EMPLOYMENT LAW UPDATE

2018

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TABLE OF CONTENTS

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PROGRAM AGENDA

8:30 – 9:00	**Registration and Breakfast** *Complimentary breakfast*
9:00 – 9:05	**Welcome and Introduction** *J. Travis Hockaday*
9:05 – 10:05	**The Post-#MeToo Era: Emerging Trends, Best Practices** *Kimberly J. Korando and Taylor M. Dewberry* A year after the tweet that sparked a movement, we reflect on nine important emerging trends that are changing the way we think about and respond to unacceptable workplace behaviors, the role of workplace culture and leadership, common mistakes in policy drafting and implementation, and what EEOC says your training program should look like.
10:05 – 10:45	**Evolving Leave Trends: Employer Challenges with Unlimited or Discretionary Leave, Paid Parental Leave and Mandatory Paid Sick Leave** *Rosemary G. Kenyon and Susan M. Parrott* In light of the growing trend to provide paid parental leave and unlimited discretionary leave, employers are faced with administrative and legal challenges in implementing these policies. In addition, multi-state employers are confronted with a patchwork of mandatory paid and unpaid sick leave laws. This session will review these trends and provide practical advice on how to develop and administer compliant policies.
10:45 – 10:55	**Morning Break**
10:55 – 11:35	**Mandatory Arbitration - It's a No-Brainer - or is it?** *Zebulon D. Anderson and Kerry A. Shad* We will explain the Supreme Court's *Epic* decision and the current arbitration landscape; review interesting post-*Epic* decisions by lower courts; look at legislative responses enacted or proposed in response to or that implicate the scope of *Epic*; outline the factors and practicalities to consider when deciding whether arbitration is right for your business; and explain the various components and options for an enforceable arbitration program.
11:35 – 12:15	**Emerging Drug Trends, Laws, and Your Drug Policies and Testing Programs** *Sarah W. Fox and J. Travis Hockaday* With more and more states legalizing marijuana for medical and recreational use, and with the continued use (and abuse) of prescription opiates and the emergence and legalization of cannabis-derived products such as CBD oil, many employers are struggling to understand what it all means for their drug use policies and drug testing programs. During this session, two of our lawyers will discuss the current legal landscape and options for employer policies and

	practices, and we will hear from a certified Medical Review Officer (MRO) about how use of these products affects drug test results, and how MROs and their client employers are interpreting those results.
12:15 – 1:05	**Lunch** *Complimentary Lunch* **<u>The Opioid Epidemic</u>** *Carla Parker Hollis, Chief Executive Officer* *Nadia S. Meyer, M.D., Chief Medical Officer* *Triangle Springs Hospital* The impact of the opioid epidemic is being felt across the country, and workplaces are not immune. During this lunch program, Carla Parker Hollis, Chief Executive Officer, and Dr. Nadia S. Meyer, Chief Medical Officer, both of Triangle Springs Hospital, will discuss the challenges communities and employers are facing, and what can be done to address the epidemic.
1:05 – 1:45	**<u>The Future of Work 2019: 2 Challenges HR Cannot Ignore</u>** *Kimberly J. Korando and Kerry A. Shad* Whether you call them independent contractors, consultants, freelancers, project-based or on-demand gig workers, HR professionals are increasingly faced with management requests to engage workers on a 1099 basis. Yet, there is no clear or uniform guidance on who must be classified as a W-2 employee and who may be classified as a 1099 worker. We will cover current litigation, lessons learned and the emerging ABC test plus practical tips for identifying and evaluating alternative staffing solutions. And then there is Social Media 2.0…as more employers begin to encourage employees to use social media as a marketing or recruiting tool, the question becomes who "owns" the accounts the employees open on Facebook, LinkedIn, Twitter and other social media platforms? HR plays a key role in making sure that policies and employee agreements are in place to ensure that the organization owns the accounts, especially once the individual leaves the organization. Join us for an overview of what needs to be in the toolkits of HR professionals and corporate counsel for securing employer rights.
1:45 – 1:50	**Transition to Breakout Sessions**
1:50 – 2:35	**Concurrent Breakout Sessions** *(choose one)* **Session A: <u>Benefits in Mergers & Acquisitions for the HR Generalist: The Real Deal</u>** *Caryn C. McNeill, Jamison H. Hinkle and Kara M. Brunk* M&A activity is on the rise. Come get the low down from our benefits lawyers about the issues that pop up over the life of a transaction. In this fast-paced program, we'll share plenty of practical advice about the difference the fundamental deal terms make, the plans and arrangements to be on the lookout

	for in due diligence, and alternative ways of handling a target's plans at and after closing. Bring your questions as we unpack this process and share the real deal. **Session B: <u>A Case Study: Navigating Performance Issues in Light of the Minefield of Overlapping Laws on Mandatory Leave, Disability and Discrimination</u>** *Rosemary G. Kenyon and Susan M. Parrott* This workshop session will provide an opportunity for a practical review of how an employer may successfully navigate a real-life human resource problem in compliance with the overlapping state and federal laws on disability, mandatory leave (both paid and unpaid) and discrimination. The session will specifically discuss applicability of the Americans with Disabilities Act, the Family and Medical Leave Act, and the new mandatory paid sick leave state laws, among other laws.
2:35 – 2:45	**Afternoon Break**
2:45 – 3:25	**<u>Shifting Sands in Labor Law: A Review of Recent Developments Under the New NLRB</u>** *J. Travis Hockaday and Patrick D. Lawler* We will discuss the changing landscape of labor law under the current NLRB, how its decisions indicate a shift in focus from years past, and how your workplace policies and practices may be affected. Specifically, we will review the standards governing employee handbook policies and standards for determining joint employer status, discuss whether misclassification of a worker as an independent contractor may be an unfair labor practice, cover the latest on the NLRB's email rules, and more.
3:25 – 4:05	**<u>EEO Update</u>** *Zebulon D. Anderson* A discussion of EEOC enforcement trends and plans, as well as select cases representative of recent trends in EEO litigation.
4:05	**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 in 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 attorney-client 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
    - employee embezzlement
    - kick-backs and favoritism in award of vendor contracts

    - 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 non-employee 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 reorganization-related 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 businesses 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 for 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 included 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 played 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 experienced first-hand how their decisions and actions played 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 to 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.

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Partner

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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 non-compete and non-solicitation restrictions, trade secret misappropriation, tortious interference and unfair competition.

EXPERIENCE

- Since 2000, served as lead counsel in over 80 cases in various industries involving the defense of employment-related claims, including alleged discrimination, harassment, retaliation, wrongful discharge, civil rights violations, labor standards and wage and hour violations, denial of employee benefits and workplace violence
- Served as lead counsel in aviation industry-based class and collective action alleging violation of wage and hour laws in connection with baggage-related tip and service charge practices
- Represented global pharmaceutical company in series of class and collective actions filed in Arizona, California and New York alleging that the company's failure to pay its pharmaceutical sales representatives overtime for hours worked in excess of 40 hours per week violated the FLSA and state law

AA CONTACT INFO

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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
- Order of the Coif

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

- Defended employer in the material handling industry that was sued in Florida state court by Fortune 100 company that claimed the employer misappropriated its trade secrets, tortiously interfered with its employee relationships and otherwise unfairly competed with it when the employer hired 19 of its at-will employees over the course of several months
- Defended employer in the entertainment industry and a newly-hired employee who was sued in Michigan state court by a competitor who previously employed that employee and who claimed that the employee breached and the employer tortiously interfered with a non-solicitation agreement after the employee joined the employer
- Represented multiple insurance companies in lawsuits brought in state and federal courts in North Carolina that involved allegations of non-compete and non-solicitation agreement breach by insurance agents who left one company to join a competitor
- Represented medical device distributor in lawsuit filed in federal court in North Carolina that sought to restrain the sales activities of former sales employees who left to join a competitor, but were bound by non-solicitation agreements
- Represented many employers in the health care, pharmaceutical, logistics/transportation and other industries in lawsuits throughout the state and federal courts in North Carolina involving allegations of non-compete and non-solicitation agreement breach, trade secret misappropriation, tortious interference and unfair competition
- Provided advice and counseling to employers in connection with all aspects of employment law, ranging from EEO issues to non-compete agreements and trade secret protection
- Advised a global financial services technology company on the employment-related aspects of its acquisition of a leading provider of deal analytics and valuation technology

HONORS & AWARDS

- Martindale-Hubbell AV Preeminent Rated
- *The Best Lawyers in America©,* Litigation - Labor and Employment (2016-2019); Employment Law-Management (2018-2019)
- *Chambers USA: America's Leading Business Lawyers,* Labor & Employment (2015-2018)
- North Carolina *Super Lawyers* (2012-2018)
- *Business North Carolina's Legal Elite,* Employment (2017)
- North Carolina *Super Lawyers*, Rising Star (2009)

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
  - Former Member, Section Council
  - Former Editor, *The Litigator*
  - 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

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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.

EXPERIENCE

- Amending and restating qualified retirement plans to comply with the Pension Protection Act and other changes in the law.
- Advising employers regarding designing and administering benefits plans in compliance with the Internal Revenue Code and ERISA.
- Drafting and revising health and welfare plan documents and summary plan descriptions.
- Assisting employers with identifying and correcting plan errors through DOL and IRS compliance programs.
- Reviewing and amending executive compensation arrangements.
- Advised a leading CRO in Asia on the employee benefits aspects of its acquisition of CRO assets in the United States.

AA CONTACT INFO

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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

- Advised a publicly-traded health information technologies and clinical research company on the employee benefits aspects of its sale of a consulting line of business.
- Advised a private equity fund on the employee benefits aspects of its acquisition of a specialty pharmaceutical company.

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

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Associate

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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

NEWS

- Smith Anderson Drives Effort to Raise Nearly $14,000 for Legal Aid of North Carolina
  12.11.2017
- Smith Anderson Welcomes Four New Associates in 2017
  11.20.2017

PUBLICATIONS

- Refresher on North Carolina - Specific Leave Laws
  06.28.2018
- Minimum Wage Increases in January 2018
  01.03.2018
- DACA Going Forward
  09.28.2017
- Note – *Title VII and African American Hair: A Clash of Cultures,* Washington University Journal of Law and Policy, Vol 54

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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 Appeals for the Fourth Circuit

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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 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

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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

- Wilson Academic Scholar, Wake Forest University School of Law

Tulane University, B.A., 1977

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.

EXPERIENCE

- Represented Global 100, Fortune 500 and private employers in defense of federal and state employment claims
- Represented U.S. Congressman in contested election
- Represented shareholder executive in obtaining multimillion dollar bench and jury awards
- Conducted internal workplace investigations and human resource training
- Represented employers and executives in noncompetion, confidentiality and fiduciary disputes
- Represented employers in OSHA industrial fatality accidents
- Represented employers in defense of pattern and practice claims by the Equal Employment Opportunity Commission
- Represented employers and executives in connection with employment arrangements

HONORS & AWARDS

- *The Best Lawyers in America©,* Employee Benefits (ERISA) Law (2013-2019)
- *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

CLERKSHIPS

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

- Human Resources Roundtable, Chair 2011-present
- North Carolina Bar Association, Employment Law Section
- Badger-Iredell Foundation
  - President 2001-2002
  - Board of Directors 1996-2002
- Capital Area Preservation
  - President 1995-1996
  - 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
  - Chair, 2006-present
  - 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
  - President 1996
  - 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 Bar Foundation, Development Committee 2018
- North Carolina Inaugural Ball, Co-Chair 2001

- North Carolina Museum of History, Hugh Morton Event Co-Chair 2004
- North Carolina Museum of History Associates
  - Board of Directors 2010-2018
  - Executive Committee 2011-2012
  - Chair, Human Resource Committee 2011-2012
  - Co-Chair Executive Director Search Committee 2012
- Prevent Blindness North Carolina
  - Board of Directors 2003-2007
  - "Eyes of March" Gala Co-Chair 2003
- Ravenscroft
  - Trustee Advisory Council 2014-Present
  - Executive Committee 2008-2011
  - Board of Directors 2005-2011
  - Corporate Secretary 2008-2011
  - Audit Chair 2008-2011
- SAFEchild
  - Board of Directors 1995-2004
  - Executive Committee 1995-1996, 2002-2004
  - Chair, Personnel Committee 2002-2003
- Special Olympics World Games, Co-Chair Honored Guest Committee 1999
- The First Lady of North Carolina Luncheon
  - Co-Chair 2001, 2005
- Wake Forest University School of Law
  - Board of Visitors 2013-Present

SMITH ANDERSON
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Jamison H. Hinkle
Partner

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Fax: 919.821.6800
jhinkle@smithlaw.com

Jamie Hinkle advises a wide range of clients on all aspects of their employee benefits and compensation programs. Much of his practice includes helping employers design and administer cost-effective retirement and health and welfare benefit plans while minimizing legal risks and administrative complications. His work includes helping ensure benefit plans comply with ERISA, the Internal Revenue Code, HIPAA, COBRA, relevant sections of the North Carolina Insurance Code and other federal and state laws as well as assisting employers correct operational errors and respond to IRS and Department of Labor (DOL) plan audits.

Jamie also frequently advises corporate clients ranging from start-ups to global publicly-traded companies with respect to the adoption and administration of annual and long-term incentive and bonus plans, nonqualified deferred compensation arrangements and various equity-based compensation plans, including stock option, restricted stock and restricted stock unit (RSU) awards. He works closely with the firm's business lawyers in addressing the various employee benefits and executive compensation due diligence, correction and integration issues that arise in connection with mergers, acquisitions and other corporate transactions. As part of his practice, Jamie also frequently represents both executives and employers in negotiating and drafting executive employment and severance agreements, including work on golden parachute (Code Section 280G) issues and deferred compensation compliance matters under Code Section 409A.

Jamie also has broad experience in estate planning for high net-worth executives with particular expertise on planning for the tax-efficient transfer and diversification of stock options and other equity compensation awards.

AA CONTACT INFO

Sarah Herklotz
Phone: 919.821.6749
sherklotz@smithlaw.com

PRACTICE AREAS

Employee Benefits and Executive Compensation

Insurance Regulation

Tax

Trusts and Estates

BAR & COURT ADMISSIONS

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

All North Carolina State Courts

EDUCATION

University of North Carolina, J.D., *with honors*, 1996

Duke University, A.B., 1991

Jamie practiced employee benefits and estate planning with Hunton & Williams in Raleigh and with Balch & Bingham LLP before he joined Smith Anderson in 2000.

EXPERIENCE

- Design and draft equity compensation and bonus plans for various start-up companies
- Coordinate company-wide stock option repricing and exchange program for underwater stock options
- Represent employer in overhauling existing equity compensation awards for chief operating officer
- Prepare and file Corrective Top Hat Plan Filings Under DOL's Delinquent Filer Voluntary Compliance Program (DFVCP) for Fortune 100 Company
- Advise on Benefit Plan Corrections in Connection with Sale of Major Pharmaceutical Company
- Advise Terminating Multiple Employer Welfare Arrangement (MEWA) and Voluntary Employees' Beneficiary Association (VEBA) on IRS and DOL Compliance Issues and Distribution of Surplus Trust Assets
- Advise employers on 401(k) plan coverage and eligibility issues in connection with IRS contractor misclassification audit
- Advise on Equity Compensation and Benefit Plan Integration Issues Following Client's Purchase of Major Competitor
- Design and Draft Nonqualified Deferred Compensation Retention Plan for Key Executives of Venture-Backed Start-Up
- Advise a public specialty pharmaceutical company on cash-out of target's stock options, coordination of severance benefits, and post-closing benefits integration
- Advise insolvent client on criminal liabilities associated with improper benefit plan terminations
- Amend and restate numerous 401(k) plans for required plan amendments
- Represent a global provider of biopharmaceutical development services and commercial outsourcing services in favorably resolving DOL audit of 401(k) Plan reporting failures
- Coordinate Revisions to major pharmaceutical company's self-insured health plan to comply with health care reform rules
- Advise Publicly-Traded Pharmaceutical Company Section 409A Compliance for Staggered Severance Payments to Departing Executives
- Advised a multinational Fortune 500 provider of product development and integrated healthcare services on benefits-related matters in its merger with a NYSE-listed global information and technology services company, creating a leading information and tech-enabled healthcare service provider. The equity market capitalization of the joined companies was more than $17.6 billion at closing
- Advised a private equity fund on the acquisition, equity and debt financing of a reference laboratory
- Advised a SaaS company on employee benefits and executive compensation issues related to its sale to a data integration public company

- Advised a leading healthcare services provider on employee benefits and executive compensation issues related to its $60 million cash acquisition of a global sourcing company
- Advised a leading provider of financial software and information products to U.S. financial institutions on employee benefits and executive compensation issues related to its reverse triangular merger with a private equity-backed company.

HONORS & AWARDS

- *The Best Lawyers in America*©, Employee Benefits (ERISA) Law (2013-2019)
- North Carolina *Super Lawyers* Rising Star, ERISA (2013)

PROFESSIONAL & COMMUNITY AFFILIATIONS

- American Bar Association
- North Carolina Bar Association
  - Tax, Business Law, and Estate Planning & Fiduciary Law Sections
  - Council Member, Tax Section Council, North Carolina Bar Association (2001-present)
  - Chair, Employee Benefits Committee, Tax Section, North Carolina Bar Association (2005-2014)
- Wake County Bar Association
- Director, Food Runners Collaborative, Inc. (2011- Present; Chair, 2014)
- Former Director, Junior Achievement of Eastern North Carolina, Inc.
- National Association of Stock Plan Professionals (NASPP), Carolinas Chapter
- Triangle Benefits Forum (TBF)

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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.

EXPERIENCE

- Defending employers against claims involving discrimination, wrongful discharge, retaliation, harassment and civil rights claims
- Defending wage and hour, ERISA, and other benefit-related claims
- Representing clients in investigations conducted by both federal and state Departments of Labor, the Equal

AA CONTACT INFO

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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

Employment Opportunity Commission and the U.S. Department of Justice

- Advised a leading CRO in Asia on the employment law aspects of its acquisition of CRO assets in the United States
- Advised a publicly-traded health services company on the employment law aspects of its acquisition of a health services division of a privately-held company for $105 million in cash
- Advised a leading healthcare services provider on the employment law aspects of its $60 million cash acquisition of a global sourcing company
- Advised a private equity-backed medical device repair services company on the employment law aspects of its sale of its wholly-owned operating subsidiaries to a strategic buyer operating in the medical device repair services industry
- Advised a publicly-traded health information technologies and clinical research company on the employment law aspects of its acquisition of a consulting business focusing on orphan drug designations
- Advised a private equity fund on the employment law aspects of its acquisition of a specialty pharmaceutical company
- Representing clients before the North Carolina Employment Security Commission
- Advising clients regarding the development of effective employee handbooks, policies and practices
- Representing employers and individuals in connection with allegations of violation of non-compete agreements, unfair competition and tortious interference with contract
- Providing training to management, human resource professionals and employees regarding numerous employment-related topics, including workplace discrimination and harassment, religion in the workplace, unemployment compensation, the Family and Medical Leave Act and the Uniformed Services Employment and Reemployment Rights Act
- Advising clients on variety of state and federal regulatory issues
- Serving as outside counsel to a state licensing agency

HONORS & AWARDS

- North Carolina *Super Lawyers,* Rising Star (2011, 2018)
- *The Best Lawyers in America*©, Litigation - Labor and Employment (2019)

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
  - Elder and Trustee (1999-2005; 2012-2017)
  - Clerk of Session (2013-2017)
- Class of 2003 Reunion Representative, University of North Carolina School of Law

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Rosemary G. Kenyon
Partner

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rkenyon@smithlaw.com

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.

EXPERIENCE

- Served as lead in-house employment and labor counsel to a Fortune 500 company for 13 years, during a period of rapid change that included major workforce restructurings, union organizational activity, numerous employment based lawsuits and claims (including several multiple plaintiff suits and systemic claims), multiple OFCCP audits (including corporate headquarters and glass ceiling), among other things.
- Lead employment lawyer in numerous merger and acquisition transactions in a wide range of industries that included the

AA CONTACT INFO

Cheryl Baber
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cbaber@smithlaw.com

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

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

resolution of significant transition issues regarding the misclassifications of workers (e.g., wage and hour, independent contractor), leased employee arrangements, liability for significant paid-time-off balances, professional employer organization arrangements, non-competition agreements and executive employment agreements, among other things.

- Conducted internal investigations into misconduct, embezzlement, harassment, threats of workplace violence and other wrongdoing, for both publicly-traded and private companies.
- Advised a global financial services technology company on employment-related matters in connection with its acquisition of a leading provider of deal analytics and valuation technology.
- Represented employers in the development of employment agreements, severance and non-competition agreements for senior level officers of both private and publicly-traded companies.
- Advised a leading global healthcare services company on employment-related matters in connection with its acquisition of a specialty laboratory and diagnostics products company.
- Represented CEOs and senior level officers of both private and publicly-traded companies in connection with their employment agreements in a wide range of industries, including the institutional health care, pharmaceutical, banking, technology and manufacturing industries, and in higher education.
- Represented national and global companies in major reorganizations and downsizings of their workforces, including the relocation of offices, in a wide-variety of industries including the pharmaceutical, hospitality, technology, utility and manufacturing industries.
- Provided strategic and risk management advice on sensitive and high-risk employment decisions and processes, corporate governance and the development of system-wide policies and handbooks.
- Advised a multinational Fortune 500 provider of product development and integrated healthcare services on employment-related matters in its merger with a NYSE-listed global information and technology services company, creating a leading information and tech-enabled healthcare service

CLERKSHIPS

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

provider. The equity market capitalization of the joined companies was more than $17.6 billion at closing.

- Represented a global solid state LED lighting and semiconductor manufacturing company in connection with the employment aspects of its announced agreement for its $850 million sale of assets to a publicly traded German semiconductor company. The transaction was terminated before completion due to regulatory considerations.
- Advised a specialty pharmaceutical company on employment-related matters in a $120 million merger with a subsidiary of a publicly-traded international pharmaceutical company.
- Successfully defended numerous whistleblower claims under federal and state laws.
- Successfully defended employers against systemic claims of race discrimination, and sensitive harassment and gender discrimination claims before the EEOC and the OFCCP.
- Successfully defended employers before OSHA in serious injury and fatality cases.
- Successfully defended employers in discrimination and employment contract lawsuits in federal and state court, including appeals.
- Advised employers on system-wide wage and hour and independent contractor classification issues under federal and state wage and hour laws and tax laws.
- Represented employers in government audits of I-9 compliance.

HONORS & AWARDS

- Fellow, College of Labor and Employment Lawyers, Inducted 2015
- *Chambers USA: America's Leading Business Lawyers,* Labor & Employment (2008-2018)
- *The Best Lawyers in America©,* Employment Law - Management (2016-2019)
- Women of Justice Award, Business Practitioner, *North Carolina Lawyers Weekly* (2012)
- North Carolina *Super Lawyers* (2012-2018)
- 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
  - Board of Governors (2005-2008)
  - Chair, Strategic Planning and Emerging Trends Committee (2008-2011)

  - Chair, Women in the Profession Committee (2001-2004)
  - Chair, Dispute Resolution Section (1995-1996)
  - Council Member, Corporate Counsel Section (1989-1997)
  - Sections of Labor and Employment, Litigation and Dispute Resolution
- American Bar Association
  - Sections of Labor and Employment, Litigation and Dispute Resolution
- Wake County Bar Association and Tenth Judicial District Bar
  - Grievance Committee (2013-2016)
  - Strategic Planning Committee (2015-2016)
- Saint Mary's College Alumnae Association, Board of Directors (Notre Dame, IN) (2015-present)
  - Committee Chair and Member of Executive Committee (2016-present)
- Community Music School of Wake County, Board of Directors (2014-present)
  - Secretary (2017-present)
  - Member of Executive Committee (2016-present)
  - Chair of Search Committee for Executive Director (2018)
- Habitat for Humanity of Wake County
  - Board Chair (2011-2013)
  - Board of Directors (2005-2013)
  - Honorary Co-Chair, Women's Build (2014)
  - Honorary Chair, 17th Annual Holiday Home Tour & Party (2017)
- Pines of Carolina Girl Scout Council
  - President (1992-1995)
  - Board of Directors (1986-1995)

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Kimberly J. Korando
Partner

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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 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

AA CONTACT INFO

Kristin Terry
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kterry@smithlaw.com

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

recognized organizations.

EXPERIENCE

- Regularly advises global companies based outside the U.S. (Japan, Germany, The Netherlands, Austria, France, U.K. and Canada) and outside North Carolina with regard to establishing North Carolina workforces and associated compliance with U.S. and North Carolina laws.

FLSA

- Enterprise-wide audits of worker classification and time recording practices and development of strategies for reclassifying misclassified workers and practical solutions for time recording practices (including donning/doffing, automatic clocking/deductions and use of remote devices for work) for manufacturing, healthcare, hospitality, distribution, technology and other industry employers.

EEO

- Successful defense of EEOC investigations and OFCCP compliance audits focusing on allegations of class-wide race, gender and disability discrimination in hiring, promotion, compensation and terminations, including challenges to criminal history, testing and other employee selection criteria.

- Successful pre-litigation resolution of allegations of systemic race and gender discrimination, including those made by current employees and supported by national and local civil rights groups, and allegations of harassment against executives and high ranking officials.

Affirmative Action

- Establishment and annual update of affirmative action plans for defense and other federal contractors (financial, healthcare, pharmaceutical, manufacturing, consulting, distribution, hospitality) with special emphasis on risk management regarding analysis of employment activity, compensation, recruiting and selection procedures.

Whistleblowing/Retaliation

- Successful defense of whistleblower and retaliation complaints before the U.S. Department of Labor, EEOC and other agencies, including environmental and financial fraud complaints.

Internal Investigations

- Retained as special counsel to conduct internal investigations into allegations of harassment, discrimination, code of conduct violations, embezzlement and root cause of management failures.

Restructuring

- Design of comprehensive workforce restructuring programs, including voluntary separation programs and employee selection and staffing processes that have been successfully defended before the U.S. Court of Appeals.

ADA/FMLA/Absence Management

- 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.

Crisis Management

- Coordinated and managed regulatory, communication and risk management response to high profile industrial accidents and fatalities and other workplace crises.

Labor

- Coordinated responses to union organization campaigns and collective bargaining with USW and IBEW.

Training

- Developed highly participatory mock trial training experience in which supervisors experience first-hand how their decisions play out in front of a jury which has been customized for employers in a wide range of industries and delivered across the country.

Technology and Related Policies

- Assisted companies with development of BYOD, remote work, social media and departing employees procedures designed to protect company reputation and assets.

HONORS & AWARDS

- *The Best Lawyers in America©,* Employment Law - Management, Labor Law - Management (2007-2019)
- *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 (2005-2018)
- Martindale-Hubbell AV Preeminent Rated since 1999
- North Carolina *Super Lawyers* (2006-2018)
- 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

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Patrick D. Lawler
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plawler@smithlaw.com

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.

EXPERIENCE

Advised a multinational Fortune 500 provider of product development and integrated healthcare services on employment-related matters in its merger with a NYSE-listed global information and technology services company, creating a leading information and tech-enabled healthcare service provider. The equity market capitalization of the joined companies was more than $17.6 billion at closing.

HONORS & AWARDS

- Aycock-Poe Scholarship
- North Carolina Law Review (2012-2013)
- North Carolina *Super Lawyers,* Rising Star (2018)

AA CONTACT INFO

Jacqueline Williams
Phone: 919.838.2050
jwilliams@smithlaw.com

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

SMITH ANDERSON
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Continued

PROFESSIONAL & COMMUNITY AFFILIATIONS

- North Carolina Bar Association
- Wake County Bar Association

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Caryn Coppedge McNeill
Partner

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Raleigh, North Carolina 27601
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cmcneill@smithlaw.com

Caryn McNeill leads Smith Anderson's Employee Benefits and Executive Compensation practice group, which has consistently received the highest ranking (metropolitan Tier 1) from *U.S. News & World Report* and *Best Lawyers*® "Best Law Firms" since 2010. She regularly advises public and private companies on all aspects of the design, implementation and administration of employee benefit plans and executive compensation arrangements, including stock option plans and other types of equity-based compensation arrangements. A significant part of her practice is devoted to counseling and negotiating on behalf of clients in connection with mergers and acquisitions. She also regularly assists employers, lenders and institutional fiduciaries with the structure and implementation of leveraged ESOP transactions.

EXPERIENCE

- Advised a multinational Fortune 500 provider of product development and integrated healthcare services on benefits-related matters in its merger with a NYSE-listed global information and technology services company, creating a leading information and tech-enabled healthcare service provider. The equity market capitalization of the joined companies was more than $17.6 billion at closing.
- Provided employee benefits advice to a global LED lighting and semiconductor manufacturing company in connection with its agreement to sell $850 million of assets to a publicly traded German company. The parties terminated the sale before closing due to regulatory considerations.
- Represented a global provider of biopharmaceutical services in its $1.1 billion initial public offering and listing on the New York Stock Exchange, including design and preparation of

AA CONTACT INFO

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PRACTICE AREAS

Employee Benefits and Executive Compensation

BAR & COURT ADMISSIONS

North Carolina

EDUCATION

Duke University, J.D., 1991

Davidson College, B.A., with honors in English, 1988

Holton-Arms School, 1984

new stock incentive plan and annual management incentive plan, and assistance with related disclosures.

- Served as company counsel with respect to ESOP's participation in $2.04 billion aftermarket auto parts industry merger.
- Represented a pharmaceutical company being acquired by a global biopharmaceutical company and negotiated related 280G treatment and future severance protection and incentive arrangements for seller's employees.
- Advised a public biotherapeutic company about the 409A issues associated with extending the term of expiring options and the correction of same.
- Represented an institutional ESOP trustee in connection with the purchase of 100% of the stock of a chemical supplier.
- Advise multiple companies about a variety of issues associated with the administration of their qualified retirement plans, including creating investment policy statements, reviewing investment performance and replacing investment options; analyzing fiduciary issues related to changes in employer contributions or other plan design issues due to changes in economic circumstances; and correcting operational failures arising in day-to-day plan administration.
- Advised a publicly traded health services company on the employee benefits aspects of its acquisition of a health services division of a privately held company for $105 million in cash.
- Advised a private equity fund on the employee benefits aspects of its acquisition of a specialty pharmaceutical company.

HONORS & AWARDS

- *The Best Lawyers in America©, Employee Benefits (ERISA) Law (2010-2019)*
- *The Best Lawyers in America*© "Lawyer of the Year," Raleigh Employee Benefits (ERISA) Law (2013, 2016, 2018)
- North Carolina *Super Lawyers* (2014-2018)
- *North Carolina Lawyers Weekly* "Leaders in the Law" Honoree (2017)
- Martindale-Hubbell AV Preeminent Rated
- Triangle Business Leader Media's Pro Bono Impact Award

PROFESSIONAL & COMMUNITY AFFILIATIONS

- President, North Carolina Bar Association (2017-2018)
- Carolinas Chapter of The ESOP Association
- National Association of Stock Plan Professionals
- Triangle Benefits Forum

- Chair, Board of Trustees, Ravenscroft School (2015-2017)
- Sewanee Parents' Council
- Fellow, American Bar Foundation

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expectexcellence®

Susan Milner Parrott
Partner

Wells Fargo Capitol Center
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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.

EXPERIENCE

- Served as lead employment lawyer in the representation of a publicly-traded specialty pharmaceutical company in its acquisition of a privately-traded specialty pharmaceutical company
- Served as lead employment lawyer for numerous acquisitions by a multi-state, publicly-traded convenience store operator
- Prepared executive employment agreement for the president and chief executive officer of a publicly-traded bank holding company
- Responsible for executive employment agreements required for the succession of the chief executive officer of a publicly-traded, global manufacturer of consumable products
- Successfully defended U.S. Department of Labor investigations of wage and hour exemption classification in various industries including banking, software, retail distributing, restaurant, civil engineering and pharmaceutical manufacturing

AA CONTACT INFO

Claire Dodd
Phone: 919.821.6693
cdodd@smithlaw.com

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

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

Duke University, B.A., with honors 1974

- Successfully defended North Carolina Department of Labor investigation of wage payment practices for retail distributing company
- Conducted internal audits of wage and hour and wage payment matters for clients in various industries, including banking, pharmaceutical manufacturing and sales, retail and internet/technology
- Advised a multinational Fortune 500 provider of product development and integrated healthcare services on employment-related matters in its merger with a NYSE-listed global information and technology services company, creating a leading information and tech-enabled healthcare service provider. The equity market capitalization of the joined companies was more than $17.6 billion at closing.
- Advised a private equity fund on employment-related matters in connection with its acquisition, equity and debt financing of a reference laboratory
- Advised a leading healthcare services provider on employment-related matters in connection with its $60 million cash acquisition of a global sourcing company
- Advised a leading provider of pharmacy-based patient care solutions and medication synchronization services to independent and chain pharmacies on employment-related matters in its approximately $41 million sale of the company to a publicly-traded buyer
- Advised a French multinational industrial and steel distributor on employment-related matters in connection with its acquisition of a controlling interest in a Virginia-based steel service center
- Appellate advocacy practice has included representation of clients before the North Carolina appellate courts, the Fourth Circuit Court of Appeals and the Supreme Court of the United States

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
- Wake County Bar Association
  - Professionalism Committee, Past Member
- Community Foundation
  - Wake County Advisory Board, Past Member

- White Memorial Presbyterian Church
  - Elder

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Kerry's practice focuses on representing employers in all types of employment related litigation. She regularly defends employers against EEOC charges and lawsuits in federal and state courts involving alleged discrimination, harassment and retaliation. Kerry advises companies of all sizes, including global companies, on a wide variety of employment law issues across a range of industries, including pharmaceutical and CRO, technology, retail, hospitality and manufacturing.

