

EMPLOYMENT LAW UPDATE

2021 virtual edition



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ANDERSON**

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PROGRAM AGENDA

Day 1 – October 26, 2021

8:30 – 8:45	<u>Registration / Login</u>
8:45 – 8:55	<u>Welcome and Introductions</u> <i>J. Travis Hockaday</i>
8:55 – 9:50	<u>The Here, There and Everywhere Workforce: Tips, Traps and Best Practices</u> <i>Kimberly J. Korando</i> Whether your employees are working across town, across the state or across the country, this growing trend poses new challenges, risks, compliance headaches and, of course, opportunities. In this session, we will focus on what employers need to be thinking about to move from remote work as a pandemic survival strategy to a strategy for thriving in a post-pandemic world. Top 10 legal issues, what successful programs look like, rethinking performance management, cybersecurity and protecting business assets, and employee monitoring software.
9:50 – 10:35	<u>Navigating Disability and Leave Laws in the Workplace – During a Pandemic and Beyond</u> <i>Rosemary G. Kenyon</i> Effectively navigating the array of disability and leave laws at the federal and state levels is a challenge under any set of circumstances, but more so in the face of a pandemic. This session will provide updates from recent case decisions and emerging trends, including the latest on employer medical inquiries, handling accommodation requests, managing attendance, complying with evolving leave laws, and more, with practical tips on avoiding liability and resolving problems in the workplace.
10:35 – 10:45	<u>Break</u>
10:45 – 11:30	<u>Managing Retirement Plan Risk: Fiduciary Duties and Litigation Trends</u> <i>Caryn C. McNeill, Kara L. Brunk, Michael W. Mitchell</i> In this session, we will review the basics of ERISA fiduciary duties and then share some lessons learned from the recent wave of class action litigation alleging fiduciary breach on the part of 401(k) and 403(b) plan fiduciaries.
11:30 – 12:15	<u>Panel Discussion – Hot (Non-COVID-19) Topics in Employment Law</u> <i>Sarah W. Fox, Moderator, Kimberly J. Korando, J. Travis Hockaday, Taylor Dewberry, and Jenny Bobbitt</i> While COVID-19 has consumed most of our time and focus since March 2020, other areas of employment law continue to develop. During this panel discussion, several of our veteran employment lawyers will discuss a number of timely (non-COVID-19) topics for employers, including the latest on legalization of marijuana for recreation and medical use and impacts on the workplace, the changing landscape of the National Labor Relations Board under the Biden Administration and what it could mean for all (even non-union) employers, updates on requirements for federal contractors, new state leave laws, and more.

12:15 – 12:25	<u>Break</u>
12:25 – 1:00	<u>Wage and Hour Update</u> <i>J. Travis Hockaday</i> This session will cover developments at both the state and federal levels on key wage and hour issues, including updates to the North Carolina Wage and Hour Act, the latest on the federal independent contractor/gig worker and joint employer rules, and managing wage and hour compliance risks related to remote workers (including defining and tracking hours worked when work and personal obligations are commingled, potential effects of remote work on exempt status, challenges with home office expenses and recovering costs of unreturned company property, and more), and will offer practical advice for compliance.
1:00 – 1:30	<u>Live Questions and Answers</u> <i>J. Travis Hockaday, Moderator</i> Our panelists will answer your questions about the day's topics, and more.

PROGRAM AGENDA

Day 2 – October 28, 2021

8:30 – 8:45	<u>Registration/ Login</u>
8:45 - 9:20	<u>Trends, Targets and Hotspots in Employment-Related COVID-19 Litigation</u> <i>Kerry A. Shad</i> Over 3,500 lawsuits have been filed against employers related to COVID-19 since March 2020. In this session, we will review the types of claims being filed, the types of industries most likely to be sued, and the geographic hotspots for these types of claims.
9:20 – 10:20	<u>COVID-19 Roundup</u> <i>Rosemary G. Kenyon, Kimberly J. Korando, Stephen T. Parascandola</i> This hour-long session will focus on recent COVID-19 related developments impacting employers, including vaccine and testing requirements for large employers and federal contractors and the latest from OSHA, and will provide practical advice for handling requests for accommodations for vaccination and testing requirements for religious and other reasons.
10:20 – 10:30	<u>Break</u>
10:30 – 11:10	<u>Top 10 Mistakes Employers Make with Non-Compete and Confidentiality Agreements</u> <i>Isaac A. Linnartz</i> The law on non-competes and confidentiality agreements is constantly evolving and presents pitfalls both old and new. This session identifies ten mistakes employers often make that jeopardize the effectiveness of these agreements and put confidential information and customer relationships at risk.
11:10 – 12:00	<u>EEO Update</u> <i>Zebulon D. Anderson</i> A discussion of EEOC enforcement trends and plans, as well as select cases representative of recent trends in EEO litigation.
12:00 – 12:45	<u>Live Questions and Answers</u> <i>J. Travis Hockaday, Moderator</i> Our panelists will answer your questions about the day's topics, and more.

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-Hubbel*®.

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 multinational 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, with 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 multistate 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 multisite 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, and supervisor/manager responsibilities
- Developed highly participatory and mock trial training exercise for Human Resources professionals and investigators for a 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 participants experience first-hand how their decisions and actions play out in front of a jury. The program is customized to client's policy and workforce and has been delivered to employers in a wide range of industries across the country

EMPLOYEE BENEFITS AND COMPENSATION

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

MEET OUR TEAM



Zebulon D. Anderson

Attorney

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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
Higher Education
IP 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

- 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.

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

HONORS & AWARDS

- *Benchmark Litigation*, North Carolina Labor and Employment Star (2018-2021)
- *Best Lawyers®*, Litigation - Labor and Employment (2016-2022); Employment Law-Management (2018-2022)
- *Chambers USA: America's Leading Business Lawyers*, Labor & Employment (2015-2021)

- North Carolina *Super Lawyers* (2012-2021)
- *Business North Carolina's Legal Elite*, Employment (2017)
- North Carolina *Super Lawyers*, Rising Star (2009)
- Martindale-Hubbell AV Preeminent Rated

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 Lawyer Development Committee
- Member and former co-chair, Smith Anderson Diversity and Inclusion Committee
- Member and former co-chair, Smith Anderson Recruiting Committee
- Wake County Bar Association



Jenny E. Bobbitt

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Jenny Bobbitt joined Smith Anderson's Employment, Labor and Human Resources practice group in 2019. Her practice focuses on counseling clients on employment law issues and the employment aspects of corporate transactions.

Prior to joining Smith Anderson, Jenny was a corporate lawyer in the Louisville office of a regional law firm. Prior to that, Jenny practiced employment law in the Louisville office of a national law firm.

EXPERIENCE

- Advised an online gaming company in a definitive agreement to acquire an online 3-D modeling company.
- Advised a company specializing in video game and software development in an acquisition of a UK-based pioneer in the "kidtech" market.
- Advised an international research-oriented healthcare group on employment-related matters in its acquisition of worldwide product rights to a rare disease therapy.
- Advised a global contract research organization and drug development services company in a transaction to acquire a provider of decentralized and traditional clinical trial-related services that included cross-border employment issues for employees and contractors located in various countries in Europe.
- Advised a contract research organization in a definitive agreement to acquire a specialized contract research organization for the biotechnology industry.

AA CONTACT INFO

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PRACTICE AREAS

Employment, Labor and Human Resources

BAR & COURT ADMISSIONS

North Carolina

Kentucky

Western District of Kentucky

Eastern District of Kentucky

EDUCATION

- Washington University in St. Louis School of Law, J.D. with a Certificate in Business Law, 2016
 - Dean's List
- Washington University in St. Louis Olin School of Business, M.B.A., 2016
- Northwestern University, B.A., 2012
 - Dean's List

- Advised a leading provider of patient affordability, access, adherence, and support services on cross-border employment matters related to our client's acquisition of a healthcare information management software company.

HONORS & AWARDS

- *Best Lawyers®*, "Ones to Watch," Labor and Employment Law – Management (2022)
- The National Black Lawyers Top 100, Top 40 Under 40 (2021)
- North Carolina *Super Lawyers*, Rising Stars (2020-2021)
- Kentucky *Super Lawyers*, Rising Stars (2019)
- Louisville Bar Association Leadership Academy (2019)
- *Louisville Business First* "Young Leaders Award" (2018)
- Staff Editor, *Washington University Jurisprudence Review*
- CALI Excellence for the Future Award – UCC Article 2
- Scholar in Law Award

PROFESSIONAL & COMMUNITY AFFILIATIONS

- Board of Directors, Restorative Justice Louisville (2017–2019)
- Member, Public Service Committee of Louisville Bar Association (2017-2019)
- Executive Committee, Young Lawyer's Division of Kentucky Bar Association (2018-2019)



Kara Brunk

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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

- Represented a North Carolina bank and its parent with respect to the employee benefits aspects of an approximately \$220 million merger with another bank.
- Advised a private equity fund and its contract research solutions portfolio company in employee benefits matters related to their acquisition of a statistical programming, consulting, and data management company.
- Advised a company specializing in video game and software development on employee benefits matters related to the definitive agreement to acquire a company that developed a presence-based social networking platform connecting users online through live video on mobile and desktop apps.
- Advised a provider of services to people with intellectual and/or developmental disabilities on employee benefits matters related to the acquisition of another provider of support and services to help individuals with developmental and physical

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

disabilities.

- 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.
- 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.
- Advised a leading contract research organization in a definitive agreement to acquire a provider of contract research, clinical and regulatory and other consulting services. Advised specifically on benefits reps, warranties and covenants, conducted due diligence and helped the company navigate integration issues.

HONORS & AWARDS

- *Best Lawyers®*, "Ones to Watch," Employee Benefits (ERISA) Law (2021-2022)
- *Chambers USA: America's Leading Lawyers for Business*, Employee Benefits & Executive Compensation (2021)
- *North Carolina Super Lawyers*, Rising Stars (2020-2021)
- Staff Member and Contributing Editor, *North Carolina Law Review*, 2010-2012

PROFESSIONAL & COMMUNITY AFFILIATIONS

- Board Member, Food Runners Collaborative, 2017-Present, Secretary, 2019
- Board Member, Raleigh Kiwanis Foundation, 2016-2018
- President, Triangle Benefits Forum, 2016-2019
- 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



Taylor M. Dewberry
Attorney

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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. Her practice focuses on employment-related counseling and defending employers against claims involving discrimination, wrongful discharge, retaliation, harassment and civil rights claims. She has represented clients in state and federal courts and agencies throughout North Carolina.

