may go on for many months
- Start of the investigation
 - Typically a phone call from the Investigator, followed by a confirmation letter stating:
 - Date & time of visit
 - Plan(s) to be reviewed
 - Requests for information/documents to be made available





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Examples of Information Requested



- Governing Plan Documents
- Service Provider Contracts
- Required Reporting 5500s, Annual Funding Notices, SBCs, Participant Statements, SARs
- Corporate Meeting Minutes
- Trust Reports
- Bank Account Statements

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Examples of Information Requested



- Investment Account Statements
- Fidelity Bond/Fiduciary Liability Policy
- Participant Loan Records
- Appraisals
- ACA Related Information
- COBRA/HIPAA/Other Notices

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Investigation Interviews



- Voluntary
- The interviewee's attorney may be present
- Interview subjects may include:
 - Plan Administrator
 - Trustees
 - Plan Sponsor
 - Other Fiduciaries
 - Human Resources Personnel

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Resolution of Investigation



- Possible Results of Investigation:
 - "No Action" Letter
 - Voluntary Compliance Letter
 - Some ERISA violations were found and they must be corrected under the Voluntary Fiduciary Compliance Program (VFCP)
 - This is the most common result
 - Civil litigation
- Negotiation
- Closing Letter

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Potential Penalties



- Fiduciary breach 20% of amount DOL recovers
 - Penalty may be waived in limited circumstances
- Penalties issued for:
 - Civil litigation
 - Formal settlement agreement
 - Repeat offenders and egregious situations

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IRS Employee Plan Audits

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An audit may occur as a result of:



- Random Selection
- Referral from the DOL
- Questionable or unusual item on a return
- EPCU Projects and Compliance Checks
 - If you receive a compliance check, you should respond!

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EPCU Projects and Compliance Checks

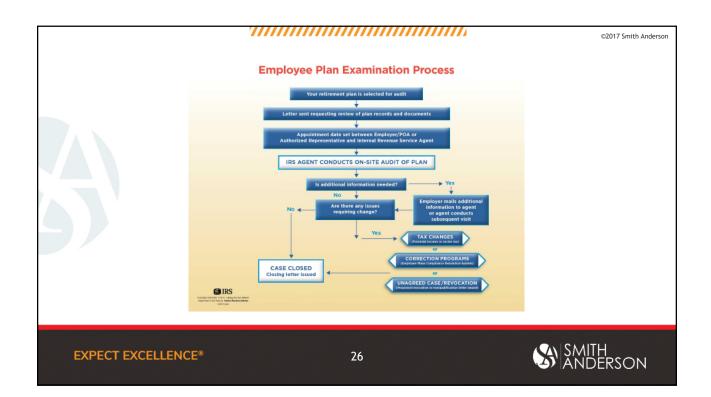


- Plan Termination Project
- Non-Governmental 457(b) Plans Project
- Asset Mismatch Project
- Form 5500 Non-filer Project

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IRS Employee Plans Examination Process



- Initial Contact by Telephone or Letter
 - Letter confirming audit will follow initial phone contact
 - Information Document Request
 - Use Form 2848 to authorize a representative

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IRS Employee Plans Examination Process



- Initial Interview
 - Explain plan administrative practices and procedures, organizational structure and operation
 - Help examiner understand the plan, focus the review and complete the examination in a shorter time
- Information Review
 - $\circ\hspace{0.2cm}$ Examiner will analyze the information, perform tests and sample data

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Common Mistakes



- Common mistakes found in retirement plans include:
 - Failure to timely correct ADP/ACP mistakes
 - Failure to implement automatic enrollment provisions
 - Failure to implement employee deferral elections and failure to apply contribution limits
 - Hardship distribution errors
 - Plan loan failures and deemed distributions
 - Failure to provide Safe Harbor 401(k) Plan Notice
 - Using a plan amendment to self-correct an error
 - Failure to obtain spousal consent
 - For 403(b) plans, failure to timely adopt a written 403(b) plan

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Closing the Examination



- Possible Results:
 - "No Action" Letter
 - Best case scenario
 - Problems are discovered
 - Consequence of noncompliance = Plan disqualification!
 - Employee Plans Compliance Resolution System (EPCRS)
 - Qualification errors discovered on audit generally must be resolved through the Audit Closing Agreement Program (Audit CAP)
 - Note: If found early, insignificant operational errors may be resolved through the Self-Correction Program (SCP)

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Audit CAP Sanctions



= the sum for the open taxable years (generally 3) of the amount that would become taxable to the plan sponsor and participants if the plan lost its taxfavorable status

For 401(k) and other types of plans with a trust, these amounts would include:

- a) Tax on the trust (Form 1041),
- b) Additional income tax resulting from the loss of employer deductions for plan contributions,
- C) Additional income tax resulting from income inclusion for participants in the plan (Form 1040), including tax on plan distributions that have been rolled over, and

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d) Interest and penalties





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Audit CAP Sanctions

Comparison to VCP Fees:

of Participants Fee
20 or fewer \$500
21-50 \$750
51-100 \$1,500
101-1,000 \$5,000
1,001-10,000 \$10,000
more than 10,000 \$15,000

Takeaway - Cheaper to correct before an audit commences!

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Preparing for the Audit

Best Practices and Tips

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Best Practices and Tips



- Collect and organize requested documents before auditors arrive
 - Create folders or a binder with tabbed headings, indexed by information requested
 - Make photocopies of documents
 - Respond affirmatively if a requested item is not applicable
 - Audits typically go back 3 to 6 years

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Best Practices and Tips



- Notify your team so they are available during the audit
 - ERISA Attorney, plan consultant, Investment Advisor, Trustee
 - Anticipate questions and practice answers
- Clear your calendar if possible
 - Consider bringing in outside counsel or consultants to manage the audit
- If you are not prepared ask for more time!
 - Auditors will delay their visit for the sake of efficiency



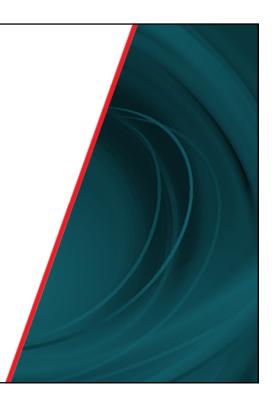




DOL and IRS Audits

What to Expect and How to Prepare

Kara Brunk October 2017





Handling Unemployment Insurance Claims and Appeals Hearings: Employer Do's and Don'ts



J. Travis Hockaday

Partner

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thockaday@smithlaw.com



Travis Hockaday has practiced with Smith Anderson since September 2003. His practice focuses on providing employment-related counseling and risk management advice to clients in a variety of industries, both public and private, and identifying and managing employment-related issues in mergers, acquisitions and reorganizations. He also represents clients in state and federal courts and agencies throughout North Carolina and other jurisdictions.

His experience includes defending employers against claims involving discrimination, wrongful discharge, retaliation, harassment and civil rights claims; defending wage and hour, ERISA, and other benefit-related claims; and representing clients in investigations conducted by, and proceedings before, both federal and state departments of labor, the Equal Employment Opportunity Commission, the U.S. Department of Justice, the North Carolina Industrial Commission and the North Carolina Division of Employment Security.

Travis is a frequent speaker on employment and labor law issues, and regularly conducts training for human resources professionals and executive management.

HONORS & AWARDS

 Listed, North Carolina Super Lawyers Rising Star (Employment Litigation: Defense)

PRACTICE AREAS

Complex Contract Disputes
Employment Litigation
Employment, Labor and Human
Resources
Litigation

BAR & COURT ADMISSIONS

U.S. Court of Appeals for the Fourth Circuit

U.S. District Courts for the Eastern, Middle and Western Districts of North Carolina

All North Carolina State Courts

EDUCATION

University of North Carolina, J.D., 2003

Campbell University, B.A., *summa cum laude*, 2000



PROFESSIONAL & COMMUNITY AFFILIATIONS

- American Bar Association, Labor & Employment and Litigation Sections
- North Carolina Association of Defense Attorneys
- North Carolina Bar Association, Young Lawyers Division, Labor & Employment, and Litigation Sections
- Member, North Carolina Bar Association Lawyer
 Effectiveness/Quality of Life Committee (2008-2012)
- Member, Society for Human Resources Management
- Wake County/Tenth Judicial District Bar Association
- Grove Presbyterian Church
 - o Elder (1999-2005; 2012 Present)
 - o Trustee
 - o Clerk of Session
- Class of 2003 Reunion Representative, University of North Carolina School of Law



Patrick D. Lawler

Associate

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Patrick Lawler is an associate in Smith Anderson's Employment, Labor and Human Resources practice group. Patrick advises clients in a variety of industries on a broad range of employment issues, including developing effective policies and procedures and providing risk management advice. He assists in identifying and managing employment-related issues in mergers, acquisitions, reorganizations, and other corporate transactions. In addition, Patrick defends employers from claims of discrimination, retaliation, wrongful termination, breach of contract, unfair trade practices, and other business-related claims.