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 Supreme Court where the issue was whether pharmaceutical sales representatives are exempt as outside sales people under the FLSA.

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.

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

EXPERIENCE

- Successfully represented leading employers before the United States Equal Employment Opportunity Commission and state and local fair employment practices commissions across the country in connection with investigations of single claimant and class allegations

AA CONTACT INFO

Tracy Benning
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tbenning@smithlaw.com

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*
- Order of the Coif

Florida State University, B.S., 1985

- Conducted in depth analysis for acquiring companies to determine whether target companies had properly classified employees as exempt under the FLSA, determined financial risk of misclassifications to support indemnity provision, and recommended changes to classifications to avoid future liability
- Represented global pharmaceutical company in series of class and collective actions filed in Arizona, California, Florida and New York alleging that the company's failure to pay its pharmaceutical sales representatives overtime for hours worked in excess of 40 per week violated the FLSA and state law. The Supreme Court ultimately affirmed the entry of summary judgment for the company
- Retained as special counsel by 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
  - retaliation against "whistleblowers"
  - misconduct by high-ranking company officials
- Successfully defended wage and hour audits and complaint investigations conducted by the federal and state departments of labor involving donning/doffing in manufacturing plants, overtime, and misclassification issues (in a variety of industries) with exposure well in excess of $1 million
- Represented publicly-traded company in action brought under the anti-retaliation provisions of the Sarbanes-Oxley Act ("SOX") by former Internal Auditor who asserted his termination was in retaliation for having reported accounting and reporting irregularities to the company
- Represented convenience store chain in action filed in federal court in North Carolina by a member of the Sikh religion alleging religious and national origin discrimination in application of dress and grooming standards to screen out applicants
- Represented global pharmaceutical company in action filed in federal court in Tennessee and the Sixth Circuit Court of Appeals by former manufacturing plant employee alleging race and gender discrimination and harassment and retaliation
- Represented global pharmaceutical company in federal court action alleging race discrimination by employee in research and development
- Represented employers to secure (and to defend against) TROs and preliminary/permanent injunctions to enforce confidentiality, non-solicitation and non-competition agreements against former employees, and protect employers' trade secrets in many industries, including technology, logistics/transportation, health care (physicians/physical therapists), insurance (agents/brokers), construction, and contract research organizations
- Represented medical group in action filed by former physician-employee alleging that miscalculations of compensation due under an employment contract violated the NCWHA
- Retained by employers after EEOC issued cause findings for representation during the conciliation process and risk management of potential liability exposure
- Served as "in-house" employment litigation counsel to large company managing employment litigation in jurisdictions across the country

- Represented clients in arbitrations arising out of business sales and alleged violations of non-competition agreements
- Developed highly participatory and mock trial training exercise for HR 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 client's policy and workforce

HONORS & AWARDS

- *The Best Lawyers in America©,* Employment Law - Management, Litigation - Labor & Employment (2009-2019)
- *Business North Carolina's Legal Elite*, Employment
- *Chambers USA: America's Leading Business Lawyers,* Labor & Employment (2012-2018)
- Martindale-Hubbell AV Preeminent Rated
- North Carolina *Super Lawyers* (2012-2018)
- *Triangle Business Journal*'s "Women in Business Award" (2015)

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

The Post-#MeToo Era:
Emerging Trends, Best Practices


SMITH ANDERSON
The Post-#MeToo Era: Emerging Trends, Best Practices
Kimberly J. Korando
Taylor M. Dewberry
November 2018
EXPECT EXCELLENCE®


THE 15 FUNNIEST PEOPLE ALIVE
LOUIS C.K.
KING OF COMEDY
TIME
SEX, LIES & POLITICS
America's watershed debate on sexual harassment
On the Rocks

US EEOC Select Task Force Report: (June 2016)

"With legal liability long ago established,

with reputational harm from harassment well known,

with an entire cottage industry of workplace compliance and training adopted and encouraged for 30 years, …

…why does so much harassment persist and take place in so many of our workplaces? And, most important of all, what can be done to prevent it?

After 30 years—is there something we've been missing?"

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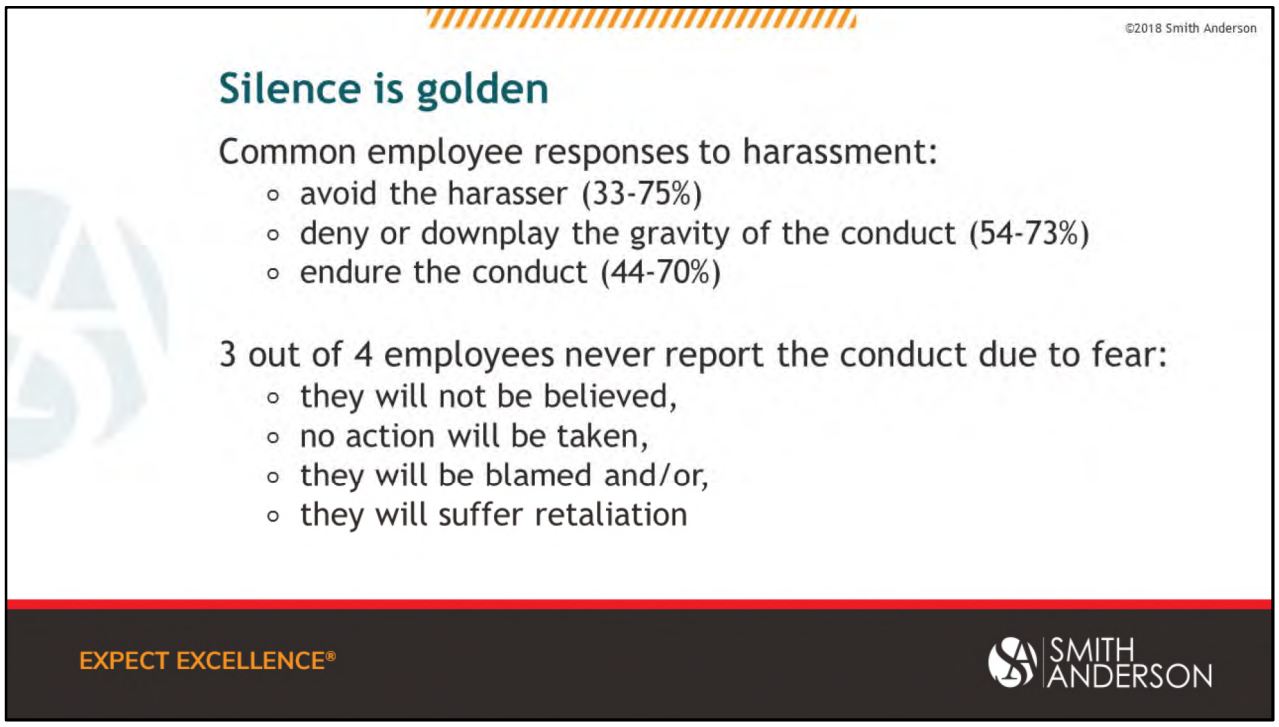


Study findings cited by EEOC Select Task Force Report (EEOC Report):

Lilia M. Cortina and Jennifer L. Berdahl, Sexual Harassment in Organizations: A Decade of Research in Review, 1 The Sage Handbook of Organizational Behavior 469 (J. Barling & C.L. Cooper eds., 2008)

Mindy Berman et al, The (Un)reasonableness of Reporting: Antecedents and Consequences of Reporting Sexual Harassment, 87(2) J. Applied Psychology 230 (2002). According to Bergman, "It is actually unreasonable for employees to report harassment to their companies because minimization and retaliation were together about as common as remedies and created further damage to people who had already been harassed. Further, because remediating the situation did not make the person whole—that is, did not overcome the damage caused by harassment – and helpful vs. hurtful responses were each found about 50% of the time, reporting is gamble that is not worth taking in terms of individual well-being."

Surveys show that reports, when made, are often followed by organizational indifference or trivialization, hostility or reprisals, and, according to one researcher, study results have shown that, "in many work environments, the most 'reasonable' course of action for the victim to take is to avoid reporting harassment."

EEOC Report, page v, 15-16.

It's not just about sex…

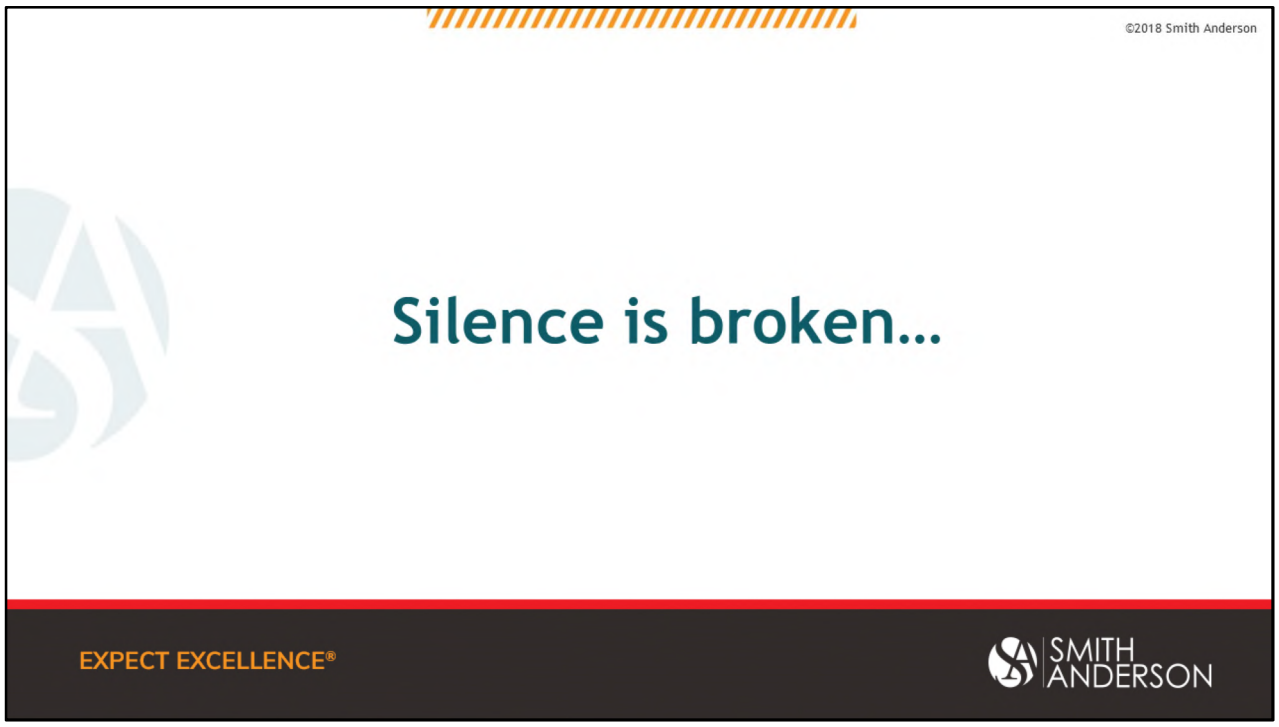
Effective harassment prevention extends to all legally protected characteristics

- Race, color
- Religion
- National origin
- Age
- Disability
- Veteran status
- Other legally protected characteristics

U.S. EEOC Select Task Force Report (June 2016)

Report issued to "reboot workplace harassment efforts" because:

"too many people in too many workplaces find themselves in unacceptably harassing situations when they are simply trying to do their jobs."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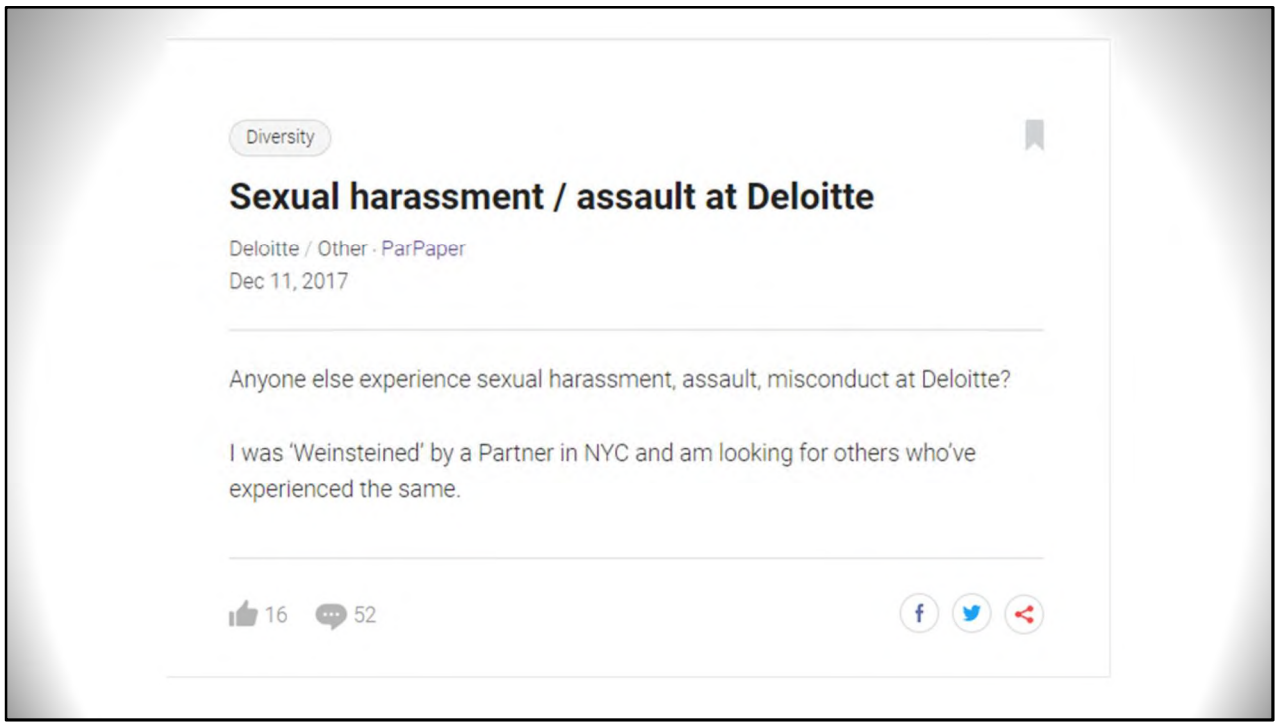
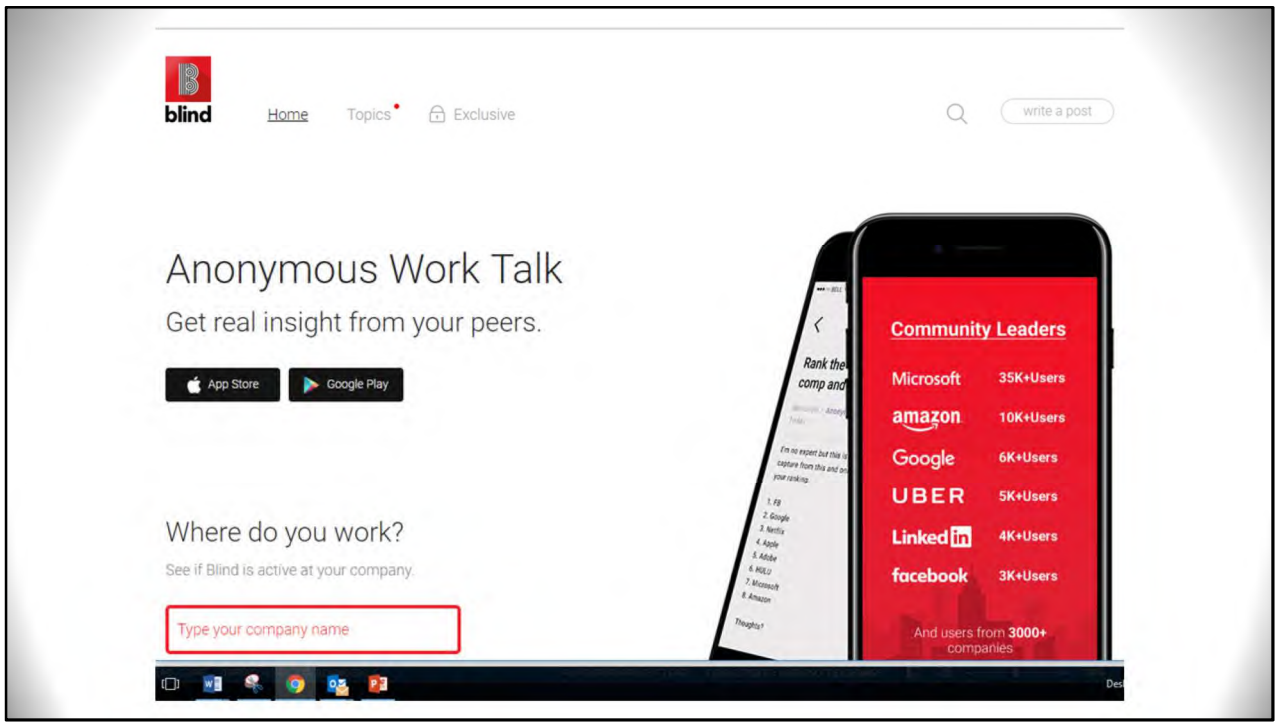
SMITH ANDERSON


Me too.
Suggested by a friend: "If all the women who have been sexually harassed or assaulted wrote 'Me too.' as a status, we might give people a sense of the magnitude of the problem."
Alyssa Milano
@Alyssa_Milano
If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet.
3:21 PM - Oct 15, 2017
68,366
25,129
53,685


Diversity
Sexual harassment / assault at Deloitte
Deloitte / Other · ParPaper
Dec 11, 2017
Anyone else experience sexual harassment, assault, misconduct at Deloitte?
I was 'Weinsteined' by a Partner in NYC and am looking for others who've experienced the same.
16
52


blind
Home
Topics
Exclusive
write a post
Anonymous Work Talk
Get real insight from your peers.
App Store
Google Play
Where do you work?
See if Blind is active at your company.
Type your company name
Community Leaders
Microsoft 35K+Users
amazon 10K+Users
Google 6K+Users
UBER 5K+Users
LinkedIn 4K+Users
facebook 3K+Users
And users from 3000+ companies

The Silence Breakers, Time Person of the Year 2017

Time Person of the Year 2017:
The Silence Breakers

"Women have had it with bosses and co-workers who not only cross boundaries but don't even seem to know that boundaries exist. They've had it with the fear of retaliation, of being blackballed, of being fired from a job they cannot afford to lose. They've had it with the code of going along to get along. They've had it with men who use their power to take what they want from women.

These silence breakers have started a revolution of refusal, gathering strength by the day, and in the past two months alone, their collective anger has spurred immediate and shocking results: nearly every day, CEOs have been fired, moguls toppled, icons disgraced….

…women who thought they had no recourse see a new, wide-open door."

Whole point of the high profile cases (media, politics) is to spur more cases against business leaders in traditional industries

Emerging Trends

- Lower tolerance for inappropriate but not unlawful behavior
- Stale claims not discounted (#whyididntreport)
- Public disclosures and reputational impacts driving prevention (regulatory agencies, courts not so much)
- StopIt and other reporting apps

Other third party vendors:

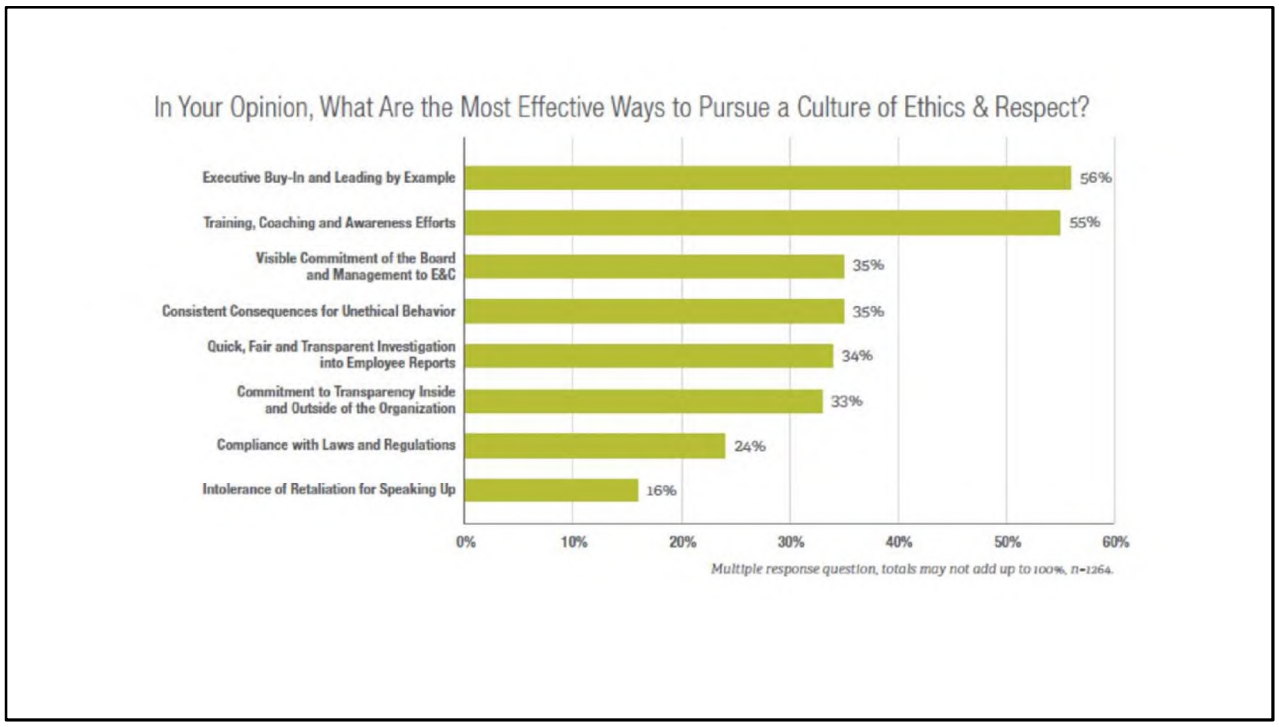
All Voices: https://allvoices.co/
Woices: https://allvoices.co/

January 2018 Lean In survey (https://leanin.org/sexual-harassment-backlash-survey-results):

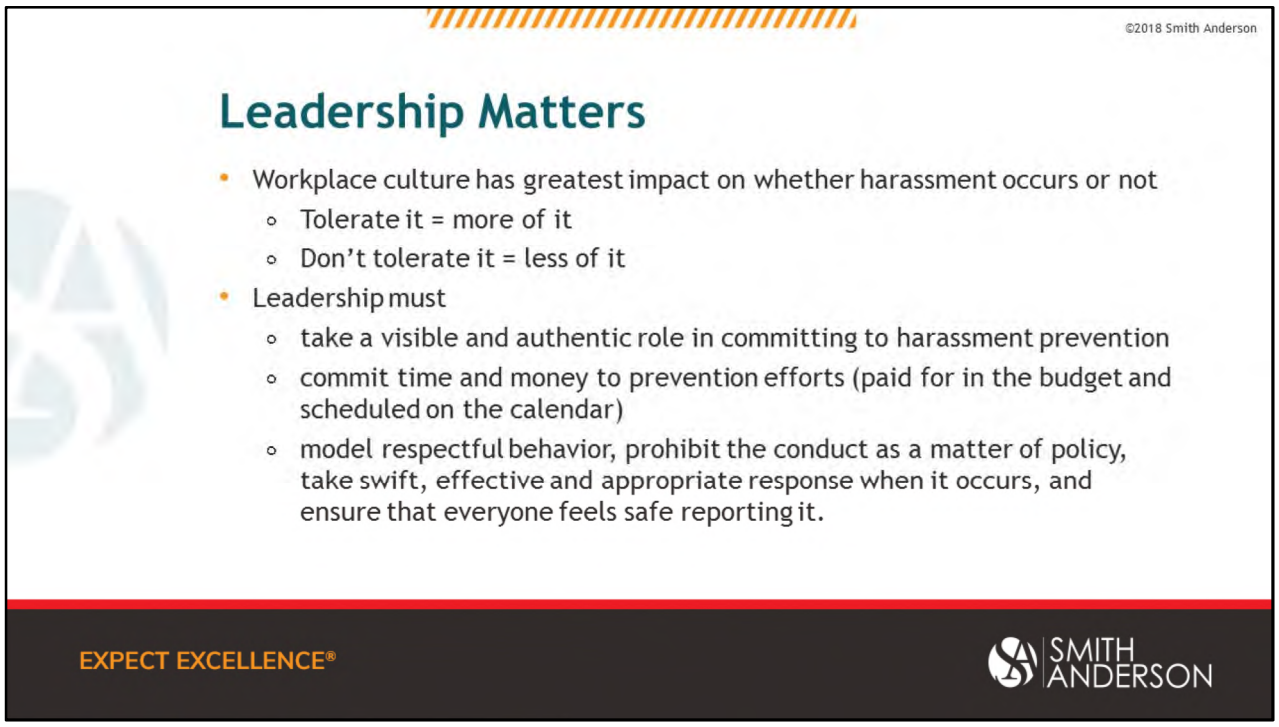
Almost half of male managers are uncomfortable participating in a common work activity with a woman, such as mentoring, working alone, or socializing together. This SurveyMonkey online poll was conducted January 23–25, 2018, among a national sample of 2,950 employed adults. The modeled error estimate is +/- 2.5% among employed adults. Unless otherwise noted, all statistics are from the January 23–25 poll.

Almost 30% of male managers are uncomfortable working alone with a woman—more than twice as many as before.

Senior men are 3.5 times more likely to hesitate to have a work dinner with a junior-level woman than with a junior-level man—and 5 times more likely to hesitate to travel for work with a junior-level woman. This SurveyMonkey online poll was conducted February 1–4, 2018, among a national sample of 5,907 employed adults.

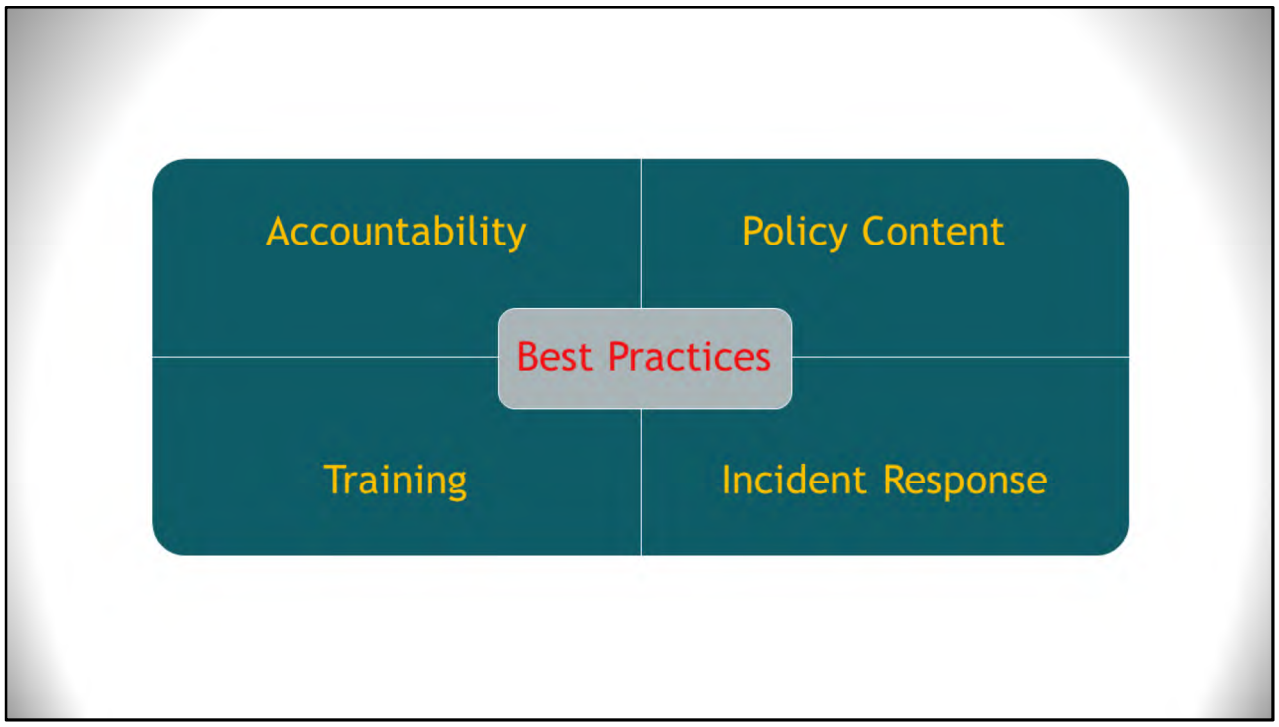


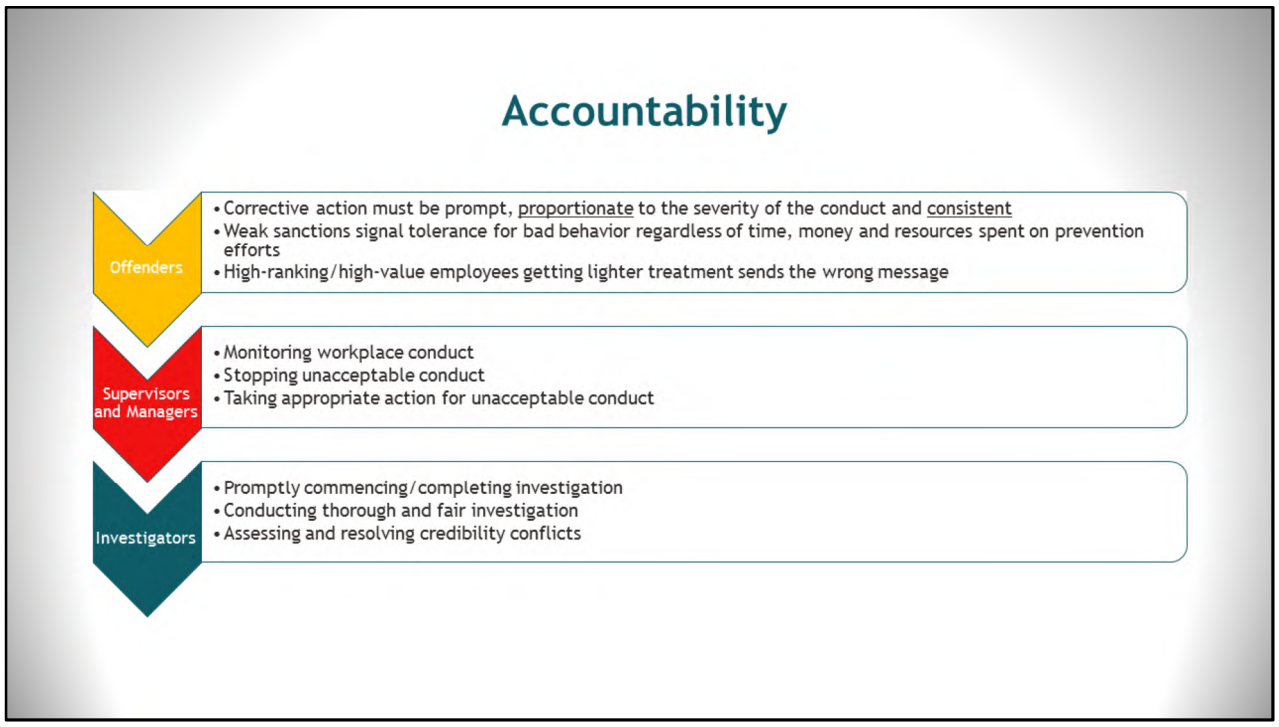
Source: NAVEX Global 2018 Ethics & Compliance Training Benchmark Report.



Leaders who do not model respectful behavior, who are tolerant of demeaning conduct or remarks by others, or who fail to support harassment prevention with necessary resources may foster a culture conducive to harassment.

Some employers have sought to demonstrate leadership commitment by notifying top executive(s) of all harassment reports (unless a conflict of interest exists) who then are briefed on investigation outcomes and prevention analysis. EEOC Report at 41.

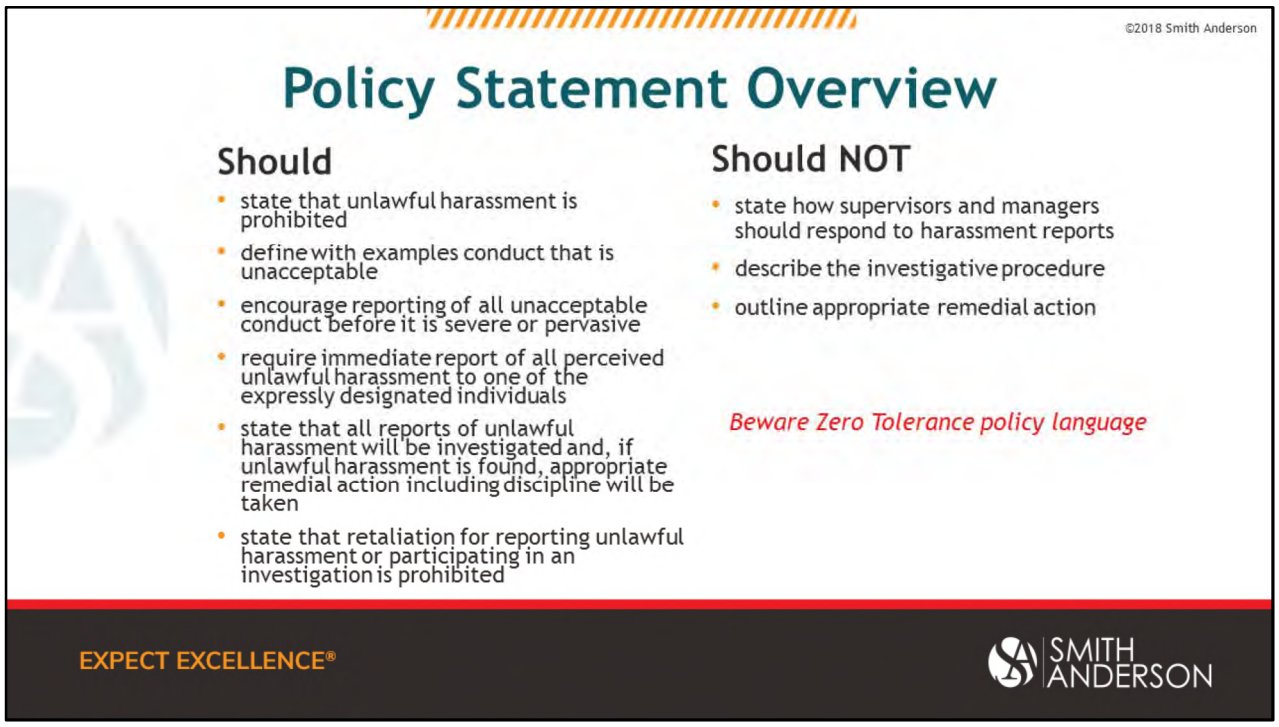

Accountability
Policy Content
Best Practices
Training
Incident Response



Workplace culture is manifested by what behaviors are formally and informally rewarded. EEOC Report, page 34-37.