EXPERIENCE

- Advised a global contract research organization and drug development services company in a transaction to acquire a provider of mobile-connected self-service platform solutions for decentralized clinical trials that included cross-border employment issues for employees and contractors located in Europe and India.
- Advised a specialty pharmaceutical company in its acquisition of a private pharmaceutical company focusing on pediatric medications.
- Advised a leading contract research organization on the employment law aspects of a definitive agreement to acquire a provider of contract research, clinical and regulatory and other consulting services.
- Defended employers against claims involving discrimination, wrongful discharge, retaliation, harassment, wage and hour, and civil rights claims.
- Represented clients in investigations conducted by the Equal Employment Opportunity Commission.

AA CONTACT INFO

Tracy Benning
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PRACTICE AREAS

Employment, Labor and Human
Resources
Higher Education

BAR & COURT ADMISSIONS

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

- Presented on workplace issues, such as recruiting, onboarding and sexual harassment law.
- Conducted an internal investigation into workplace harassment.

Appeals for the Fourth Circuit

HONORS & AWARDS

- *Best Lawyers®*, "Ones to Watch," Labor and Employment Law – Management (2022)
- The National Black Lawyers Top 100, Top 40 Under 40 (2020)
- Executive Notes Editor, *Washington University Journal of Law and Policy*

PROFESSIONAL & COMMUNITY AFFILIATIONS

- Member, North Carolina Bar Association
 - Chair, Young Lawyers Division, Diversity and Inclusion Committee
- Member, Wake County Bar Association
- Executive Board Member, Black Law Students Association



Sarah W. Fox

Attorney

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Sarah Fox has more than 35 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* and is listed in *Best Lawyers®*. 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 investigations and successfully litigating federal and state claims,

AA CONTACT INFO

Jacqueline Williams
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PRACTICE AREAS

Employment Litigation
Employment, Labor and Human Resources
Litigation
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



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 in the Raleigh office of a global law firm.

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 noncompetition, confidentiality and fiduciary disputes.
- Represented employers in OSHA industrial fatality accidents.
- Represented employers and executives in connection with employment arrangements.

HONORS & AWARDS

- *Best Lawyers®*, Employee Benefits (ERISA) Law (2013-2022), Litigation - Labor & Employment (2021-2022), Employment Law - Management (2022)
- *Best Lawyers®*, "Lawyer of the Year," Raleigh Employee Benefits (ERISA) Law (2021)
- *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

- Fourth Circuit Judicial Conference, Member
- Human Resources Roundtable, Chair 2011-Present

CLERKSHIPS

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

- North Carolina Bar Association, Employment Law Section
- North Carolina Bar Foundation, Development Committee 2018-Present
- 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 Past 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 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 2014-2018
 - 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 2013-2020



Jamison H. Hinkle

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Jamie Hinkle advises a wide range of clients on all aspects of their employee benefits and compensation programs. Much of his practice involves helping employers design and administer cost-effective retirement and health and welfare benefit plans while minimizing risks and administrative complications. His work includes helping ensure benefit plans comply with ERISA, the Internal Revenue Code, HIPAA, COBRA, 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 employee benefits and executive compensation due diligence, correction, and integration issues that arise in connection with mergers, acquisitions and other corporate transactions.

In his practice, Jamie also frequently represents both executives and employers in negotiating and drafting executive employment agreements and severance agreements, including work on golden parachute (Code Section 280G) issues, supplemental executive retirement plans (SERPs) and other deferred compensation plans and related compliance issues under Code Section 409A.

Jamie 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

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sherklotz@smithlaw.com

PRACTICE AREAS

Employee Benefits and Executive Compensation

Insurance Regulation

Private Client Services

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 in the Raleigh office of a global law firm and with a national corporate firm before he joined Smith Anderson in 2000.

EXPERIENCE

- Advise numerous employers on 401(k) plan and design changes and regulatory amendments in response to COVID-19 concerns.
- Coordinate company-wide stock option repricing and exchange program for underwater stock options.
- Advise leading provider of patient support services in a definitive agreement to acquire a provider of mobile-based solutions.
- Design and draft equity compensation and bonus plans for various start-up companies.
- Represent employer in overhauling existing equity compensation awards for C-Suite officers.
- Prepare and file corrective Top Hat Plan filings under DOL's Delinquent Filer Voluntary Compliance Program (DFVCP) for Fortune 100 company.
- Coordinate benefit plan corrections arising in 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 assets.
- Advise insolvent client and officers and directors on potential criminal law violations associated with improper benefit plan terminations.
- Represent employer on 401(k) plan coverage and participation issues in connection with IRS contractor misclassification audit.
- Advise on equity compensation and benefit plan merger and integration issues following client's purchase of major competitor.
- Design and draft bespoke nonqualified deferred compensation retention plan for key executives of venture-backed start-up.
- Advise public pharmaceutical company on cash-out of target's stock options, coordination of severance benefits, and post-closing benefits integration.
- Amend and restate numerous 401(k) plans for required and discretionary plan amendments.
- Represent a global biopharmaceutical and outsourcing services company 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.
- Design Section 409A-compliant staggered severance benefits plan for departing executives of publicly-traded pharmaceutical company.
- Advise multinational Fortune 500 provider of integrated healthcare services on benefit plan restructuring and integration matters in merger with NYSE-listed technology services company, creating a leading tech-enabled

healthcare service provider with a market capitalization of \$17.6 billion at closing.

- Advised leading healthcare services provider on benefits and executive compensation issues in its \$60 million acquisition of a global sourcing company.
- Advised a leading provider of financial software to U.S. financial institutions on employee benefits, and executive compensation issues and Section 280G (golden parachute) cleansing vote in its reverse triangular merger with a private equity-backed company.

HONORS & AWARDS

- *Best Lawyers®*, Employee Benefits (ERISA) Law (2013-2022)
- 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 (2001-2015)
 - Chair, Employee Benefits Committee, Tax Section, (2005-2014)
- Wake County Bar Association
- Director, Food Runners Collaborative, Inc. (2011-2016; Chair, 2014)
- Former Director, Junior Achievement of Eastern North Carolina, Inc.
- National Association of Stock Plan Professionals (NASPP), Carolinas Chapter
- Triangle Benefits Forum (TBF)



J. Travis Hockaday

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Travis Hockaday has practiced with Smith Anderson since September 2003 and leads the firm's Employment, Labor and Human Resources practice group. 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

- Advised a EU-based clinical research organization in a definitive agreement to acquire the pharmacovigilance business from a global, listed healthcare services company for approximately \$10,000,000 in cash.
- Advised a contract research organization in a definitive agreement to acquire a specialized contract research organization for the biotechnology industry.

AA CONTACT INFO

Simone Faircloth
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PRACTICE AREAS

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

- Advised a private equity fund and its contract research solutions portfolio company in their acquisition of a statistical programming, consulting, and data management company.
- Advised a company specializing in video game and software development in a definitive agreement to acquire a company that developed a presence-based social networking platform connecting users online through live video on mobile and desktop apps.
- Advised a private equity fund in its acquisition of a leading provider of staffing resources to the biotechnology, pharmaceutical and medical device companies for clinical trial needs.
- 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 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.
- Advised a frozen foods company on the employment law aspects of its definitive agreement to acquire a frozen snacks business.
- 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

- *Benchmark Litigation*, North Carolina Labor and Employment Star (2020-2021)
- *Best Lawyers®*, Litigation - Labor and Employment (2019-2022)
- North Carolina *Super Lawyers*, Rising Star (2011, 2018)

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
- Class of 2003 Reunion Representative, University of North Carolina School of Law



Rosemary Gill Kenyon

Attorney

Wells Fargo Capitol Center
150 Fayetteville Street, Suite 2300
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rkenyon@smithlaw.com



Rose Kenyon's practice involves all aspects of employment and labor law in a wide variety of industries for both private and public companies, including investigations, corporate governance matters, advising boards of directors and special committees and assisting companies on employment matters in mergers and acquisitions. She has extensive experience drafting complex employment agreements and separation agreements on behalf of both companies and executives.

Rose is a trusted advisor to employers on their most strategic and high risk employment issues, and clients describe Rose as a "...very talented lawyer" (*Chambers USA*). She is a frequent speaker on emerging employment and labor law trends and regularly conducts training for human resources professionals and managers.

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 a civil practice 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.

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

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



- Lead employment lawyer in numerous merger and acquisition transactions in a wide range of industries that included the 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, executive employment agreements, and cross-border issues, among other things.
- Conducted internal investigations into misconduct, embezzlement, harassment, threats of workplace violence and other wrongdoing, for both publicly-traded and private companies.
- Represented employers in the development of employment agreements, severance and non-competition agreements for senior level officers of both private and publicly-traded companies and private institutions of higher education.
- Represented CEOs and senior level officers of both private and publicly-traded companies, and private institutions of higher education, 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.
- Successfully defended employers in federal and state court and before administrative agencies against whistleblower claims under federal and state laws, systemic and individual claims of race discrimination, and sensitive harassment and gender discrimination claims, employment contract claims, wage and hour claims, classification issues, and in government audits.

CLERKSHIPS

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

HONORS & AWARDS

- Fellow, College of Labor and Employment Lawyers

- *Chambers USA: America's Leading Business Lawyers*, Labor & Employment (2008-2021)
- *Best Lawyers®*, Employment Law - Management (2016-2022)
- Women of Justice Award, *North Carolina Lawyers Weekly* (2012, 2019)
- North Carolina Pro Bono Honor Society
- North Carolina *Super Lawyers* (2012-2021)
- 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)
- North Carolina Symphony, Board of Trustees (2021-present)
- Saint Mary's College Alumnae Association, Board of Directors (Notre Dame, IN) (2015-2021)
 - Committee Chair and Member of Executive Committee
- Community Music School of Wake County, Board of Directors (2014-present)
 - President (2019-present)

- Secretary (2017-2019)
- 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)



Kimberly J. Korando

Attorney

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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*, *Best Lawyers®* and *Business North Carolina Legal Elite*. She founded the firm's Employment, Labor and Human Resources practice group and served as its inaugural leader.

For more than 30 years, Kim has served as a trusted advisor to public and private companies throughout the U.S. in matters of financial, reputational and operational significance. Her work has led to *Chambers' USA* 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."