Prior to joining Smith Anderson, Patrick was an associate in the Raleigh office of a global labor and employment law firm.

HONORS & AWARDS

- Aycock-Poe Scholarship
- North Carolina Law Review (2012-2013)

PROFESSIONAL & COMMUNITY AFFILIATIONS

- North Carolina Bar Association
- Wake County Bar Association

PRACTICE AREAS

Employment Litigation

Employment, Labor and Human Resources

Litigation

BAR & COURT ADMISSIONS

North Carolina

U.S. District Court, Eastern, Middle and Western Districts of North Carolina

EDUCATION

University of North Carolina, J.D., with honors, 2014

University of North Carolina, B.A., 2009



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Ultimate Goals

- Provide NCDES the right information/documents to make the right decision
- Protect the company's UI tax rate
- Do no harm (in response to the request for separation information or in the appeals hearing)

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DO tee up the termination correctly

- If you want disqualification for misconduct, ensure the record will support a misconduct finding
- Ensure existence/sufficiency of written policies covering each statutory example of misconduct and other acts considered to be misconduct
 - Do they address specific acts that run afoul of policy and include clear consequences for non-compliance?
- Ensure employees acknowledge in writing their receipt and understanding of, and agreement to abide by, policies

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	c3017 Smith Anderson	o
DO	tee up the termination correctly (cont'd)	-
y	temember - poor performance can constitute misconduct, if ou can show that the employee received no fewer than 3 written reprimands in the 12 months preceding discharge	
• Sc		
	 Carefully document performance issues, and include facts to show deliberateness and lack of good cause to justify conduct/failure to perform, if appropriate 	
	 Confirm in documentation that employee had notice of applicable policy/expectation 	
	Document employee's response	
	 Use "written reprimand" vs. "verbal", "coaching", and "counseling" language 	
EXPECT EXCELLE	ence* 4 S) SMITH ANDERSON	
	n3017 Saith Jodenno	
	©2017 Smith Anderson	in .
DO	N'T wait until after 100 days to terminate if it's	
jus	t not going to work out	
	n employer's account is not charged for benefits granted to claimant terminated within the first 100 days for a <i>bona</i>	
fi	ide inability to do the job for which s/he is hired	
• C	onsider using 90-day introductory periods	
	mplement process to assess and act upon performance issues	
W	vithin first 100 days	
	• I CANTIL	
EXPECT EXCELLE	ence* 5 SMITH ANDERSON	
	©2017 Smith Anderson	n
DO	provide a timely and adequate response to	
NC	UI 500 AB	
	espond within 14 days	
	 If company is using a vendor, make sure vendor is adhering to deadlines 	-
• Pi	rovide sufficient facts to enable DES to make a correct	
	etermination under the law without having to contact the	



employer to obtain any additional information

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DO provide a timely and adequate response to NCUI 500 AB (cont'd)

- If benefits are erroneously paid to a claimant at the initial stage, and the employer later appeals and proves misconduct, benefit charges to the employer's account may not be reversed if the employer has a pattern of failing to respond timely or adequately to DES requests
- Pattern = failing to respond timely or adequately to two or two percent, whichever is greater, of the total requests made to employer during the applicable reporting cycle year • DES is keeping track!

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DO provide a timely and adequate response to NCUI 500 AB (cont'd)

- When providing reason for termination, be truthful and consistent - provide the same reason you gave employee, and same reason you would give to EEOC or court
- Be concise, but include key facts/details
 Example: Ms. Doe was discharged for failure to adequately perform job duties despite 5 written reprimands over the past 8 months. See attached documentation.
- Highlight potential for non-charging, if applicable (i.e., employee left because military spouse was relocated; employee left work because of domestic violence issues)

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DO provide a timely and adequate response to NCUI 500 AB (cont'd)

- Provide appropriate documents (resignation letter; applicable policies; signed acknowledgments; documentation about policy violations; warnings, PIPs, etc.; information on circumstances leading to termination)
- Provide information about separation pay employee received
 Note: accrued, unused PTO/vacation no longer considered separation pay by DES if paid out post-termination per written policy
- Respond to questions from adjudicator (if any) by deadline provided

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DO consider appropriate response to NCUI 500AB in "dicey" cases • Consider risk of no response when no response may be best Consider limited response (in effort to avoid "pattern" finding) with note that company does not wish to contest claim SMITH ANDERSON

DON'T run off to an appeals hearing without thinking first

- Consider engaging legal counsel
- Consider whether potential benefits outweigh costs and risks
 - Costs/risks:

 - Time, energy, resources
 Opportunity for free and early discovery for claimant/opposing counsel through cross-examination of company witnesses and subpoenas for documents
 - Benefits:
 - Avoiding charges/increase in UI tax rate
 - Dissuading employee from initiating other litigation/charges

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DON'T run off to an appeals hearing without thinking first (cont'd)

- Proceed cautiously in cases involving:
 - o Problematic facts for the company
 - Claimant with history of complaints about discrimination, harassment, retaliation, pay issues, etc.
 Claimant who has filed, threatened to file, or is expected to file
 - charge/complaint with EEOC, DOL, court, etc.





	mm		©2017 Smith Anderson
	DO consider the	best time/format	t for the hearing
	Available formatsTelephonicIn-person		
		e granted if in-persored for other good caus	n hearing is requested, ses
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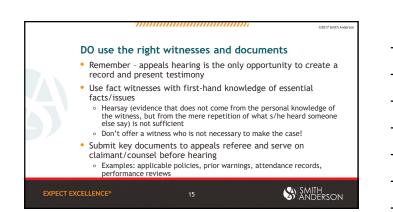
DON'T forget your right to obtain documents

• Request/review the DES file prior to the hearing
• Consider whether a subpoena is necessary to obtain documents/compel attendance of witnesses

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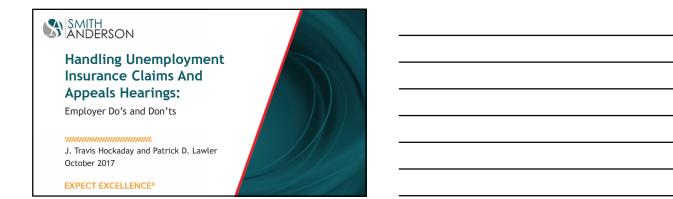


DON'T forget special rules for drug/alcohol testing cases • These cases require proof of technical/scientific facts at hearing • Testimony or affidavit from expert witness with medical/scientific knowledge is necessary • Documentary evidence is essential to prove employer rules, compliance with state drug testing law, chain of custody of sample, results, etc.