Is the policy written and distributed to all employees?
It should be. Harassment claims frequently are accompanied by accusations that the employer ignores, tolerates or even condones harassment. An explicit policy prohibiting harassment that is clearly and regularly communicated to employees discourages such accusations and helps minimize liability for harassment, especially in cases where the first notice of the alleged harassment is the EEOC charge or lawsuit.

Are all employees required to sign a written acknowledgment form that they have read and understand the policy?
They should. This places your company in a position to assert an important affirmative defense against liability for a hostile environment created by supervisory personnel.



Expressly say that unlawful harassment will not be tolerated, that all harassment reports will be investigated and that, if harassment is found to have occurred, remedial action, including appropriate disciplinary action, will be taken.
These principles are the essence of what it takes to minimize liability for unlawful harassment, so make them the essence of the written policy. Putting them in the policy reminds you how to minimize liability, discourages accusations that your company tolerates harassment and, in cases where the first notice of the alleged harassment is the EEOC charge or lawsuit, discourages the frequent accusations that the claimant did not promptly report the alleged harassment because your company would not have done anything about it. These features also aid in establishing the affirmative defense for a hostile environment created by supervisory personnel.

Don't say too much.
Harassment policies that are distributed to employees are not the place to set forth statements about how supervisors and managers should respond to harassment reports, describe the investigative procedure, or outline appropriate remedial action. While these things will increase the likelihood of successfully defending harassment claims, they should not be set forth in the harassment policy. Instead, they should be set forth in documents that are distributed only to supervisors or managers.

Beware the zero tolerance policy.
While EEOC emphasizes that it is important for employers to make clear that NO harassment will be tolerated, it expresses concern that use of the phrase "zero tolerance" policy can be misleading to employees who may believe that all conduct regardless of how severe will result in the same discipline rather than being proportionate to the conduct and that this, in turn, could result in under-reporting of harassment by employees who do not want others to lose their jobs over relatively minor behavior that they just want 2 stopped. EEOC Report, page 37-40.

See Model Policy (attached)

The recent attention on sexual harassment has caused some employers to overlook the other types of unlawful harassment when developing or revising harassment policies. The policy should define not only sexual harassment but also other unlawful harassment, specifically harassment based on race, color, religion, gender, pregnancy, national origin, age, disability, and genetic information. Covered federal contractors and subcontractors with contracts entered into or modified on or after April 8, 2015 should expressly include sexual orientation or gender identity as unlawful bases for harassment.

The policy also should expressly state that the prohibition against unlawful harassment applies to all management (including the CEO, president and other high-ranking officials), and other supervisory personnel, coworkers and non-employees.

Sample language

Harassment of any employee in the workplace by management (including the president and other executives), supervisory personnel, co-workers, or nonemployees (including contractors, customers, or vendors) on the basis of race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age, disability, genetic information, veteran status or other characteristic protected by applicable law is a form of discrimination that violates the law and company policy.

Harassment is prohibited and will not be tolerated. No personnel are immune from this policy.

Define sexual and other types of unlawful harassment <u>and include examples</u>.
Defining unlawful harassment lets employees know exactly what kind of conduct may get them in trouble. Employees often do not understand that what is welcome workplace banter to one is harassment to another. Defining harassment using examples helps them to avoid conduct that might be perceived as unlawful harassment, minimizes the chance that employees who are disciplined for harassing conduct will contend that they had no idea their conduct was improper, and enhances the value of the policy in defending harassment claims and establishing the affirmative defense for supervisory hostile environment claims.

Sample language (Definitions)

Unlawful harassment may include:
(1) Verbal, nonverbal, or physical conduct that shows aversion, denigration, or hostility because of race, color, religion, national origin, sex (including pregnancy, gender identity and sexual orientation), age, disability, veteran status or any other protected characteristic when it creates an intimidating, hostile, or offensive working environment; unreasonably interferes with an individual's work; or adversely affects an individual's employment opportunities.
(2) Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when submission to the conduct is made either explicitly or implicitly a term or condition of an individual's employment; submission to or rejection of the conduct is used as the basis for employment decisions; or the conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. Sexual harassment can include conduct between members of the same sex.

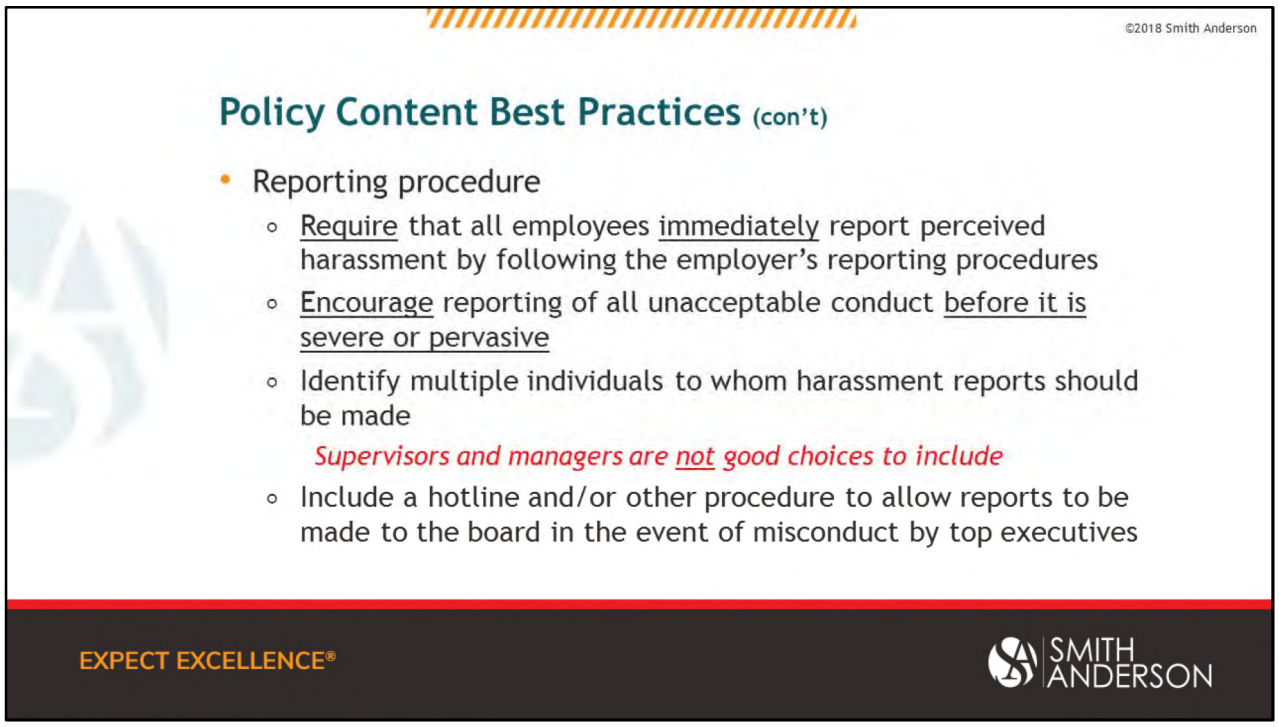
Sample Language (Examples)
Examples of types of behavior that may violate this policy include:
***Verbal/written**:*

- *Offensive comments, including slurs or ridicule of another's culture, accent or appearance;*
- *Humor, jokes or teasing about protected class characteristics, including comments about the individual's body;*
- *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);*
- *Threatening, intimidating or abusive words or acts;*
- *Rumors about other employees;*
- *Whistling.*
- *Sexual harassment also includes propositions, innuendo, flirtation, suggestive or sexist comments, or continued advances or other unwelcome conduct after the conclusion of a consensual relationship.*

***Visual/graphic/non-verbal**:*

- *Pictures, posters, signs, cartoons, computer transmissions/email/social media or online postings/texts;*
- *display of objects;*
- *graffiti;*
- *vandalism;*
- *exclusion.*

***Physical**: Touching, pinching, patting, brushing the body, hugging, assault, impeding access.*



Require that all employees immediately report perceived harassment by following the employer's reporting procedures. Stale claims are difficult to investigate and are often impossible to corroborate or disprove. Omitting this requirement breeds stale false claims. Including it not only discourages them but also helps to defend them.

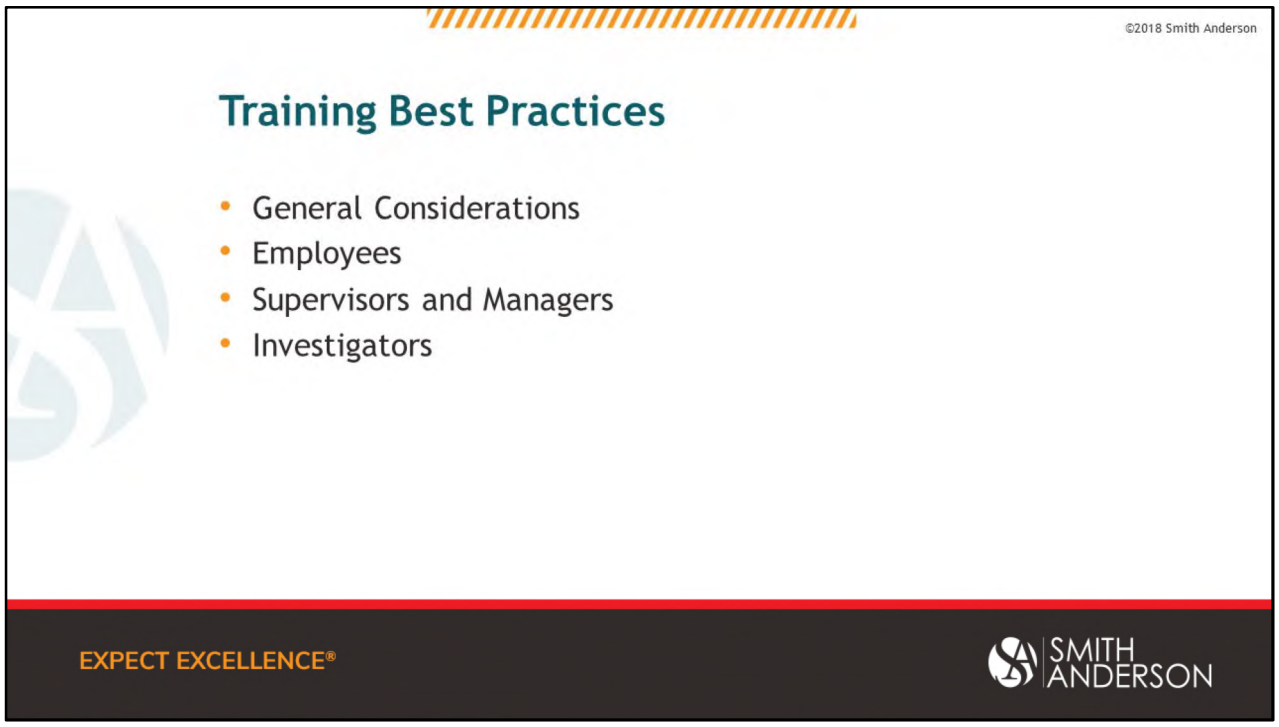
Identify the individuals to whom harassment reports should be made and provide information on how or where these individuals may be reached.
Doing so may help avoid liability even if the harassment occurred. Many times employers can avoid liability for harassment simply by taking certain actions once they receive a harassment report. An important key to minimizing employer liability in these cases is to increase the likelihood that harassment reports will be made to individuals who are trained to handle them and who can be trusted to carry out their duties appropriately. Select these individuals carefully and require all employees to report harassment to them. *Supervisors and managers are not good choices to include.*

Be sure to identify more than one person to whom reports can be made and encourage employees to pick the one with whom they would be most comfortable speaking. These features will preclude the possibility that the policy requires or encourages employees to report the harassment to the individual who happens to be the harasser. This is especially important for establishing the affirmative defense for supervisory hostile environment claims. Finally, identifying at least one woman to whom the report can be made enhances the value of the policy in defending harassment claims. *Again, supervisors and managers are not good choices to include.*

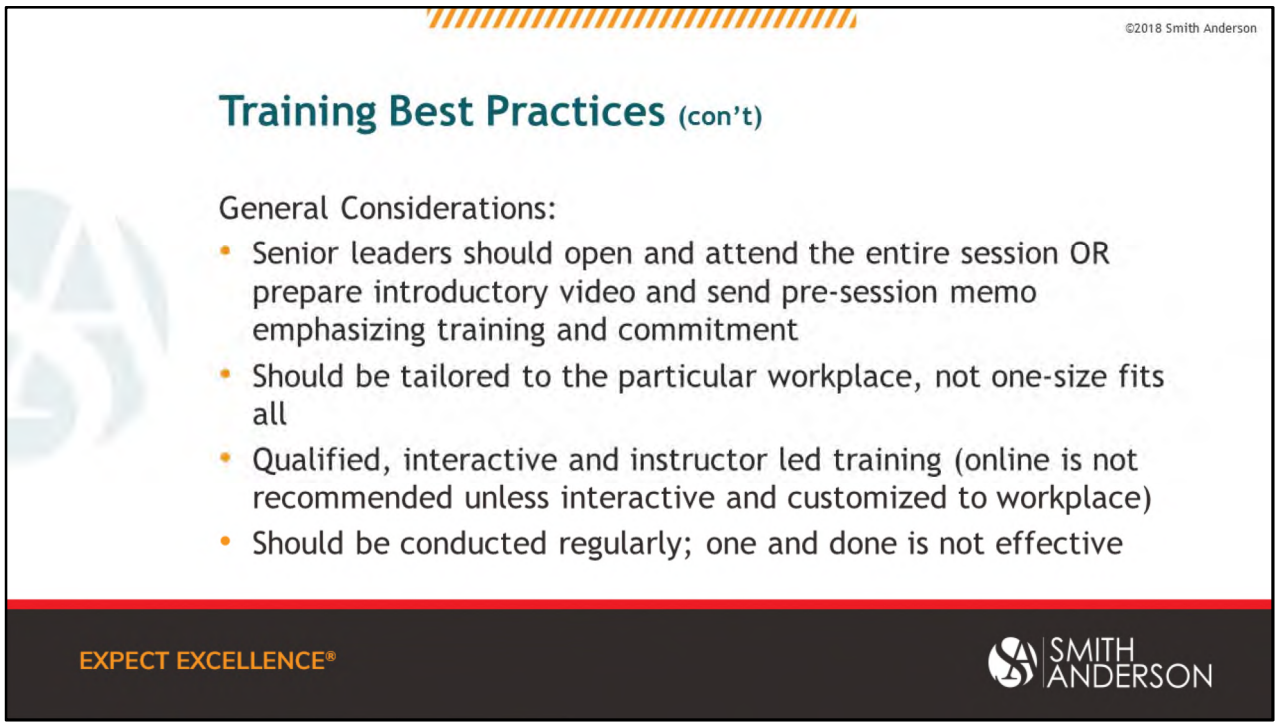
Sample Language

If you believe that you are being unlawfully harassed or retaliated against or you observe or otherwise become aware of such conduct in the workplace, immediately report the incident to one of the following individuals: _____ . If you are uncomfortable discussing the matter with any of these individuals, you may utilize the Company's reporting hotline [INSERT CONTACT INFORMATION].

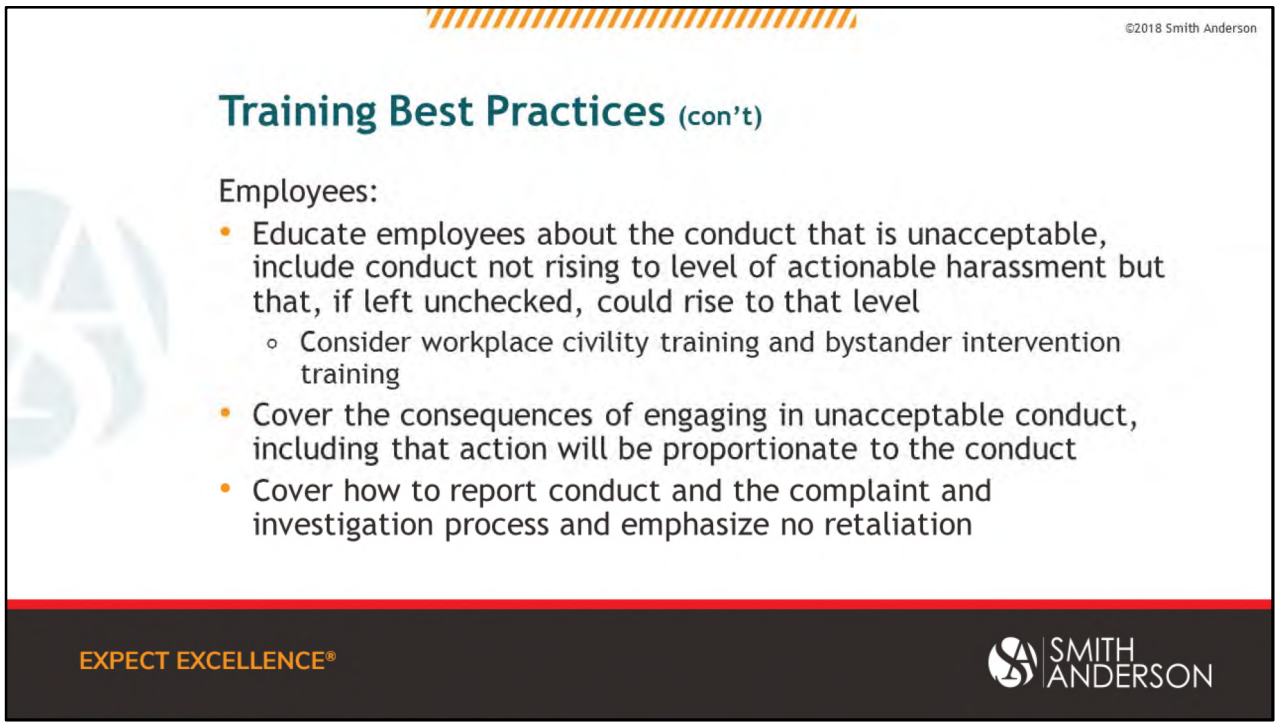
This procedure does not require reports to be made to your supervisor or to anyone whom you believe is participating in the conduct. Instead, you may choose from the above-listed individuals the person with whom you would be most comfortable speaking. Supervisors and managers who become aware of perceived harassment or retaliation must immediately report such matters to _____ .



EEOC Report, page 44-60.



Per EEOC, training is essential to effective harassment prevention, but it must be part of the holistic prevention efforts. Studies have shown that while training is particularly effective in increasing male employee understanding of what behaviors are unacceptable, it likely does not have a significant impact on changing employee attitudes. Moreover, some studies have indicated that participants who come into training with more of a tendency to harass (based on pre-training questionnaires) are more likely to have a negative reaction to the training. EEOC Report at 47 (citing Heather Antecol & Deborah Cobb-Clark, Does Sexual Harassment Training Change Attitudes? A View from the Federal Level 84 Soc. Sci. Q. 826 (2003); Lisa K. Kearney et al., Male Gender Role Conflict, Sexual Harassment Tolerance and the Efficacy of a Psycho educative Training Program, 5.1 Psychol. Of Men & Masculinity 72).



According to studies cited by EEOC, "incivility is often an antecedent to workplace harassment, as it creates a climate of 'general derision and disrespect' in which harassing behaviors are tolerated." EEOC Report at 55. Bystander intervention training has been used as a violence prevention tool, especially in schools, to prevent sexual assault. It has been shown to change social norms and empower students to intervene with peers to prevent assaults from occurring. This type of training could be used to teach employees to not simply stand by when unacceptable conduct occurs. EEOC Report at 57.

EEOC Develops Harassment Prevention Training Program for Employers

On October 4, 2017, EEOC announced that it was launching a training program available to employers for a fee, led by EEOC instructors. According to EEOC, the training for non-supervisory employees "focuses on WHAT TO DO – the words and actions that promote respect and fairness, and participants' responsibility for contributing to respect in the workplace. Using case studies, trainees strategize about bystander intervention and ways to help others who may be behaving in ways that are disrespectful or who are being targeted by disrespect. Finally, they use a feedback model to practice both giving and getting feedback about behavior that is uncivil or disrespectful." The 3-hour program for non-supervisory employees covers the following topics (italics denotes content only provided in non-supervisory training):

RESPECT
Develop a shared and specific understanding of respectful words and behavior.
Understand the relationship between perceived respect and organizational performance.

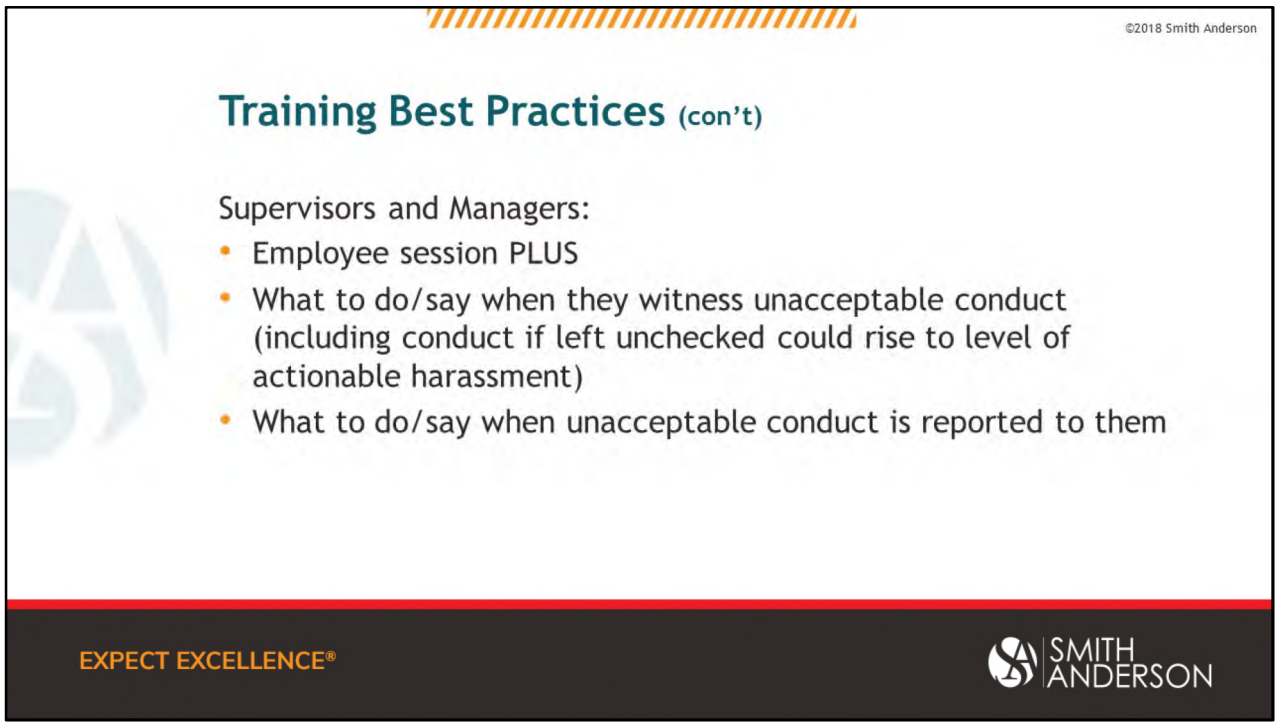
WHAT GOES WRONG – DERAILERS
Understand all forms of conduct that derail respect, including incivility, abusive behavior and unlawful harassment
Identify behavior that is problematic and/or unlawful
Define and understand unlawful harassment
Understand choices when an employee becomes aware of possible unlawful conduct

POLICY REVIEW
Be familiar with the organization's policy regarding harassing conduct
Understand rights and responsibilities under the organization's policy
Understand different options for reporting
Understand the process after a report of harassment is filed

STEPPING UP AND STEPPING IN
Understand the value of peer intervention/bystander intervention and develop a sense of collective responsibility
Identify the ways that bystanders can intervene when they observe or learn about problem behavior in the employee's specific workplace
Explore barriers to bystander intervention and how they can be overcome
Practice applying bystander intervention techniques to a simulated situation

FEEDBACK – GIVING AND GETTING THE GIFT
Understand the power of peer-to-peer effective feedback in workplace situations
Identify barriers to effective feedback in workplace situations
Learn a model for giving and getting feedback about derailer behaviors

LEARNING
Commit to making a change or taking action
Share that commitment with a colleague and hold each other accountable



EEOC Develops Harassment Prevention Training Program for Employers

On October 4, 2017, EEOC announced that it was launching a training program available to employers for a fee, led by EEOC instructors. According to EEOC, the training for supervisory employees "focuses on WHAT TO DO – the words and actions that promote respect and fairness, and participants' responsibility for contributing to respect in the workplace. Supervisors practice skills in responding appropriately to employee complaints and discuss how they can create a sense of respect for their employees, focusing on the employee's perceptions of fairness and the supervisor's responsibility to respond with emotional intelligence. Finally, supervisors are taught simple but effective ways to coach employees whose behavior might be a problem – early intervention to nip problems in the bud before they rise to the level of illegal harassment." The 4-hour program for supervisory employees covers the following topics (italics denotes content only provided in supervisory training):

RESPECT
Develop a shared and specific understanding of respectful words and behavior
Understand the relationship between perceived respect and organizational performance
Identify specific supervisory activities that promote and sustain respect

WHAT GOES WRONG – DERAILERS
Understand all forms of conduct that derail respect, including incivility, abusive conduct and unlawful harassment
Identify behavior that is problematic and/or unlawful
Define and understand unlawful harassment
Understand responsibilities when a supervisor or manager becomes aware of possible unlawful conduct

POLICY REVIEW
Be familiar with the organization's policy regarding harassing conduct
Understand rights and responsibilities under the organization's policy (*including supervisor's responsibility to report*)
Understand different options for reporting
Understand the process after a report of harassment is filed

HANDLING EMPLOYEE COMPLAINTS WITH FAIRNESS
Understand the importance of fairness
Apply fairness principles to complaint handling
Understand the psychology of employee complaints
Understand how to deal with request for confidentiality
Understand the essential components of an effective response to employee complaints
Understand the things to avoid when receiving an employee complaint
Identify barriers to effective complaint handling
Practice complaint handling

COACHING FOR RESPECTFUL BEHAVIOR
Learn a simple coaching model to deal with early problem behavior
Identify challenges to applying the model
Practice applying the model to rude/uncivil behavior

LEARNING
Commit to making a change or taking action
Share that commitment with a colleague and hold each other accountable

Training Best Practices (con't)

Investigators:

- Legal subject matter
- Credibility assessments/guidelines
- Investigation techniques and related legal aspects
- Report writing and document retention

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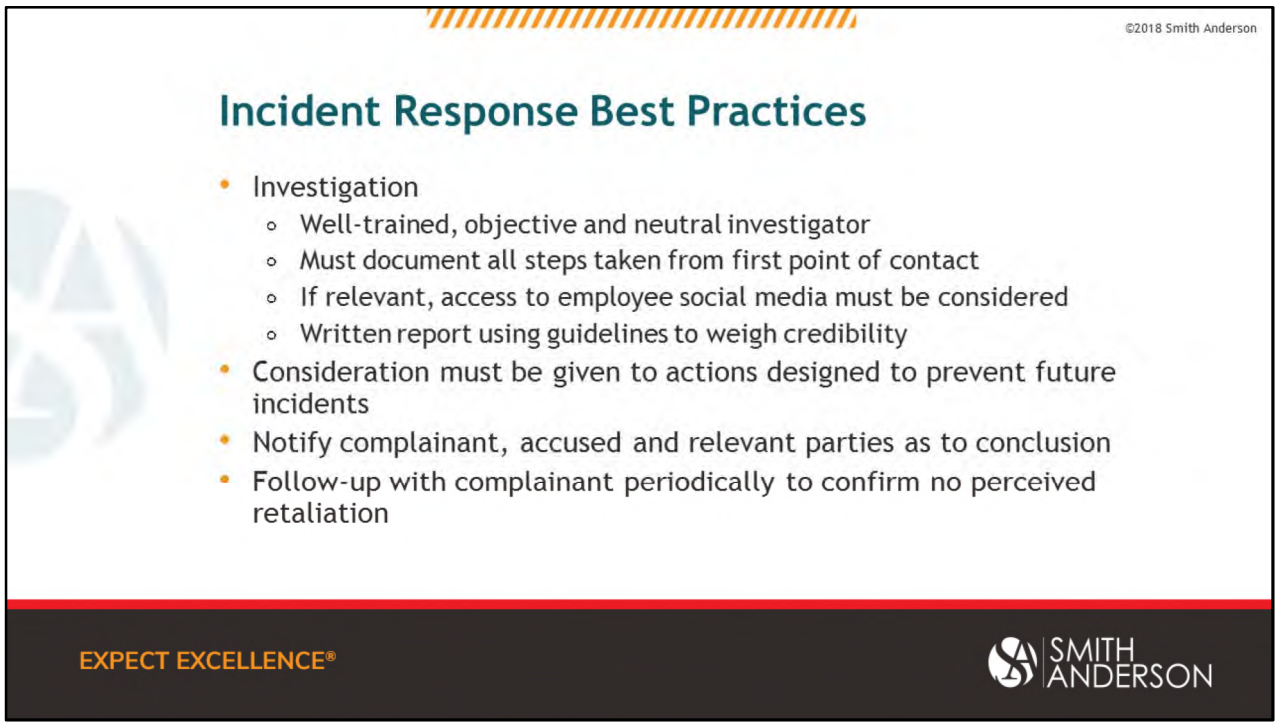

Give strong consideration to outside investigator in cases involving allegations against senior executives.

Final Thoughts

- Time to review and "reboot" your policies, practices and training
- Refocus on authentic leadership toward a respectful workplace culture
- Be mindful of less tolerance for unacceptable behavior and the impact of social media on the organization's reputation
- Avoid MeToo backlash (discourage avoidance tendencies/ensure due process)

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Aretha Franklin on the cover of the June 28, 1968, issue of TIME.
Boris Chaliapin


SMITH ANDERSON
The Post-#Me-Too Era: Emerging Trends, Best Practices
Kimberly J. Korando
Taylor M. Dewberry
November 2018
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MODEL WORKPLACE HARASSMENT POLICY

Harassment of any employee in the workplace by management (including executives), supervisory personnel, co-workers, or nonemployees (including contractors, customers, or vendors) on the basis of race, color, religion, sex (including pregnancy, gender identity, transgender status and sexual orientation), national origin, age, disability, genetic information, veteran status or other characteristic protected by applicable law is a form of discrimination that violates the law and company policy. Such harassment is prohibited and will not be tolerated. No personnel are immune from this policy.

If you believe that you are being or have been subjected to such harassment, you must immediately report the perceived harassment according to the reporting procedure below. All reports of perceived unlawful harassment will be investigated, and, if it is found to have occurred, appropriate disciplinary action up to and including termination of employment will be taken. Consideration also will be given to remedial action necessary to eliminate unlawful harassment and remove any detriment suffered by the aggrieved employee as a result of unlawful harassment. Retaliation against employees who report perceived unlawful 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.

Workplace Harassment Defined

The purpose of this policy is not to regulate the personal morality of employees. It is to ensure that in the workplace, employees are not subjected to harassment based on characteristics protected by law nor inadvertently engage in behaviors that may be perceived as such harassment.

Unlawful harassment may include:
(1) Verbal, nonverbal, or physical conduct that shows aversion, denigration, or hostility because of race, color, religion, national origin, sex (including pregnancy, gender identity, transgender status and sexual orientation), age, disability, veteran status or other protected characteristic when it creates an intimidating, hostile, or offensive working environment; unreasonably interferes with an individual's work; or adversely affects an individual's employment opportunities.

(2) Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when submission to the conduct is made either explicitly or implicitly a term or condition of an individual's employment; submission to or rejection of the conduct is used as the basis for employment decisions; or the conduct has the purpose or effect of unreasonably interfering with

an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Examples of types of behavior that may violate this policy include:

Verbal/written: Offensive comments, including slurs or ridicule of another's culture, accent or appearance; humor, jokes, teasing or asking unwelcome questions about protected class characteristics, including comments about the individual's body; 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); threatening, intimidating or abusive words or acts; rumors about other employees; whistling.

Sexual harassment also includes offering or implying an employment-related reward such as promotion or raise in exchange for sexual favors or submission to sexual conduct, or threatening or carrying out negative actions such as termination, demotion, denial of raise or leave due to rejection of such advances; comments about sexual activities, prowess or deficiencies; or propositions, innuendo, flirtation, suggestive or sexist comments or gifts, or continued advances or other unwelcome conduct after the conclusion of a consensual relationship. Sexual harassment can include conduct between members of the same sex.