Kim serves as general outside employment and 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 retained as special counsel to conduct independent internal investigations, workplace compliance audits and workplace culture assessments, including those arising from #Me-Too and Social Justice movements and allegations of hostile and toxic work environments.

Kim is a thought leader who frequently speaks and writes on human resources compliance and risk management issues in the business and legal community. She regularly collaborates with

AA CONTACT INFO

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PRACTICE AREAS

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

companies developing in-house training programs and has trained thousands of supervisors, managers and Human Resources professionals in legally compliant employment practices, as well as investigators for the U.S. Equal Employment Opportunity Commission. She serves on the Board of Editors for the nation's leading employment discrimination treatise, and authors a leading North Carolina workplace policies and forms guidebook that is updated annually through the North Carolina Chamber.

EXPERIENCE

Crossborder

- 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.

Compensation and FLSA

- Conducted enterprise-wide compensation analyses focusing on identifying and correcting pay equity issues.
- Developed discretionary and “unlimited” paid time off programs implemented to replace accrued leave programs.
- Conducted enterprise-wide audits of worker classification and developed 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.

Affirmative Action, Diversity Initiatives and EEO

- Developed and presented briefings for boards and other governing bodies addressing institutional leadership on these initiatives.
- 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.
- Successfully resolved (pre-litigation) 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.
- Regularly establishes and annually updates 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

- Strategic advice on managing whistleblowing employees.
- Successfully defended 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 and Organizational Changes

- Designed RIFs, lay-offs, furloughs and recovery programs.
- Designed 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.

WorkHealth Initiatives and Risk Management

- Developed and integrated corporate policies for hospitals, banks and pharmaceutical, manufacturing and technology companies to manage leave (FMLA/STD/ADA reasonable accommodation leave/workers' compensation leave) and mandatory paid sick leave obligations. Developed fitness for duty programs including functional capacity testing for manufacturing, healthcare and distribution worksites.
- Developed mandatory vaccine policies designed to maximize herd immunity while minimizing liability for ADA and Title VII reasonable accommodation violations and served as reviewer of exemption requests.
- Developed drug-testing programs, including random testing programs and programs in medicinal and recreational marijuana and CBD jurisdictions.
- 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.

Crisis Management

- Regularly develops and executes strategies and plans for minimizing liability in high risk terminations.
- Coordinated and managed regulatory, communication and risk management response to high profile workplace crises, including those arising from #Me-Too and Social Justice movements and employee and community social media postings, and industrial accidents.

Labor

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

Training

- Develops customized content for training programs on establishing and maintaining respectful workplaces (including diversity, inclusion and microaggressions), interviewing and selection, performance management and legal aspects of managing people.
- 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.

- Developed highly participatory mock trial training experience in which human resources professionals and internal company investigators experience first-hand how their decisions in conducting an investigation 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.

Mergers and Acquisitions

- Advised an international research-oriented healthcare group on employment-related matters in its acquisition of worldwide product rights to a rare disease therapy.

HONORS & AWARDS

- *Best Lawyers®*, Employment Law - Management, Labor Law - Management (2007-2022)
- *Best Lawyers®*, "Lawyer of the Year," Raleigh Labor Law - Management (2013, 2021)
- *Chambers USA: America's Leading Business Lawyers*, Labor & Employment (2005-2021)
- Martindale-Hubbell AV Preeminent Rated since 1999
- North Carolina *Super Lawyers* (2006-2021)
- *Oklahoma Law Review*, Note Editor

PROFESSIONAL & COMMUNITY AFFILIATIONS

- ABA Equal Employment Opportunity Committee
- American Bar Association, Labor and Employment Section
- American Employment Law Council
- Fellow, American Bar Foundation
- North Carolina Bar Association, Labor and Employment Section



Isaac A. Linnartz

Attorney

Wells Fargo Capitol Center
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Isaac Linnartz's practice focuses on business litigation and employment litigation. He has experience litigating claims for breach of contract, unfair trade practices, fraud, breach of fiduciary duty and other business-related claims. In addition, he represents employers in cases involving claims of discrimination, retaliation, harassment, wrongful termination, wage and hour violations, and trade secret and non-compete issues. Using this experience, Isaac also advises businesses and employers on how to prevent and resolve disputes prior to litigation.

Isaac is a co-chair of Smith Anderson's Recruiting Committee.

EXPERIENCE

Business Litigation

- Represented one of the nation's largest public utilities in complex contract litigation involving a long-term supply contract. Obtained a favorable judgment on an important remedies provision of the agreement after a bench trial in the North Carolina Business Court.
- Represented an internet marketing company in bringing trade secret and breach of contract claims against public company for misappropriating trade secrets and misusing confidential information obtained during due diligence for a potential business transaction. Obtained preliminary and permanent injunctions barring the defendant from using our client's confidential information or engaging in wrongful competition.
- Represented a publisher of telephone directories in a breach of contract case against a national telecommunications company. After a bench trial, the Court ruled in our client's favor on all issues, issued a declaratory judgment that saved

AA CONTACT INFO

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PRACTICE AREAS

Complex Contract Disputes
Corporate and Securities Litigation
Employment Litigation
Employment, Labor and Human Resources
IP Litigation
Litigation
Medical Malpractice Defense
Non-Compete and Trade Secrets

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

Duke University, J.D., *cum laude*, 2009

- *Order of the Coif*

our client over \$100 million, and awarded our client over \$1.2 million in attorneys' fees.

- Defended a bank in numerous consumer class action lawsuits around the country alleging that the bank facilitated improper lending practices.
- Represented a company and its directors and officers in defense of shareholder derivative claims filed under "say on pay" provisions of Dodd-Frank Act. Obtained dismissal of all claims in federal court.
- Defended a soft drink bottler against claims for breach of an alleged long-term requirements contract brought by cooperative of soft drink bottlers. The case was resolved by confidential settlement after a week-long trial in federal court in South Carolina.

Employment Litigation

- Defended a public utility company against whistleblower retaliation, retaliatory discharge, wrongful discharge, and wage and hour claims brought by former employee. Obtained summary judgment in federal court that was affirmed on appeal by the United States Court of Appeals for the Fourth Circuit.
- Defended a public utility company against sex discrimination, harassment, and retaliation claims brought by former employee. Obtained summary judgment in federal court that was affirmed on appeal by the United States Court of Appeals for the Fourth Circuit.
- Defended a global provider of biopharmaceutical development services and commercial outsourcing services against sex and national origin discrimination claims brought by former pharmaceutical sales representative. The matter was favorably resolved by confidential settlement agreement.
- Defended a global provider of biopharmaceutical development services and commercial outsourcing services against national origin and pregnancy discrimination claims brought by former pharmaceutical sales representative. Obtained summary judgment in federal court in Florida.
- Defended a global provider of biopharmaceutical development services and commercial outsourcing services and supervisor against sex discrimination, disability discrimination, FMLA non-compliance, and FMLA retaliation claims brought by former pharmaceutical sales representative.

Duke University Divinity School,
Master of Theological Studies,
summa cum laude, 2009

Duke University, B.A., History, 2004

CLERKSHIPS

Law Clerk to Chief Judge David B.
Sentelle of the United States Court
of Appeals for the District of
Columbia Circuit in Washington, DC.

The matter was mediated and favorably resolved by confidential settlement.

- Defended a community college against religious discrimination claim brought under Title VII and obtained dismissal with prejudice.
- Defended a public telecommunications company against claims of racial discrimination and retaliation brought by a former employee in federal court. Obtained dismissal with prejudice by showing through discovery that plaintiff made false representations to the court in applications to proceed in forma pauperis.
- Represented a global pharmaceutical, vaccines, and consumer health company in putative collective and class actions in Florida and New York alleging violations of federal and state wage and hour laws based on failure to pay overtime to pharmaceutical sales representatives.

Other Litigation

- Defended a surgeon and surgical practice at trial in case alleging wrongful death. The jury returned a verdict in favor of our clients after a 9-day trial.
- Represented a tenant pro bono in a lawsuit against her landlord for retaining her security deposit after failing to deliver habitable premises. The case was tried and resulted in our client obtaining and collecting a judgment for actual damages and punitive damages.

HONORS & AWARDS

- North Carolina *Super Lawyers*, Rising Stars (2014-2021)
- *Benchmark Litigation*, North Carolina Labor and Employment Star (2019-2021)
- *Benchmark Litigation*, 40 & Under Hot List (2018-2021)
- Selected, North Carolina Bar Association's Leadership Academy, Class of 2016
- Executive Editor, *Duke Law Journal*

PROFESSIONAL & COMMUNITY AFFILIATIONS

- North Carolina Bar Association
- Wake County Bar Association
- North Carolina Association of Defense Attorneys
 - Member, Board of Directors (2021)
 - Chair, Ethics Committee (2019-2021)
 - Chair, Commercial Litigation Practice Group (2016-2017)
 - Vice Chair, Commercial Litigation Practice Group (2015-2016)



Caryn Coppedge McNeill

Attorney

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Caryn McNeill leads Smith Anderson's Employee Benefits and Executive Compensation practice group. Caryn receives a Band 1 ranking in *Chambers USA*. Clients say she is a "seasoned expert, incredibly knowledgeable and intelligent" (*Chambers USA* 2021). The firm's Employee Benefits and Executive Compensation group is also highly credentialed, having consistently received the highest ranking (metropolitan Tier 1) from *U.S. News & World Report* and *Best Lawyers®* "Best Law Firms" since 2010 and recently been ranked in Band 1 of *Chambers USA* Employee Benefits & Executive Compensation. Caryn 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.

Caryn is a Past President of the North Carolina Bar Association, a former Board Chair of Ravenscroft School, an elected member of The American Law Institute (ALI) and member of Smith Anderson's Management Committee.

EXPERIENCE

- Represented a North Carolina bank and its parent with respect to the employee benefits aspects of an approximately \$220 million merger with another bank.
- 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

AA CONTACT INFO

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PRACTICE AREAS

Employee Benefits and Executive
Compensation
Higher Education

BAR & COURT ADMISSIONS

North Carolina

EDUCATION

Duke University, J.D., 1991
Davidson College, B.A., with honors
in English, 1988
Holton-Arms School, 1984

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 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.
- Advised a global contract research organization and drug development services company in a definitive agreement to acquire a provider of decentralized and traditional clinical trial-related services.
- Advised a global contract research organization and drug development services company in a definitive agreement to acquire a provider of mobile-connected self-service platform solutions for decentralized clinical trials.
- Advised a contract research organization in a definitive agreement to acquire a specialized contract research organization for the biotechnology industry.
- Advised a private equity fund and its contract research solutions portfolio company in their acquisition of a statistical programming, consulting, and data management company.
- 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 semiconductor and LED company on employee benefits aspects of the divestiture of its lighting products business unit for an initial cash payment of \$225 million plus the potential to receive an earn-out payment based on the business's post-closing performance.
- 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 100% Employee Stock Ownership Plan-owned company providing support services to the poultry industry in an acquisition by a private equity-backed buyer for approximately \$21 million in cash and equity.