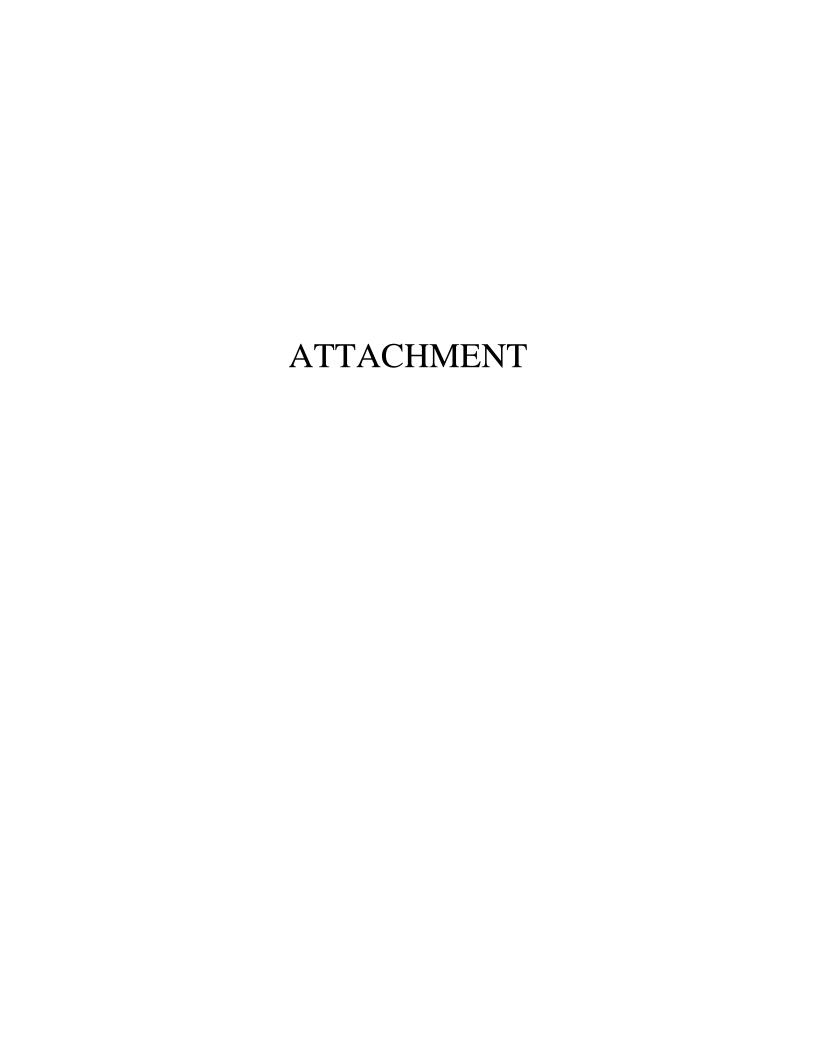
DO prepare yourself/witnesses • Employer has burden of proof in discharge cases, and will go first during hearing • Be prepared to explain nature of business and claimant's role • Outline and practice direct examination questions with employer witnesses • Be prepared to identify and authenticate documents • Be prepared to cross-examine claimant/claimant's witnesses, if necessary • Prepare brief closing argument to summarize employer's position











§ 96-14.6. Disqualification for misconduct.

- (a) Disqualification. An individual who the Division determines is unemployed for misconduct connected with the work is disqualified for benefits. The period of disqualification begins with the first day of the first week the individual files a claim for benefits after the misconduct occurs.
 - (b) Misconduct. Misconduct connected with the work is either of the following:
 - (1) Conduct evincing a willful or wanton disregard of the employer's interest as is found in deliberate violation or disregard of standards of behavior that the employer has the right to expect of an employee or has explained orally or in writing to an employee.
 - (2) Conduct evincing carelessness or negligence of such degree or recurrence as to manifest an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer.
- (c) Examples. The following examples are prima facie evidence of misconduct that may be rebutted by the individual making a claim for benefits:
 - (1) Violation of the employer's written alcohol or illegal drug policy.
 - (2) Reporting to work significantly impaired by alcohol or illegal drugs.
 - (3) Consumption of alcohol or illegal drugs on the employer's premises.
 - (4) Conviction by a court of competent jurisdiction for manufacturing, selling, or distributing a controlled substance punishable under G.S. 90-95(a)(1) or G.S. 90-95(a)(2) if the offense is related to or connected with an employee's work for the employer or is in violation of a reasonable work rule or policy.
 - (5) Termination or suspension from employment after arrest or conviction for an offense involving violence, sex crimes, or illegal drugs if the offense is related to or connected with the employee's work for an employer or is in violation of a reasonable work rule or policy.
 - (6) Any physical violence whatsoever related to the employee's work for an employer, including physical violence directed at supervisors, subordinates, coworkers, vendors, customers, or the general public.
 - (7) Inappropriate comments or behavior toward supervisors, subordinates, coworkers, vendors, customers, or to the general public relating to any federally protected characteristic that creates a hostile work environment.
 - (8) Theft in connection with the employment.
 - (9) Forging or falsifying any document or data related to employment, including a previously submitted application for employment.
 - (10) Violation of an employer's written absenteeism policy.
 - (11) Refusal to perform reasonably assigned work tasks or failure to adequately perform employment duties as evidenced by no fewer than three written reprimands in the 12 months immediately preceding the employee's termination. (2013-2, s. 5; 2013-224, s. 19.)

G.S. 96-14.6 Page 1

HR's Role in Preventing and Responding to Data Breaches



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Sarah Fox has more than 30 years' experience in employment and labor law, coupled with commercial litigation. Sarah clerked with the Honorable Robert D. Potter, Chief Judge for the U.S. District Court for the Western District of North Carolina and is a member of the Fourth Circuit Judicial Conference. She is a recipient of the *Triangle* Business Journal's Women in Business Award, has been honored as one of the Top 50 Female Super Lawyers by North Carolina Super Lawyers, is listed in The Best Lawyers in America®, and elected to Business North Carolina's Legal Elite. Sarah is active in industry associations and community organizations including having served on multiple boards and as Chair of the Foundation of Hope, President of The Badger Iredell Foundation, Inc., President of Capital Area Preservation, President of The Junior League of Raleigh, and served on the Executive Committees of the NC Museum of History Associates and SAFEchild.

Her practice includes federal and state discrimination laws; workplace investigations; human capital management; wage and hour compliance; executive shareholder claims; workforce policies, procedures and handbooks; employment agreements; executive compensation; restructuring; wrongful discharge; severance and separation programs; merger and acquisition workplace transitions; confidentiality, assignment of inventions, and non-competition agreements; trade secrets and fiduciary duties; harassment; ADA; FMLA; workplace

PRACTICE AREAS

Employment Litigation

Employment, Labor and Human Resources

Litigation

Non-Compete and Trade Secrets
OSHA and Workplace Safety

BAR & COURT ADMISSIONS

Supreme Court of the United States

U.S. Court of Appeals for the Fourth Circuit

U.S. District Courts for the Eastern, Middle and Western Districts of North Carolina

All North Carolina State Courts

EDUCATION

Wake Forest University, J.D., *cum laude*, 1983



violence; OSHA; drug and alcohol compliance; compensation for tax–exempts; and alternative staffing.

Sarah has been a guest lecturer in employment law at North Carolina State University in the Masters in Accounting Program, conducted human resource training, led diversity initiatives and training, and is a frequent speaker and author on employment matters. She has substantial experience in conducting workplace investigations and successfully litigating federal and state claims, including discrimination claims, non-competition and employee misappropriation claims, and executive shareholder claims.

Prior to joining Smith Anderson, Sarah was a founding partner of the employment and labor practice at Kilpatrick Stockton LLP in Raleigh.

HONORS & AWARDS

- The Best Lawyers in America©, Employee Benefits (ERISA) Law (2013-2018)
- Business North Carolina Legal Elite
- Martindale-Hubbell AV Preeminent Rated
- North Carolina Super Lawyers, Top 50 Female Super Lawyers
- Triangle Business Journal, Women in Business Award

PROFESSIONAL & COMMUNITY AFFILIATIONS

- American Bar Association, Employment Law Section
- Fourth Circuit Judicial Conference, Member
- Human Resources Roundtable, Chair 2011-present
- North Carolina Bar Association, Employment Law Section
- Badger-Iredell Foundation

 Wilson Academic Scholar, Wake Forest University School of Law

Tulane University, B.A., 1977

CLERKSHIPS

Law Clerk to the Honorable Robert. D. Potter, Chief Judge for the U.S. District Court for the Western District of North Carolina





- o President 2001-2002
- Board of Directors 1996-2002
- Capital Area Preservation
 - President 1995-1996
 - o Board of Directors 1992-1995
- Cerebral Palsy Center of North Carolina, Inc., Past Board of Directors
- Duke University Health System, Duke Raleigh Hospital Advisory Board
- Foundation of Hope
 - o Chair, 2006-present
 - o Board of Trustees, 1995-present
- Greater Raleigh Chamber of Commerce, Chair Human Resources Roundtable 2004-2011
- Governor's Summit on Volunteerism, Delegate
- Guatemala Mission, 2008
- Head Start Volunteer Award
- Junior League of Raleigh
 - o President 1996
 - o Board of Directors 1992-1995
 - Sustaining Advisor 2005-2006
 - Executive Committee 1993-1994
 - Community Vice President 1993-1994
 - Provisional Chair 1994-1995
- Leadership Raleigh Alumnus
- North Carolina Inaugural Ball, Co-Chair 2001
- North Carolina Museum of History, Hugh Morton Event Co-Chair 2004
- North Carolina Museum of History Associates