Visual/graphic/non-verbal: Pictures, posters, signs, cartoons, computer transmissions/email/social media or online postings/texts; display of objects; graffiti; vandalism; staring; exclusion.

Physical: Touching, pinching, patting, brushing the body, hugging, assault, impeding access, vandalism.

Conduct prohibited by this policy is unacceptable in the workplace and in any work-related setting outside the workplace, such as during business trips, business meetings and business-related social events.

Rude, uncivil, disrespectful or otherwise unacceptable conduct that is not based on legally protected characteristics is not covered by this policy. However, it is covered by other company policies.

Reporting Procedure

If you experience unwelcome conduct in violation of this policy, or believe that you are being unlawfully harassed or retaliated against, or you observe or otherwise become aware of such conduct in the workplace, you are encouraged (if you are comfortable doing so), but not required, to promptly tell the person that the conduct is unwelcome and ask them to stop the conduct. Anyone who receives such a request is expected to comply with it and not retaliate against the person making the request.

If this action does not put a stop to the unwelcomed conduct or perceived harassment or retaliation or if you do not want to confront the individual, then you must immediately report the conduct to one of the following individuals: _____. If you are uncomfortable discussing the matter with any of these individuals, you may utilize the Company's reporting hotline [INSERT CONTACT INFORMATION]. Regardless of which approach you take, the company encourages prompt reporting of unwelcome conduct before it becomes severe or pervasive. Early reporting and intervention have proven to be the most effective method of resolving actual or perceived harassment.

This procedure does not require reports to be made to your supervisor or to anyone who you believe is participating in the conduct. Instead, you may choose from the above-listed individuals the person with whom you would be most comfortable speaking. Supervisors and managers who become aware of perceived harassment or retaliation must immediately report such matters to _____.

Disciplinary action, up to and including termination of employment, may result against supervisors and managers who fail to respond immediately and appropriately to the allegations.

All reports of alleged harassment or retaliation will be investigated. Under no condition will the investigation be conducted by or under the direction of the person reported to have engaged in this alleged harassment or retaliation. Confidentiality will be maintained to the extent consistent with adequate investigation and appropriate corrective action.

Evolving Leave Trends: Employer Challenges with Unlimited or Discretionary Leave, Paid Parental Leave and Mandatory Paid Sick Leave


SMITH ANDERSON
Evolving Leave Trends:
Employer Challenges with Unlimited or Discretionary Leave, Paid Parental Leave, and Mandatory Paid Sick Leave
Rosemary Gill Kenyon
Susan Milner Parrott
EXPECT EXCELLENCE®

Evolving Leave Trends

- Unlimited or Discretionary Leave
- Required Paid Sick Leave – State and Local Laws
- Parental Leave

Employer Challenges

- Meeting needs of workforce and flexibility
- Addressing accommodations under the ADA
- Compliance with overlapping federal and state laws (e.g., FMLA)
- Coordinating use of overlapping leave programs
- Multistate employers
- Managing absenteeism
- Avoiding claims of discrimination

I. Discretionary Paid Leave

- "Unlimited" vacation or paid time off
- "Discretionary" paid leave
- "Flexible" leave
- "Self-Managed" leave
- Trending in popularity: Netflix; Kronos; GE exempt employees
- Various estimates show only 1-3% of employers offer such leave

Discretionary Leave - Pros

- Could increase employee morale.
- Gives covered employees flexibility in when to take time off without worry as to whether sufficient time has been accrued or whether they will lose unused time.
- May be a good recruiting tool.
- Provides potential for administrative efficiency if don't have to track time.
- Reduces financial liability for employer—no vacation accrues, therefore, no accrued liability and no expense for payout at termination.

Discretionary Leave - Cons

- Ill-suited for nonexempt employees.
- Can be abused, exploited by employees.
- May be difficult to coordinate with other paid and unpaid leave benefits such as FMLA or paid sick leave.
- Could negatively affect morale if employees are reluctant to take vacation or uncertain of employer's expectations.
- If employees have been misclassified as exempt, employer will lack time records.
- Could make planning difficult if there are uncertainties about how long employees will be out.

Transition from Accrued Leave to Discretionary Leave with Care

- Consider how to treat unused leave accrued under existing policy.
  - State law may dictate aspects of transition process.
    - Does policy state that it can be changed?
  - Could pay for/cash out unused leave at time of change.
  - Allow time to use accrued before making the change.
  - Separately track the accrued balance and pay it out at termination (if so required).
- Give adequate notice of the impending change.
- Assess other current benefit plans for coordination concerns.

Tips for Drafting a Discretionary Leave Policy

- Avoid use of "unlimited."
- Determine which employees will be eligible.
- Employee must request time and get approval.
- Be clear that approval of requested leave is in the employer's discretion.
- Emphasize that the leave has no job-protection status.

Tips for Drafting a Discretionary Leave Policy (cont'd)

- State that time off does not accrue, that there is no carryover, and that there is no payout at termination.
- State that leave cannot be used during resignation notice period.
- Prohibit other employment during period of leave.
- Failure to comply with policy is grounds for denial of pay.

Tips for Drafting a Discretionary Leave Policy (cont'd)

- Consider limiting consecutive days or requiring minimum workdays between vacation periods.
- Require a set return to work date (the leave is not available for indefinite/open-ended leaves).
- Clarify that the leave is not applicable to any time off covered by other paid or unpaid leave or benefit programs (*e.g.*, FMLA, ADA, STD/LTD, sick, bereavement, jury, parental) or not applicable to absences eligible for pay through other company benefit plans or programs.

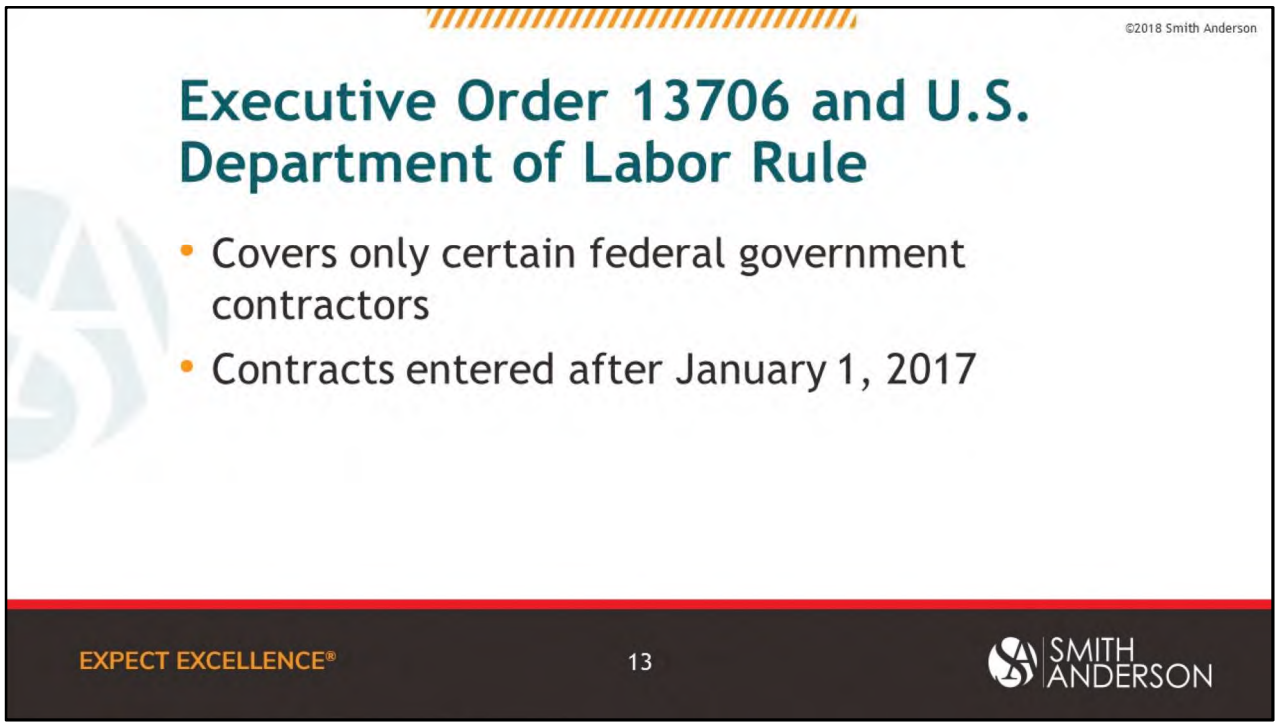
Additional Considerations

- California law issues – plaintiff's lawyers looking for ways to challenge (is it really "use it or lose it;" do limitations on use turn it into an accrual policy?).
- Possible discrimination concerns if applied in discriminatory fashion.
- No judicial guidance on legality to date.

II. Paid Sick Leave Laws

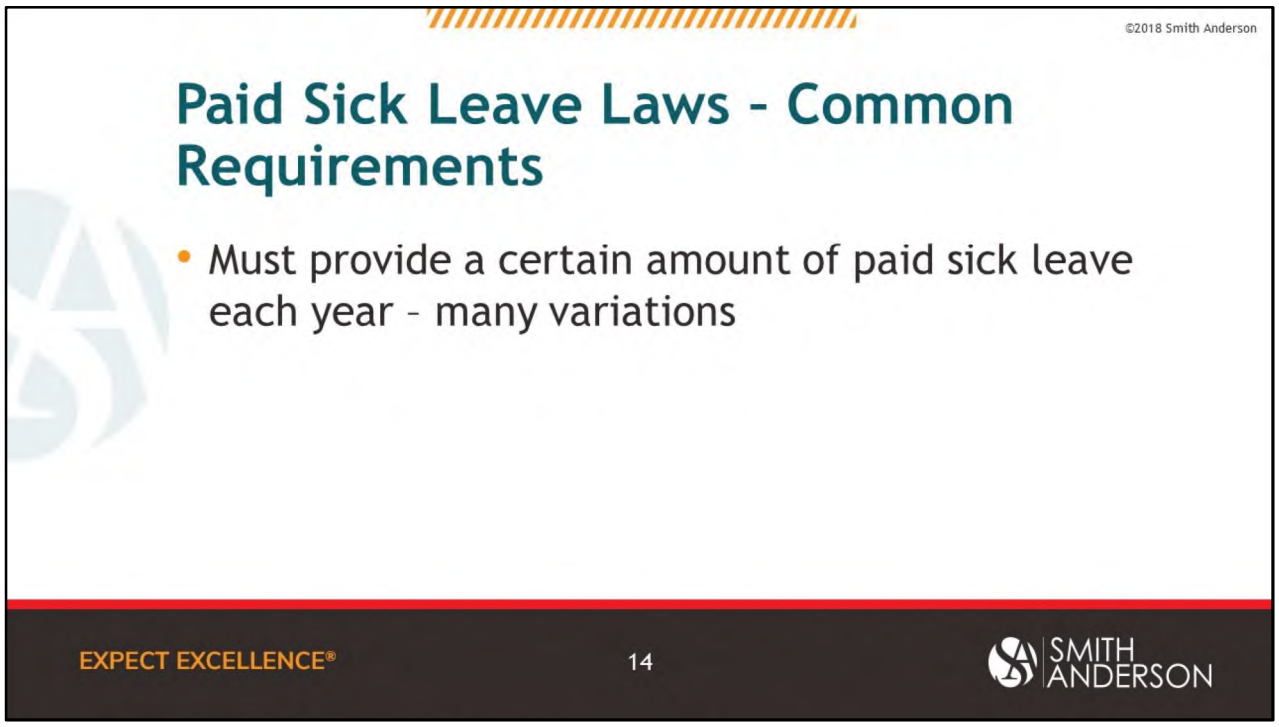
A growing number of states and localities are requiring employers to provide paid sick leave to employees

- At least 11 states and DC: Arizona, California, Connecticut, District of Columbia, Maryland, Massachusetts, Michigan, New Jersey, Rhode Island, Oregon, Vermont and Washington
- Many municipalities



U.S. Department of Labor Rule and Executive Order 13706 applies to 4 types of contracts:

1. Procurement contracts for construction covered by the Davis-Bacon Act.
2. Contracts for concessions, meaning the federal government grants a right to use federal property to furnish services (such as furnishing food, lodging, automobile fuel, souvenirs, recreational equipment, etc.).
3. Contracts in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public (examples of which include leases of space in a federal building to a contractor who operates a child care center, credit union, gift shop, barber shop, coffee shop, fitness center, etc.).
4. Contract for services covered by the Service Contract Act (SCA).

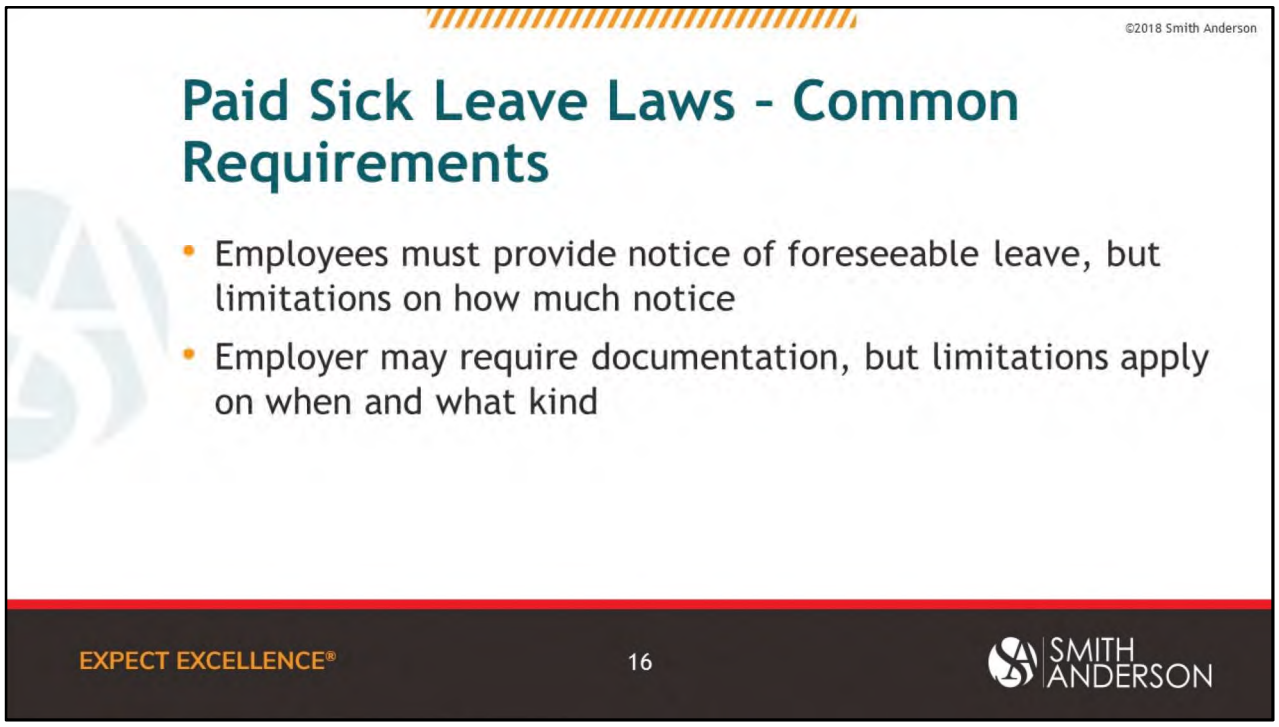


Examples

- NJ - 1 hour per 30 work hours, with a cap no less than 40 hours per year
- Connecticut - 1 hour per 40 work hours, with a cap no less than 40 hours per year
- Arizona - 1 hour per 30 work hours, with a cap no less than 40 hours per year (employers with 15+ employees) or 24 hours (employers with 1-14 employees
- E.O. – 1 hour per 30 hours worked, with a cap of 56 hours
- Many states and E.O. also allow frontloading hours

Carryover examples:

- NJ, Connecticut: no less than 40 hours, if accrual
- Arizona: no less than the cap
- E.O.: no less than 56 hours



Notice examples:

- NJ and E.O. – cannot require more than 7 days' notice
- Other states – reasonable notice

Medical documentation examples:

- NJ and E.O. – Only for a minimum absence of 3 or more days

Paid Sick Leave Laws - Common Requirements

- Employer must establish a paid sick leave policy
  - Posters required in most states
- Confidentiality requirements
  - Need HR processes and limit supervisory involvement
- Anti-retaliation protections

Waiting period examples:

- NJ: 120 days of employment
- California: 90 days
- Connecticut: 680 hours of employment

Coordinating Paid Sick Leave Laws and Paid Time Off Policies or FMLA

Most laws allow compliance through PTO policies

- But most PTO policies will need to be revised to comply
- Including discretionary or unlimited PTO policies

Manage overlap with FMLA

- Notice requirements – both employer and employee
- Medical documentation

Paid Sick Leave - Action Items

- Determine whether workforce is covered by one of these new laws
- Review PTO, vacation, sick pay, and related leave policies to revise as needed
- Handbook nightmare

III. Paid Parental Leave for Employees

What it is:

- Leave granted to eligible employees following the birth of the employee's child or the placement of a child with the employee in connection with adoption or foster care
- Leave for the purpose of bonding with the child

Paid Parental Leave for Employees

What it is not:

- Pregnancy-related medical leave ("leave related to any physical limitations imposed by pregnancy or childbirth." EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues)

What Benefits and Job Protection Does a New Parent Currently Have?

Federal:

- Family Medical Leave Act (FMLA)
  - Up to 12 weeks of unpaid, job-protected leave per year
  - Employer must have 50 or more employees
  - Employee must have worked for employer at least 12 months, 1,250 hours over the past 12 months, at a location where the employer employs 50 or more employees within 75 miles

What Benefits and Job Protection Does a New Parent Currently Have?

State/Municipal:

- Many states have family leave laws similar to FMLA
- A small but increasing number of states are requiring paid parental leave (pay may be less than 100% of current pay); for example: California, Massachusetts (2021), New Jersey, New York, Oregon, Rhode Island, Washington (2020).
- Some municipalities require paid parental leave (some just for public employees).

United States Lags Behind Other Developed Nations in Providing Paid Parental Leave

- Of 41 countries surveyed, U.S. is the only country that does not mandate paid leave for new parents. (Organization for Economic Cooperation and Development 2015); Pew Research Center
- U.S. has the least generous paid parental leave policies of 21 high-income countries. (Center for Economic and Policy Research, 2009, "Parental Leave Policies in 21 Countries: Assessing Generosity and Gender Equality")

Some Private Employers Are Stepping Up to Provide Paid Parental Leave

- From 2015 to 2017, approximately 75 large companies issued press releases on new or expanded parental leave policies (Netflix, Gates Foundation, Google, Facebook, Walmart, Amazon, Apple)
- "Paid Parental Arms Race" (Harvard Business Review)
- May provide the company with reputational benefits
- May confer competitive edge in recruitment
- May help in retaining workers and increasing productivity

So, As An Employer, You Want To Compete in the Paid Parental Leave "Arms Race"

Suppose you adopt a policy that provides:

- 6 weeks of paid parental leave for "primary caregivers"
- 2 weeks of paid parental leave for "secondary caregivers"
- 4 week transition back to work flexibility period for "primary caregivers"

The parental leave is separate from the medical leave biological mothers receive for childbirth.

Good idea?

- Not such a good idea – this is the policy challenged by the EEOC in its suit against Estée Lauder filed in the summer of 2017 in the U.S. District Court for the Eastern District of Pennsylvania and settled this summer.
  - EEOC: Estée Lauder engaged in sex-based pay discrimination in violation of the Equal Pay Act and Title VII of the Civil Rights Act.
- Charging Party asked for 6 weeks as the "primary caregiver" and was informed that biological fathers were only entitled to "secondary caregiver" leave of 2 weeks.
- Consent decree: approximately $1,000,000 to 210 male employees who received 2 weeks rather than 6 weeks.
- New policy: 20 weeks of paid leave for child bonding regardless of gender or caregiver status.

- EEOC: "Parental leave policies should not reflect presumptions or stereotypes about gender roles. When it comes to paid leave for bonding with a new child or flexibility in returning to work from that leave, mothers and fathers should be treated equally."
- "Primary caregiver" type policies are being challenged – ACLU contends JPMorgan Chase's policy discriminates against new fathers.

What Should Employers Do Now?

- Review existing policies
  - Any "bonding" policies? If so, applied equally?
- If creating a new policy:
  - Check state and local laws
  - How will the new policy coordinate with existing policies? (Ex. Run concurrently with FMLA, not in addition to)
  - Consider:
    - paid or unpaid
    - % of pay
    - eligibility requirements (*e.g.*, length of employment and number of hours)
    - procedures (*e.g.*, in case of the birth mother, the leave commences at conclusion of STD/sick leave benefit for employee's own medical recovery)
    - restrictions (*e.g.*, can only be taken in first 12 months in single continuous block; runs concurrently with FMLA)

Legislative Proposals & Examples

- Family and Medical Insurance Leave Act providing up to 12 weeks of family leave at up to 2/3 of pay. (Sen. Gillibrand, D-NY)
- Allow new parents to draw Social Security benefits early and delay retirement benefits. Two months off at 2/3 regular salary to care for newborn or newly-adopted child. (Sen. Rubio, R-FL)
- Workflex in the 21st Century Act gives workers between 12 to 20 days of paid sick time depending on the size of the company and employee's tenure. (Sen. Walters, R-CA)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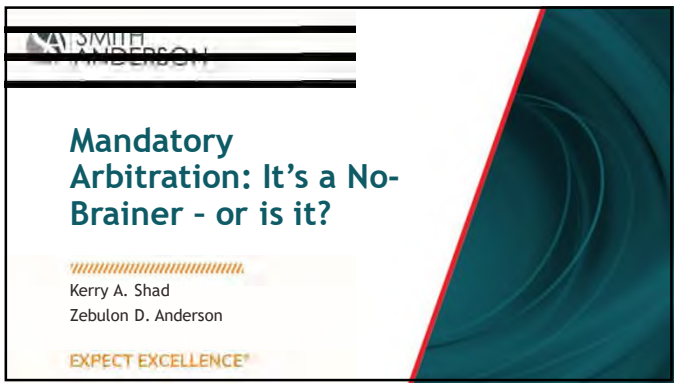
Mandatory Arbitration :
It’s a No-Brainer - or is it?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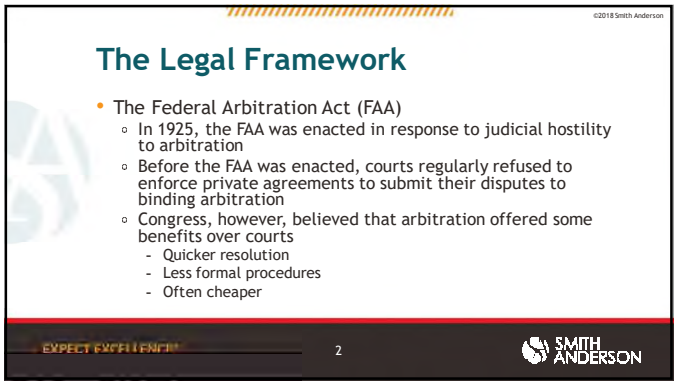
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The Legal Framework
• The Federal Arbitration Act (FAA)
◦ In 1925, the FAA was enacted in response to judicial hostility to arbitration
◦ Before the FAA was enacted, courts regularly refused to enforce private agreements to submit their disputes to binding arbitration
◦ Congress, however, believed that arbitration offered some benefits over courts
- Quicker resolution
- Less formal procedures
- Often cheaper
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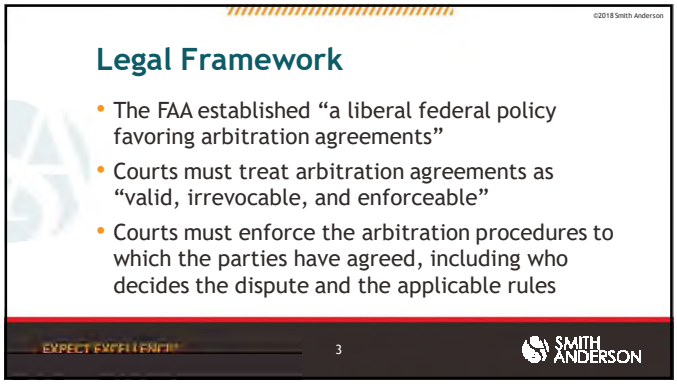
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Legal Framework
• The FAA established "a liberal federal policy favoring arbitration agreements"
• Courts must treat arbitration agreements as "valid, irrevocable, and enforceable"
• Courts must enforce the arbitration procedures to which the parties have agreed, including who decides the dispute and the applicable rules
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Arbitration in Employment Agreements

Legal Framework

- §2 of the FAA states that it applies to written arbitration provisions "in any maritime transaction" or in any "contract evidencing a transaction involving commerce"
  - Some have argued that the FAA should not apply to employment agreements because they are not commercial agreements – they do not relate to a "transaction involving commerce"

Legal Framework

- §1 of the FAA clarifies that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce"
  - Some have argued that the FAA should not apply to employment agreements because employees are "workers engaged in interstate commerce"

Legal Framework

Circuit City Stores v. Adams (U.S. 2001)

- In Circuit City, the Court rejected the argument that the FAA did not apply to employment agreements
- And, it interpreted the §1 exclusion to apply only to seamen, railroad employees, and other *transportation* workers
- So, this means that most employment agreements may include arbitration provisions

Legal Framework

Gilmer v. Interstate/Johnson Lane (U.S. 1991)

- The issue in this case was whether ADEA claims were subject to arbitration and a waiver of the judicial forum
- The Court noted that prior cases had held that statutory claims may be subject to arbitration
- It concluded that, like other statutory claims, ADEA claims may be subject to arbitration
- It explained "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum"
  - That means that an arbitration agreement may change the dispute resolution forum for statutory claims from the courts to arbitration; however, the agreement cannot include a waiver of substantive statutory rights

Legal Framework

- The Court rejected the argument that the ADEA implicitly intended to prevent the arbitration of ADEA claims
- The Court also rejected arguments that suggested that arbitration was improper because it negatively impacted the ability of the EEOC to eliminate discrimination
  - The EEOC still may investigate and litigate, even if the employee waives the right to proceed with litigation
  - The EEOC also can bring class or collective actions, even if the employee waives the right to pursue such a claim in court

Legal Framework

- In tandem, *Circuit City* and *Gilmer* make clear that employers may include arbitration provisions in employment agreements that require the arbitration of statutory employment claims and prevent the litigation of such claims in court
- As a result, more and more employers are requiring the arbitration of employment disputes as a condition of employment

Legal Framework

Green Tree Financial v. Randolph (U.S. 2000)

- In this case, the party who sought to avoid arbitration argued that the arbitration provision was unenforceable because it did not address the cost of arbitration, and, therefore, she faced a risk that she could not pursue her claim because it would be too expensive
- The Court explained that "it may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum"

Legal Framework

- However, to avoid arbitration the individual must have evidence of prohibitive costs – the individual "bears the burden of showing the likelihood of incurring such costs"
- So, if an employer wants to minimize the risk that its arbitration agreement will be deemed unenforceable, it will agree to pay much of the cost

Legal Framework

Epic Systems v. Lewis (U.S. 2018)

- In this case the Court addressed the issue of whether the NLRA prevents the enforcement of arbitration agreements that require employees to bring individual claims in arbitration and waive their ability to pursue collective or class claims
- Starting in 2012, the NLRB started to advance this argument, and courts and governmental representatives took conflicting positions

Legal Framework

- §2 of the FAA states that courts may refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract"
- State contract law generally prevents the enforcement of illegal contracts
- The employees first argued that the NLRA renders the waiver of class or collective actions illegal, which thereby provides a ground for revoking the arbitration agreement *under the FAA*

Legal Framework

- According to the Court, even if the NLRA prohibited such waivers and made them "illegal", §2 does not apply
- §2 allows courts to refuse to enforce arbitration agreements based on contract defenses that apply to "any contract," such as fraud, duress, and unconscionability
- It does not apply to defenses that apply *only* to arbitration contracts – such as a defense based on an argument that arbitration waivers of class and collective actions are illegal

Legal Framework

- The Employees next argued that the NLRA itself overrides the FAA and prevents the waiver of class or collective claims
- §7 of the NLRA gives employees the right to self-organization and to bargain collectively
- The Employees argued that such language clearly commands that they have the right to pursue class or collective actions
- The Court disagreed

Legal Framework

- So, an "arbitration agreement . . . must be enforced as written"
- And, it may include a requirement that statutory claims be pursued individually in arbitration
- And, it may include a waiver of class or collective actions

Legal Framework

- The dissent focused mostly on policy and legislative history arguments
- In response, the Court stated: "It is the business of Congress to sum up its own debates in its legislation, 'and once it enacts a statute' [w]e do not inquire what the legislature meant; we ask only what the statute means.'"

Legal Framework

- Finally, it is important to note that an arbitration agreement is a form of contract
- So, when an arbitration agreement is challenged, regular state law contract principles apply
  - Consideration
  - Does the language clearly manifest an assent to arbitrate
  - What parties are bound
  - Was it signed under duress
  - Is it unconscionable
  - Was it fraudulently obtained
  - Etc.

Legal Framework

Weckesser v. Knight Enterprises (4th Cir. 2018)

- Weckesser was a contractor for Knight Enterprises
- Jeffrey Knight, Inc. was the parent of Knight Enterprises
- Weckesser signed an arbitration agreement with Jeffrey Knight, Inc., but not with Knight Enterprises
- Weckesser sued Knight Enterprises
- Knight Enterprises argued that the suit was barred by the arbitration agreement
- The Court disagreed, and Knight Enterprises appealed

Legal Framework

Weckesser

- "Arbitration 'is a matter of contract'"
- Applying SC contract law, the Court concluded that:
  - The arbitration agreement did not apply because Knight Enterprises was not a party
  - Knight Enterprises was not a third-party beneficiary of the Jeffrey Knight, Inc. arbitration agreement
  - Weckesser was not equitably estopped from avoiding that agreement in this case
- District Court decision was affirmed

Comparison of Court to Arbitration

	Court	Arbitration
Class Actions	Yes	No
Mediation	Yes	Can be required
Time to Resolution	12-18 months to trial, or longer	Can be quicker
Costs	Parties don't pay for the judge or the courtroom	Arbitrations are expensive
Risk of "Runaway Jury Verdict"	Yes	No (arbitrator less likely to "go crazy")
Discovery	Federal or State Rules of Civil Procedure Apply	Can Limit/Expedite
Dismissal/Summary Judgment	Good chance in many courts	Less likely - risk of "split the baby"
Appeal Rights	Yes	Limited. Hard to set aside a bad result.
Confidentiality	No	Yes (but could be hard to enforce)

Other Possible Downsides

- Multiple single-employee arbitrations = huge expense for employer
- Even "nuisance" disputes may have to be arbitrated

Scope - Limitations

- Arbitration/Class Waiver will not apply to:
  - Certain state law claims
    - e.g., California PAGA claims
  - Charges and complaints filed with government agencies
    - e.g. EEOC charges, DOL complaints
    - Agencies may still pursue actions on behalf of multiple individuals
  - Workers' compensation/unemployment benefit claims
  - Unionized employees (grievance process subject to collective bargaining)
- FAA not applicable to transportation workers

Should You Have an Arbitration Program?

- Key Question:
  - What is the Class Action Risk?
- The greater the risk, the greater the reason to use an arbitration agreement/class waiver

Key Considerations

- Current employees or only new employees?
  - If turnover is high, maybe only new employees
  - If current employees covered, what consideration is required?
    - Some states require consideration beyond continued employment
    - $$; additional vacation/PTO; bonus; commissions; stock

Key Considerations

- Apply to all or only a part of the workforce?
- Independent workers/contingent workers?

Key Considerations

- Mandatory or Voluntary?
  - Mandatory = employee cannot decline to participate
    - Are you prepared to fire existing employees and not hire applicants who refuse?
    - Morale issues
  - Voluntary = employee may "opt out" of program
    - If voluntary, how long do they have to "opt out"?
    - What is the process for doing so?

Key Considerations

- What claims are covered? Free to pick and choose.
  - All employment-related claims?
  - Only wage and hour claims?
  - Carve outs?
    - Some employers are excluding sexual harassment and sex discrimination/Title VII claims
  - Injunctive relief?

Key Considerations

- Cost Shifting – tricky – one study found employer paid 100% of costs in 95% of disputes in arbitration
  - Some states require employer to pay (California, for example)
  - Cost-shifting to employee can invalidate the agreement
    - State law "unconscionability" analysis
    - "effective vindication exception" to policy favoring enforcement
      - Agreement that would require massage therapy student to pay $2,525.50 invalidated entirely
      - Provision that required employee earning $54,000 to pay $1,622 in costs invalidated

- Cost shifting
  - Individually negotiated agreements, such as executive employment agreements, more frequently allocate up to half the costs to the employee, but still only @ 35% of the time
  - Can limit the costs employer will pay to those not typically incurred in court litigation (e.g. arbitrator's fees, travel expenses, conference rooms, etc.)
  - Consider requiring employee to pay whatever the court filing fee would have been

Key Considerations

- Require mediation or some other ADR measure before arbitration?
- What procedures will apply?
  - Third party administrator – AAA, CPR, JAMS
    - Easy access to arbitrators, use their rules to govern the process
  - If not, need to be very clear in the agreement about how to select the arbitrator and what the rules are
- How will arbitrator be selected? (see above)
  - Single or panel
  - Particular expertise?
- Limitations on arbitrator's authority

Key Considerations

- Discovery?
- What state's law will apply?
- Where will the arbitration be conducted?
  - Headquarters?
  - Where the employee is located?
- Any cost-shifting? (see above)
- Confidentiality
- Type of decision to be rendered

Key Considerations

- Logistics of communication and implementation
  - Will the agreements be signed?
    - Not necessary in all states
    - But have to be able to prove employee knew of it and agreed
  - Opt out process/tracking

Thank you!