- Advised a private equity fund on the employee benefits aspects of its acquisition of a specialty pharmaceutical company.

HONORS & AWARDS

- *Best Lawyers®*, Employee Benefits (ERISA) Law (2010-2022)
- *Best Lawyers®*, "Lawyer of the Year," Raleigh Employee Benefits (ERISA) Law (2013, 2016, 2018, 2020)
- *Chambers USA: America's Leading Lawyers for Business*, Employee Benefits & Executive Compensation (2021)
- North Carolina *Super Lawyers* (2014-2021)
- North Carolina *Lawyers Weekly* "Women of Justice" Award Recipient (2019)
- 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)
- Elected Member, The American Law Institute
- Carolinas Chapter of The ESOP Association
- National Association of Stock Plan Professionals
- Triangle Benefits Forum
- Chair, Board of Trustees, Ravenscroft School (2015-2017)
- Fellow, American Bar Foundation



Michael W. Mitchell

Attorney

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Mike Mitchell is a trial and appellate lawyer with 30 years of experience in state and federal courts. He is co-chair of the firm's Business Litigation team, as well as the Intellectual Property Litigation practice. In *Chambers USA*, Mike is praised for his "*great insight*" and for being a "*creative thinker, effective at connecting divergent ideas and facts.*" Sources also note that "*his client service is fabulous.*"

Mike advises clients on business strategies for resolving complex disputes. He regularly manages complex business litigation. He has tried cases in all three federal districts in North Carolina and in numerous counties across the State. Mike routinely handles cases in the North Carolina Business Court, and cases designated as Exceptional by the Chief Justice. He has handled appeals before the Fourth Circuit Court of Appeals, the North Carolina Supreme Court and the North Carolina Court of Appeals. He also has represented clients with cases pending in other states, including California, Florida, Illinois, New York, Texas, Michigan, Washington and South Carolina.

Mike was appointed by Chief Justice Mark Martin to serve on the Chief Justice's Rules Advisory Commission, and was reappointed by Chief Justice Cheri Beasley and again by Chief Justice Paul Newby. Chief Justice Martin also appointed Mike to serve on the Commission for the Administration of Law and Justice. Mike was appointed by Governor Pat McCrory to serve on the North Carolina General Statutes Commission. Mike also serves on the Civil Local Rules Committee of the Eastern District of North Carolina and he has worked to revise the local rules for the Tenth Judicial District for electronic discovery.

Mike has served as the Vice Chair of the North Carolina Business Committee for Education. He has served on a special advisory committee to Governor McCrory to consider changes to the

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PRACTICE AREAS

Appellate Advocacy
Complex Contract Disputes
Construction
Higher Education
IP Litigation
Litigation
Trademark and Copyright

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
U.S. District Court for the District of Colorado
U.S. District Court for the Southern District of Illinois
All North Carolina State Courts

EDUCATION

Wake Forest University, J.D., 1989



composition of the Education Cabinet in North Carolina.

He has served in various leadership positions in the North Carolina Bar Association and currently holds several leadership roles in the firm. Mike formerly served as a law clerk to the Honorable Frank W. Bullock, Jr., United States District Court for the Middle District of North Carolina.

EXPERIENCE

- Represented a large hospital system against the University of North Carolina system in litigation involving contract and governance disputes.
- Represents a multinational company in a large insurance coverage dispute in the North Carolina Business Court.
- Represented a large general contractor in construction litigation against the State of North Carolina.
- Represented a bank in ERISA litigation in federal court in North Carolina.
- Represented a private company in proceedings before the Trademark Trial and Appeal Board.
- Represented a public company in ERISA litigation in federal court in North Carolina and Florida.
- Successful appeal (N.C. Supreme Court) unanimously affirming the judgment in favor of guardian ad litem on behalf of a minor child.
- Successful appeal (unpublished opinion by the N.C. Court of Appeals) unanimously affirming the judgment in favor of guardian ad litem on behalf of minor children.
- Successful appeal (unpublished opinion before the N.C. Court of Appeals) unanimously affirming the termination of parental rights in favor of a guardian ad litem who represented minor children.
- Successful appeal (unpublished opinion before the N.C. Court of Appeals) unanimously affirming dismissal of a third-party complaint in an aviation case.
- Successful appeal (unpublished opinion before the N.C. Court of Appeals) unanimously affirming a large sanctions award against opposing counsel.
- Successful appeal (N.C. Supreme Court) unanimously affirming the business court in a complex contract case.

- Editorial Staff, *Wake Forest Law Review*

Wake Forest University, B.A., 1986

CLERKSHIPS

Law Clerk to the Honorable Frank W. Bullock, Jr., United States District Court for the Middle District of North Carolina

- Successful appeal (published opinion by the N.C. Court of Appeals) unanimously affirming dismissal of an unfair trade practice case.
- Successful appeal (unpublished opinion by the N.C. Court of Appeals) reversing the trial court in a complex property rights case.
- Successfully tried a heavily contested complex land use dispute in Onslow County where the trial included an examination of 13 witnesses, including 10 experts.
- Tried a jury trial in a breach of contract case in the United States District Court for the Middle District of North Carolina.
- Served as lead counsel in a two-week jury trial in Wake County Superior Court in a breach of contract case resulting in a verdict of \$37 million. This was the largest verdict in North Carolina in 2010 and one of the top 60 in the U.S. This judgment was affirmed unanimously by the Court of Appeals, and then satisfied in full (\$48.5 million including interest).
- Tried both a jury trial and a bench trial in the United States District Court for the Middle District of North Carolina in consolidated cases arising out of an aviation accident in Martinsville, Virginia.
- Tried cases in all three federal districts in North Carolina, as well as in Buncombe, Gaston, Randolph, Moore, Lee, Wake, Cumberland, Nash, Pitt, and Onslow Counties.
- Represented clients in U.S. and foreign arbitration proceedings, and served as lead U.S. counsel in obtaining a multi-million euro arbitration award for breach of a patent license.
- Experience as an arbitrator.

HONORS & AWARDS

- *Benchmark Litigation*, North Carolina Litigation Star (2013-2021)
- *Best Lawyers®*, Commercial Litigation, Construction Law, Real Estate Law, Bet-the-Company Litigation, Litigation - Intellectual Property (2012-2022)
- *Business North Carolina* "Legal Elite," Commercial Litigation
- *Chambers USA: America's Leading Business Lawyers*, Litigation: General Commercial (2014-2021)
- Martindale-Hubbell AV Preeminent Rated
- North Carolina *Super Lawyers* (2011-2021)
- North Carolina *Super Lawyers*, Top 100 Lawyers (2013, 2015, 2016)

PROFESSIONAL & COMMUNITY AFFILIATIONS

- Member, Chief Justice's Rules Advisory Commission
- Member, Civil Local Rules Committee for the Eastern District of North Carolina
- American Bar Association, Commercial Litigation

- North Carolina Association of Defense Attorneys, Commercial Litigation
- North Carolina Bar Association
 - Co-Chair, Administration of Justice Committee
 - Past Co-Chair, Bench Bar Liaison Committee, North Carolina Bar Association
- Board of Directors, North Carolina Business Committee for Education
- Member, Board of Directors, Wake County Economic Development (WCED)
 - Member, Existing Industry EDGE 6 Committee
- Past Member, North Carolina Commission for the Administration of Law and Justice
- Past Member, North Carolina General Statutes Commission



David R. Ortiz

Attorney

Wells Fargo Capitol Center
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Raleigh, North Carolina 27601
Phone: 919.821.6637
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dortiz@smithlaw.com



David Ortiz is a commercial and employment litigation attorney who represents clients in diverse business disputes and industries. David has experience with breach of contract disputes, unfair trade practices, state constitutional issues and various business-related claims. In addition, David has represented businesses in employment litigation matters in state and federal court as well as in arbitration, defending claims for discrimination, retaliation, harassment, wrongful termination, severance issues and other employment-related claims.

David joined Smith Anderson in 2019 after clerking for the Honorable James C. Dever III in the United States District Court for the Eastern District of North Carolina. David graduated from the University of Virginia School of Law in 2018. While in law school, David was the Managing Editor for Business of the *Journal of Law and Politics*, represented asylum applicants as part of the Immigration Law Clinic, and was a summer associate for a national law firm in Washington D.C. Before law school, David graduated in 2015 from the University of North Carolina at Chapel Hill with highest distinction.

HONORS & AWARDS

Managing Editor for Business and Editorial Board Member, *Journal of Law and Politics*

AA CONTACT INFO

Cheryl A. Baber
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cbaber@smithlaw.com

PRACTICE AREAS

Employment Litigation
IP Litigation
Litigation
Non-Compete and Trade Secrets
Trademark and Copyright

BAR & COURT ADMISSIONS

North Carolina

EDUCATION

- University of Virginia School of Law, J.D., 2018
- University of North Carolina, *with highest distinction*, B.A., 2015
- Phi Beta Kappa

CLERKSHIPS

Law Clerk to the Honorable James C. Dever III, Eastern District of North Carolina



Stephen T. Parascandola

Attorney

Wells Fargo Capitol Center
150 Fayetteville Street, Suite 2300
Raleigh, North Carolina 27601
Phone: 919.821.6775
Fax: 919.821.6800
sparascandola@smithlaw.com



Steve Parascandola is recognized as one of North Carolina's leading environmental, health and safety lawyers by *Chambers USA: America's Leading Business Lawyers*, *The Best Lawyers in America*®, Marquis' *Who's Who in American Law*, *Business North Carolina's Legal Elite*, and *North Carolina Super Lawyers*. He leads Smith Anderson's Governmental Affairs, Administrative and Regulatory Law team, including the Environmental and OSHA practice groups.