- o Board of Directors 2010-present
- Executive Committee 2011-2012
- Chair, Human Resource Committee 2011-2012
- Co-Chair Executive Director Search Committee 2012
- Prevent Blindness North Carolina
 - o Board of Directors 2003-2007
 - "Eyes of March" Gala Co-Chair 2003
- Ravenscroft
 - o Trustee Advisory Council 2014-Present
 - Executive Committee 2008-2011
 - o Board of Directors 2005-2011
 - o Corporate Secretary 2008-2011
 - Audit Chair 2008-2011
- SAFEchild
 - Board of Directors 1995-2004
 - Executive Committee 1995-1996, 2002-2004
 - o Chair, Personnel Committee 2002-2003
- Special Olympics World Games, Co-Chair Honored Guest Committee 1999
- The First Lady of North Carolina Luncheon
 - o Co-Chair 2001, 2005
- Wake Forest University School of Law
 - Board of Visitors 2013-Present



Mary Pat K. Sullivan

Associate

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Mary Pat Sullivan joined Smith Anderson in September 2012. Her practice focuses on life sciences, technology contracting and licensing, and information privacy and security.

Mary Pat regularly advises life sciences and technology clients, including in connection with patent and technology licensing, research and development collaborations, supply and distribution arrangements, and other strategic transactions. Mary Pat also advises clients on information privacy matters, including compliance with federal and state data privacy laws and data breach responses.

HONORS & AWARDS

- Elected, Order of the Coif, University of North Carolina
- Staff Member, North Carolina Law Review, 2010-2011

PROFESSIONAL & COMMUNITY AFFILIATIONS

- North Carolina Bar Association
- Wake County Bar Association
- Past Member, Board of Directors, New Leaf Behavioral Health

PRACTICE AREAS

AgTech

Corporate Compliance
Data Use, Privacy and Security
Information Technology
Intellectual Property
Life Sciences

Mergers and Acquisitions
Technology

BAR & COURT ADMISSIONS

North Carolina

EDUCATION

University of North Carolina, J.D., with high honors, 2012

Order of the Coif

Wofford College, B.A., 2007



Lorie Y. Beam
Director of Technology

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Lorie Beam has served as the firm's Technology Director since 2000. She brings many years of experience gained from working in the legal technology field at other major law firms. Lorie directly coordinates the ongoing development of the firm's strategic technology initiatives, the role technology plays in the delivery of legal services, and the organization and management of its infrastructure.

The IT department is responsible to ensure the firm is compliant with security regulations, management of the network infrastructure, telecommunications, client services, litigation support technology, help desk, application development and web design.

PROFESSIONAL & COMMUNITY AFFILIATIONS

Chair, North Carolina Bar Association Technology Committee

EDUCATION

University of North Carolina, B.S., 1990

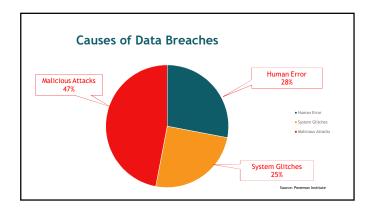
Liberty University, M.S., 2017



Why Should HR Be Concerned Equifax · Class actions seek over \$70 billion in damages Target • \$39.3 million settlement with banks • \$10 million settlement with affected consumers • \$18.5 million settlement with state attorneys general Home Depot \circ \$25 million settlement with banks $\circ \hspace{0.1in}$ \$19.5 million settlement with affected consumers SMITH ANDERSON















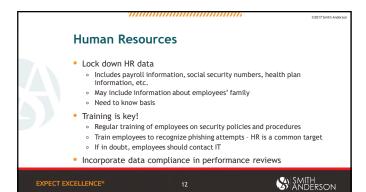






Prevention Consider adequacy of network security and security practices Understand where sensitive information resides and how it is protected Promptly install patches to anti-virus software • Limit access to sensitive information to a "need to know" basis o Consider ways to safeguard against human error (such as restricting print privileges on certain sensitive documents/information) · Vet third party vendors; limit vendor system access SMITH ANDERSON

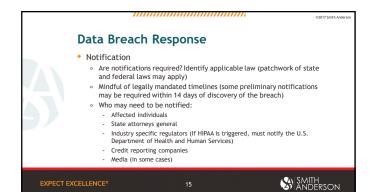
Human Resources Implement written policies and procedures Privacy and security policies Bring your own device policies Remote access policies Acceptable use policies Implement procedures for departing employees - don't let sensitive data walk out the door • Strong employee/vendor confidentiality agreements SMITH ANDERSON





Data Breach Response Activate data breach response team and breach response plan Includes internal breach response team, attorneys, and forensic experts • Use secure method to communicate Contact insurance carrier SMITH ANDERSON

Data Breach Response Investigation Preserve evidence/logs (make a forensic image of affected systems) Determine what happened and how Determine what systems and data are affected Confirm that the breach is over Consider involving law enforcement (depending on nature of incident) Mitigate and remediate damage from breach SMITH ANDERSON





Data Breach Response Additional Messaging / PR Talking points to address employee concerns Track messaging in official breach notification letter Communicate actions taken to investigate breach, to mitigate harm, and to prevent future breaches · Free identity theft protection can help rebuild goodwill SMITH ANDERSON







EEO Update



Zebulon D. Anderson

Partner

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Phone: 919.821.6735 Fax: 919.821.6800

zanderson@smithlaw.com



Zeb Anderson has devoted his career to the representation of private and public employers in connection with all aspects of employment-related litigation. He has represented employers in state and federal courts and before government agencies throughout North Carolina and in other jurisdictions across the country. His experience includes litigation involving employment-related statutory, as well as common law, claims arising under federal and state law and issues that arise when employees leave to join competitors, including noncompete and non-solicitation restrictions, trade secret misappropriation, tortious interference, and unfair competition.

HONORS & AWARDS

- Martindale-Hubbell AV Preeminent Rated
- The Best Lawyers in America©, Litigation Labor and Employment (2016-2018); Employment Law-Management (2018)
- Chambers USA: America's Leading Business Lawyers, Labor & Employment (2015-2017)
- North Carolina Super Lawyers (2012-2017)
- North Carolina Super Lawyers, Rising Star (2009)

PRACTICE AREAS

Employment Litigation

Employment, Labor and Human Resources

Intellectual Property Litigation
Litigation

Non-Compete and Trade Secrets

BAR & COURT ADMISSIONS

Supreme Court of the United States

U.S. Court of Appeals for the Fourth Circuit

U.S. District Courts for the Eastern, Middle, and Western Districts of North Carolina

All North Carolina State Courts

EDUCATION

University of Virginia, 1994

 Editorial Board, Virginia Law Review, 1992-1994



PROFESSIONAL & COMMUNITY AFFILIATIONS

- American Bar Association, Employment Section
- Defense Research Institute, Employment Law, Intellectual Property Litigation, and Diversity Committees
- North Carolina Association of Defense Attorneys, Employment and Commercial Litigation Practice Groups
- North Carolina Bar Association, Labor & Employment Section
 - Member, Section Council
- North Carolina Bar Association, Litigation Section
 - o Former Member, Section Council
 - o Former Editor, The Litigator
 - o Former Treasurer
- Co-chair, Smith Anderson Associate Development Committee
- Member and former co-chair, Smith Anderson Diversity Committee
- Member and former co-chair, Smith Anderson Recruiting Committee
- Wake County Bar Association