Mandatory Arbitration: It's a No-Brainer – or is it?

Kerry A. Shad
Zebulon D. Anderson

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Emerging Drug Trends, Laws, and Your Drug Policies and Testing Programs

SMITH ANDERSON

Emerging Drug Trends, Laws, and Your Drug Policies and Testing Programs

Sarah W. Fox
J. Travis Hockaday

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What the numbers show . . .

- 21,000,000 Americans have substance abuse problems, and 75% of those Americans are employed...
- Drug use by U.S. workforce at highest rate in more than a decade
- Test positivity rate of 4.2% for 2017, up from 3.5% in 2012 (but way down from 13.6% in 1988)
  - *Quest Diagnostics Drug Testing Index, released May 8, 2018*

What the numbers show . . .

- Cocaine, methamphetamines, and marijuana have driven the increase
  - Marijuana positivity rising sharply in states with recreational use laws enacted since 2016 (NE, CA, MA), in both regulated/safety-sensitive functions and in the general workforce
    - 22% of American adults currently using marijuana
  - Meth positivity increased 140% in the South in last five years (the lowest of any region in the country)
    - *Quest Diagnostics Drug Testing Index, released May 8, 2018*

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What the numbers show . . .

- Good news – prescription opiate positivity rates declined dramatically nationwide
  - Efforts to decrease availability effective, at least as to working public?
  - Still, a national epidemic
    - *Quest Diagnostics Drug Testing Index, released May 8, 2018*

Who's high(est)?

Quest Diagnostics Drug Testing Index, released May 8, 2018

State laws on marijuana

- **ILLEGAL** in all 50 states (according to the federal government)
- **LEGAL** for certain medical uses in 31 states and D.C.
  - Laws vary, but generally cover possession limits, distribution, methods of ingestion, qualifications for carding, patient/caregiver registry, civil and employment protections
  - At least 15 states allow use of low-THC, high-CBD products for limited medical reasons or as legal defense (NC, AL, FL, GA, IO, KY, LA, MS, MO, SC, TN, TX, UT, VA, WI)
- **LEGAL** for recreational use in 9 states (CO, AK, WA, OR, CA, NV, MA, ME, VT) and D.C.
  - Laws generally allow use and possession by adults 21 and over
- **CONSTANTLY CHANGING** and **INCONSISTENT**
- **CONFUSION** across the board for employers

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State laws on marijuana

National Conference of State Legislatures, June 2018

State laws on marijuana

- Current/future ballot initiatives include:
  - Michigan – recreational use (2018)
  - Missouri – comprehensive medical use (2018)
  - North Dakota – recreational use (2018)
  - Utah - comprehensive medical use (2018)
  - Ohio – recreational use (2019)

State of the law per the feds

- Marijuana is a Schedule 1 narcotic
  - "high potential for abuse"
  - "no currently accepted medical use in treatment"
  - Manufacture, sale, distribution, possession are federal crimes

State of the law per the feds

- Changing politics
  - August 2013 - Obama administration / "Cole Memorandum" deferred to state enforcement and gave discretion regarding enforcement to U.S. Attorneys
  - January 2018 – AG Sessions rescinded Cole Memorandum, giving prosecutors authority to prosecute anyone violating federal drug laws
  - March 2018 – AG Sessions advised that focus would be on drug gangs
    - Prosecutors "haven't been working small marijuana cases before" and "are not going to be working them now."

State of the law per the feds

- U.S. Department of Transportation . . .
  - . . . doesn't give a rat's "you know what" about state laws or the USDOJ's position!
  - "We want to make it perfectly clear that the DOJ guidelines will have no bearing on the [DOT's] regulated drug testing program," which "does not authorize 'medical marijuana' under a state law to be a valid explanation for a transportation employee's positive drug test."
  - MROs are prohibited from verifying a test as negative based on medical use under state law that "purports to authorize" such use.

Employee Protections for Medical Use

- Employers never required to allow marijuana use at work or permit employees to work under the influence
- In some states, applicants/employees using medical marijuana have certain limited job protections (including AK, AZ, CT, DE, IL, ME, MA, MN, NV, NY, PA, RI)
  - Protections vary: prohibit adverse action based solely on medical use; prohibit positive test from being automatic grounds for adverse action; disability accommodation; showing of impairment required for adverse action; private right of action
  - Exceptions apply for compliance with federal law, and when federal funding is at stake

Employee Protections for Medical Use

- In other states, applicants/employees have no protection or likely have no protection (including CA, CO, HW, MI, MT, NM, OR, WA)
  - Generally, no accommodation obligation, no private right of action, no restriction on discipline
- Status of protection unclear in some states

Employee Protections for Recreational Use

- Only in Maine?
  - Employers not required to accommodate use or employees being under the influence, etc. in the workplace
  - No effect on employers' ability to enact and enforce policies restricting use by employees or disciplining employees who are under influence at work
  - However, employers may not refuse to employ or otherwise penalize a person 21 or older solely because s/he uses outside of employer's property

Opioids

- Morphine
- Codeine
- Fentanyl
- Heroin (6 – AM)
- Added to DOT panel effective Jan. 1, 2018:
  - Oxycodone
  - Oxymorphone
  - Hydrocodone
  - Hydromorphone

ADA/FMLA/other considerations

- No ADA duty to accommodate illegal drug use
- Interactive process for employees with disabilities who are medical marijuana users
- Protections for addicts
- Leave for treatment
- Off-duty lawful use of lawful products statutes

Effects in the workplace

- Accidents
- Workers' comp claims/costs
- Lost work time
- Tardiness, absences
- Theft

Testing Basics

- Sample
- Initial screening / confirmation
- Interpretation (MRO) – interferences, drug interactions, etc.
- Employer's decision

MRO's role (and possible explanations for positivity)

- Amphetamines (possible prescription and OTC use)
- Cocaine (potential topical application; no prescription use)
- Opioids (possible prescription use, poppy seeds)
- PCP (no prescription or OTC explanations)
- THC (Marinol exception; otherwise, positive means positive)
- Other (adulterated/substituted specimens, dilutes, etc.)

CBD products

- Extracted from the cannabis or hemp plant
- Touted for (potential) effectiveness for inflammation, arthritis, anxiety, seizures, epilepsy, PTSD, chronic pain, insomnia, heart disease, cancer (but evidence is scant)
- May come without the "high" if it contains no or low-enough level of THC (the "high"-causing substance in marijuana that causes a positive test)
- However, it's a marijuana extract, and thus considered a Schedule 1 drug under federal law

CBD products

- Many uncertainties
  - It's the "Wild West" – production not well regulated
  - Quality varies from product to product
  - Products contain varying levels of CBD (some too much, some too little)
  - One study shows 1 in 5 CBD products contain THC (the "high"-causing chemical)
  - Metabolic rate?
  - Limited studies on effectiveness

State of the law on the cannabidiol (CBD) marijuana compound

- 17 states (mostly in South) have CBD-specific laws
  - NC, AL, FL, GA, IN, IA, KY, MS, MO, OK, SC, TN, TX, UT, VA, WI, WY
- Laws generally allow for use of low-THC, high-CBD products in some circumstances, or as a legal defense
- NC's law
  - Allowed for intractable epilepsy; if recommended by a neurologist; must contain less than 0.9% THC and at least 5% CBD, and no other psychoactive substances

Interplay between CBD oil use and drug testing

- IF CBD oil contains only CBD and no THC, then test may not be positive for marijuana (unless person uses a very high level of CBD oil)
- In NC, if an applicant/employee tests positive for marijuana, CBD oil usage is not an acceptable defense; consequences under employer policy will apply

To test or not to test…

- Secretary of Labor Alexander Acosta thinks employers should think twice before drug testing every applicant/employee
- Many employers forging ahead with testing as usual
- Other employers are:
  - concerned about staffing shortages resulting from marijuana positivity, especially in states where marijuana is legal
  - removing marijuana from testing panels in light of new laws, and because it stays in body for long periods and positive test may not necessarily mean that the person is impaired at work
  - evaluating applicants/positions on case-by-case basis and considering whether marijuana use is/should be a bar
  - testing only for regulated/safety-sensitive positions

Recommendations for Employers

- Review policies and revise as needed; include disciplinary action for abuse of prescription drugs

Consider including the following provisions:

- Misused drugs prohibited by this policy include any use of drugs prescribed by a licensed physician when used by someone other than the person to whom they were prescribed or when used by the person to whom they were prescribed but used for a purpose or condition other than the one for which they were prescribed or used in an amount or manner other than in accordance with the prescription.
- The use of legal drugs prescribed by a licensed physician for a specific treatment used in accordance with the prescription will not result in disciplinary action. However, any employee who must use such prescribed medication while engaged in Company business and who knows or should know that his/her safe and reliable performance or behavior may be adversely affected by such medication should report these facts to the Human Resources Manager. Employees also are expected to inform Human Resources of over-the-counter medications that might adversely affect the safe and reliable performance of their work.

Recommendations for Employers

- Decide how medical marijuana will be treated, considering state/local laws
- Always prohibit use or impairment at work
- Prohibit "any detectable level" of any illegal controlled substance
- Train supervisors and managers to identify "high" workers
- Keep current on evolving laws in states/localities in which you operate - use a color coded map
- Do not advise applicants or employees regarding positivity risk of using CBD products
- Limit access to drug test results, and segregate from personnel file
- Opioids - can't bar them outright, but expand testing program and educate workers


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Emerging Drug Trends, Laws, and Your Drug Policies and Testing Programs
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The Future of Work 2019:
2 Challenges HR Cannot Ignore


SMITH ANDERSON
The Future of Work 2019: 2 Challenges HR Cannot Ignore
Kimberly J. Korando
Kerry A. Shad
November 2018
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Independent Contractors, the "Gig Economy" and the "ABC Test"

A Bit of Background

- About 1/3 of workforce identifies as an "independent contractor" ("IC")
- More workers are asking to be treated as ICs rather than W-2 employees
  - Truck drivers
  - IT workers
  - Accountants
  - High-level managers with special skills/expertise
- The "gig economy" depends on ICs
  - Uber, Lyft, etc.

What Does "Gig" Mean Anyway?

- A pronged spear for catching fish
- A person of odd or grotesque appearance
- A job usually for a specified time
  - Merriam Webster's online dictionary

Gig Workers

- Freelancers who work on a variety of different projects – not for just one entity
  - Flexible
  - Can be remote often
  - Work as little or much as chosen
  - Sometimes under an app-based model

Why do employers use gig workers?

- Access to large talent pool
- No long-term commitments
- Saves money
- Avoids employment-related laws and obligations

Are Gig Workers Employees or Independent Contractors?

- Answer is determined by the same legal standards as apply to any other type of worker
- No single test for all purposes – focus generally on degree of control and "economic realities"
- Classifying any worker as an Independent Contractor remains risky

Employee or Independent Contractor?

BIG NEWS: California adopts the "ABC Test" in *Dynamex Operations West, Inc. v. Superior Court (April 2018)*

- Under the ABC Test, a worker is an IC only if she or he is:
  - A) – free from control and direction of the hiring company "in connection with the performance of the work, both under the contract for the performance of the work and in fact";

Employee or Independent Contractor?

- The "ABC Test" – worker is an IC only if she or he:
  - B) "performs work that is outside the usual course of the hiring company's business"; AND

Employee or Independent Contractor?

- The "ABC Test" – worker is an IC only if she or he is:
  - C) "customarily engaged in an independently established trade, occupation, or business of the same nature" as the work performed for the hiring entity

Employer or Independent Contractor?

- Employer must prove A, B and C
  - Presumption of employee status
  - Liberally classify workers as employees so they are entitled to the protections only employees get

Employee or Independent Contractor?

- *Dynamex* applies to California wage orders (claims for meal and rest breaks, overtime, seating not provided, etc.) but likely will expand into other areas
- ABC Test makes it much harder to classify workers as ICs
- Part A - examples
  - Workers who knit clothes at their homes were employees because the company provided the patterns and told them how to knit
  - Truck drivers not ICs where hiring entity required them to clean the trucks, get permission before transporting any passengers, go to the dispatch center to get assignments, and could terminate service for policy violations
  - Worker who restored historic homes not an employee because he set his own schedule, worked without supervision, bought the materials on a business credit card, and had turned down employment so he could control his own activities

Employee or Independent Contractor?

- Part B – goal to capture "all individuals who can reasonably be viewed as working in the [hiring entity's] business"
  - Examples of employees
    - Home knitters
    - Cake decorators
    - Lumber harvesters
    - Art instructors at a museum
    - Entertainers at a resort that advertises live performances

Employee or Independent Contractor

- Examples of ICs
  - House restorer
  - Plumber hired to fix leak at a retail location

Employee or Independent Contractor?

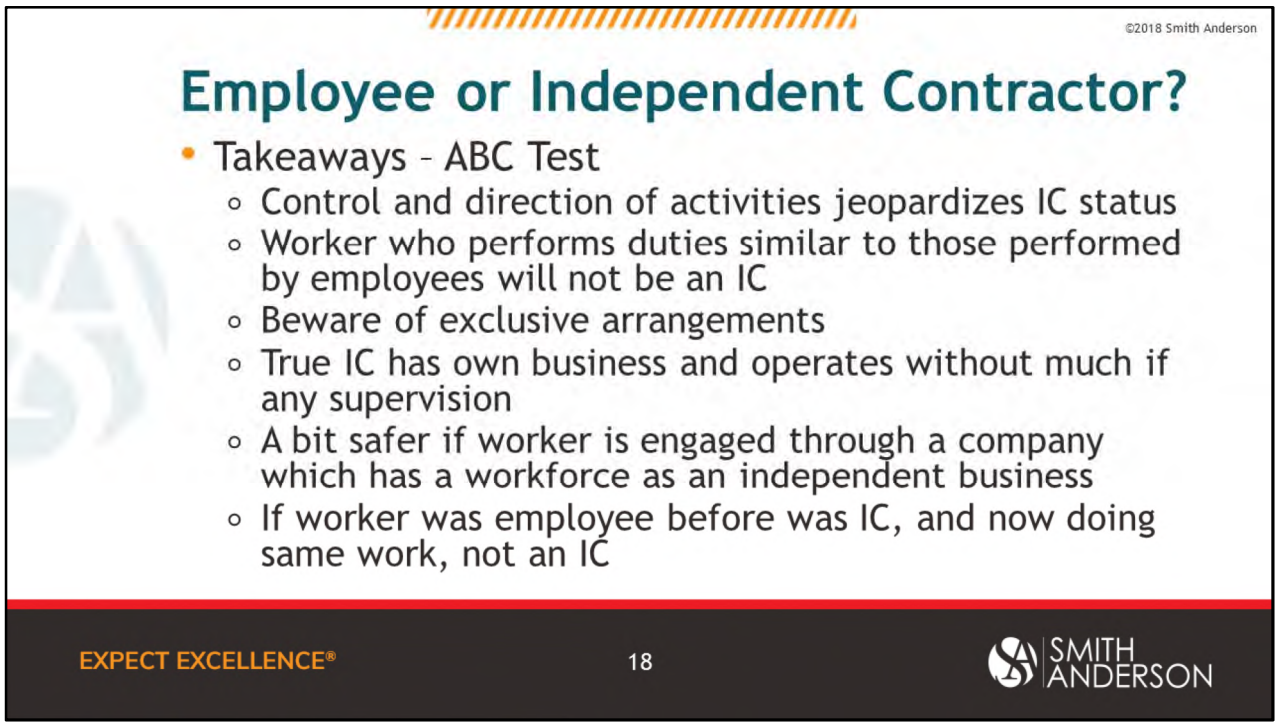
- *Ruggiero v. American United Life Insurance Co.*, (D. Mass. 2015)
  - Insurance company drafted policies, obtained regulatory approval of policies and invested premiums, but did not sell policies
  - Court agreed - company had legitimately outsourced the sale of policies
    - Plaintiff also sold policies for other companies and most of his sales were for other companies

Employee or Independent Contractor?

- Part C – must prove "individual *independently* has made the decision to go into business for himself or herself"
  - Independent business cards, phones, locations, ads, licenses, etc.

Employee or Independent Contractor?

- ABC Test also used in Massachusetts and New Jersey
- Could catch on elsewhere (@20 states use this test in some context, for example, in unemployment compensation determinations)
- Significant implications for:
  - The gig economy
  - Traditional industries that use ICs a lot, such as insurance and real estate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Employee or Independent Contractor?
Takeaways – ABC Test
Control and direction of activities jeopardizes IC status
Worker who performs duties similar to those performed by employees will not be an IC
Beware of exclusive arrangements
True IC has own business and operates without much if any supervision
A bit safer if worker is engaged through a company which has a workforce as an independent business
If worker was employee before was IC, and now doing same work, not an IC
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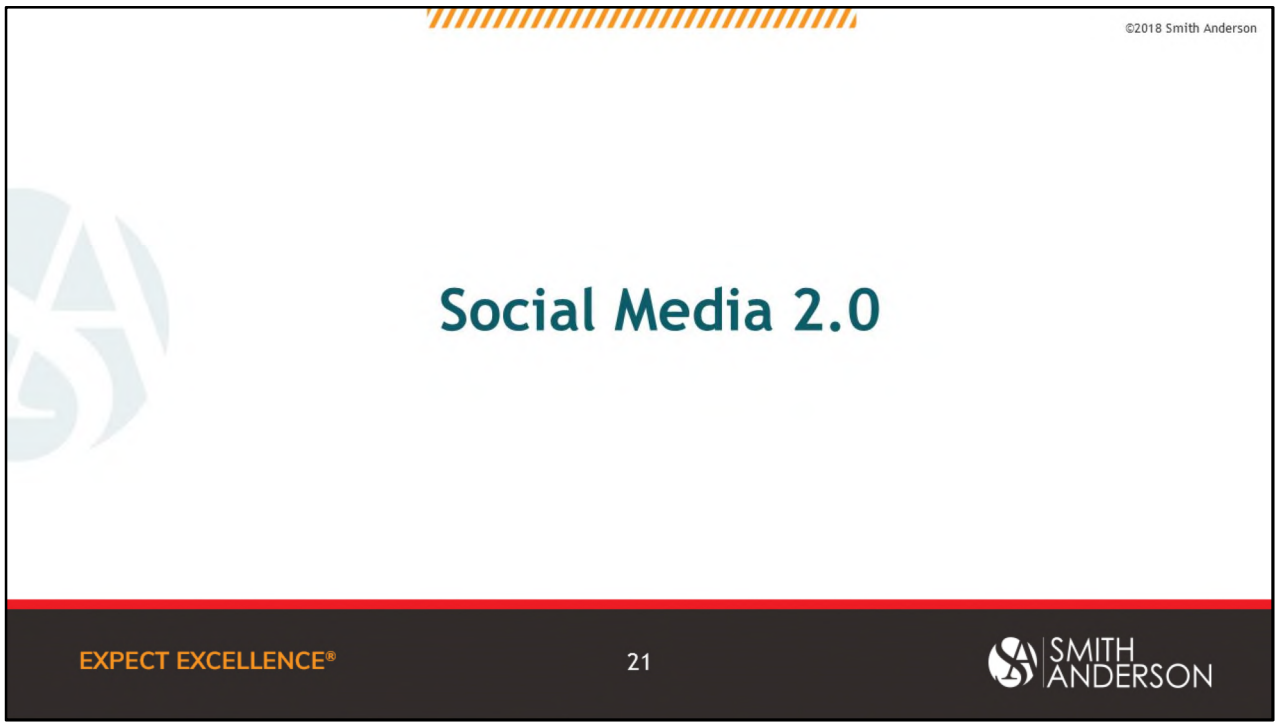
Arbitration/Class Waivers

- Consider using them in agreements with ICs as a risk management tool
- *Uber* and other litigation
- BUT, REMEMBER, even if class action is avoided, the underlying legal risks are still present
- AND, the "joint employment" issue still lurks

Practical Tips

- Make sure to know the applicable law in the applicable jurisdiction
- Differing tests for different laws (FLSA, IRS, UI, etc.) even in same jurisdiction
- Internal process that all engagements be handled through HR, not operations (big liability issue for a lot of companies; managers retaining folks that HR has no idea about)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Key Components of the Social Media Account

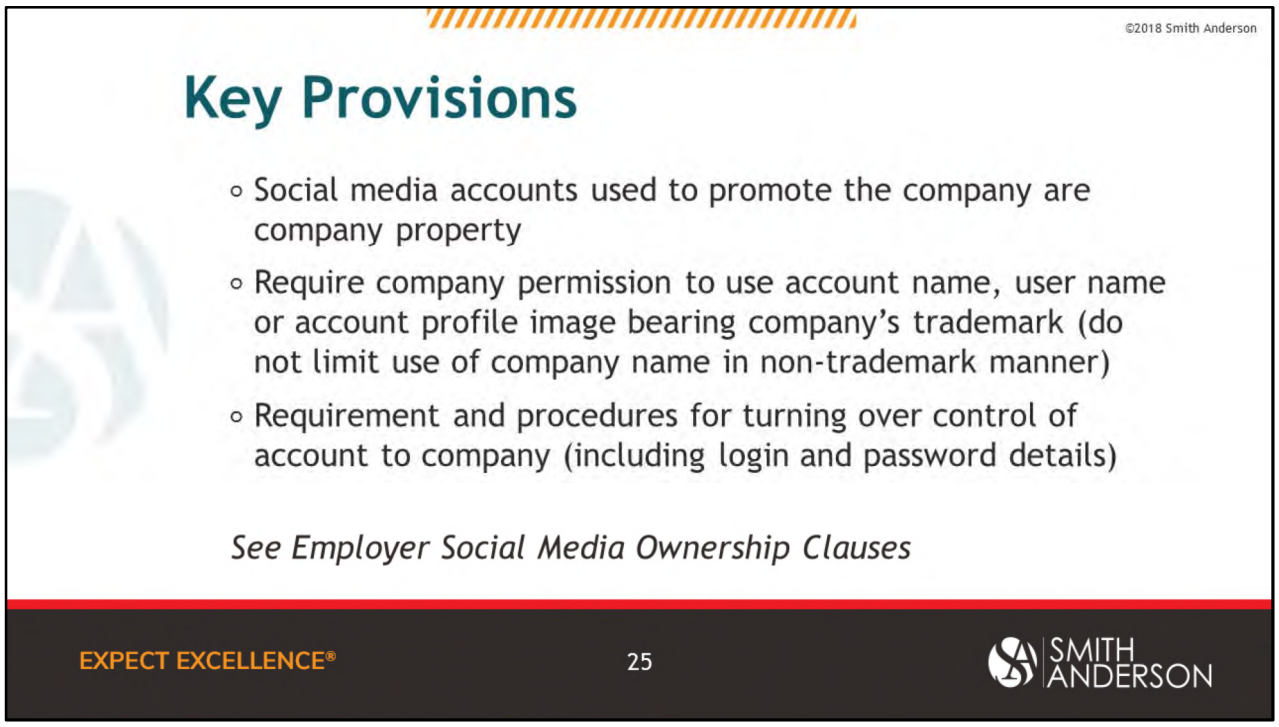
- Account name
- User name
- Access, password
- Content
- Follows, other connections (groups)

The solution:
A legally enforceable agreement

Options

- Include provision in standard confidentiality/non-solicit/intellectual property agreement (required as condition of employment)
- Stand alone agreement
- Employment agreement (if applicable)
- Social media policy with signed acknowledgement (not best option)
- Employee handbook with signed acknowledgement (not good option)

Warning: Company cannot assert ownership to individual personal social media accounts. Allowing employees to use personal accounts for business purposes is not a good idea.



EMPLOYER SOCIAL MEDIA OWNERSHIP CLAUSES

Ownership of Social Media Accounts, Data, and Information. Any and all social media and other online accounts and profiles created or used by Employee on behalf of the Company or otherwise for the purpose of promoting or marketing the Company or similar business purposes, including such accounts and profiles featuring or displaying the Company's name and trademarks ("**Company Social Media Accounts**"), belong solely to the Company. The Company owns all Company Social Media Accounts regardless of the employee who opens the account or uses, manages, or accesses it. Each Company Social Media Account includes any and all log-in information, data, passwords, trademarks, and content related to the profile or account, including all followers, subscribers, and contacts. Company Social Media Accounts do not include any social media accounts or profiles that are created or used by Employee [exclusively/primarily] for Employee's own personal use.

Employee agrees that s/he will not create, develop, or maintain any Company Social Media Accounts without the Company's express prior authorization. All approved Company Social Media Accounts shall where possible be registered, in whole or in part, using the Company's name and contact information. After registration, the log-in and password information for each Company Social Media Account shall promptly be reported to the [INSERT APPROPRIATE DEPARTMENT NAME] Department and may not be changed

thereafter without prior express authorization from [INSERT APPROPRIATE DEPARTMENT NAME] Department. Upon the Company's request at any time during employment or immediately upon and after separation of employment for any reason, Employee shall: (i) cease accessing, using, updating, and modifying the Company Social Media Accounts; (ii) provide to the Company the log-in information, including usernames and passwords, for each Company Social Media Account that Employee created, used, or managed; and (iii) assist the Company with the transition and maintenance of each Company Social Media Account created or used by Employee during Employee's employment, including providing all information that may be necessary to ensure that the Company is able to access and control the Company Social Media Accounts.

Upon separation of employment for any reason, the Company will retain ownership and control of all Company Social Media Accounts created or used during the course of Employee's employment, including all related data and information.

Avoid conflict with other laws

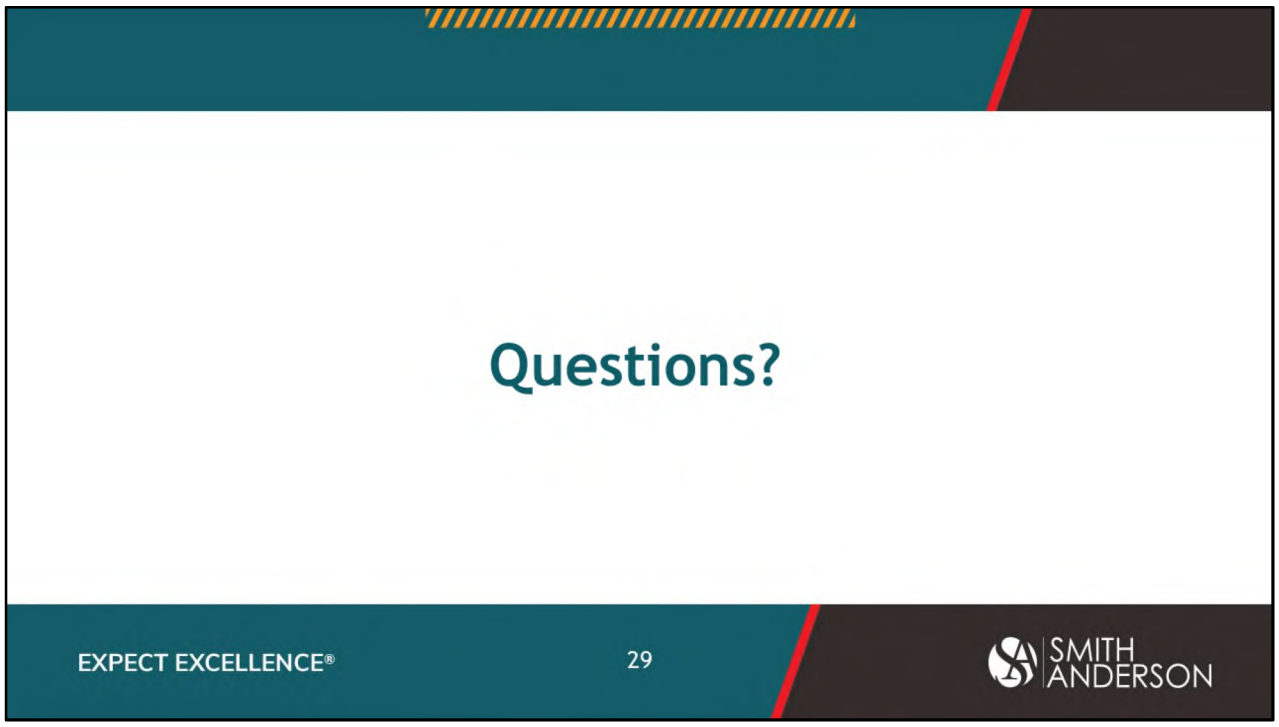
- National Labor Relations Act: Do not discourage employees from discussing terms and conditions of employment with other employees or third parties and disclaim any interference with these rights
- State laws prohibiting employer access to employee personal social media accounts (disclosure of username/passwords)

In absence of a legally enforceable contract… …factors court may consider in ownership dispute

- Who created or directed the creation of account
- Type of account and whether follower contact information is publicly available
- Who generated the content, who else managed the account
- Subject matter of content sent from account
  - Things get messy when employee has used the account for personal use
- Industry (information publicly available versus secret)
- Account username
  - Usernames featuring employee name even in combination with company name more likely to be considered a personal account
- How quickly company asserted ownership upon departure

Departing Employee Checklist

- Clearly communicate to the employee any limitations on right to:
  - post on employer-owned social media accounts
  - use contacts developed through employer-owned social media accounts
  - use social media to solicit clients or employees
- Change account password when employee departs/rename account (if necessary)


Questions?
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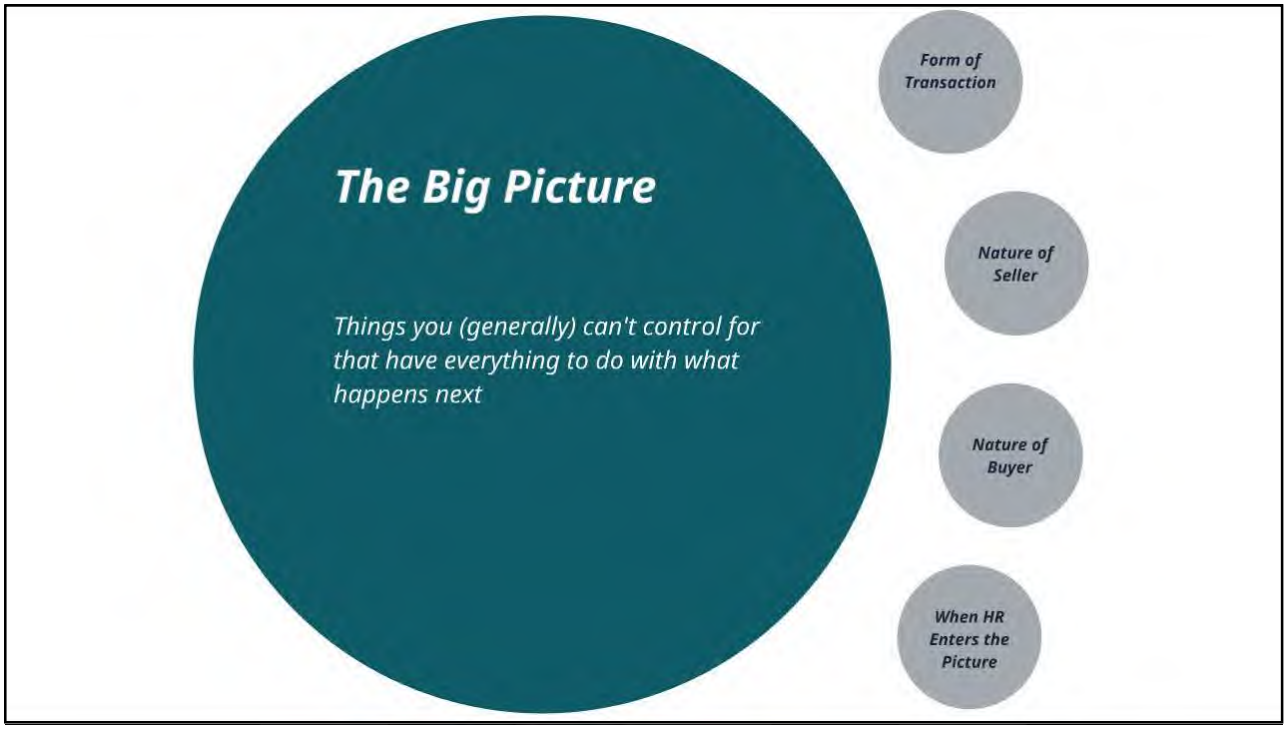
Benefits in Mergers & Acquisitions for the HR Generalist: The Real Deal