Steve began his career as an environmental, health and safety attorney in the New York City office of a prominent regional law firm. Prior to joining Smith Anderson in 1996, he also spent almost four years as Senior Enforcement Counsel for the North Carolina Department of Environmental Quality. Among other things, Steve served as co-counsel in the first Superfund cost recovery action ever brought by the State of North Carolina, and helped to implement the state Brownfields Program. He has also served as lead defense counsel in one of the largest OSHA enforcement actions brought to date in North Carolina.

His current practice involves many substantive areas of environmental, OSHA and land use law, including the State and Federal CERCLA, RCRA, UST, FIFRA, TSCA, FDA, FSMA, USDA/APHIS, Dry Cleaner Solvent and Brownfields Programs. His practice also includes water quality, landfill, storm water, and wetlands issues. In addition, Steve advises clients in the biotechnology, pesticide, agricultural, pharmaceutical and food management industries with respect to registrations, certifications, labeling, permits, and regulatory compliance. He is a registered lobbyist in North Carolina.

He regularly counsels clients on risk management, particularly with respect to mergers and acquisitions, due diligence, insurance matters, investigations and audits, and public company

AA CONTACT INFO

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PRACTICE AREAS

AgTech
Commercial Real Estate
Construction
Corporate Relocation and Incentives
Environmental
Higher Education
Land Use and Zoning
Life Sciences
OSHA and Workplace Safety
Real Estate Development

BAR & COURT ADMISSIONS

North Carolina
New York
Florida

EDUCATION

Stetson University, J.D., 1988

• *Law Review*

Eckerd College, B.A. 1984



environmental disclosures. He also has extensive experience representing clients before regulatory agencies and has handled a broad range of complex transactions for the purchase, sale, leasing, construction and development of commercial, industrial, and public utility properties.

Within the firm, Steve has held various leadership positions, most recently serving as a member of the firm's Partnership Admission and Compensation Committees.

Universidad Complutense de
Madrid, 1982-1983

EXPERIENCE

- Advised an investment company in a definitive agreement to purchase the outstanding equity interests of the largest independent blender and packager of lubricants to the automotive, agriculture, commercial and heavy duty markets in North America.
- Served as local environmental counsel for Fortune 100 company that owns and operates large scale waste-to-energy facilities.
- Represented a major convenience store chain for over 20 years in connection with acquisitions, enforcement defense, environmental permitting, and private party settlements throughout 14 states.
- Represented a leading North Carolina developer in connection with contaminated property redevelopments throughout North Carolina.
- Represented a global developer and manufacturer of pharmaceuticals, biopharmaceuticals and agrochemicals in connection with defense of one of the single largest OSHA enforcement actions ever brought by the N.C. Department of Labor.
- Represented an international privately-held soft drink manufacturer, seller and distributing company in connection with its acquisitions and environmental and OSHA compliance at facilities across the United States.
- Represented one of North Carolina's largest community banks in connection with financing of Brownfields Program projects throughout North Carolina.
- Advised a semiconductor and LED company on the environmental aspects of the divestiture of its lighting products business unit for an initial cash payment of \$225 million plus the potential to receive an earn-out payment

based on the business's post-closing performance.

- Assisted the largest electric utility in the United States for over 16 years with acquisitions, dispositions, and regulatory compliance regarding the utility's power plant properties, lakes, substations, transmission and distribution projects across North and South Carolina.
- Represented a national paper product company in connection with its environmental permitting and OSHA compliance at several North Carolina facilities.
- Represented a major convenience store chain with environmental insurance coverage disputes throughout the Southeast.
- Represented the largest electric utility in the United States who is a performing party in a CERCLA removal action at the largest Superfund Site in North Carolina and also in related contribution litigation brought against over 150 parties.
- Represented the nation's third-largest poultry producer in OSHA enforcement defense, managing OSHA inspections, and with responses to employee complaints made to NCDOL's OSH Division.
- Represented one of the nation's largest convenience store chains with the acquisition of 47 stores and 6 ethanol distribution facilities in Kansas and Missouri.
- Assisted a global developer and manufacturer of pharmaceuticals, biopharmaceuticals and agrochemicals with OSHA compliance, document requests and inspections by NCDOL's OSH Division.
- Represented various clients to defend against and avoid to third-party claims for property damage and personal injury related to off-site contamination from underground storage tanks and general facility operations.

HONORS & AWARDS

- *Best Lawyers®*, Environmental Law (2007-2022)
- *Chambers USA: America's Leading Business Lawyers*, Environmental (2013-2021)
- *Business North Carolina* "Legal Elite," Environmental
- Martindale-Hubbell AV Preeminent Rated
- North Carolina *Super Lawyers* (2010-2013, 2016-2021)
- Marquis *Who's Who in American Law*
- Fluent in Italian and Spanish; conversational and written Portuguese

PROFESSIONAL & COMMUNITY AFFILIATIONS

- American Bar Association
- The Florida Bar
- New York Bar Association

- North Carolina Bar Association
 - Member, Environmental Law Section Council
- Wake County Bar Association
- Local Advisory Board, Capital Bank
- Member, Existing Industry Committee, Cary Chamber of Commerce
- President, Board of Governors of MacGregor Downs Country Club, Ltd.
- Member, North Carolina Association of Environmental Professionals
- Member, North Carolina Citizens for Business and Industry's Environmental Concerns Committee
- Member, North Carolina Economic Developers Association

Susan Milner Parrott

Attorney

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Raleigh, North Carolina 27601
Phone: 919.821.6664
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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

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PRACTICE AREAS

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 contract research organization on the employment law aspects of a definitive agreement to acquire a provider of contract research, clinical and regulatory and other consulting services.
- 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.
- Advised a frozen foods company on employment-related matters in connection with a definitive agreement to acquire a frozen snacks business.
- 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, Past 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



David A. Pasley

Attorney

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David Pasley is a business litigation attorney who counsels and advocates for clients in a variety of business disputes, including breach of contract issues, trademark disputes, unfair trade practices and other business-related claims. He also has experience with employment litigation and has counseled and represented employers in cases involving claims of discrimination, retaliation, harassment, wrongful termination and other employment-related issues.

David joined Smith Anderson in 2018 after graduating with high honors from the University of North Carolina School of Law in 2017 and clerking for Judge Thomas Schroeder of the United States District Court for the Middle District of North Carolina. Prior to law school, David taught Eighth Grade English for two years in Orangeburg, South Carolina. David was born and raised in Raleigh and is excited to be part of the growing and thriving professional community here.

EXPERIENCE

- Represented a company in successfully protecting and enforcing intellectual property rights.
- Represented multiple corporations in defending claims of false advertising.
- Represented owner of commercial real estate in action brought to enforce property rights.
- Represented a private individual in dispute with the United States involving tax refund.
- Represented a company in defending claim arising out of breach of contract claim involving medical devices.

AA CONTACT INFO

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cbaber@smithlaw.com

PRACTICE AREAS

Asbestos and Toxic Torts
Complex Contract Disputes
Corporate and Securities Litigation
Employment Litigation
Litigation
Non-Compete and Trade Secrets
Trademark and Copyright

BAR & COURT ADMISSIONS

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

EDUCATION

University of North Carolina School
of Law, J.D., *with high honors*, 2017

- Order of the Coif

University of North Carolina, B.A.,
Philosophy, *with distinction*, 2012

CLERKSHIPS

Honorable Thomas D. Schroeder,

- Represented various employers in defending against sex, gender, and disability discrimination claims, as well as claims of wrongful termination and/or retaliation.

United States District Court for the
Middle District of North Carolina

HONORS & AWARDS

- *Best Lawyers®*, "Ones to Watch," Commercial Litigation (2022)
- Articles Editor, *North Carolina Law Review*, 2017
- 2015 Gressman-Pollitt Award for Best Overall Oral Advocacy

PROFESSIONAL & COMMUNITY AFFILIATIONS

- North Carolina Bar Association
 - Member, Litigation, Business Law
 - Member, Young Lawyers Division
 - Member of LINK (Leadership, Information, Networking, and Knowledge) Committee – coordinates with local high schools to present information about entering into, and succeeding in, the legal profession to students
 - Wake County Bar Association
 - North Carolina Association of Defense Attorneys



Edward F. Roche

Attorney

Wells Fargo Capitol Center
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Raleigh, North Carolina 27601
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Fax: 919.821.6800
eroche@smithlaw.com



Ed Roche helps businesses navigate complex disputes. Ed regularly handles employment and intellectual property cases and a wide range of other business disputes, including claims for breach of contract, unfair trade practices, breach of fiduciary duty and violations of securities laws.

Ed enjoys working for clients of all shapes and sizes and in all sectors. He handles disputes at the administrative, trial and appellate levels, in state and federal courts across the country. Before litigation arises, Ed works with clients to optimize their positions and evaluate their litigation risk. Ed partners with clients to understand their businesses and goals, allowing him to advise them on how disputes will affect their overall business interests.

Before joining Smith Anderson in 2019, Ed was an attorney in the Washington, D.C. office of a global law firm and clerked for a federal appeals court judge.

EXPERIENCE

- Represent a California software company in contract disputes in California and Minnesota.
- Enforced a local business's intellectual property rights against an international retailer.
- Represented a bank in emergency proceedings to prevent harm to customers due to technology vendor's actions.
- Represent a technology company in a breach of contract action concerning royalty payments.
- Defended a construction company in a copyright dispute, prevailing after a two-day arbitration.

AA CONTACT INFO

Cheryl Baber
Phone: 919.838.2023
cbaber@smithlaw.com

PRACTICE AREAS

Litigation
Complex Contract Disputes
Employment Litigation
IP Litigation
Non-Compete and Trade Secrets

BAR & COURT ADMISSIONS

- District of Columbia
- Massachusetts
- North Carolina
- U.S. Supreme Court
- U.S. Court of Appeals for the Fourth Circuit
- U.S. Court of Appeals for the Fifth Circuit
- U.S. Court of Appeals for the Sixth Circuit
- U.S. Court of Appeals for the Ninth Circuit
- U.S. Court of Appeals for the Tenth Circuit
- U.S. Court of Appeals for the Eleventh Circuit



- Defended a government contractor against a whistleblower complaint, involving administrative proceedings in the Department of State and an appeal to a federal appeals court.
- Represented an insurance company in securing dismissal of employee's wrongful dismissal claims.
- Represented various employers in enforcing employee non-compete provisions.
- Helped online retailers secure takedowns of websites infringing retailer's intellectual property rights.
- Represented various clients in trademark proceedings at the Trademark Trial and Appeal Board ("TTAB").
- Helped clients respond to third-party subpoena requests.