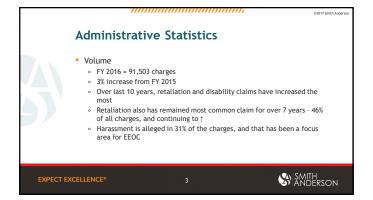
Order of the Coif

Duke University, B.A., *magna cum laude*, 1991











	Administrative Statistics	
	 Location FY 2016: 4,372 charges in NC - 5% of all charges nationwide - consistent over last 8 years Texas, Florida, California, Georgia, Illinois, Pennsylvania, and North Carolina account for 46% of all charges nationwide 	
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	Litigation Statistics	
	In FY 2016 - 86 new merits lawsuits filed	
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	Systemic Statistics	
	Systemic cases involve 20+ employees and are focused on matters in which the alleged discrimination has a broad impact FY 2016 273 systemic investigations resolved = \$20.3M Sight † in volume from prior year 113 systemic investigations yielded "cause" findings While only 3% of all charges yielded "cause" findings, roughly 1/3 of the systemic investigations yield "cause" findings 28.5% of all active litigation cases are systemic - highest % EEOC has 92% success rate in systemic litigation	



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	Strategic Enforcement Plan: FY 2017-2021	
	 Since 2012, EEOC has followed its Strategic Enforcement Plan (SEP) for FY 2012-2016 	
	 The SEP established EEOC priorities With dwindling and stagnant resources, focus on these priorities was 	
	important	
3 /	• At end of 2016, EEOC published a new SEP for FY 2017-21	
	 The new SEP maintains the same 6 priority areas, but with some modifications 	
	. CAITL	
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	SEP 2017-21	
	3LF 2017-21	
	1. Eliminating barriers in recruitment and hiring	
VAA	 Focus on class-based discriminatory practices (e.g., background checks, job application forms, medical questionnaires) 	
	EEOC notes concern with lack of diversity in technology industry	
	Protecting vulnerable workers, such as immigrant and migrant workers	
		-
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	SEP 2017-21	-
	3. Addressing selected emerging and developing issues	
	 Qualification Standards and inflexible leave policies that discriminate 	
	against individuals with disabilities Duty to accommodate pregnancy-related limitations	
	 Protecting LGBT people from discrimination Protection for temporary workers, workers hired through staffing 	
	agencies, and misclassified "independent contractors"	-

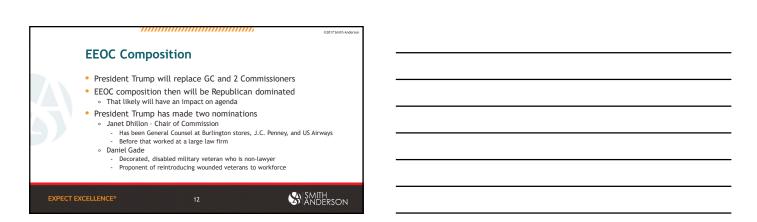


 Protecting Muslims and people of Arab descent from backlash against them as a result of tragic events

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SEP 2017-21	
4. Ensuring equal pay for all workers	
5. Preserving access to Legal system • Broad releases	
Mandatory arbitration provisions The failure to maintain and retain required applicant and employment	
data • Retaliation	
6. Preventing Systemic Harassment	
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EEOC Composition

• General Counsel
• Vacant since December
• Five Commissioners
• Victoria Lipnic (Acting Chair) - R
• Chail Feldblum - D
• Charlotte Burrows - D
• Jenny Yang - D - soon to be vacant
• Vacant





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	National Origin Discrin	nination	
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EEOC Enforcement Guidance on National Origin Discrimination November 18, 2016: www.eeoc.gov/laws/guidance/national-origin-guidance.cfm Replaces the 2002 National Origin section of Compliance Manual "Sets forth the Commission's interpretation of the law of national origin discrimination" Not binding authority, but important to understand Also provided: Qta: www.eeoc.gov/laws/guidance/national-origin-qa.cfm Small Business Fact Sheet: www.eeoc.gov/laws/guidance/national-origin-qa.cfm Small Business Fact Sheet: www.eeoc.gov/laws/guidance/national-origin-qa.cfm

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	National O	rigin Discriminat	ion - Defined
	from a parti ethnic group - E.g., discr United Sta 4. Discriminati	on based on the belief that an icular place or belongs to a par — even if the belief is mista imination against an "Arab," ever ites and does not identify herself on because an individual is ass ational origin or ethnic group	ken n if the individual is from the as a part of an Arab ethnic group
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National Origin Discrimination - Defined

- 5. Discrimination because of the combination of national original and another protected class
 - another protected class

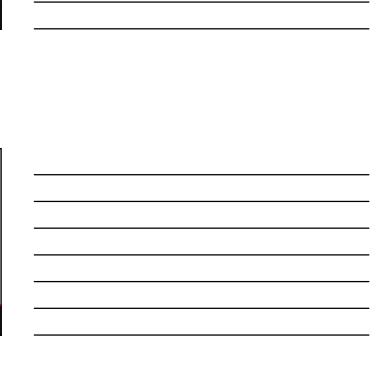
 Example: Employee alleges that she was not promoted because she is a Mexican-American woman. The individuals who were selected for the promotion were two non-Mexican women and one Mexican-American man. While the selection of Mexican-Americans and women might suggest an absence of discriminatory intent, Employee can proceed with her claim that she was discriminated against because she is a Mexican-American woman.



National Origin Discrimination - Other Issues

- Employers who use a staffing agency cannot request only candidates who are of a single particular national origin group
 Employers may not rely on the discriminatory preferences of coworkers, customers, or clients as the basis for adverse employment actions.
 - Example: Employee, who is of Iraqi national origin, was discharged from bus driver job. He had a good performance and driving record, but some customers complained and refused to ride the bus because Employee was "Arab" and they were worried about terrorism. When Employer discharged Employee because of these customer complaints, it violated Title VII.





National Origin Discrimination - Language Issues In 2014, an average of 20.9% of the population spoke a language other than English at home In 2000 - 17.9%	
• In 2014, an average of 20.9% of the population spoke a language other than English at home	
other than English at home	
In 1990 - 13.8% Employers may have a legitimate business reason for basing	
employment decisions on linguistic characteristics, but they must be carefully scrutinized because "linguistic characteristics are closely associated with national origin"	
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National Origin Discrimination - Language Issues	
Accent Discrimination An employment decision may legitimately be based on an individual's accent	
if the accent interferes materially with job performance - This requires evidence showing that: (a) effective spoken communication in English is required to perform job duties, and (b) the accent materially	
interferes with the individual's ability to communicate in spoken English	
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COST Setts Addrson	
National Origin Discrimination - Language Issues	



2. Fluency Requirements

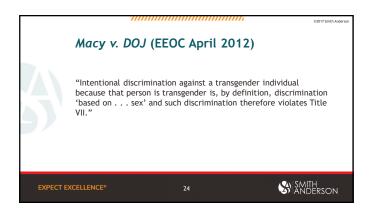
An English fluency requirement is permissible only if required for the effective performance of the position for which it is imposed Employers should assess the level of required fluency on a position-by-position basis

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	National Ori	gin Discrimination - I	Language Issues
	presumpti - Requiring necessary operations - English-on	lly Rules employees to speak English in the wor vely violates Title VII employees to speak English in limited to promote safe and efficient job perf s may be lawful lly policies should not be adopted for d a discriminatory way	circumstances when formance and business
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Sex Discrimination (Sexual Orientation and Gender Identity)

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Baldwin v. DOT (EEOC July 2015)

Title VII prohibits discrimination because of sex

Sexual orientation discrimination is sex discrimination in at least three ways:

It necessarily entails treating an employee less favorably because of sex

It is "associational" discrimination on the basis of sex

• It is discrimination based on sex-stereotypes

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Scott Madical Health Conto

EEOC v. Scott Medical Health Center (W.D. Pa. 2016)

- Baxley worked for Defendant
- EEOC alleged that Baxley's supervisor regularly and persistently referred to him by offensive slurs based on his sexual orientation.
- EEOC alleged that this conduct created an actionable hostile work environment and that when Baxley resigned, he was constructively discharged
- EEOC asserted a Title VII claim based on sexual orientation
 - The first such lawsuit it had filed

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EEOC v. Scott Medical Center

- Defendant asked the Court to dismiss the claim, arguing that, under 3rd Circuit precedent, Title VII does not prohibit sexual orientation discrimination
- EEOC argued that Defendant's motion should be denied for the three reasons identified in *Baldwin*
- The Court agreed with EEOC and denied the motion to dismiss