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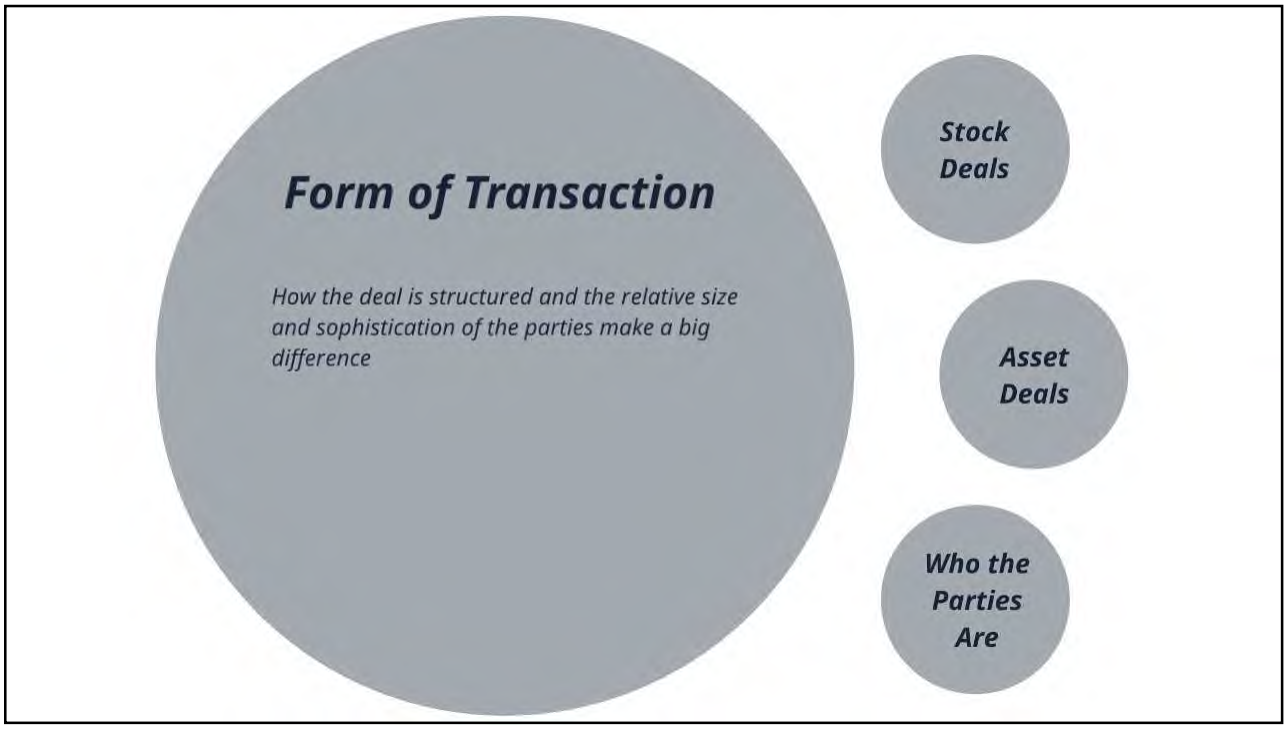


Stock Deals

In a stock purchase/reverse subsidiary merger, the buyer steps into the seller's shoes

The seller's plans (and any problems with them) become buyer's at close

Employment continues for seller's employees

Asset Deals

In an asset purchase, the buyer is free to pick and choose which of seller's plans it will and won't assume

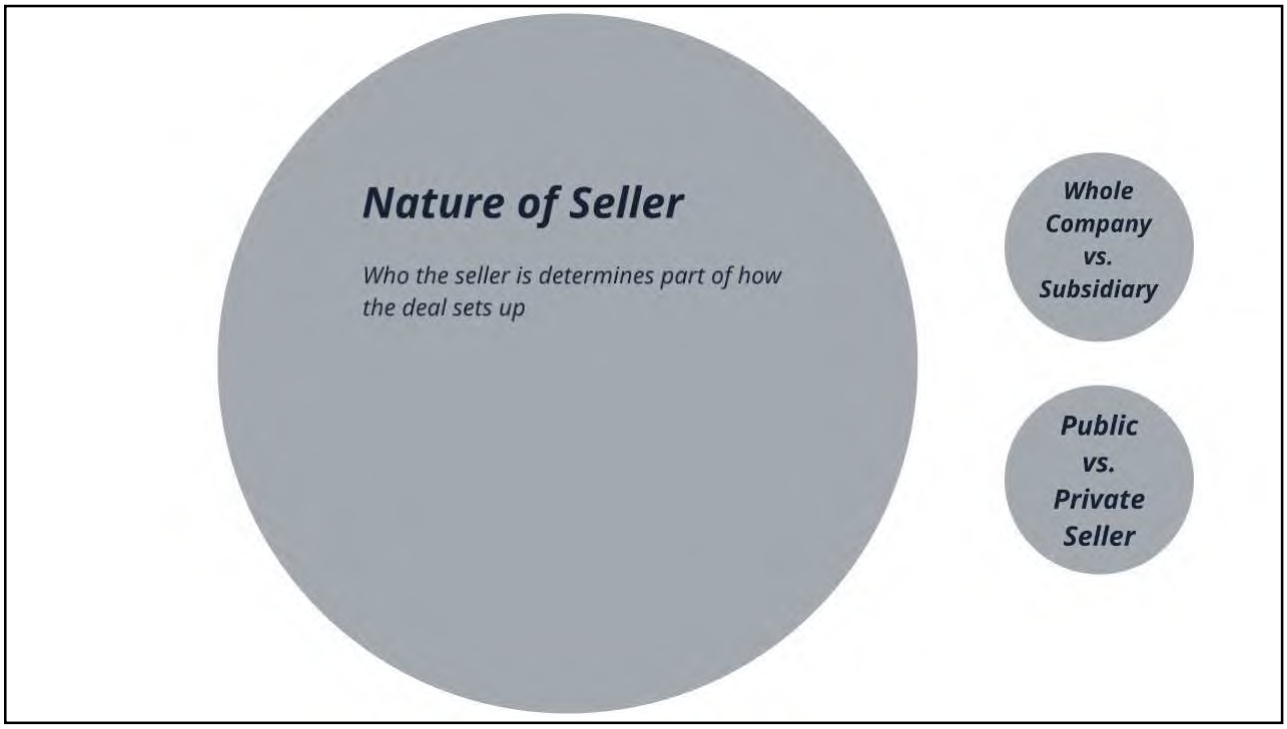
(For that reason, asset deals are sometimes the default structure in the case of a "gotcha")

Seller's employees experience a termination of employment at close

Who the Parties Are

Drivers include:

- Relative size and sophistication (Does buyer do a lot of deals?)
- How the deal came about (Did seller shop the company?)
- Deal size (issues that loom large in a $20M deal may matter less in a $200M deal)



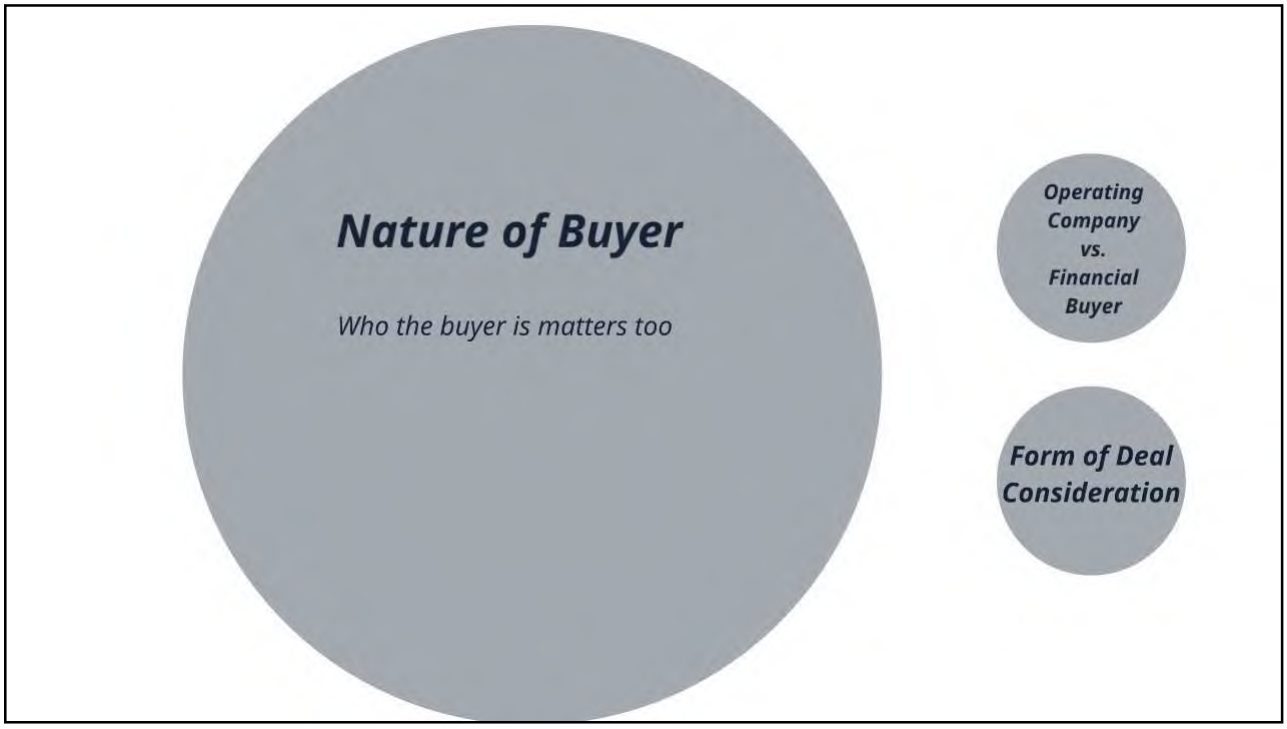
Whole Company vs. Subsidiary

Where the whole company is being sold, the plans are more likely to go along in the deal.

Where a subsidiary is being sold, they probably won't. And separating subsidiary employees from the benefit plans they've been participating in can raise issues that are a lot like the issues that arise when a plan or an employee terminates. The relationship between the plan and employee ends.

Public vs. Private Seller

- Impacts equity comp (especially pricing of options)
- Availability of 280G cleansing vote
- Confidentiality



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Operating Company vs. Financial (or Foreign) Buyer

If the buyer doesn't have benefit plans of its own, it is likely to keep seller's plans.

Form of Deal Consideration

Often a driver in how equity awards are handled.

Options are more likely to be cashed out where the consideration is cash and are more likely to be assumed where the consideration is stock.

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Earlier is Better

HR can:

- Identify diligence issues
- Share preferences for purposes of the purchase agreement
- Begin thinking about integration

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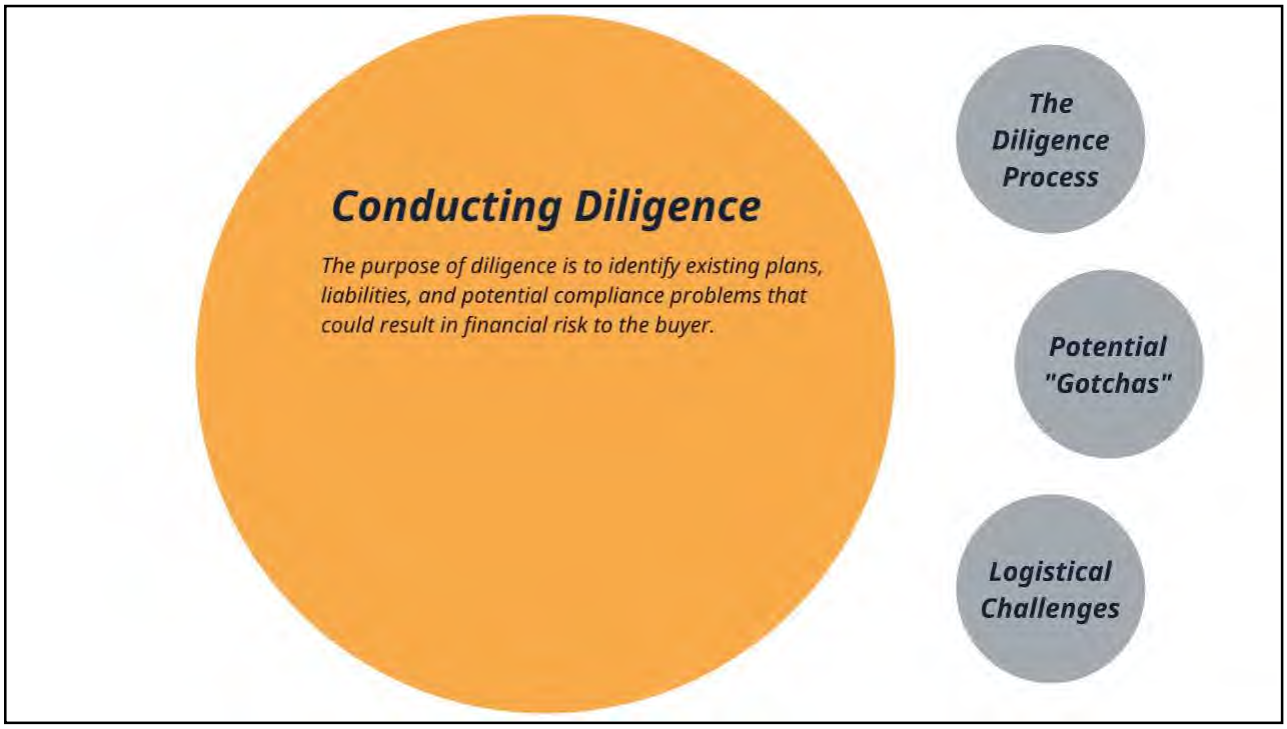
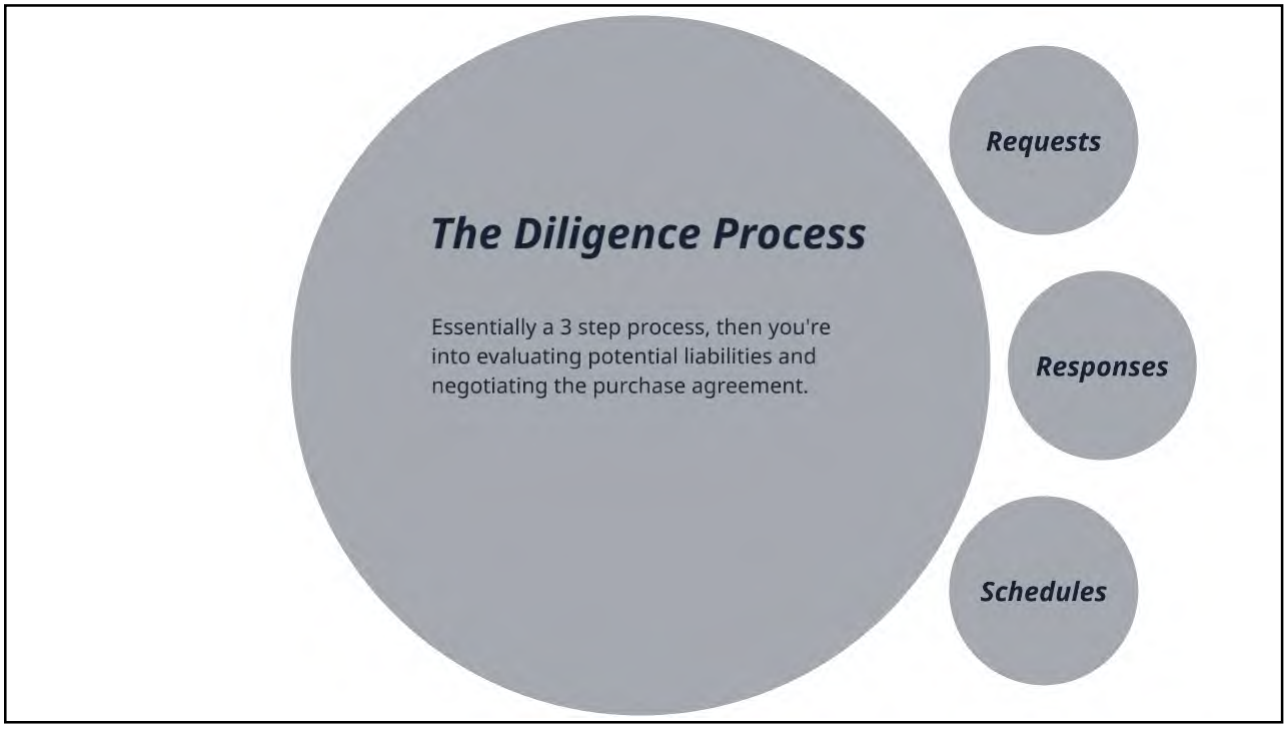
When Earlier Isn't the Case

HR should:

- Determine what's happened already
- Request copies of documents (diligence requests, diligence reports, deal document, disclosure schedules, etc.) as appropriate


Conducting Diligence
The purpose of diligence is to identify existing plans, liabilities, and potential compliance problems that could result in financial risk to the buyer.
The Diligence Process
Potential "Gotchas"
Logistical Challenges


The Diligence Process
Essentially a 3 step process, then you're into evaluating potential liabilities and negotiating the purchase agreement.
Requests
Responses
Schedules

Requests

Buyer should make a detailed request for all material information related to the seller's employee benefit and compensation plans and agreements.

This is part of a larger legal due diligence request.

Tailor the request to fit the particular facts and circumstances of the proposed deal.

Responses

Review seller's responses to identify potential risks and liabilities.

Typically not possible to determine all of the possible compliance issues that may exist.

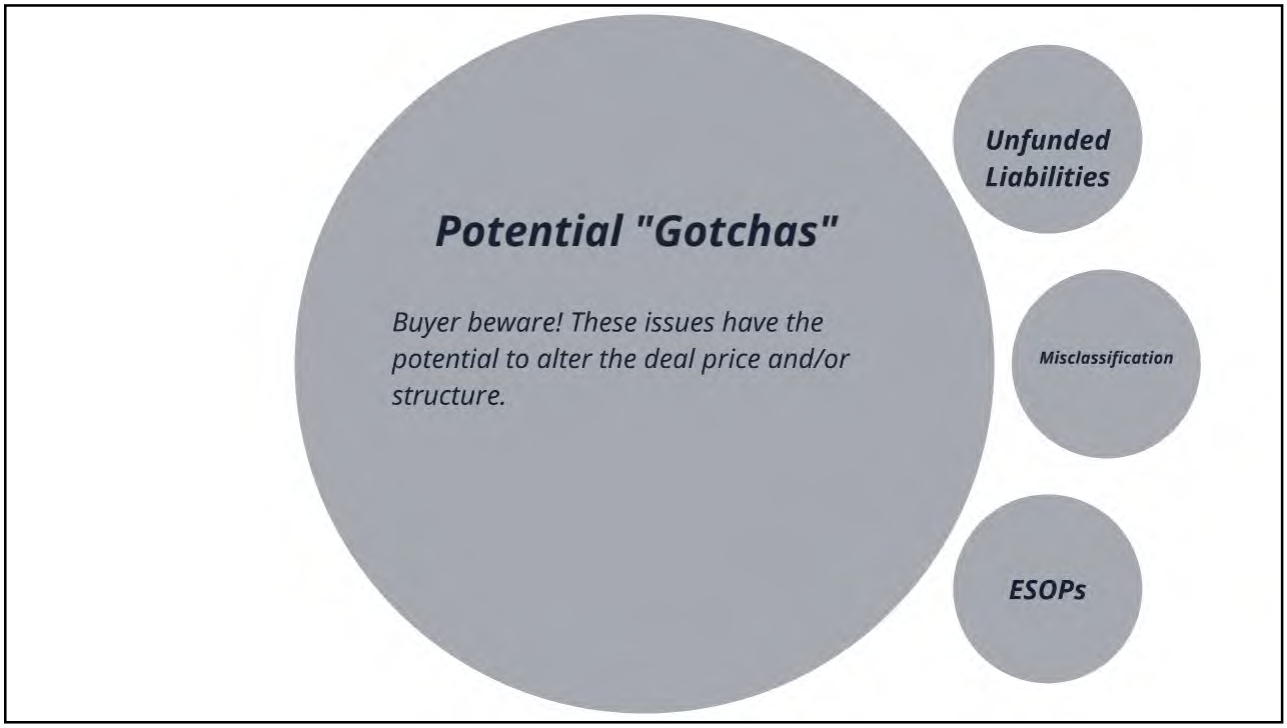
Supplemental requests may be needed to follow up on open requests and questions raised by the seller's initial responses.

Schedules

Supplements the representations and warrants contained in the agreement.

Typically used by the seller to disclose exceptions to, and to provide information that is too lengthy to include in, the agreement.

Typically attached to the end of the agreement and incorporated by reference.



Unfunded Liabilities

Potential sources include:

1. Single-Employer Defined Benefit Plans
    - Funding status and minimum required contributions
2. Multiemployer Defined Benefit Plans
    - Withdrawal liability
3. Retiree Medical

Misclassification

Can result in liability for the benefits misclassified contractors would have received over the course of the working relationship had they been properly classified as employees.

Be sure to look for a "Microsoft" clause!

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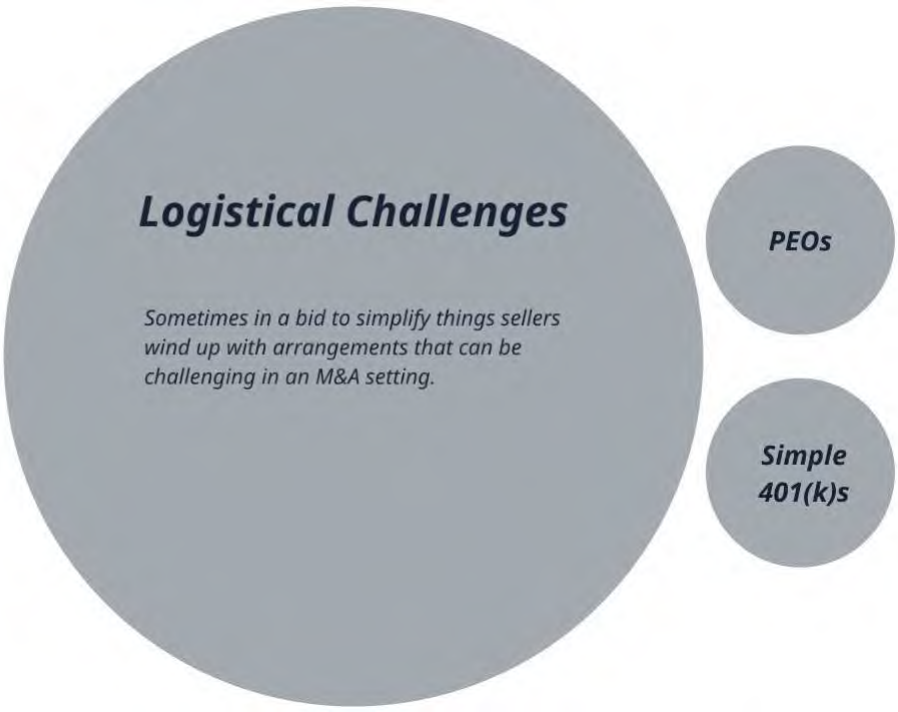
ESOPs

This special type of qualified plan adds more complexity to the deal.

Special players and a special process are required.

Typically, whether the sale is in the best interests of participants is determined by an independent trustee who is advised by separate counsel and a valuation firm.

The process includes additional diligence by the trustee team, a valuation report, and a fairness opinion and may include a pass through vote.



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PEOs (Professional Employer Organizations)

May affect the economics of the deal if the cost of providing benefits through buyer's plans is more than under the PEO arrangement.

Co-employment and joint employer issues.

PEO is ordinarily not a party to the transaction or purchase agreement.

Simple 401(k)s

Employers are generally eligible for a SIMPLE 401(k) plan if they have 100 or fewer employees and do not sponsor another retirement plan.

SIMPLE 401(k)s are not as easy to get out of as they are to get into; it's not clear that they can be terminated mid-year.


Benefits in Mergers & Acquisitions for the HR Generalist:
The *Real* Deal
The Big Picture
Conducting Diligence
Negotiating Deal Terms
Handling Sellers' Plans
Pre- and Post-Closing To-Dos
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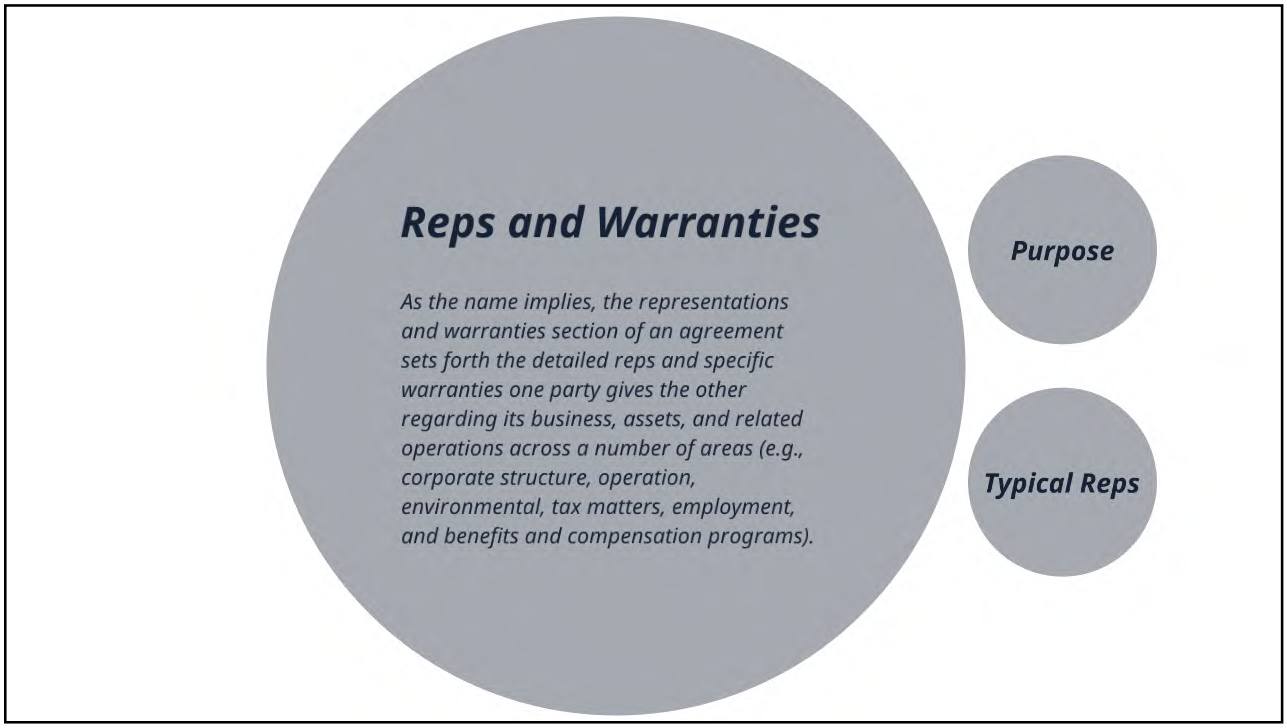
Negotiating Deal Terms
The terms of the deal will be negotiated and set forth in a detailed purchase agreement (or merger agreement) that solidifies and forms a legal, binding agreement between the parties. The length, detail and complexity of such agreements vary depending on the nature and size of the transaction as well as who the parties are. Even the simplest agreements touch on employee benefits and compensation compliance and integration issues across key areas.
General Framework of Purchase Agreements
Reps & Warranties
Covenants
Common Legal Issues


General Framework of Purchase Agreements
1. Preamble and Recitals (e.g., Who and What)
2. Definitions*
3. Transaction Details (When, Where, How Much)
4. Seller Representations and Warranties*
5. Buyer Representations and Warranties
6. Covenants*
7. Closing Conditions (Deliverables)*
8. Indemnification*
9. Termination
10. General Provisions


Reps and Warranties
As the name implies, the representations and warranties section of an agreement sets forth the detailed reps and specific warranties one party gives the other regarding its business, assets, and related operations across a number of areas (e.g., corporate structure, operation, environmental, tax matters, employment, and benefits and compensation programs).
Purpose
Typical Reps

Purposes of Reps & Warranties

Ideally, reps and warranties confirm and supplement due diligence and allow buyer to better assess seller's plans and the potential costs or financial risks involved so buyer can factor that into negotiations and deal price.

Reps and warranties also provide added protection around areas that cannot be easily or fully reviewed.

In other cases, reps and warranties may be used as a substitute for more fulsome (any?) due diligence.

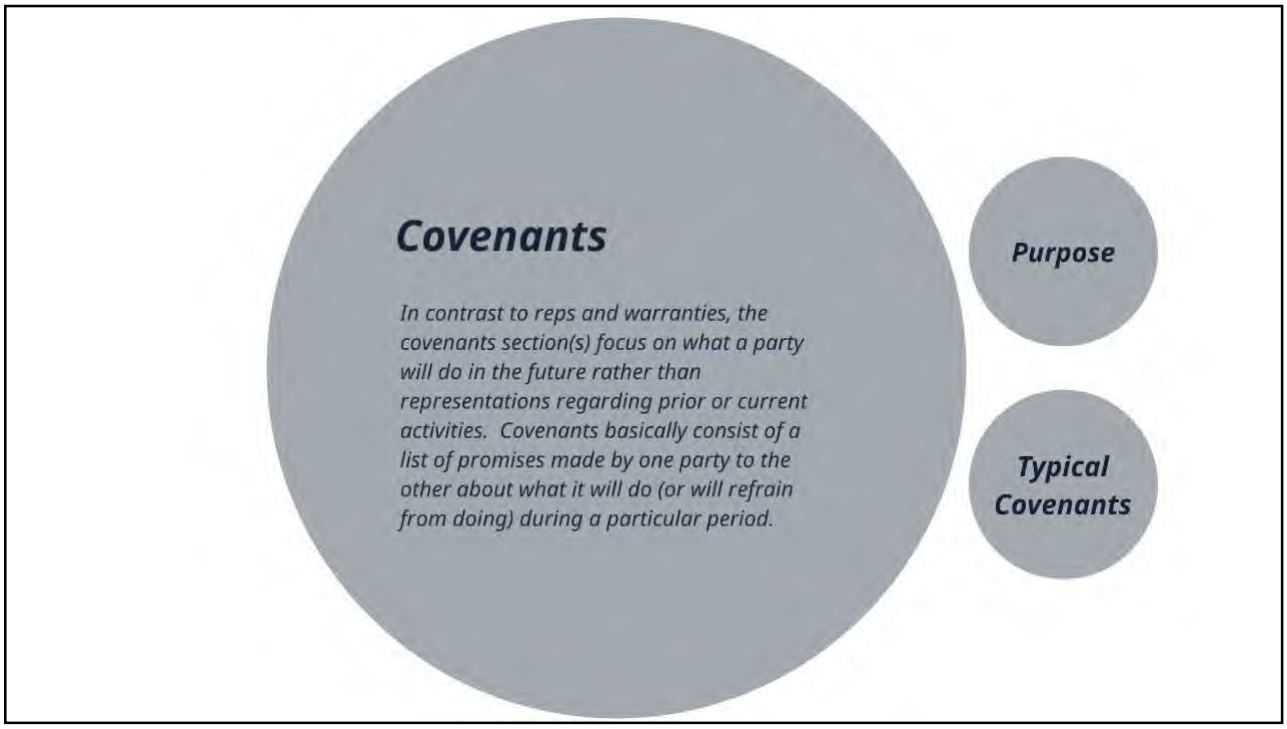
Seller's benefit reps generally require the seller to affirmatively identify: (1) the universe of its benefit plans and programs, (2) areas of prior noncompliance, and (3) plans that could result in unfunded liabilities or future risks.

Reps and warranties work in conjunction with an agreement's indemnification provisions to protect buyers against losses arising from breaches of the reps or warranties discovered post-closing.

Typical Benefit Reps & Warranties

Sellers are typically asked to provide the following reps and warranties confirming the nature and status of their benefit plans or programs while "scheduling" any exceptions or instances where the reps or warranties cannot be given:

- Seller has provided buyer true and correct copies of all plan documents
- Seller (and its ERISA affiliates) have never maintained, sponsored or had an obligation to contribute to any of a variety of potentially troubling plans (e.g., (1) defined benefit pension plans, (2) collectively bargained plans, (3) retiree health programs, (4) MEWAs, (5) VEBAs, (6) ESOPs, etc.)
- All plans maintained, administered, and funded per terms and in compliance with the Code, ERISA, and applicable laws
- Seller has no knowledge of any pending or threatened claims (other than routine claims for benefits) or any audit for any benefit plan
- Each retirement plan intended to be tax-qualified has received an IRS determination letter or is entitled to rely on an IRS opinion letter and nothing has occurred that would jeopardize such qualification
- All required plan contributions and premium payments have been made (or accrued) up through closing
- The transaction, alone or in conjunction with any other event, will not result in excess parachute payments under Code Section 280G or entitle any employee to accelerated vesting or payment of benefits or comp
- Each plan or equity award subject to regulation under Section 409A has been in documentary compliance with Section 409A and complied in practice and operation with all requirements of Section 409A.



Purpose of Covenants

While covenants may come from either the buyer or seller, benefits covenants typically involve promises of what the buyer will do for the seller and seller's employees post-closing, as well as how the buyer will address the seller's benefit plans.

Typical Benefits Covenants

Hiring / General offers of employment extended in asset deals:

Continued employment at specified pay and/or benefits levels for some minimum period of time (or guaranteed severance in lieu thereof)

(1) Comp and benefits no less favorable than in place prior to closing.
(2) Comp and benefits comparable to what buyer provides similarly situated employees; or
(3) No minimum requirements or obligations.

Retirement and Welfare Plans Covenants:

- Buyer agrees to credit prior service with seller (and predecessors) under buyer's plans
- Buyer agrees to credit deductibles and prior co-pays / co-insurance amounts incurred under seller's health plans if terminated mid-year
- Sellers often required to terminate their 401(k) plan prior to closing
- Sellers occasionally asked to terminate health and welfare plans

280G

Caps compensation to "disqualified individuals" (officers, certain shareholders or HCIs) triggered by a CIC at 2.99Xs the employee's "base amount"

If the total goes $1 over, everything greater than 1xs the base amount is subject to a 20% excise tax and not deductible by the company

Amounts that count include:

- CIC bonuses
- CIC severance
- Equity awards made within one year prior to the CIC
- Accelerated vesting

Solutions include:

- Cut back (including "valley" provision)
- Allocation to noncompete (takes extra time and $)
- Shareholder cleansing vote (requires disclosure and waiver)

Code Section 409A

Section 409A regulates "nonqualified deferred compensation" which is broadly defined as any compensation to which a recipient obtains a legally binding right in one tax year but may not be payable until a later tax year.