Litigation experience Ed gained prior to joining Smith Anderson:

- Defended directors against shareholder derivative actions alleging securities violations, breaches of fiduciary duties and various related claims in state and federal courts.
- Represented mutual fund advisors against claims of excessive fees.
- Advised a university on potential antitrust dispute concerning the competitive opportunities open to the university's athletic program.
- Represented multinational technology companies responding to regulators' allegations of antitrust violations.
- Provided advice on First Amendment arguments for a news website to raise in appealing trial verdicts obtained by a public figure based on the website's news report.
- Represented a major pharmaceutical company in an investigation launched in response to a federal government subpoena seeking information on compliance with Anti-Kickback Statute.
- Served as counsel to the American Bar Association and individual plaintiffs in a lawsuit against the Department of Education, challenging the department's conduct in relation to the Public Interest Loan Forgiveness Program.
- Wrote briefs and delivered arguments to the U.S. Court of Appeals for the Sixth Circuit on behalf of a federal habeas petitioner.

- U.S. Court of Appeals for the District of Columbia Circuit
- U.S. District Courts for the Eastern, Middle, and Western Districts of North Carolina
- U.S. District Court for the District of Columbia
- U.S. District Court for the Southern District of Illinois
- U.S. District Court for the Western District of Tennessee

EDUCATION

- University of North Carolina, J.D., *with high honors*, 2014
 - *Order of the Coif*
- University of Oxford, Worcester College, B.A., Law, 2007

CLERKSHIPS

Law Clerk to The Honorable Julia S. Gibbons, U.S. Court of Appeals for the Sixth Circuit

- Represented a voting rights organization litigating constitutional and statutory civil rights claims in federal court to stop a state preventing access to public voter registration records.
- Coordinated nationwide litigation efforts to assist detained immigrants.

HONORS & AWARDS

- *Best Lawyers®*, "Ones to Watch," Commercial Litigation, Litigation – Intellectual Property (2022)
- Editor in Chief, *North Carolina Law Review*

PROFESSIONAL & COMMUNITY AFFILIATIONS

- British-American Business Council, Triangle Chapter
- Kiwanis Midtown Raleigh, Board Member

Shameka C. Rolla

Attorney

Wells Fargo Capitol Center
150 Fayetteville Street, Suite 2300
Raleigh, North Carolina 27601
Phone: 919.821.6652
Fax: 919.821.6800
srolla@smithlaw.com



Shameka Rolla joined Smith Anderson's Litigation team after graduating from Wake Forest University School of Law where she was a member of the National Trial Team. She serves clients on a wide range of business disputes, including contract and business tort claims.

AA CONTACT INFO

Cheryl Baber
Phone: 919.838.2023
cbaber@smithlaw.com

PRACTICE AREAS

Employment Litigation
Litigation
Non-Compete and Trade Secrets

BAR & COURT ADMISSIONS

North Carolina

EDUCATION

- Wake Forest University School of Law, J.D., 2020
 - The Order of Barristers
- Duke University, B.A., 2017



Kerry A. Shad

Attorney

Wells Fargo Capitol Center
150 Fayetteville Street, Suite 2300
Raleigh, North Carolina 27601
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Fax: 919.821.6800
kshad@smithlaw.com



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 healthcare (insurers and hospitals), pharmaceutical and CRO, technology, biotech, agtech, retail, hospitality and manufacturing.

Kerry's practice also focuses 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 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*, *Benchmark Litigation*, *Best Lawyers* 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 as an elected member of the Management Committee and Co-Chair of the Diversity & Inclusion 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
Phone: 919.821.6654
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

- Retained as lead counsel for global pharmaceutical company to defend claims filed in arbitration under the company's ADR program.
- Represented hospital in two lawsuits filed in federal court in North Carolina alleging discrimination in violation of the ADA (secured dismissal under Rule 12(c)) and national origin discrimination and retaliation in violation of Title VII (stipulation of dismissal with prejudice with no payment after successful deposition of Plaintiff).
- 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

- *Best Lawyers®*, Employment Law - Management, Litigation - Labor & Employment (2009-2022)
- *Best Lawyers®*, "Lawyer of the Year," Raleigh Employment Law - Management (2022)
- *Chambers USA: America's Leading Business Lawyers*, Labor & Employment (2012-2021)
- *Benchmark Litigation*, Top 250 Women in Litigation (2021)
- *Benchmark Litigation*, North Carolina Labor and Employment Star (2018-2021)
- Martindale-Hubbell AV Preeminent Rated
- North Carolina *Super Lawyers* (2012-2021)
- *Business North Carolina Magazine* Legal Elite, Employment
- *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
- Wake County Bar Association



Derek A. Sutton

Attorney

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Derek Sutton is a commercial litigator whose practice encompasses a wide range of civil litigation, including contract and commercial disputes, antitrust, intellectual property, mergers and acquisitions, employment, and business-related tort and statutory claims.

Derek joined Smith Anderson after practicing for several years in the New York office of a leading national law firm.

***NOT ADMITTED TO PRACTICE IN NORTH CAROLINA**

EXPERIENCE

Prior to joining Smith Anderson, Derek:

- Represented several *inter vivos* trusts challenging the constitutionality of the District of Columbia's imposition of fiduciary income tax.
- Defended a medical device manufacturer in federal multidistrict litigation involving an alleged conspiracy violating federal and state antitrust laws.
- Represented a chemical manufacturer in an ICC arbitration to resolve a commercial dispute regarding a Site Services Agreement.
- Represented a corporation before the North Carolina Business Court in a bench trial concerning statutory appraisal claims made by dissenting shareholders.
- Assisted in drafting a settlement agreement to resolve a global, multi-billion dollar dispute between leading technology companies involving breach of contract, tortious interference, antitrust and patent claims.

AA CONTACT INFO

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PRACTICE AREAS

Litigation
Complex Contract Disputes
IP Litigation
Mergers and Acquisitions
Employment Litigation
Non-Compete and Trade Secrets

BAR & COURT ADMISSIONS

New York
U.S. District Court for the Southern
District of New York
U.S. District Court for the Eastern
District of New York

EDUCATION

New York University School of Law,
J.D., 2017

- Robert McKay Scholar
- Dean's Award Scholar

University of Michigan, B.A., 2012

- Phi Beta Kappa

- Defended a cellular technology company in federal court in a bench trial involving allegations of anticompetitive conduct relating to standard-essential patent licensing and cellular modem chip sales practices.

The Here, There and Everywhere Workforce: Tips, Traps and Best Practices



The Here, There and Everywhere Workforce:

Tips, Traps and Best Practices



Kimberly J. Korando

October 26, 2021

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Polling Question 1

Pre-pandemic what percentage of your office-based workers worked remotely regularly 1 or more days a week?

- < 10%
- 10 - 25%
- 26 - 50%
- 51 - 75%
- 76 - 100%

Polling Question 2

Is your organization considering increasing remote work options for office-based workers post-pandemic?

Yes

No

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Polling Question 3

Post-pandemic what percentage of your office-based workers will work remotely regularly 1 or more days a week?

- < 10%
- 10 - 25%
- 26 - 50%
- 51 - 75%
- 76 - 100%

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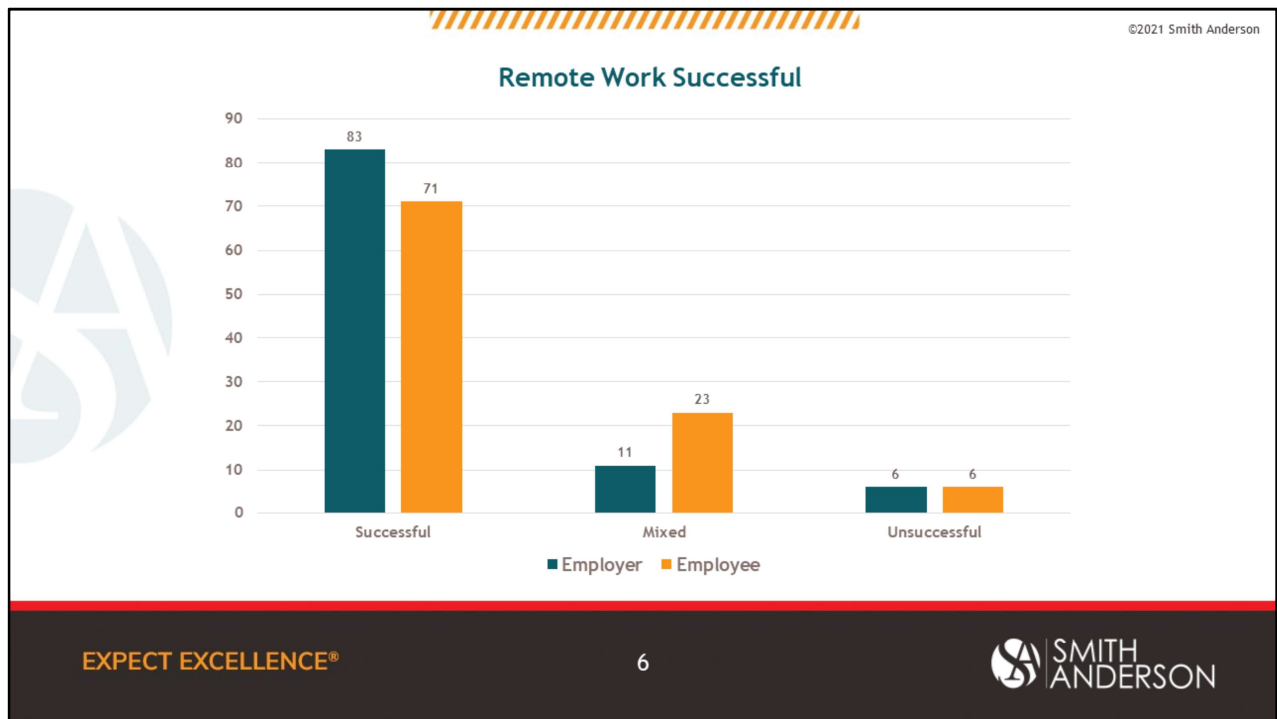


How are employers doing?