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EEOC v. Scott Medical Center It concluded that sexual orientation discrimination is discrimination because of "sex" "The Court finds discrimination on the basis of sexual orientation is, at its very core, sex stereotyping plain and Case was set for trial in December Counsel for Defendant has withdrawn EEOC has asked for default judgment SMITH ANDERSON

Hively v. Ivy Tech (7th Cir. 2017) (en banc)

- Hively was a part-time professor at Ivy Tech
- She alleged that she was passed over for promotions and that her contract was not renewed because of her sexual orientation
- District court dismissed her claim because it concluded that, based on clear 7th Circuit precedent, Title VII does not bar sexual orientation discrimination
- · Hively appealed



Hively

- The 7th Circuit panel began by agreeing that its precedent would compel dismissal
- However, based on Baldwin and intervening Supreme Court and other judicial decisions, it decided to analyze the issue anew
- Ultimately, the court concluded that two separate legal principals had developed and that those two principles were at odds:
 - Cases almost uniformly hold that sexual orientation discrimination is not covered by Title VII
 But they also hold that sex-stereotype/gender non-conformity discrimination is prohibited by Title VII





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	 The Court agreed that this dichotomy has proven to be analytically problematic because, as one scholar wrote, "the challenge facing lower courts is finding a way to protect against the entire spectrum of gender stereotyping while 	
	scrupulously not protecting against the stereotype that people should be attracted only to those of the opposite gender."	
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	Hively	-
	• In the end, however, the 7 th Circuit affirmed the dismissal of	
	Hively's claims: o "Perhaps the writing is on the wall. It seems unlikely that our society	
	can continue to condone a legal structure in which employees can be fired, harassed, demeaned, singled out for undesirable tasks, paid lower wages, demoted, passed over for promotions, and otherwise	
	discriminated against solely based on who they date, love, or marry But writing on the wall is not enough. Until the writing comes in the	-
	form of a Supreme Court opinion or new legislation, we must adhere to the writing of our prior precedent, and therefore, the decision of the district court is AFFIRMED."	
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	Hively	
	• The 7 th Circuit (11 judges) then voted to hear the case <i>en banc</i>	
	 In a landmark decision, the 7th Circuit reversed the decision of the district court and concluded that Title VII prohibits 	
	discrimination on the basis of sexual orientation	
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Hively		
 The majority opinion bega determine the meaning of discrimination because of 	n by noting that the Court must the statutory prohibition on "sex"	
 The majority acknowledge 1964, Congress may not he orientation" discrimination discrimination 	d that when Title VII was enacted in nive intended to prohibit "sexual n when it prohibited "sex"	
 But according to the majo 	rity, that doesn't answer the question ibition on discrimination because of	
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	WAR I ATTEMPT AND AND	
Hively		
	ee theories (the three theories	
advanced by EEOC) that le "Comparative" Theory	d to the same conclusion	
 Hively contends that if ever experience, qualifications, 	ything about her was the same (her etc.), but she was a man, she would have	
been promoted The majority agreed that the	is is "paradigmatic sex discrimination"	
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Hively		
"Sex-Stereotyping/Gender		
Hively represents the ultima	f the gender non-conformity line of cases, ate case of a failure to conform to the female	
stereotype; she is not Accordingly, the majority co sort of sex stereotyping was	oncluded that, under SCOTUS precedent, this	



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	Hively	
	"Associational" Theory	
	 Looking back to Loving v. Virginia (1967) and subsequent similar cases, the majority found that a prohibition on race discrimination includes a 	
	prohibition on interracial association discrimination	
	 The majority agreed that this principle should be extended to all protected traits under Title VII, including sex, such that discrimination 	
	based on the sex of someone with whom an employee associates is prohibited sex discrimination	
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	Trivery	
	• "As we acknowledged at the outset of this opinion, [contrary	
VAA	legal authority exists]. But this court sits en banc to consider what the correct rule of law is now , not what someone	
	thought it meant one, ten, or twenty years ago. The logic of the Supreme Court's decisions, as well as the common-sense	
	reality that it is actually impossible to discriminate on the basis	
	of sexual orientation without discriminating on the basis of sex, persuade us that the time has come to overrule our previous	
	cases"	
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	Hively	
	-	
	 Judge Posner Concurred and joined, but preferred to directly acknowledge a more 	
	active judicial role in statutory interpretation	
	 "I would prefer to see us acknowledge openly that we, who are judges rather than members of Congress, are imposing on a half-century-old statute a propriate five discriptation." but the Congress that constraint is the control of the propriate of th	
9)	meaning of "sex discrimination" that the Congress that enacted it would not have accepted. This is something courts do fairly frequently to avoid statutory obsolescence and concomitantly to avoid placing the entire burden	
	of updating old statutes on the legislative branch We are taking advantage of what the last half century has taught."	
•	- · · · · · · · · · · · · · · · · · · ·	



Hively

• Judges Flaum and Ripple

• Concur and join most of the majority opinion

• Offer a slightly different analysis

• Discriminating against someone because of their sexual orientation constituted discrimination because of: (i) the employee's sex and (ii) their sexual attraction to members of the same sex

• Under Title VII, if sex is a motivating factor for the action, the action is unlawful, even if sex wasn't the only factor

• So, because sex is one of two factors in sexual orientation discrimination, such discrimination is unlawful

Hively

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- 3 dissenting Judges
- They agree that this is a "momentous" decision, but believe that the majority exceeded the scope of their interpretive authority
- The majority opinion is not "faithful to the statutory text, read fairly, as a reasonable person would have understood it when it was adopted."
- "It's understandable that the court is impatient to protect lesbians and gay men from workplace discrimination without waiting for Congress to act.... But we are not authorized to amend Title VII by interpretation. The ordinary, reasonable, and fair meaning of sex discrimination ... does not include discrimination based on sexual orientation, a wholly different kind of discrimination."

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Zarda v. Altitude Express (2nd Cir. 2017)

- Zarda alleged that he was fired because of his sexual orientation
- He asserted discrimination claims under Title VII and NY state law
- District court granted summary judgment on Title VII claim
- State law claim went to trial, and Zarda lost
- He appealed

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	Zarda	
	• The 2 nd Circuit panel noted that under prior decisions of the 2 nd	
	Circuit:	
1	 Title VII does not prohibit sexual orientation discrimination Title VII does prohibit sex stereotyping 	
	Zarda only appealed the issue of whether Title VII prohibits	
	sexual orientation discrimination • Like the <i>Hively</i> panel, the 2 nd Circuit panel concluded that it	
	was bound by precedent and affirmed the summary judgment	
	for the employer	
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DA ECT E	ANDERSON	
	G2017 Smith Anderson	
	Zarda	
PAN	• The 2 nd Circuit then voted to hear the case <i>en banc</i>	
VA \	 Oral argument is scheduled for 9/26/17 The EEOC was invited to file a brief, and it has done so, arguing 	
	that Title VII prohibits sexual orientation discrimination based	
9)	on the three theories it has advanced in each of these cases	
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	Zarda	-
	On July 26, 2017, the US Department of Justice (DOJ) filed an	
	amicus brief	
	 The DOJ states that although the EEOC has filed a brief in support of the plaintiff, "the EEOC is not speaking for the United States" 	



The DOJ argues that "unlike the recent contrary decision in *Hively* ..., this Court's well-established position correctly reflects the plain meaning of the statute Any efforts to amend Title VII's scope should be directed to Congress rather that the courts."