Broadly defined, Section 409A not only applies to Supplemental Executive Retirement Plans (SERPs) or other traditional nonqualified deferred compensation arrangements but also to severance pay, bonus plans, stock options and other equity compensation awards. In short, Section 409A pops up in surprising places.

We place special attention on Section 409A in deals because:

1. **Compliance concerns**—past noncompliance with Section 409A can result in significant costs, including 20% excise taxes plus assessment of penalties and interest

2. **Change in Control as distribution trigger**—a CIC is one of the limited permissible distribution events allowed by Section 409A, thus transactions may trigger payouts or terminations of seller's 409A plans or programs or permit their termination subject to special rules

3. **Amendment issues with existing employment agreements**—Section 409A may limit the ability to modify or replace certain plans and terms in seller's employment agreements as is common in connection with deals

COBRA

Under IRS regulations, if a seller maintains a group health plan after a sale, it will have the obligation to make COBRA available to any COBRA qualified beneficiaries. However, if a seller ceases to maintain a group health plan post-closing, the COBRA regulations may impose different COBRA obligations depending on whether the transaction is a stock deal or an asset deal sometimes with surprising or counter-intuitive results.

In stock deals, there is no termination of employment for continuing employees so there is no COBRA qualifying event for those employees, even if the seller's plans are terminated and coverage is lost. Ultimately, though, buyer is on the hook.

In asset deals, transferred employees will have a termination of employment. If the seller continues its plans post-closing, the termination may be a COBRA qualifying event and the seller's plans may have an obligation to offer COBRA to transferred employees even if they are covered under buyer's health plan.

On the other hand, if the seller discontinues all plans at or following closing and buyer is a "successor employer" (i.e., buyer continues the operations associated with the purchased assets without substantial change) then transferred employees generally will not be qualified beneficiaries (even when not covered under buyer's plans) if hired by buyer immediately after the sale.

However, terminated seller employees not hired by a buyer after a sale may be entitled to COBRA from a buyer. This is true even if they initially received COBRA under seller's plans following closing but coverage ended when seller subsequently terminated its plans. This can yield the surprising result of buyers having to provide COBRA to individuals that have never worked for them. It is critical for buyers to understand these potential COBRA liabilities, and address or negotiate protections in the deal documents.

Benefits in Mergers & Acquisitions for the HR Generalist: The *Real* Deal

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Handling Seller's Plans
Most corporate transactions will require changes to a seller's existing benefits and compensation plans—from possible termination of seller's plans to merger or significant amendments to surviving plans as part of post-deal benefits integration. The steps for addressing seller's plans may be negotiated and incorporated into the deal documents but there will likely be gaps and various items that are not addressed and require careful review and coordination by the parties (and their respective HR groups).
Equity Awards
Qualified Plans
Welfare Plans


Equity Awards
Addressing a seller's stock options, restricted stock, or other equity compensation awards is not only of great interest to Seller's employees but also critical to overall deal structure since the seller (and seller's stock) is going away or will be significantly transformed. While a seller's plans will usually address what happens to outstanding equity awards in a deal, that is often just a starting point for addressing equity awards.
Cash Out vs. Assumed
Automatic / Accelerated Vesting of Equity Awards
Other Possible Equity Plan Considerations

Exercise vs. Cash-Out vs. Assumption and Substitution

Will seller's equity awards get cancelled or converted and continue post-closing?
Typical plans give participants a minimum period to exercise vested options prior to close but automatically terminate unexercised options and unvested stock awards at closing.
Some plans provide for (or participants may agree to amend awards to permit) a cash-out (or stock-out) of options without having to actually exercise.
Alternatively, a buyer may assume seller's outstanding equity awards and substitute options or stock awards covering buyer's stock instead of seller's stock.
Whether buyer assumes or substitutes can turn on: (1) nature of transaction (e.g., more likely to assume in stock deal); (2) degree of vesting remaining and whether buyer gets retentive value; (3) overall value / accounting costs involved; (4) differences between buyer and seller plans and compensation programs, etc.

Automatic / Accelerated Vesting of Equity Awards

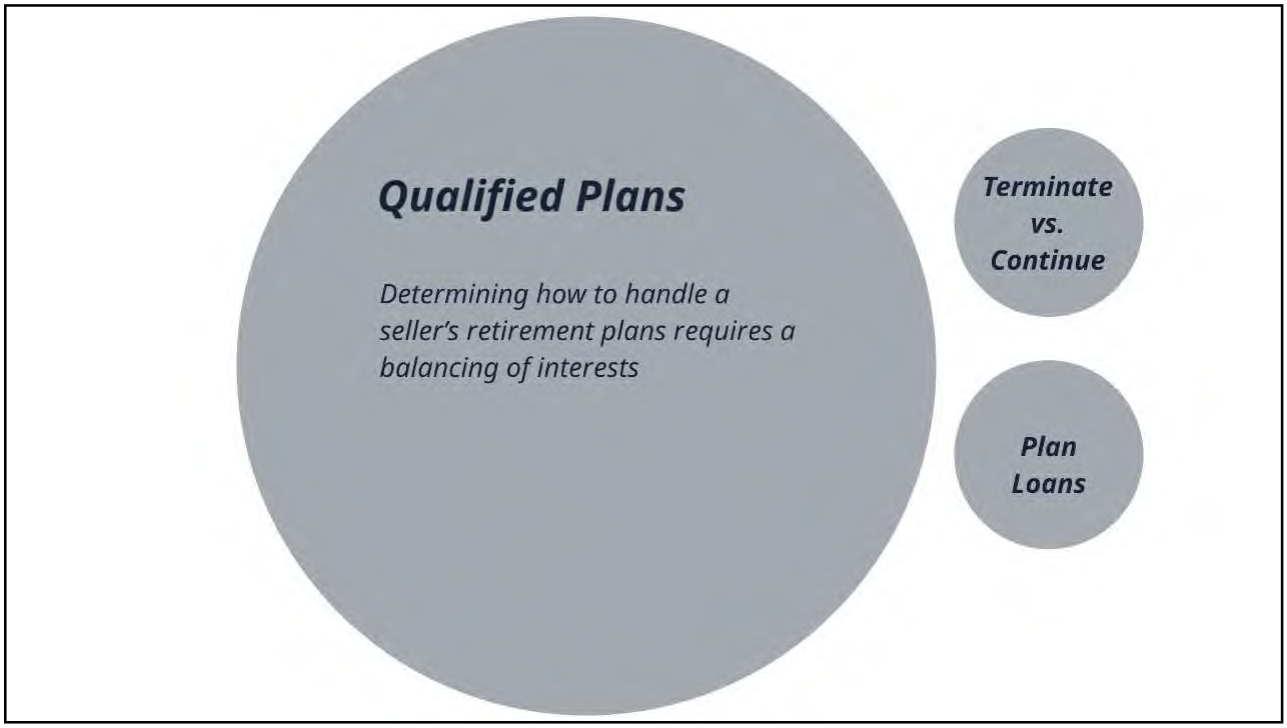
A critical issue for seller's employees is whether the transaction will result in any automatic / accelerated vesting of unvested awards.

Historically, many plans provided for full or significant automatic vesting upon a change in control; modern trend is to provide little or no automatic vesting but preserve seller's ability to accelerate generally in deal negotiations.

Some buyers prefer (demand) full acceleration of unvested equity—they want a clean slate, happy employees, and don't care about shareholder dilution.

Other Possible Equity Plan Considerations

- 280G implications of accelerated vesting.
- Will equity award "windfall" deprive buyer of human capital?
- Need / desire to negotiate for new / additional incentive awards?



Terminate vs. Continue

Factors that weigh in favor of continuation:

- ESOP with long escrow
- ESOP becomes profit-sharing plan at closing

Factors that weigh in favor of termination (which triggers 100% vesting):

- Acquisitive buyer
- Known qualification issues

Plan Loans

Plan termination will typically cause any outstanding participant loans to default

Some buyers' plans will accept rollovers of participant loans along with plan assets

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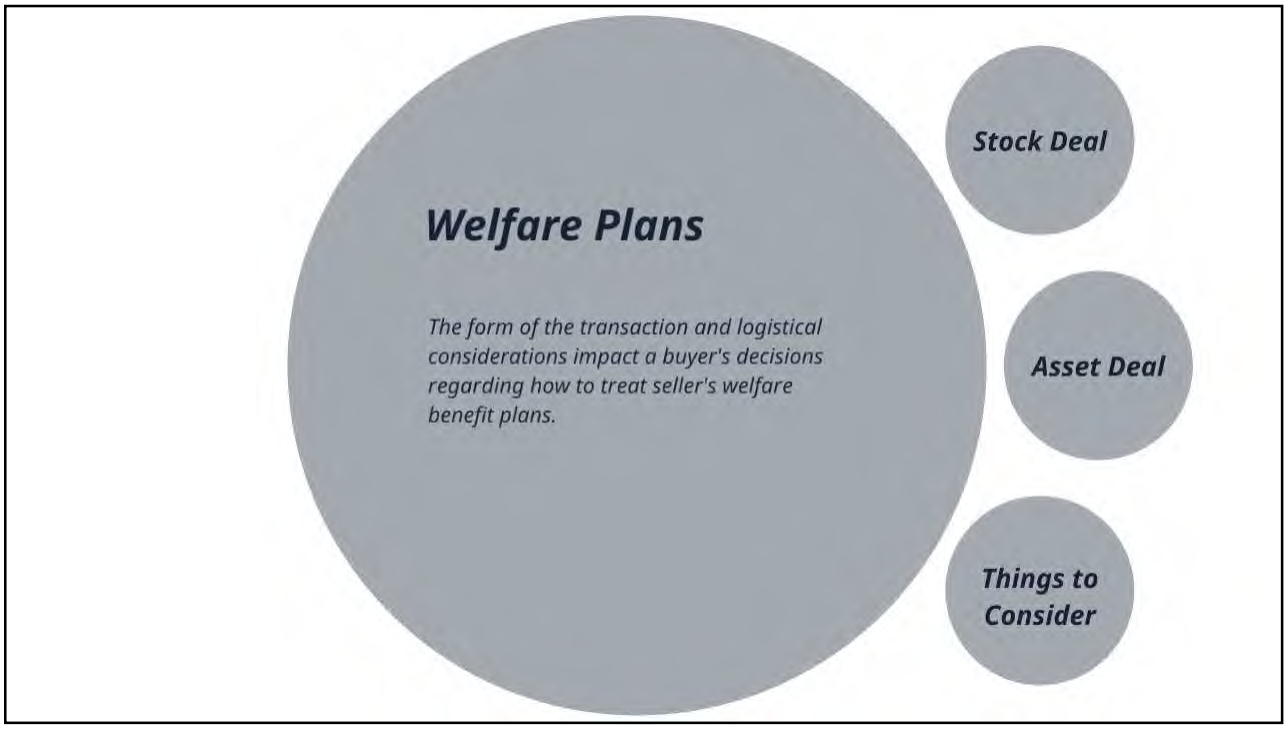

Stock Deal

Are the plans sponsored by the target or control group member?

- If the target's, those plans will continue.
- If the control group member's, the buyer has some more work to do.

Asset Deal

Buyer has a few options:

1. Assume target's plans
2. "Mirror" target's benefits
3. Leave target's plans

Logistical Considerations

When deciding how to handle seller's welfare plans, here are some things buyer will want to consider:

1. Claims incurred prior to the transaction
2. Crediting deductibles or copayments
3. Enrollment process
4. ACA requirements
5. Retiree medical coverage


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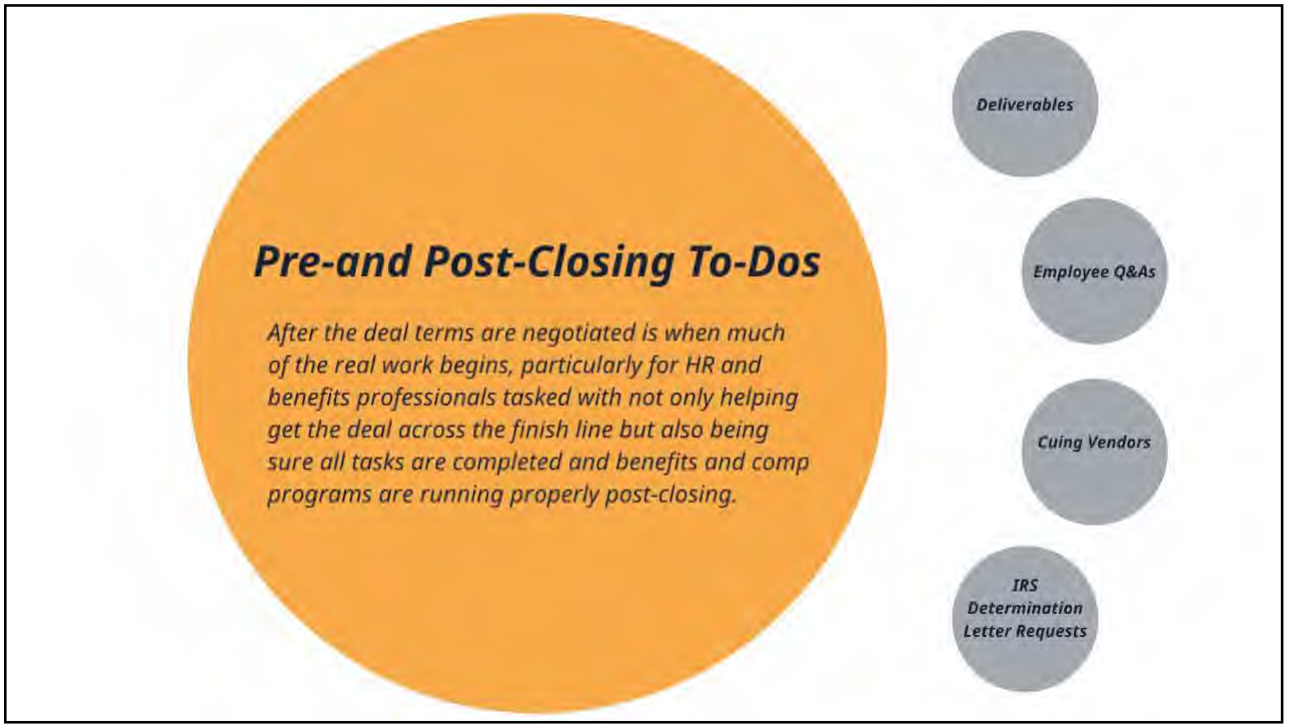
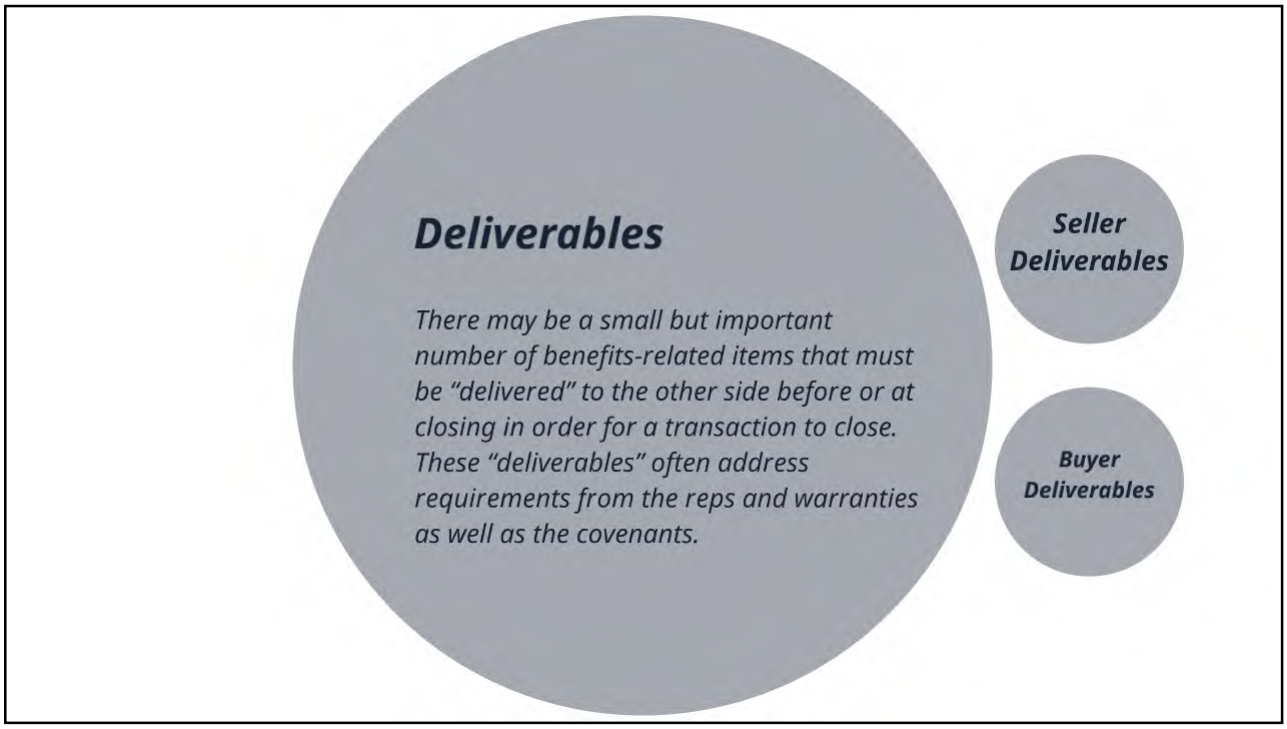

Pre-and Post-Closing To-Dos
After the deal terms are negotiated is when much of the real work begins, particularly for HR and benefits professionals tasked with not only helping get the deal across the finish line but also being sure all tasks are completed and benefits and comp programs are running properly post-closing.
Deliverables
Employee Q&As
Cuing Vendors
IRS Determination Letter Requests



Seller Deliverables

- Schedules to benefit plan reps and warranties—Used to "schedule" or point up any exceptions to the stated reps and warranties (i.e., this is where the seller reveals its benefit plan issues or prior compliance problems, etc.)
- Section 280G analysis / cleansing vote waivers and consents (if required)
- Board action terminating seller's 401(k) plan prior to closing (if required)
- Possible severance plan / retention plan / sale bonus programs, etc. (often in conjunction with buyer)

Buyer Deliverables

New employment agreements for seller executives

Possible bonus, incentive compensation or equity plans or awards for continuing / transferred employees (often customized to acquired company / group)

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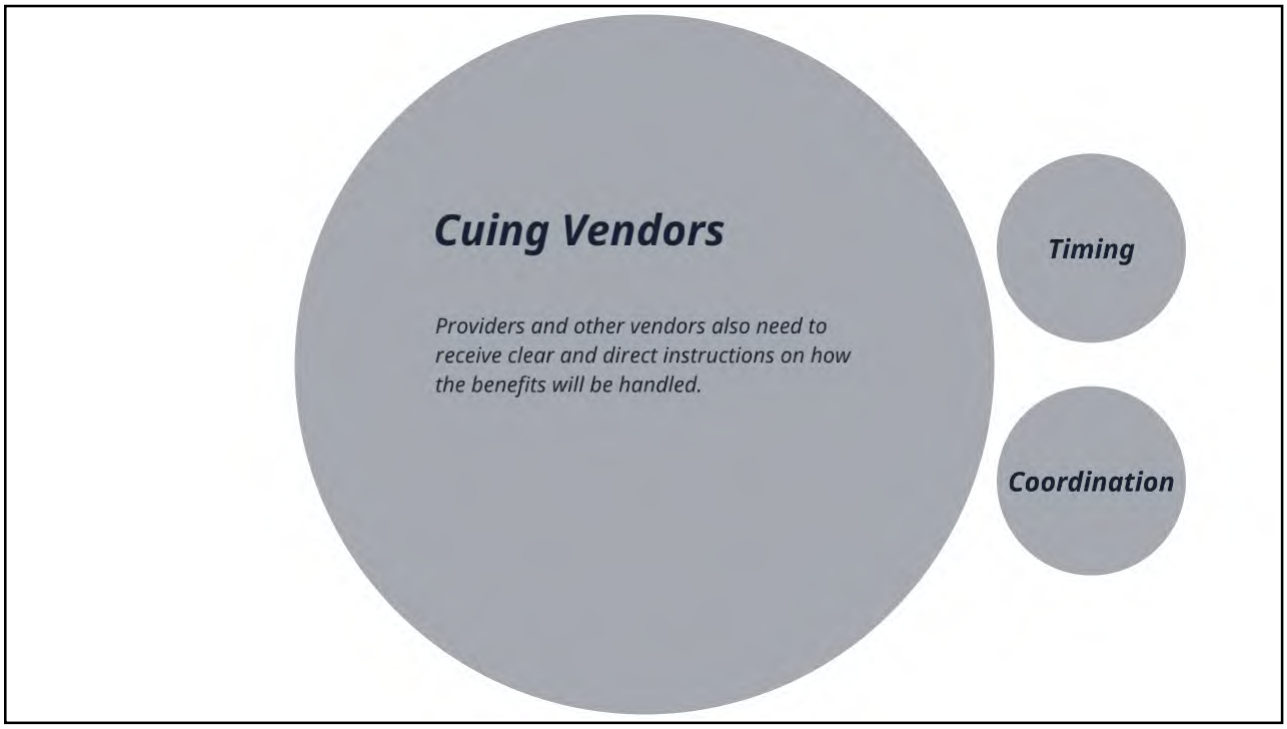
Coordination and Timing

Parties should discuss how communications to seller's employees will be handled (e.g., who will speak on behalf of each party, who will answer questions, when and how employee communications will be made).

Parties will want to review and agree beforehand to any written communications that are made, if the communications are not joint.

Representations

Parties should expressly agree that neither party will make representations to employees about how the M&A transaction will affect benefits until the details of the transaction have been negotiated.



Timing

The earlier notice can be given, the better.

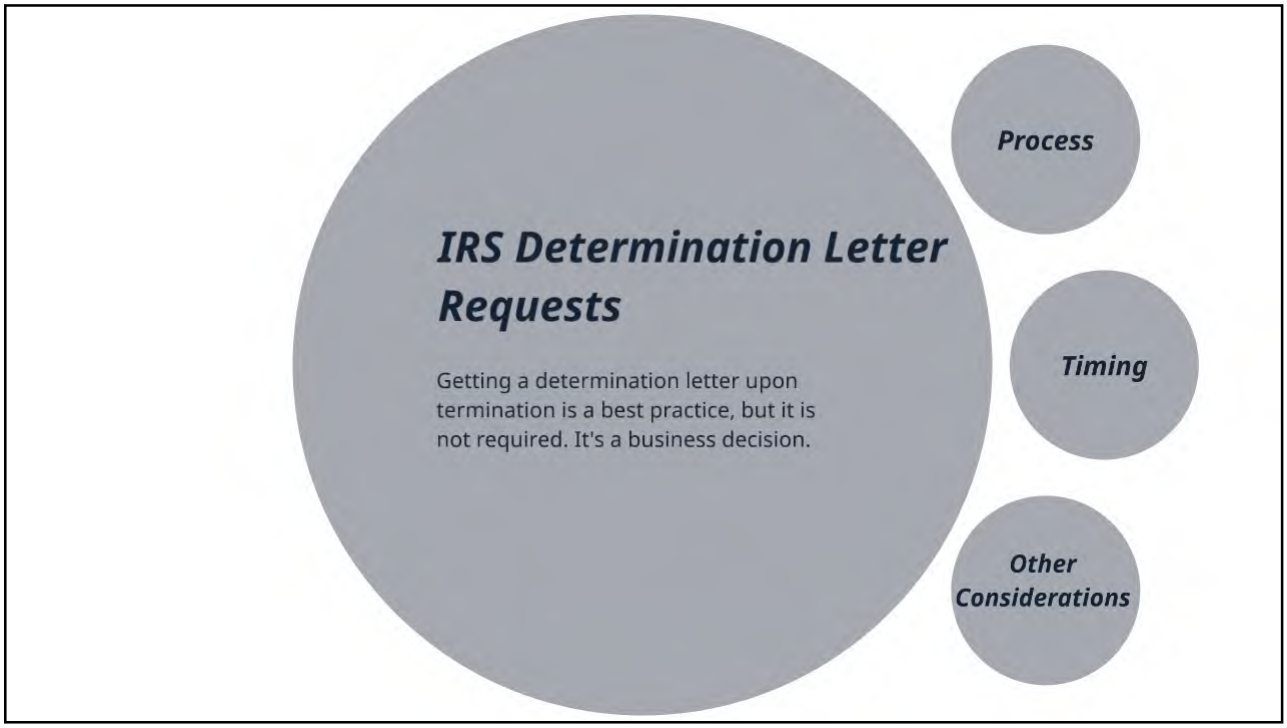
It may not always be possible to give advance notice to vendors (e.g., due to confidentiality issues, simultaneous sign and close).

Look to the service agreements for notice deadlines but, in the end, do your best.

Coordination

Parties should expressly agree as to who will be responsible for notifying vendors.

If pre-closing, then this would likely be the seller's responsibility.



Process

1. Gather plan information and documents to complete form 5310
2. Distribute the Notice to Interested Parties to participants and beneficiaries
3. File the submission with the IRS and be prepared to answer any follow-up questions

Timing

If there's time between signing and closing, may like to get started preparing the determination letter filing package before closing.

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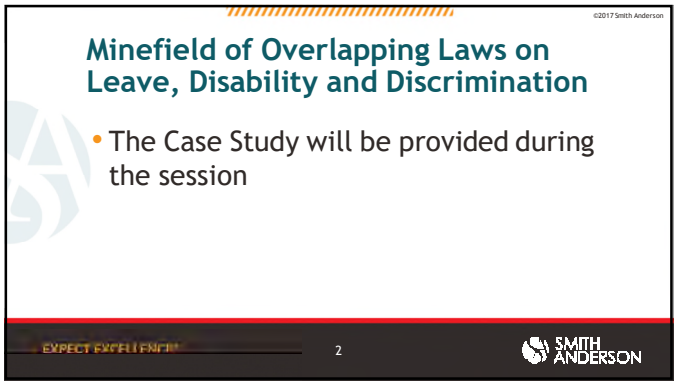
Other Considerations

A timely filed determination letter is a valid reason for postponing final distributions.

A Case Study: Navigating Performance Issues in Light of the Minefield of Overlapping Laws on Mandatory Leave, Disability and Discrimination



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Overlap of ADA, FMLA, Workers' Compensation Laws,
State Leave Laws (Paid and Unpaid), Employer Paid-Time-Off Policies

	ADA[1]	FMLA	State Leave Laws (Paid and Unpaid Sick Leave or other Forms of Leave)	Workers' Comp Laws	Employer Policies on Paid-Time-Off, Sick Pay[2] or Short Term Disability
Employer coverage	15 or more employees in 20 weeks in current or preceding year	50 or more employees in 20 weeks in current or preceding year	Minimum number of employees specified by state law; but generally applies to smaller employers than covered by FMLA	Minimum number of employees specified by state law	
Employee Eligibility	All employees covered	1. Worksite with 50 or more employees within 75 miles 2. Employee has worked for you a total of 12 months (need not be consecutive) 3. Employee has 1,250 hours of service in 12 months before leave	Specified in specific law or employer policy; but generally applies to smaller employers than covered by FMLA	All employees covered	Should be specified in policies

[1] Consider state disabilities laws that may also apply.

[2] As of October 1, 2018, the following states require employers to provide paid sick leave: Arizona, California, Connecticut, District of Columbia, Maryland, Massachusetts, Michigan, New Jersey, Rhode Island, Oregon, Vermont and Washington.

	ADA[1]	FMLA	State Leave Laws (Paid and Unpaid Sick Leave or other Forms of Leave)	Workers' Comp Laws	Employer Policies on Paid-Time-Off, Sick Pay[2] or Short Term Disability
Employee health condition triggering protection of law	"Disabled" under ADA, as amended	1. Employee's serious health condition prevents him from working; 2. Birth or adoption of a child; 3. Care for serious health condition of a family member; 4. Any qualifying exigency arising out of employee's spouse, son, daughter, or parent who is a covered military member on covered active duty; or 5. Care for a covered service member (who is a spouse, son, daughter, parent, or next of kin) with a serious injury or illness	Specified in specific law or employer policy; generally covers more conditions than FMLA or ADA Many laws also cover: • school conferences, • taking shelter or action related to domestic violence, and • other reasons	Work-related injury or illness	Should be specified in policies
Impact on ability to work requirement	To qualify for ADA protection, employee must be able to perform essential job functions if reasonable accommodation is provided	Employee unable to work due to covered conditions or covered reason for leave (see above)	Employee unable to work due to covered conditions or covered reason for leave (see above)	To receive income benefits, generally must show some level of incapacity	Should be specified in policies

	ADA[1]	FMLA	State Leave Laws (Paid and Unpaid Sick Leave or other Forms of Leave)	Workers' Comp Laws	Employer Policies on Paid-Time-Off, Sick Pay[2] or Short Term Disability
Leave available?	Depends on facts. Requires reasonable accommodation that doesn't pose undue hardship, which, in some cases, may mean leave of absence or time off	Yes	Yes	Leave is not technically required, but, if employee is unable to work, he is entitled to income benefits	Should be specified in policies
Paid leave required?	Not generally, but again, depends on facts (must give reasonable accommodation), and may not discriminate based on disability	No, but, if provided, can count against annual FMLA leave allotment	Eleven states and the District of Columbia have paid leave requirements for sick days (*see* Footnote 2) Other laws may apply as well (e.g., state sponsored disability or parental leave plans, etc.)	Depending on nature of injury and resulting incapacity, employee may be entitled to income benefits	Should be specified in policies
Duration of leave?	Depends on facts, but must consider extended leave as a possible reasonable accommodation	Up to 12 weeks in a single 12-month period Up to 26 weeks in a single 12-month period if leave is to care for a covered service member with a serious injury or illness	As required by specific state law	Continuation of pay obligation depends on nature of injury and incapacity, even if employee is no longer employed	Should be specified in policies
Intermitted leave or reduced work schedule required?	Again, depends on facts of case	Yes	Generally yes But see specific laws that apply	"Light duty" is often provided to employees injured on the job, and this may include part-time or reduced schedule work	Should be specified in policies

	ADA[1]	FMLA	State Leave Laws (Paid and Unpaid Sick Leave or other Forms of Leave)	Workers' Comp Laws	Employer Policies on Paid-Time-Off, Sick Pay[2] or Short Term Disability
Notice from employee required?	Yes, but "constructive notice" is possible	Yes, but "constructive notice" is possible by employee if employer is aware of conditions that would qualify employee for FMLA leave	Yes, but specific state laws may address how much may be required	Depends on state law	Should be specified in policies
Medical certification required?	Employer has a right to request	Yes, per FMLA regulations	Yes, but specific state laws may address when and how	Generally yes	Should be specified in policies
Nature of medical certification?	Diagnosis, impact on job, impact on major life activities, recommendation on reasonable accommodation	Confirm "serious health condition"	Yes, but specific state laws may address when and how obtained	Depends on state, but generally employer has broad access to medical information; employer may direct medical care in many states	Should be specified in policies
Frequency?	As needed	No more often than every 30 days, unless circumstances significantly change (e.g., duration or frequency of absences, nature or severity of illness, complications, etc.).	Yes, but specific state laws may address when and how obtained	As needed	Should be specified in policies
Required to provide benefits during leave?	Depends	Yes, for health benefits (on same terms as before leave); upon return, must restore other benefits as if employee was never gone	Generally yes	These laws do not address benefits in most cases	Should be specified in policies
Required to reinstate at end of leave?	Generally yes, but depends on facts of case	Generally, must restore employee to same or equivalent job	Generally, must restore employee to same or equivalent job	Generally depends on employee's ability to do the job	Should be specified in policies
Obligated to provide light duty?	Depends on facts of case (reasonable accommodation test)	No; if do provide it, can't require employee to cut FMLA leave short to take it	These laws do not generally address	Depends on state law, but light duty is often used to mitigate employer's liability	

	ADA[1]	FMLA	State Leave Laws (Paid and Unpaid Sick Leave or other Forms of Leave)	Workers' Comp Laws	Employer Policies on Paid-Time-Off, Sick Pay[2] or Short Term Disability
Fitness for duty to return to work	Employer may require if done in a nondiscriminatory fashion	Employer may require if done in a nondiscriminatory fashion	Generally, yes, but depends on state law	Generally, yes	Should be specified in policies
Anti-retaliation provision	Yes	Yes	Yes	Generally, most states have such laws	
May employer terminate employment	Depends on facts	Only if leave is exhausted or on grounds unrelated to leave that are clearly documented; but see ADA for possible accommodation	Only if leave is exhausted or on grounds unrelated to leave that are clearly documented; but see ADA for possible accommodation	Depends on facts; may have economic consequence	Only if leave is exhausted or on grounds unrelated to leave that are clearly documented; but see ADA for possible accommodation
Confidentiality of medical information	Required	Required	Required	Not always addressed	Generally required

Shifting Sands in Labor Law: A Review of Recent Developments Under the New NLRB

Shifting Sands in Labor Law

A Review of Recent Developments Under the New NLRB

J. Travis Hockaday
Patrick D. Lawler

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NLRA Overview

- Applies to non-supervisory employees in all workplaces (even union-free ones); does not apply to supervisors and managers
- Gives right to engage in concerted activities for mutual aid or protection (Section 7)
- Outlaws rules or practices that interfere with Section 7 rights (Section 8)

NLRA Overview

- NLRB enforces the NLRA
- 5 person board
  - Appointed by the President with consent of the Senate
  - Acts as an appellate quasi-judicial body
- General Counsel serves as a prosecutor

Obama-era NLRB

- Worker and union-friendly
- Easier for employees to organize
- Tougher for employers to impose neutral rules

Trump Administration's NLRB

- First Republican majority (3-2) in more than 10 years
- Peter Robb – current General Counsel
- Signaling a reversal on many Obama-era policies, but significant changes are few to date

New Standard for Handbook Rules

- Old standard: *Lutheran Heritage Village – Livonia* (2004)
  - Even if work rules did not explicitly restrict, were not adopted in response to, and were not applied against, protected activities, they were still unlawful if employees could reasonably construe language as prohibiting or limiting potential protected activity under Section 7

The Boeing Co. decision (2017)

- "No camera" rule at issue
- NLRB overruled the *Lutheran Heritage* "reasonably construe" standard
- Established new balancing test for evaluation of policies/handbook provisions/rules:
  - nature and extent of the potential impact on NLRA rights, and
  - legitimate justifications associated with the rule

The Boeing Co. decision (2017)

- NLRB may also consider:
  - the type of protected activity being implicated
  - the context of particular industries and work settings
  - the circumstances that gave rise to a particular rule

The Boeing Co. decision (2017)

- Established three categories to identify and make differentiations on the legality of particular rules
  - Category 1: rules that are lawful to maintain because they do not prohibit or interfere with exercise of NLRA rights, or the potential adverse impact is outweighed by legitimate justifications
  - Category 2: rules that warrant individualized scrutiny of whether they would prohibit or interfere with rights, and if so, whether adverse impact on conduct is outweighed by legitimate justifications
  - Category 3: rules that are unlawful to maintain because they would prohibit protected activities, and adverse impact is not outweighed by justification for rule

The Boeing Co. decision (2017)

- Maintenance of Category 1 (and certain Category 2) rules will be lawful, but the application of such rules to employees who have engaged in NLRA – protected conduct may violate NLRA, depending on circumstances

GC Memo 18-04 (June 6, 2018)

- https://apps.nlrb.gov/link/document.aspx/09031d45827f38f1
- Provides details about types of policies/handbook provisions/rules that should be considered lawful/unlawful, standards for investigation of ULP charges related to same, and whether such claims will generate complaints by GC
- More good news – NLRB Regions directed to stop routine requests for handbooks/policies/rules in cases not implicating rules

Category 1 -"Green Light" rules

- Lawful
  - Civility/disruptive behavior
  - No photography/recording
  - Insubordination / non-cooperation
  - Disruptive behavior
  - Confidential, proprietary, and customer information (that make no mention of employee or wage information)
  - Defamation, misrepresentation
  - Employer logos and IP
  - Authorization to speak for company on company's behalf
  - Nepotism, disloyalty, self-enrichment

Category 2 -"Yellow Light" rules

- Scrutinize
  - Broad conflict of interest policies (that do not specifically target fraud and self-enrichment, and do not restrict membership in, or voting for, union)
  - Broad confidentiality rules ("employer business," "employee information")
  - Restrictions on disparagement/criticism of the employer
  - Restrictions on speaking to media or third parties
  - Prohibitions of off-duty conduct that might harm employer
  - Prohibitions on false/inaccurate statements
  - Rules against use of employer's name

Category 3- "Red Light" rules

- Unlawful
  - Confidentiality rules regarding wages, benefits, working conditions
  - Rules that prohibit joining outside organizations or that require employees to refrain from voting on matters concerning the employer

Words of Caution . . .