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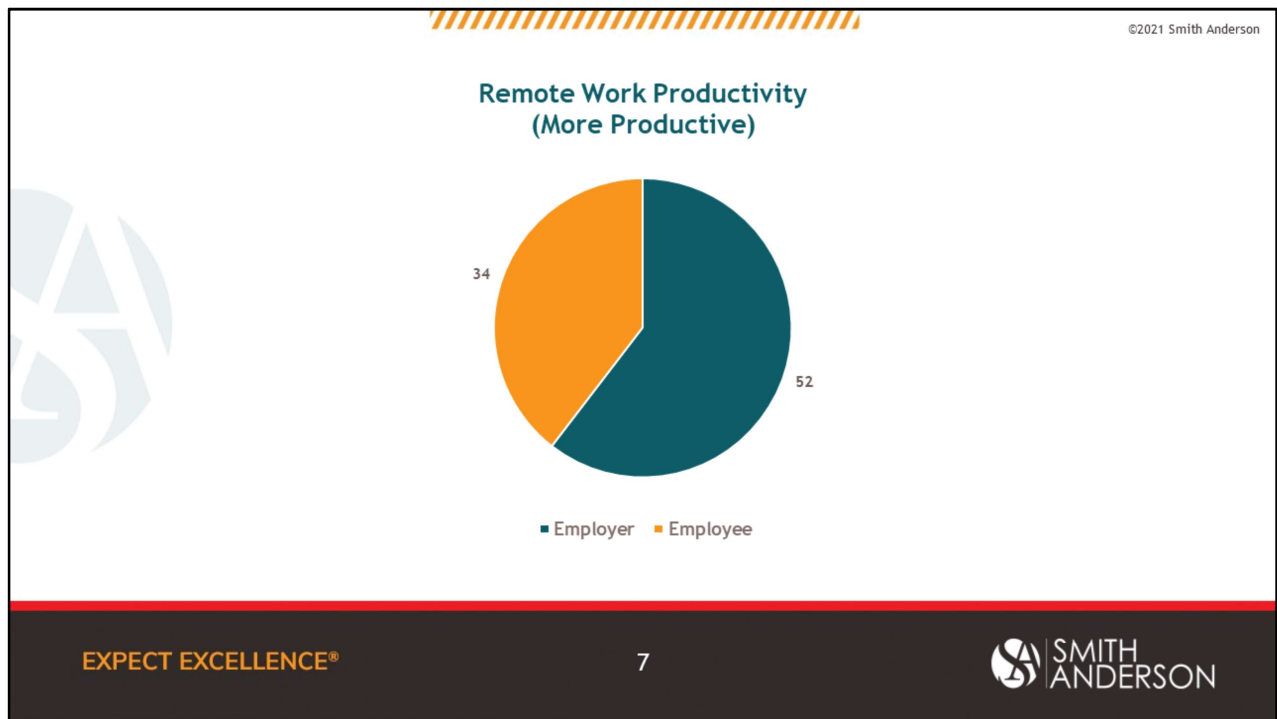
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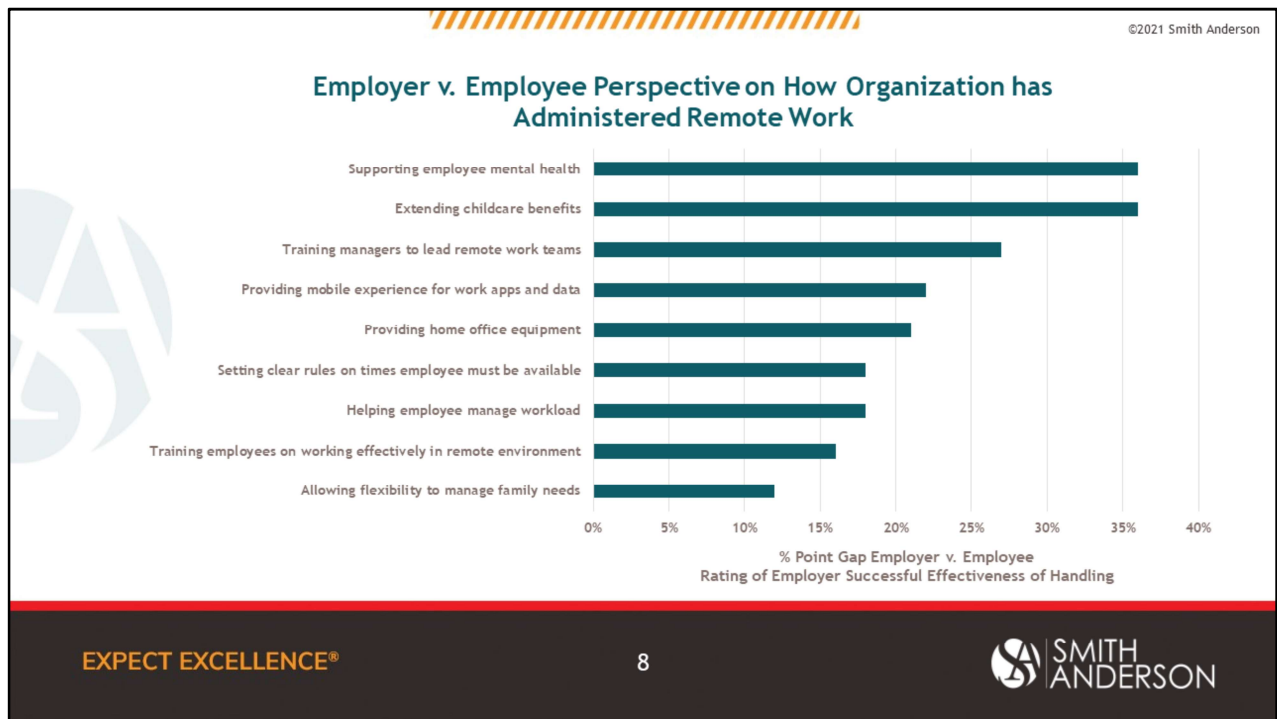
PwC US Remote Work Survey (January 12, 2021: 133 US executives, 1200 US office workers)

How successful would you say the shift to remote work because of COVID-19 has been for your company? (Responding 'successful' and 'very successful')



PwC US Remote Work Survey (January 12, 2021: 133 US executives, 1200 US office workers)

Responding “more productive” and “much more productive” to the following:
Which of the following best describes your productivity working remotely compared to before COVID-19?
How has average employee productivity changed (compared to pre-COVID-19)?
(Responding ‘more productive’ and ‘much more productive’)



PwC US Remote Work Survey (January 12, 2021: 133 US executives, 1200 US office workers)

How would you describe how effective your company has been at performing the following activities with employees working remotely?
(Responding 'successful' and 'very successful'; showing difference: employers minus employees)

Remain Remote Post-COVID

Remote Days desired/wk	Employer	Employees
No remote	21	8
>0 - <1 (1 - 3/ month)		10
1	18	10
2	29 = 68%	19 = 47%
3	15	16
4	5	10
>4 - <5 (1 - 3/month)	6	
Full-time remote	5 = 31%	29 = 55%

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PwC US Remote Work Survey (January 12, 2021: 133 US executives, 1200 US office workers)

The purpose of an office according to...

Rank	Employers	Employees
1	Increase productivity	Collaborating
2	Client meetings	Accessing equipment/documents
3	Employee collaboration	Meeting with clients/colleagues
4	Enabling corporate culture	Training/career development

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PwC US Remote Work Survey (January 12, 2021: 133 US executives, 1200 US office workers)

Listing highest ranked answers to “the purpose of your physical office in the future” and “how important are the following for while you're in the office.”


Identifying Your Optimal Remote Work Strategy

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Questions to be Considered

- 
- WHY** • will remote work be used?
 - WHAT** • types of remote work will we use?
 - WHERE** • will we work--local, in-state, out-of-state, out-of-country?
 - WHO** • will be working remotely--positions and people?
 - HOW** • pay? terms, policies? training? monitoring? performance management?

The WHAT

Options

- Primarily **remote**
- **Hybrid** (*office part-time, typically 2 - 3 days per week*)
- Primarily **office**

Factors to Consider

- Nature of the work
- Experience level of workforce
- Employee preferences

The WHERE

Options

- Within commuting distance
- In-state only
- Out-of-state (w/or w/o restrictions)
- Out-of-country

Factors to Consider

- *Pros:* Increased talent pool, competitive talent acquisition
- *Cons:* Employment, tax law variation; time zone differences

Best Practice

- Policy on geographic location where employees can work
- Way to monitor work location

The WHERE Legal Compliance Considerations

Hiring: Pay disclosures, inquiries; criminal history/background checks; drug-testing; data privacy requirements

Compensation: Non-exempt overtime, breaks; exempt classification; expense reimbursement; PTO

Paid Sick Leave, state disability withholding

Unpaid Leave

EEO: Reasonable accommodation/disclosure requirements (pregnancy); expanded protected classes

Taxes: Withholding, UI, business presence requirements

Non-competes

The WHO: **Jobs, Employees,** Supervisors

Develop criteria/tools for assessing and selecting suitable **jobs**, **employees** and **managers** for remote work

Tips

Jobs: At least some portion of work can be done as well or better away from site

Employees: Selection process to assess job knowledge/skills, personality, self-motivation and home setting suitable for remote work

Managers: Manages by results, not time spent working

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Best Practices For Selecting Jobs Suitable for Remote Work

Base decisions on the job, not life style factors

Analyze job activities for remote work suitability

If on-site presence is essential to performance of the job, then this requirement should be expressly stated in the job description.

Common job suitability factors

- ✓ Requires independent work
- ✓ Requires little face-to-face interaction
- ✓ Requires concentration
- ✓ Results in specific measurable work product
- ✓ Can be monitored by output, not time

Common job unsuitability factors

- ✓ Requires extensive face-to-face interaction with supervisors, coworkers, clients, public
- ✓ Requires access to materials that are not removable from the office
- ✓ Employer unable to provide special facilities/equipment offsite
- ✓ Security measures too costly

For Selecting Employees Suitable for Remote Work

Selection process is the key:

Employee must have job knowledge/skills, personality, self-motivation and home setting suitable for telework

Don't choose employees solely on basis that they were best at the job as currently organized or because they are located farthest from office.