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• So, at least for now, the federal government does not agree on this issue

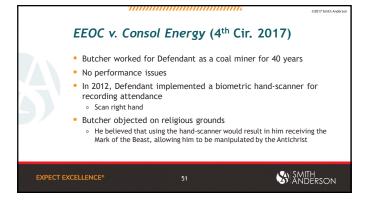
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	Evans v. Georgia Regional Hospita	ıl (11 th			
	Cir. 2017)				
	Evans alleged that she was a victim of numerous ac employment actions because of her gender non-cor	dverse nformity and			
	because of her sexual orientation The district court dismissed her claims				
	• She appealed				
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			-		
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	Evans				
	Lvans				
	 The 11th Circuit panel vacated the gender non-conf dismissal and gave Evans an opportunity to amend to add more support for that claim 	ormity her complaint			
	 But, by a 2-1 vote, it affirmed the dismissal of her orientation claim based on a prior 11th Circuit decis that Title VII does not prohibit sexual orientation d 	sion that held			
	There was a lengthy dissent	isci illination			
	 But, the 11th Circuit (unlike the 7th and 2nd Circuits rehear the case en banc) declined to			
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Evans • On 9/7/17, Evans filed a Petition for a Writ of Certiorari with SCOTUS • Evans asks that Court to resolve: • The Circuit split between the Seventh Circuit and the Eleventh Circuit • The split between the EEOC and the DOJ EXPECT EXCELLENCE* 48 SMITH ANDERSON



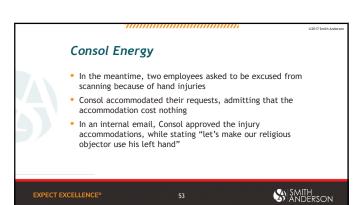
	Conclusion	
	 EEOC is very focused on these issues and is devot considerable resources to them 	ting
	 But, at her confirmation hearing on 9/20/17, Dhi is "bound" by current circuit court decisions At same hearing, Gade listed review of SEP as a priorit EEOC activism seems likely to decline 	
	 For now, different rules in different jurisdictions 	
	 The best practice is to prohibit discrimination ba orientation or gender identity and to assume that prohibits such discrimination 	sed on sexual t the law
	 Issue likely will be decided by Supreme Court 	
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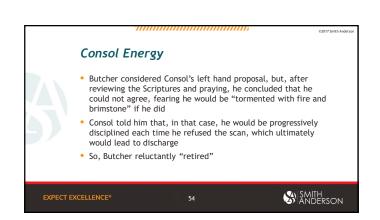






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	Consol Energ	gy	
	Consol asked him to submit a letter from a pastor supporting his request for a religion accommodation He submitted such a letter He also submitted a written explanation of his belief		
	Consol then gave him a letter from the scanner manufacturer, which explained that: No mark made by the scanner Mark of the Beast is only associated with right hand, so Butcher should let his left hand be scanned		
	 Butcher disagree Revelations 	ed with Consol's interpr	retation of the Book of
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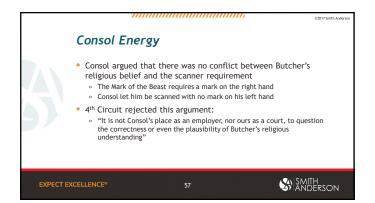




Consol Energy • The EEOC filed a lawsuit on his behalf • The EEOC alleged that Consol violated Title VII by failing to accommodate Butcher's religious belief, culminating in his constructive discharge The case went to trial, and EEOC won • \$150,000 in compensatory damages $\circ\ \ \$450,\!000$ in front and back pay Consol appealed SMITH ANDERSON

Consol Energy • Title VII prohibits discrimination because of religion • It also requires employers to make reasonable accommodations for religious beliefs of employees, but not if the accommodations impose an undue hardship To establish a claim, an employee must prove: • He has a bona fide religious belief that conflicts with an employment requirement He informed the employer of the belief He was disciplined for failing to comply SMITH ANDERSON

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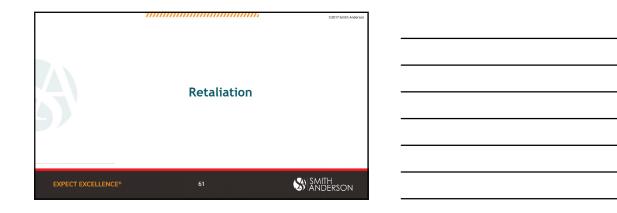




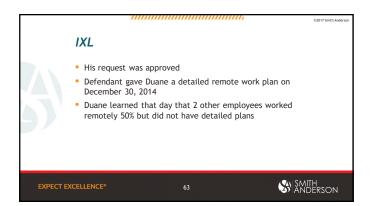
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	Consol Energy	
	 Consol also argued that Butcher was never disciplined - h preemptively The 4th Circuit also rejected this argument 	ie quit
5)	According to SCOTUS, constructive discharge requires objectively intolerable working conditions that would cause a reasonable peresign Requiring Butcher to use a hand scanner that he feared would lebeing "tormented with fire and brimstone" was sufficiently intolemented.	erson to ead to him
	support the jury's conclusion • The 4 th Circuit also rejected various arguments based on evidentiary rulings	
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	Consol Energy	
	• On September 11, 2017, Consol filed a Petition for Writ o	of
	Certiorari with SCOTUS It appears that Consol argues that the 4th Circuit wrongly	
	decided the constructive discharge issue because Butcher resigned before being forced to scan his hand or being	r
	disciplined for refusing to do so	
		AAITU
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	Conclusion	l







EEOC v. IXL Learning (N.D. CA 2017) • Adriane Duane, a transgender man, started work for Defendant in 2013 • Co-workers asked him inappropriate questions about his gender identity • In September 2014, Defendant approved his request for 6-8 weeks of sick leave for gender confirmation surgery • The surgery had complications • Duane requested a 50% remote work arrangement as accommodation



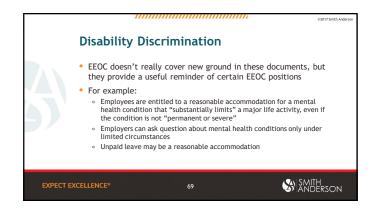


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	IXL	
TAX.	• That night, he anonymously posted a message on Glassdoor.com	-
	 "There are no politics if you fit in. If you don't - that is, if you're not a family-oriented White or Asian straight or mainstream gay person with 1.7 kids who really likes softball - then you are likely to find yourself on 	
	the outside. Treatment in the workplace, in terms of who gets flexible hours, interesting projects, praise, promotions, and a big yearly raise, is	
	different and seems to run right along those characteristics Most management do not know what the word discrimination means, nor do	
	they seem to think it matters."	
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	IXL	
	CEO found out about posting and suspected Duane	
	CEO met with Duane and asked if he posted the comment	
	• Duane confessed, and CEO terminated his employment	-
	 EEOC pursues retaliation claims under Title VII and ADA Defendant denies it knew Duane was transgender and argues it 	
	accommodated all his requests	
	Case is ongoing	
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	Lesson	
	EEOC defines protected activity broadly We activity to a second	
	 We anticipate more litigation arising out of anonymous web- based postings 	
	• Think carefully before taking adverse action after any	
	"whistleblowing" activity	
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	Disability Discrimination	©2017 Smith Anderson		
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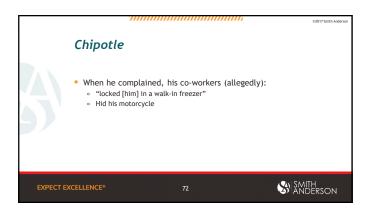
Disability Discrimination • EEOC has noted that discrimination based on mental health conditions is increasing • As a result, it published two new documents at the end of 2016 • "Depression, PTSD, and Other Mental Health Conditions in the Workplace: Your Legal Rights" • www.eeoc.gov/eeoc/publications/mental health.cfm • "The Mental Health Provider's Role in a Client's Request for a Reasonable Accommodation at Work" • www.eeoc.gov/eeoc/publications/ada mental health provider.cfm



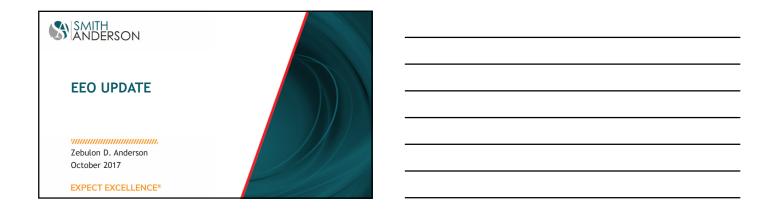




EEOC v. Chipotle Mexican Grill (N.D. CA 9/18/17) • Austin Melton was a store manager in Cupertino • His female boss (allegedly): • "slapped, groped, and grabbed [his] buttocks and groin area numerous times" • Told him she "wants to do a threesome with [him] and [his] girlfriend" • "used vegetables to simulate sex acts" • Showed him "pictures of herself in her underwear" • Kept a "sex scoreboard" in her office, tallying sex activity • Hit him "over the head with a pan" • "punched the wall until her hands bled"









A Time for Everything

(A Time to Hire, and a Time to Fire...) –

Ten Common Sense (But Often

Forgotten) Lessons for Complying

with the Law and Mitigating Risk



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Travis Hockaday has practiced with Smith Anderson since September 2003. His practice focuses on providing employment-related counseling and risk management advice to clients in a variety of industries, both public and private, and identifying and managing employment-related issues in mergers, acquisitions and reorganizations. He also represents clients in state and federal courts and agencies throughout North Carolina and other jurisdictions.