- Ensure rules/policies remain facially neutral
- Include appropriate language making clear that policies are not intended to interfere with, restrict, or prevent communications about wages, hours, or other terms and conditions of employment
  - Note that employees have the right to engage in, or refrain from, such activities
- Narrowly tailor rules to well-defined and -articulated legitimate employer interests
- Keep close watch for more guidance from NLRB

Joint Employment

- Traditionally, two entities were deemed joint employers only if they co-determined or actually exercised joint control over essential terms and conditions of employment that had direct and immediate impact
- *Browning-Ferris Industries* (2015) standard:
  - Joint employer status exists between entities even when one or more had the right to exercise minimal or "indirect" control over terms and conditions of employment (even if only limited and routine matters), even if control never actually exercised

Joint Employment

- *Hy-Brand Industrial Contractors Ltd.* (Dec. 2017)
  - Construction contractors terminated after protesting wages, benefits and workplace safety
  - NLRB:
    - "potential control" is not enough
    - Reversed *Browning Ferris*

Joint Employment

- *Hy-Brand Industrial Contractors Ltd.* (2017)
  - "[A] finding of joint-employer status shall once again require proof that putative joint-employer entities have exercised joint control over essential employment terms (rather than merely having 'reserved' the right to exercise control), the control must be 'direct and immediate' (rather than indirect), and joint-employer status will not result from control that is 'limited and routine.'"

Joint Employment

- Post-*Hy-Brand*
  - Strange things happen:
    - February 2018 – decision vacated due to potential conflict of interest of one member, and *Browning Ferris* implicitly reinstated
    - September 13, 2018 – NLRB released draft rule, adopting *Hy-Brand* standard
    - November 12, 2018 – deadline for comments on draft rule

Misclassification and the NLRA

- *Telemundo Television Studios, LLC* (2017)
  - "The evidence demonstrates that at least some of their talent managers have misclassified them as independent contractors . . ..This misclassification can and will operate as a restraint on, and interference with, the performers' exercise of their Section 7 rights."

Misclassification and the NLRA

- *Velox Express, Inc.* (2017)
  - NLRB ALJ rules that misclassification of workers as ICs (who are excluded from NLRA definition of employee) is unlawful interference in violation of Section 8
    - Noted that misinforming workers about their status sends message they have no rights under NLRA

Misclassification and the NLRA

- February 15, 2018 – NLRB invites briefing on whether misclassification of statutory employees as independent contractors violates Section 8

Revisiting E-mail Rules

- *Purple Communications, Inc.* (2014)
  - Employers must permit employees who have been provided access to their employer's email system to use that system for statutorily protected communications for non-business purposes on their non-working time in connection with Section 7 – protected activities

Revisiting E-mail Rules

- *Rio All-Suites Hotel and Casino* (Aug. 1, 2018)
  - Employer prohibited workers from sending chain letters or other forms of non-business information
  - ALJ held that because the rule banned all use of the employer's email systems for non-business distribution and solicitation, it violated *Purple Communications*
  - Then . . .

Revisiting E-mail Rules

- *Rio All-Suites Hotel and Casino* (2018)
  - August 1, 2018 – NLRB invited briefs on whether it should adhere to, modify, or overrule *Purple Communications*
  - Also asked whether the standard should apply to use of other employer-owned "computer resources" beyond email (instant messages, text messages, social media posts, etc.)

Revisiting E-mail Rules

- NLRB may be signaling a return to pre-*Purple Communications* rule:
  - Employers may lawfully impose Section 7-neutral restrictions on employees' non-work-related uses of their email systems, even if those restrictions have the effect of limiting the use of those systems for communications regarding union or other protected concerted activity

"Micro-Units" Out

- *Specialty Healthcare* (2011)
  - Lenient standard for determining whether the bargaining unit is "appropriate"
  - NLRB allowed small proposed units ("micro-units"), even if they excluded large numbers of employees doing similar tasks
  - Resulted in union ability to organize a minority share of a workforce and establish footholds in businesses where the majority of the employees might not have desired to be represented by a union

"Micro-Units" Out

- *PCC Structurals, Inc.* (Dec. 15, 2017)
  - NLRB overruled *Specialty Healthcare's* "micro-units" rule
  - Returned focus to whether employees in petitioned-for unit shared a sufficient "community of interest" to make their representation in a single unit appropriate

"Micro-Units" Out

- "Community of Interest"
  - NLRB will determine whether employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment and are separately supervised.

Unrest over Wage Rates

- "Fight for $15" movement is gaining steam nationwide
- Beware of rules that could restrict employees' rights to discuss wages - think "RED LIGHT"
- *In-and-Out Burger, Inc.* (5th Cir. 2018)
  - Violated NLRA by prohibiting workers from wearing "Fight for $15" buttons and maintaining overly broad uniform rules
- *EYM King of Michigan, LLC* (NLRB 2018)
  - Burger King violated NLRA by using anti-loitering and anti-solicitation rules to prohibit parking lot discussions about wages and strike

Other topics to watch

- "Quickie Elections"
  - 2014 rules accelerated time table for conducting elections, among other things
  - December 2017 – NLRB asked for public comment regarding whether the rules should be retained as-is or with modifications, or rescinded
  - Pending
- Limits on workplace investigations (confidentiality instructions, disclosure of statements to unions)
- Whether college-employed students are employees for bargaining purposes
- Definition of "independent contractor" under NLRA

Final thoughts…

- With politics shifting, sand will keep shifting
- Fewer changes to date than expected, but more are likely to come – STAY TUNED
- "[T]he one factor every [NLRB] case has in common . . . is the presence of at least two people who see things completely different."
  - John Fanning, former NLRB member (1954)

Shifting Sands in Labor Law

A Review of Recent Developments Under the New NLRB

J. Travis Hockaday
Patrick D. Lawler

EXPECT EXCELLENCE®

EEO Update

EEO UPDATE

Zebulon D. Anderson
October 2018

EXPECT EXCELLENCE®

EEOC Developments

Administrative Statistics

- Volume
  - FY 2017 = 84,254 charges
  - Fewest since 2007
  - Over last 10 years, retaliation and disability claims have increased the most
  - Retaliation also has remained most common claim for nearly a decade – 49% of all charges and continuing to ↑
  - Harassment is alleged in 32% of the charges and that has been a focus area for EEOC

Administrative Statistics

- Location
  - FY 2017: 3,752 charges in NC – 4.5% of all charges nationwide
  - Texas, Florida, California, Georgia, Illinois, Pennsylvania, and North Carolina account for 46% of all charges nationwide

Litigation Statistics

- In FY 2017 – 184 new merits lawsuits filed by EEOC
  - More than double last year
  - Most since 2011
  - Still, much less than 10-15 years ago
  - Finite resources focused on systemic litigation

Systemic Statistics

- Systemic cases involve 20+ employees and are focused on matters in which the alleged discrimination has a broad impact
- FY 2017
  - 340 systemic investigations resolved = $38M
    - Substantial ↑ from prior year
  - 167 systemic investigations yielded "cause" findings
    - While only 3% of all charges yielded "cause" findings, nearly 50% of the systemic investigations yield "cause" findings
  - 25% of all active litigation cases are systemic
  - EEOC has 91% success rate in systemic litigation

FY 2018 - A preview

- In October, EEOC released preliminary data regarding sexual harassment charges in the one-year #MeToo post-Weinstein era
- Charges alleging workplace sexual harassment increased by 12% - this is the first time in almost 10 years that sexual harassment charges increased
- The EEOC filed 50% more lawsuits against employers for sexual harassment
- Everyone anticipates that this trend will continue

Strategic Enforcement Plan: FY 2017-2021

1. Eliminating barriers in recruitment and hiring
   - Focus on class-based discriminatory practices (e.g., background checks, job application forms, medical questionnaires)
2. Protecting vulnerable workers, such as immigrant and migrant workers

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

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

EEOC Composition

- General Counsel
  - Vacant since December 2016
- Five Commissioners
  - Victoria Lipnic (Acting Chair) – R
  - Charlotte Burrows – D
  - Chai Feldblum – D – Term expired in 2018
    - Perceived to be very liberal
    - Has been re-nominated by President Trump
    - Blocked by Senator Lee (R)
  - Vacant
  - Vacant

EEOC Composition

- President Trump will replace GC and 3 Commissioners
- EEOC composition then will be Republican dominated
  - That likely will have an impact on agenda
- President Trump has made four nominations
  - Janet Dhillon – Chair of Commission - nominee
    - Large law firm and GC experience
  - Daniel Gade – Commission nominee
    - Decorated, disabled military veteran who is non-lawyer
  - Chai Feldblum – Commission nominee
  - Sharon Gustafson – GC nominee
    - Most of her career represented employees – conservative groups concerned
    - Testimony made liberal groups concerned

Sex Discrimination (Sexual Orientation and Gender Identity)

Macy v. DOJ (EEOC April 2012)

"Intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on . . . sex' and such discrimination therefore violates Title VII."

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

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

- First appellate court to conclude that Title VII's prohibition on discrimination "because of sex" includes prohibition on discrimination because of sexual orientation
- Landmark decision – 8-3
- Since then, other circuits have tackled this issue

Zarda v. Altitude Express (2nd Cir. 2018) (*en banc*)

- Zarda, a gay man, was a skydiving instructor
- Sometimes he told female customers about his sexual orientation to assuage concern about being strapped to him on tandem skydive
- A female customer complained that Zarda had told her about his sexual orientation and inappropriately touched her
- Zarda denied inappropriate touching but was fired
- He sued asserting, among other things, a Title VII claim for sexual orientation discrimination

Zarda

- The District Court entered summary judgment for the employer because sexual orientation discrimination is not prohibited by Title VII
- Zarda appealed
- A 3-Judge panel affirmed the decision of the District Court, concluding that prior decisions of the 2nd Circuit compelled the conclusion that Title VII does not prohibit sexual orientation discrimination
- The full 2nd Circuit (13 Judges) then agreed to decide the issue

Zarda

- The EEOC filed a brief arguing that Title VII prohibits sexual orientation discrimination based on the three theories it has advanced in each of these cases
- The US Department of Justice (DOJ) also filed a brief
  - The DOJ stated that, although the EEOC has filed a brief in support of the plaintiff, "the EEOC is not speaking for the United States."
  - The DOJ argued 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."

Zarda

- The 2nd Circuit ruled in favor of Zarda - 10-3
- There were 8 separate opinions over 100+ pages, but in the end 10 judges concluded that Title VII's prohibition on discrimination "because of sex" includes a prohibition on sexual orientation discrimination
- The defendant has asked the Supreme Court to review

Zarda

Majority

- 6 judges
- Title VII should be interpreted broadly

Zarda

Majority

- Three bases for conclusion:

1. Definitional: "Sexual orientation" necessarily requires the identification of the sex of a person and the sex of the persons to whom that person is attracted – therefore, sexual orientation discrimination is discrimination because of sex
2. Gender Stereotyping: Courts agree that discrimination based on sex stereotypes violates Title VII – therefore, discriminating against individuals based on stereotypical views of sexual preference violates Title VII
3. Associational Discrimination: Courts agree that discrimination based on the race of someone with whom the employee associates violates Title VII – therefore, discrimination based on the sex of someone with whom the employee associates violates Title VII

Zarda

Majority

- Response to argument that Congress did not intend to prohibit sexual orientation discrimination when it passed Title VII in 1964:
  - Congress did not intend to prohibit other forms of discrimination when it passed the statute, but the Supreme Court nonetheless has recognized them
  - For example, Supreme Court has held that male-on-male sexual harassment violates Title VII even though that "was assuredly not the principal evil" that Congress was worried about when it passed Title VII
  - "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed"

Zarda

Concurrences

- 2 additional Judges agreed with the associational discrimination analysis
  - Judge Jacobs rejected the rest of the majority analysis, stating that it "amounts to woke dicta"
- 1 additional Judge agreed with the outcome based on definitional analysis, but complained that the decision was too long
  - Footnote: Cf. 1 Callimachus fr. 465, at 353 (Rudolfus Pfeiffer ed., 1949) (3d century B.C.) (μέγα βιβλίον . . . μ[ε]γ[α] κακ[ου]).
  - "BigBook.Big evil"
- 1 additional Judge agreed with the definitional analysis

Zarda

Dissent

- 3 Judges – authored by a liberal judge
- Begins with a lengthy interesting discussion about the historical and political context in which Title VII was adopted
- Agrees that focus should not be on what Congress intended
- But he believes the focus should be on the "public meaning" of the language of Title VII
- And the public meaning of that language did not include a prohibition on sexual orientation discrimination

Other Circuits

- 11th Circuit
  - *Evans v. Georgia Regional Hospital* (11th Cir. 2017)
    - Followed old precedent that sexual orientation discrimination is not prohibited by Title VII
    - Declined to hear case *en banc*
    - Petition for cert denied

Other Circuits

- 11th Circuit (cont'd)
  - *Bostock v. Clayton County Bd Commissioners* (11th Cir. 2018)
    - Followed *Evans* and old precedent
    - Declined to hear case *en banc*
    - Dissent: "I cannot explain why a majority of our Court is content to rely on the precedential equivalent of an Edsel with a missing engine, when it comes to an issue that affects so many people"
    - Petition for cert filed

Other Circuits

- 8th Circuit
  - *Horton v. Midwest Geriatric Management* (8th Cir. 2018)
    - District Court rejected sexual orientation claim based on old precedent
    - Issue has been briefed and 8th Circuit will decide

EEOC and Stephens v. R.G. & G.R. Harris Funeral Homes (6th Cir. 2018)

- Stephens was born biologically male
- She was employed by Defendant Funeral Home as Funeral Director/Embalmer from 2008-2013
- During that time, she presented herself as a man
- In July 2013, she told Rost, the owner of the Funeral Home, that she planned to have sex reassignment surgery
- She explained that the first step would involve living and working as a woman for one year
- Rost then fired her

Funeral Homes

- Rost explained that he fired her because Stephens "was no longer going to represent himself as a man" and "wanted to dress as a woman"
- Rost further explained that while the Funeral Home was not affiliated with any church and welcomed clients of all faiths, he believes that its "highest priority is to honor God"
- He believes that "a person's sex is an immutable God-given gift" and that "he would be violating God's commands if he let a male funeral director dress as a woman"
- EEOC sued, alleging that the Funeral Home had violated Title VII by firing Stephens because of her sex and gender identity

Funeral Homes

- District Court granted the Funeral Home's motion for summary judgment
- The Court concluded that:
  - Discrimination because of transgender status was not prohibited by Title VII
  - But discrimination because of failing to conform with gender stereotypes *was* prohibited by Title VII
  - And there was direct evidence of such unlawful discrimination
  - But the Religious Freedom Restoration Act (RFRA) prevented the EEOC from enforcing Title VII in this case because doing so would substantially burden Rost and the Funeral Home's religious exercise and EEOC had failed to consider less restrictive solutions, such as a gender-neutral dress code
  - EEOC appealed

Funeral Homes

Claims

- Discrimination based on a failure to conform to gender stereotypes is prohibited by Title VII
  - In some cases a sex-specific dress code may not be unlawful
  - But terminating the employment of Stephens because she wants to appear and dress in a manner different than how the Funeral Home believes she should appear and dress is sex discrimination
- Discrimination because of transgender or transitioning *status* is discrimination because of sex
  - Such discrimination always is based on gender stereotypes
- Court rejects the argument that Congress did not intend to prohibit such discrimination when it enacted Title VII

Funeral Homes

Defenses

- Ministerial exception: Title VII does not apply to the employment relationship between a religious institution and its ministers
  - Funeral Home is not a religious institution
  - Stephens was not a minister

Funeral Homes

- RFRA: Government may not substantially burden a person's religious exercise unless the Government shows that the burden furthers a compelling Government interest and is the least restrictive means of furthering the interest
  - This is a possible defense only because EEOC was a party
  - Rost sincerely believed that running the Funeral Home was a religious exercise, but prohibiting transgender discrimination is not a substantial burden on that exercise
    - No evidence of adverse impact on Funeral Home customers and, in any event, reliance on customer preference is not permissible
    - As a matter of law, requiring that Rost *tolerate* Stephen's expression of her gender identity does not require him to *support* or *endorse* something that violates his religious beliefs
  - Even if enforcement of Title VII in this manner did impose a substantial burden on Rost's religious exercise:
    - EEOC has a compelling interest in eradicating unlawful discrimination
    - Enforcing Title VII is the least restrictive way to further that compelling interest

Funeral Homes

- Funeral Homes has filed a petition for cert
  - Among other things, it challenges the conclusion that transgender discrimination is prohibited by Title VII
  - Part of the Sixth Circuit argument was based on sexual orientation cases like *Hively* and *Zarda*
  - So, a Supreme Court decision in this case likely would impact all of these related issues

Conclusion

- EEOC is very focused on these issues and is devoting considerable resources to them
- Unclear what EEOC will do when Trump nominees assume positions
  - Best guess is that EEOC then may play a less active role on this issue
- For now, different rules in different jurisdictions
- Issue likely will be decided by Supreme Court
  - That decision likely will be based on arguments about how judges should interpret statutes
- Meanwhile, many states and counties prohibit such discrimination, and those laws will apply no matter what the Supreme Court decides
- The best practice is to prohibit discrimination based on sexual orientation or gender identity and to assume that the law prohibits such discrimination

Sex Discrimination (Equal Pay Act)

EEOC v. Maryland Insurance Administration (4th Cir. 2018)

- Cordaro, Green, & Rogers are women who were hired by MIA as Fraud Investigators
- They learned that they were paid less than four male Fraud Investigators
- They complained, but their salaries were not increased
- EEOC sued MIA on their behalf, alleging that MIA violated Equal Pay Act (EPA)
- Summary Judgment for MIA – pay disparity was based on factors other than sex
- Appeal

Maryland Insurance Administration

- EPA requires that men and women receive equal pay for equal work
- To establish a *prima facie* case, a plaintiff must show that:
  - Employer paid different wages to an employee of the opposite sex
  - For equal work on jobs requiring equal skill, effort, and responsibility
  - That is performed under similar working conditions
- Plaintiff *does not* have to prove discriminatory intent

Maryland Insurance Administration

- Once a *prima facie* case is established, the employer may avoid liability by proving one of the statutory affirmative defense:
  - Unequal pay is based on seniority system
  - Unequal pay is based on merit system
  - Unequal pay is based on quantity or quality of output
  - Unequal pay is based on "any other factor other than sex"
- To obtain summary judgment, the employer must submit evidence that the proffered non-sex reason for the disparity does in fact explain the disparity and no rational jury could conclude otherwise
  - Evidence that a non-sex reason *could* explain the disparity is insufficient

Maryland Insurance Administration

- Plaintiffs established a *prima facie* case
  - They were paid less than men for the same job under the same conditions
  - While there also were many male Fraud Investigators who were paid less than the plaintiffs, that does not affect the analysis
- MIA argued that the pay difference was non-sex based
  - The male Fraud Investigators had greater qualifications, certifications, and employment history
  - The Court held that, while those *could* be valid reasons for a pay disparity, MIA had failed to prove that those *were* in fact the reasons and that no reasonable jury could conclude otherwise
  - So, no summary judgment and a jury must decide

Rizo v. Yovino (9th Cir. 2018) *(en banc)*

- *Rizo* was employed by Maricopa County as a math teacher
- Fresno County hired her as a math consultant in 2009
- Her starting salary was calculated by adding 5% to her prior salary in accordance with Fresno policy
- In 2012, she learned that male math consultants had been hired at a higher salary
- She sued, asserting, among other claims, an EPA claim

Rizo

- Fresno moved for summary judgment
  - It argued that the pay disparity was based on a factor other than sex – it was based on past salary
  - District Court denied the motion because it concluded that basing starting salary on prior salary perpetuates discriminatory pay disparities
- Fresno appealed
  - 3-Judge Panel reversed
  - Prior salary is a factor other than sex
- Full 9th Circuit agreed to hear the case – 11 Judges

Rizo

- The parties agreed that *Rizo* had established a prima facie case
- The sole issue is whether Fresno had established as an affirmative defense that the pay disparity was based on a "factor other than sex"
- Fresno argued that prior salary constitutes a factor other than sex
- The Court rejected that argument
  - Factors other than sex are limited to "legitimate, job-related factors such as . . . experience, educational background, ability or prior job performance."
  - Prior salary "is not a legitimate measure of work experience, performance, or any other job-related quality" and its utilization perpetuates historical discriminatory pay disparities

Rizo

- The Court further explained:
  - "a factor other than sex must be one that is *job related*, rather than one that 'effectuates some *business* policy'"
  - "it is impermissible to rely on prior salary to set initial wages"
  - This is the law whether prior salary was the sole factor used in setting starting salary (as in this case) or whether it is one of several factors

Rizo

- Lengthy concurring opinion took issue with that last point
  - The concurring judges agreed that prior salary *alone* was not a lawful factor other than sex
  - However, they believe that prior salary, when used as one of multiple variables, can be a lawful factor other than sex because prior salary may reflect variables other than just sex-based pay disparity
  - EEOC and most circuits agree with concurrences

Conclusion

- Equal pay is an EEOC focus area
- EPA claims are hard to defend
- If men and women are paid different amounts for the same job, there is liability exposure
- And the *MIA* case suggests that, even if the employer can show non-sex-based possible explanations for the disparity, it will be hard to win summary judgment – which means it faces a jury trial
- Documenting in real-time non-sex-based reasons for disparity could be helpful
- Reliance on prior salary when setting starting pay (even if other variables also are considered), while common, is risky (and unlawful in 9th Circuit)

Harassment and Retaliation

Strothers v. City of Laurel (4th Cir. 2018)

- Strothers, an AA woman, was hired as an administrative assistant by the City of Laurel
- Piringer, the Director, agreed that she could start at 9:05 AM instead of 9:00 AM because she had child care issues
- Her supervisor, Koubek, nonetheless told her that she had to be there by 8:55 AM and marked her tardy every time she did not arrive by 8:55 AM
- Koubek also tracked every time Strothers was away from her desk, including when she used the restroom
- Koubek required Strothers to tell her when she planned to use the restroom
- When Strothers cancelled a massage appointment and gave it to Piringer, Koubek complained that Strothers was not a team player because she didn't invite her too

Strothers

- When Strothers wore black Nine West jeans on casual Friday, Koubek took the position that they were "jeggings," which were similar to forbidden leggings, and required her to go home and change
- Koubek also grabbed the jeggings and publicly berated Strothers for wearing them
- Koubek gave her a negative 3-month performance evaluation
- Strothers complained to Piringer
  - Piringer explained that Koubek was mad because Koubek had wanted to hire someone of different race
- Other employees told Strothers that Koubek treated African American employees poorly

Strothers

- After 7 months, Strothers submitted a memo to Piringer, complaining that Koubek was "harassing" her and creating a "hostile environment"
  - The memo did not allege that the harassment was race-based
- Piringer decided not to investigate further
- Koubek then sent an email saying she planned to file a grievance
- She was fired the next day
- She sued, alleging, among other things, that she was fired in retaliation for her complaints of harassment

Strothers

- District Court granted the Defendant's motion for summary judgment
  - No protected activity because she could not show that she reasonably believed the harassment was race-based
  - No causal connection because defendant did not know she was complaining about race harassment
- Strothers appealed

Strothers

- A plaintiff can establish a prima facie case of retaliation by showing:
  - She engaged in protected activity
  - Her employer took adverse action
  - There was a causal connection between the two
- Protected activity includes reporting conduct that is not actually unlawful, but that the plaintiff reasonably believes is unlawful
- If a *prima facie* case is established, the employer must offer a legitimate non-retaliatory reason
- Then, the employee must show that the proffered reason was a pretext for retaliation

Strothers

- Protected Activity – Did Strothers have a reasonable basis to believe that she was reporting an unlawful hostile work environment?
  - An actionable hostile work environment requires proof that:
    - Conduct was unwelcome
    - Conduct was based on protected characteristic
    - Conduct was sufficiently severe or pervasive to alter work conditions
    - Conduct was imputable to employer
  - Here, the conduct clearly was unwelcome
  - Based on what Piringer and co-workers said, Strothers reasonably believed it was race-based

Strothers

- Protected Activity (cont'd)
  - Conduct was sufficiently severe and pervasive
    - Look at totality of circumstances
    - Heightened scrutiny, unfair evaluations, and arbitrary dress-code violations, in the aggregate, were enough for Strothers to reasonably believe this was an actionable hostile environment
  - Conduct was imputable to the employer
    - Regardless of whether Koubek was a "supervisor," the City failed to take reasonable steps to prevent the harassment
  - So, Strothers had reasonable belief that she was complaining about unlawful harassment

Strothers

- She suffered adverse action
- There was a causal connection
  - While the memo submitted by Strothers did not mention "racial" harassment, the City certainly had reason to believe that she was engaged in protected activity
    - Piringer pointed out Koubek's race bias
    - She complained about a "hostile work environment"
  - Adverse action happened shortly after the protected activity
- Accordingly, Strothers did establish a prima facie case of retaliation and the District Court decision was reversed

EEOC v. Costco (7th Cir. 2018)

- Suppo worked for Costco, and her job regularly required her to walk around the store returning items to shelves
- May 2010, Thompson, a customer, approached her
  - Asked her personal questions
  - Asked her where she lived
- Same thing happened a few days later
- She told her supervisor, and he told her to let him know if she saw Thompson again
- She saw him soon after
  - Wearing sunglasses and hat
  - He was watching her
  - He told Suppo she looked "scared"

Costco

- She reported this to her supervisor
  - Supervisor and other managers invited Thompson to office
  - They told him not to talk to Suppo
  - He got mad; said it was a free country; agreed to stop
- She also reported Thompson to police who did an investigation
  - Thompson told police he would stop
- He didn't stop

Costco

- He continued to follow her and speak with her over the next 13 months
  - He tried to get her phone number
  - He stared at her
  - He asked her questions in a "sexual way"
  - He asked if she had a boyfriend
  - He said she was "beautiful" and "exotic"
  - He asked how old she was
  - He said she looked "scared" and asked whether he "freaked her out"
  - He asked her on dates
  - He tried to provide his phone number
  - He commented on her makeup
  - He tried to hug her twice
  - He bumped into her cart four times
  - He held up his phone and videotaped her. When she told him to stop, he said "OK. I'll leave you alone mysterious Dawn."

Costco

- It isn't clear what she was reporting to Costco, but Costco must not have taken her reports very seriously because they did not argue that they took reasonable action to prevent this
- She went to court and got a restraining order
- She took a medical leave from work
- After that, Costco told Thompson he had to shop at a different store
- Suppo did not return to work
- EEOC sued Costco on Suppo's behalf, alleging, among other things, sexual harassment
- She recovered $250,000 in a jury trial
- Costco appealed

Costco

- "An employer can be liable for a hostile environment that results from the acts of non-employees, including customers"
- The elements of a customer-based hostile environment claim are the same:
  - Conduct that is unwelcome
  - Conduct that is because of sex (or race, etc.)
  - Conduct that is severe and pervasive
  - Conduct that is imputable to the employer
- In this case, the sole issue is whether the conduct was sufficiently severe and pervasive

Costco

- Costco argued that Thompson's statements were less vulgar than statements that courts in other cases had concluded were insufficient to be severe and pervasive
- The Court agreed with Costco – For example, in one 1995 case, the Seventh Circuit held that the employer was entitled to summary judgment when the supervisor's behavior included "making masturbatory gestures while conversing with her, grunting suggestively as she turned to leave the office, referring to her as 'pretty girl,' and commenting that his office did not get 'hot' until she walked in."

Costco

- Costco also argued that Thompson's contact with Suppo was milder than contact that Courts in other cases had concluded was insufficient to be severe and pervasive
- Again, the Court agreed – For example, in one 2004 case, the Seventh Circuit held that conduct was not sufficiently severe and pervasive when supervisor "ask[ed] what color bra [plaintiff] was wearing, pull[ed] back the shoulder strap of her tank top to see for himself, and suggest[ed] that he 'make a house call' when she called in sick."

Costco

- Nonetheless, the Court held that the conduct of Thompson was sufficiently severe and pervasive
- Unlawful conduct "need not consist of pressure for sex, intimate touching, or a barrage of deeply offensive sexual comments."
- It can take other forms, "such as demeaning, ostracizing, or even terrorizing the victim because of her sex"
- Here, even though Thompson's acts were not particularly sexual, they were constant and creepy (my word) and based on her sex
- So, the verdict was affirmed

Conclusions

- Sex harassment is a focus area for EEOC
- Sex harassment claims are increasing
- That will continue in the #MeToo era, especially as these issues remain a focus of the news
- The type of conduct that, 10 years ago, courts concluded was insufficient to state a hostile environment claim may not still be insufficient today
- Be vigilant, investigate, and take action
- Provide coaching and training

Disability Discrimination

Severson v. Heartland (7th Cir. 2017)

- Severson was employed by Heartland, performing manual labor
- On June 5, 2013, he wrenched his back at home
  - He had a history of back problems
  - He went to the doctor and requested and received FMLA leave
- He remained out all summer and kept in contact with his supervisors
- On August 13, he reported that he needed surgery, which was scheduled for August 27
- He said recovery period would be 2 months and asked for extended leave

Severson

- His FMLA leave would be exhausted on August 27
- His supervisor called him back on August 26
- He explained that no additional leave would be given, that Severson's employment would end August 27, and that he could reapply post-surgery
- After that, Severson had the surgery, but did not reapply
- He sued
- He alleged that Heartland violated the ADA by refusing to accommodate his disability by granting his request for 2 months of leave
- Court entered summary judgment for Heartland, and Severson appealed

Severson

- A reasonable accommodation is one that allows the disabled employee to perform the job
- A "long-term leave of absence cannot be a reasonable accommodation" because not-working is not a means to perform the job
- Stated otherwise, an "employee who needs long-term medical leave *cannot* work and thus is not a 'qualified individual' under the ADA"

Severson

- "Intermittent time off or a short leave of absence – say, a couple of days or even a couple of weeks – may, in an appropriate circumstance" be a reasonable accommodation
- But a multi-month leave is not reasonable and is not required – the "ADA is an antidiscrimination statute, not a medical-leave entitlement"
- EEOC argued that long-term leave should be allowed if it is for a definite, time-limited duration and employee likely will be able to return afterwards – but, the Court disagreed
- So, summary judgment for Heartland was affirmed

Conclusion

- Accommodation and leave requests can be challenging
- 7th Circuit creates a helpful bright line rule
  - Multiple months of leave is not reasonable
  - Even if the requested leave is not indefinite and has a fixed end date
- Unfortunately, not all courts agree, and the EEOC doesn't agree
  - So, most employers must act carefully and thoughtfully when an employee seeks leave as an accommodation