His experience includes defending employers against claims involving discrimination, wrongful discharge, retaliation, harassment and civil rights claims; defending wage and hour, ERISA, and other benefit-related claims; and representing clients in investigations conducted by, and proceedings before, both federal and state departments of labor, the Equal Employment Opportunity Commission, the U.S. Department of Justice, the North Carolina Industrial Commission and the North Carolina Division of Employment Security.

Travis is a frequent speaker on employment and labor law issues, and regularly conducts training for human resources professionals and executive management.

HONORS & AWARDS

 Listed, North Carolina Super Lawyers Rising Star (Employment Litigation: Defense)

PRACTICE AREAS

Complex Contract Disputes
Employment Litigation
Employment, Labor and Human
Resources
Litigation

BAR & COURT ADMISSIONS

U.S. Court of Appeals for the Fourth Circuit

U.S. District Courts for the Eastern, Middle and Western Districts of North Carolina

All North Carolina State Courts

EDUCATION

University of North Carolina, J.D., 2003

Campbell University, B.A., *summa cum laude*, 2000



PROFESSIONAL & COMMUNITY AFFILIATIONS

- American Bar Association, Labor & Employment and Litigation Sections
- North Carolina Association of Defense Attorneys
- North Carolina Bar Association, Young Lawyers Division, Labor & Employment, and Litigation Sections
- Member, North Carolina Bar Association Lawyer
 Effectiveness/Quality of Life Committee (2008-2012)
- Member, Society for Human Resources Management
- Wake County/Tenth Judicial District Bar Association
- Grove Presbyterian Church
 - o Elder (1999-2005; 2012 Present)
 - o Trustee
 - o Clerk of Session
- Class of 2003 Reunion Representative, University of North Carolina School of Law



Lesson 1 - an ounce of prevention is worth a pound of cure • Compliance with the law? • Compliance with company policy? • Proof? • Consistency? • Pretext-free (does it smell bad)?

Lesson 2 - don't get carried away with the at-will doctrine (because it ain't what it used to be) • Has the employee been offered a definite term? • Is there a contract or offer letter with terms regarding termination? • Does the handbook or policies limit the right to terminate? • Have verbal representations been made that limit the right to terminate? • Is termination against public policy? • Is there evidence of discrimination / retaliation? • Is there a collective bargaining agreement?



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	Lesson 3 - consider possible job protections	
	• USERRA	
	 If employee's most recent period of service was more than 30 days, s/he may not be discharged, except for cause, for: 	
	 180 days after reemployment when most recent period of service was more than 30 but less than 180 days, or One year after reemployment, when most recent period of service was more 	
	• FMLA	
	Generally, employee on FMLA is not protected from actions that would have affected him/her if s/he had not been on FMLA leave, but	
	employer has burden to prove that employee would not have been employed at reinstatement.	
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	Lesson 4 - remember special obligations with	
	RIFs/group layoffs	
	WARN Act	
	 Detailed analysis required to determine whether obligations triggered 	
	 Covered employer must give at least 60 days' notice of plant closing or mass layoff to affected employees, state dislocated worker unit, 	
	and local government (some exceptions apply)	
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	WAG LY ARTISET PROBES AND	
	Lesson 4 - remember special obligations with RIFs/group layoffs (cont'd)	
	WARN Act - key concepts: Covered employers (100 or more employers (such ding part time) or	
	 Covered employer - 100 or more employees (excluding part-time), or 100 or more employees collectively working at least 4,000 hrs/week 	
9)	 Affected employee - employee that reasonably may be expected to experience an employment loss as a result of a proposed plant closing 	
	or mass layoff	I



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Lesson 4 - remember special obligations with RIFs/group layoffs (cont'd)	
WARN Act - key concepts: Plant closing - permanent or temporary shutdown of single site of employment, or one or more facilities or operating units at single site, resulting in employment loss at the single site occurring within any 30-day period, for 50 or more employees (excluding part-time) Mass layoff - RIF, not qualifying as a plant closing, resulting in employment loss at the single site within any 30-day period, for 50-499 employees (excluding part-time) and that number is at least 33% of active employees (excluding part-time), or for 500 or more employees (excluding part-time) without regard to percentage	
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Lesson 4 - remember special obligations with	
RIFs/group layoffs (cont'd)	
Top WARN Act compliance challenges and mistakes	
 Applying the part-time employee rules Identifying single-site of employment Counting employment losses (which employees, which reasons, over 	
Counting emptoyment usses (which employees, which reasons, over what period) Changes in termination date	-
Calculating notice date Content of notice	
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Lesson 4 - remember special obligations with	
RIFs/group layoffs (cont'd)	



• Disparate impact analysis

Applicable in at least 20 states, DC and Puerto Rico (including CA, CT, GA, HI, IL, IA, KS, ME, MD, MA, MI, MN, NH, NJ, NY, OH, PA, TN, VT, WI)

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• Is any protected class disproportionately affected?

Lesson 4 - remember special obligations with RIFs/group layoffs (cont'd)



- Waivers of age discrimination claims with exit incentive or other employment termination programs offered to a group or class of employees
 - $\circ~$ Must provide 45 days for consideration of agreement
 - Must provide disclosures as to the class, unit or group of persons covered by the program, eligibility factors, and time limits, as well as job titles and ages of all individuals eligible or selected for the program, and ages of all individuals in the same job classification or organizational unit who are not eligible or selected



Lesson 5 - if you're getting a release, get your money's worth

- For valid release of age discrimination claims:
 - Agreement must be understandable
 - Waiver must refer to rights/claims under ADEA
 - No prospective waiver
 - Consideration must be in excess of anything to which employee already is due (necessary for all releases, regardless of age)
 - Advise employee in writing to consult attorney
 - Give at least 21 days for consideration (45 if offered with exit incentive or other termination program to group/class)

 - Employee need not use the entire 21 days
 Count carefully employee has until the 22nd calendar day after receiving agreement to sign and return it
 - Give at least 7 days for revocation



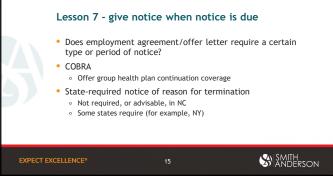
Lesson 5 - if you're getting a release, get your money's worth (cont'd)

- Regardless of age of employee, ensure consideration is sufficient, and, generally, give some period for review
- Do not prohibit employee from filing EEOC or similar charges, but do require employee to waive rights to any and all monetary damages and other remedies
- Avoid requiring employees to give up rights to participate in government investigations/proceedings, communicate regarding wages/hours/terms and conditions, or engage in other legally protected activity





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Lesson 5 - if you're getting a release, get your money's worth (cont'd)	
Do not agree to continuing coverage under health and other benefit plans after termination of employment; use direct	
pay or reimbursement arrangement instead. • Use your lawyer!	
If using a form agreement, ask counsel to review on a regular basis.	
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Lesson 6 - know what you owe and when it's due	
Determine when final pay is due under applicable state law	
May differ from policy/practice Consider:	
Bonuses Commission payments Accrued but unused vacation, sick days, other PTO	
	_
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Lesson 7 - give notice when notice is due	





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	Lesson 8 - be prepared (to do it)!	
	 Consider need for security 	
TA N	 Consider steps to protect worksite, confidential information, IT systems, etc. 	-
VAI	Choose time, place and participants carefully	
	Have a witness	
97	 Prepare and rehearse (including responses to anticipated questions) 	
	• Give the real reason	
	Do not entertain arguments	
	Avoid reentry into work areas	
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	Lesson 9 - afterwards, speak truthfully and only if	_
	necessary	
	 References Provide only dates of employment and position(s) held 	
	Avoid post-termination statements inconsistent with real	
	reason(s) for termination	
	 References Letters of recommendation 	_
	 Unemployment paperwork/hearings 	
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	Lesson 10 - Tale of a Termination Trainwreck	
	Case Study	