Employee Suitability Indicators

- ✓ Organized
- ✓ Highly disciplined
- ✓ Self-starter
- ✓ Able to work productively on own
- ✓ Knowledgeable about job
- ✓ Dependable and trustworthy
- ✓ Low need for social interaction
- ✓ Good communication skills
- ✓ Above-average performer
- ✓ Motivated by production/exceeding objectives; and not simply being seen
- ✓ Positive attitude towards telework
- ✓ Flexible
- ✓ Strong understanding of organization's objectives
- ✓ Manages time well and prioritizes
- ✓ Home environment suitable

Employee Unsuitability Indicators

- ✓ Needs on-the-job training
- ✓ Needs to learn the organization
- ✓ Needs close supervision
- ✓ Thrives on interaction with others
- ✓ Desires telework to care for child, sick, aged, etc.

Other Employee Assessment Factors

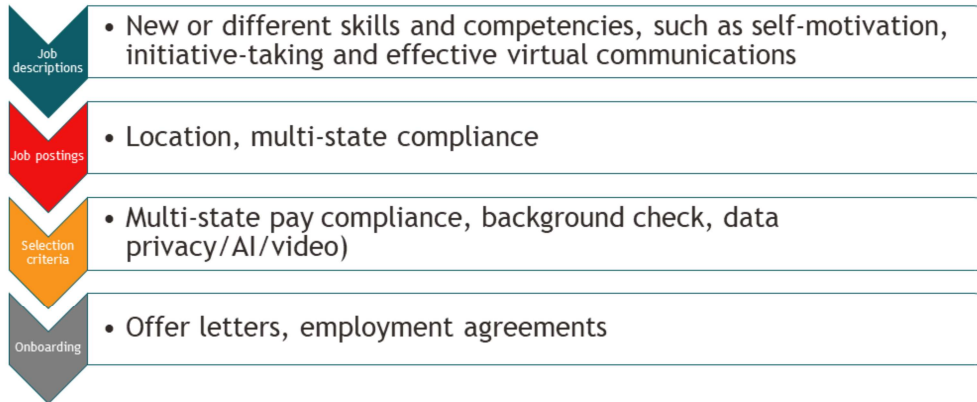
- ✓ Level of job knowledge
- ✓ Amount of job experience
- ✓ Productivity
- ✓ Overall quality of work
- ✓ Adaptability of current (or potential future) job to telework
- ✓ Organizational and planning skills
- ✓ Project management skills
- ✓ Time management skills and ability to structure time in an unstructured environment
- ✓ Ability to set goals for self and follow through on them
- ✓ Self-discipline/ability to manage potential friction between personal and work

- ✓ Communication skills: verbal
- ✓ Communication skills: written
- ✓ Self-marketing
- ✓ Technology literacy level/ability to work with technology to achieve business goals
- ✓ Ability to work productively without needed supervision or frequent feedback
- ✓ Tendency to ask for advice or input when needed
- ✓ Reliability and discipline regarding work commitments
- ✓ Ability to thrive in isolated work environments with no co-workers present
- ✓ Self-motivation, self-discipline, ability to avoid procrastination
- ✓ Flexibility
- ✓ Ability to work confidently in unfamiliar or constantly changing situations
- ✓ Independence/ability to self-manage
- ✓ Desire for scheduled flexibility
- ✓ Willingness to try new ways of working
- ✓ Interest and enthusiasm about teleworking

Best Practices Selecting Managers Suitable to Manage Remote Work

- ✓ Empowers and trusts employees
- ✓ Manages by results, not time spent working
- ✓ Encourages feedback and communication
- ✓ Effective problem solver/facilitator
- ✓ Effective planner and organizer of work to facilitate results
- ✓ Breaks down tasks and assigns deadlines
- ✓ Supports remote work and takes action for successful arrangements

The HOW: Recruiting, Hiring, Selection Criteria



The HOW: Compensation and Benefits

Base Compensation

- Location as a factor affecting pay
 - Job v. work situs based (*when working in locations of differing cost of living*) v. national median
 - How handle when employee in high COL area relocates to lower COL area (*reduce or red circle—may be informed by whether employer currently pays based on work situs*) v. new hire in lower COL area
- Must be documented, transparent and consistent

Benefits/Perks

- Aligned to remote worker interests
- Consider group health plan/provider network impacts

The HOW: Successful Programs



Policies and Tools

Telework Toolkit <http://www.teleworktoolkit.com/> A comprehensive guide to developing a telework program, including policies, forms, checklists

- Building A Telework Program http://www.teleworktoolkit.com/building_program.html

North Carolina Telework, <https://nctelework.org/>, providing policies, tools, links and case studies.

Federal and State Government Policies and Tools

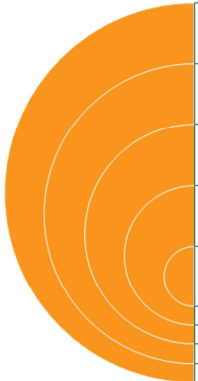
North Carolina Office of State Human Resources,
<https://oshr.nc.gov/policies/teleworking-program-policy>

Interagency Telework Site, U.S. Office of Personnel Management, General Services Administration www.telework.gov

- The U.S. Office of Personnel Management (OPM) and the U.S. General Services Administration (GSA) have established this interagency website to provide easy access to information on everything from guidance to agencies on implementing telework to training for employees. The information contained on telework.gov pertains only to Executive Branch agencies and employees.

- Telework manual, government documents and reports, information for telecommute coordinators, managers and employees
- The [Guide to Telework in the Federal Government](#) outlines practical information to assist Federal agencies, [managers](#), [Telework Managing Officers](#), other staff responsible for implementing telework, and [employees](#).

Assess and Address Technology Issues



Organization needs, cost
Security
Equipment maintenance, tech support
Connectivity/lack of broad band (high speed connections)
Employee technology competency

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Cybersecurity and Infrastructure Security Agency, Telework Guidance and Resources,
<https://www.cisa.gov/telework>

Telework Essentials Toolkit <https://www.cisa.gov/publication/telework-essentials-toolkit>

- The Telework Essentials Toolkit is designed to assist business leaders, IT staff, and end users in their transition to a secure, permanent telework environment through simple, actionable recommendations. The Toolkit provides three personalized modules for executive leaders, IT professionals, and teleworkers. Each module outlines distinctive security considerations appropriate for their role:
 - Actions for executive leaders that drive cybersecurity strategy, investment and culture
 - Actions for IT professionals that develop security awareness and vigilance
 - Actions for teleworkers to develop their home network security awareness and vigilance

Telework Reference Materials for Non-Federal Organizations

<https://www.cisa.gov/telework-reference-materials-non-federal-organizations>

- Best practices for system administrators and other technical staff to enhance Critical Infrastructure, industry, schools, as well as State, Local, Tribal, and Territorial (SLTT)

government organizational security posture during remote working conditions.

Telework Reference Materials For The At-Home Worker <https://www.cisa.gov/telework-reference-materials-home-worker> Tips and security considerations, as well as cybersecurity best practices, to help employees and non-technical users in a telework environment:

- Video Conferencing Tips
- ST04-14: Avoiding Social Engineering and Phishing Attacks
- ST15-003: Before You Connect a New Computer to the Internet
- ST05-001: Evaluating Your Web Browser's Security Settings
- ST04-004: Understanding Firewalls
- ST19-001: Protecting Against Ransomware
- ST15-002: Securing Your Home Network
- ST04-020: Protecting Portable Devices: Data Security
- ST11-001: Holiday Traveling with Personal Internet-Enabled Devices
- ST05-015: Understanding Bluetooth Technology
- 5 Steps to Protecting Your Digital Home
- 5 Everyday Steps Towards Online Safety
- Creating A Password Tip Card
- Malware Tip Card
- Best Practices for Using Public Wi-Fi Tip Card
- Mobile Security Tip Card and Mobile Security: One Pager

Information Technology Laboratory National Institute of Standards and Technology

ITL BULLETIN MARCH 2020 Security for Enterprise Telework, Remote Access, and Bring Your Own Device (BYOD) Solutions

<https://csrc.nist.gov/CSRC/media/Publications/Shared/documents/itl-bulletin/itlbul2020-03.pdf>

Guide to Enterprise Telework, Remote Access, and Bring Your Own Device (BYOD) Security July 2016 <https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.800-46r2.pdf>

- This publication provides information on security considerations for several types of remote access solutions, and it makes recommendations for securing a variety of telework, remote access, and BYOD technologies. It also gives advice on creating related security policies.

North Carolina State Government Resources

UNC School of Government, [*Teleworking Guidance: Best Practices , Sample Policies, and Cybersecurity*](#), March, 2020 (Shannon H. Tufts)

This is a resource page that includes the materials designed to help local governments navigate teleworking, including sample policies, procedures, best practices, and cybersecurity, including Top Tech Tips for Working Remotely and Securely. Links for local government telework policies provided within the article.

North Carolina Department of Information Technology, [*Telework Guidance for State Employees*](#), undated (NCDIT)

Provides cybersecurity and technology tips for employees, directors and IT Directors.

Federal Government Resources

Telework Reference Materials for the Federal Government <https://www.cisa.gov/telework-reference-materials-federal-government>

- Best practices for agency cybersecurity managers, system administrators, and other technical staff to enhance their Federal Government department and agency's security posture during remote working conditions.

Polling Questions 4 and 5

Does your organization provide “how-to” remote work training to:

- Remote workers
 - Yes
 - No

- Supervisors of remote workers
 - Yes
 - No

Orientation and Training Topics

Employees

- Setting boundaries at home
- Time management tips
- Office communications/staying involved
- Setting up home office, safety checklist

Supervisors

- Performance management
- Trust
- Communications
- Inclusion

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Policies and Tools

Telework Toolkit <http://www.teleworktoolkit.com/> A comprehensive guide to developing a telework program, including policies, forms, checklists

- Tips for Telework Managers http://www.teleworktoolkit.com/manager_tips.html
- Evaluating Teleworkers http://www.teleworktoolkit.com/evaluate_teleworkers.html
- Teleworker Self-Assessment Form http://www.teleworktoolkit.com/self_assessment.html

Government Resources

Telework Manager Landing Page <https://www.telework.gov/federal-community/telework-managers/>

- Basics for Managers <https://www.telework.gov/federal-community/telework-managers/telework-basics/>
- Performance Management <https://www.telework.gov/training-resources/telework-faqs/performance-management/>
- Online Manager Training <https://www.telework.gov/training-resources/telework-training/virtual-telework-fundamentals-training-courses/managers-course/index.htm>

Telework and Performance Management Webcast Trainings

- OPM's Telework and Performance Management recorded webcasts on successfully managing employees in a virtual environment.
- The first part of the series focuses on key steps for developing a successful telework strategy to ensure program success. Managing in a Virtual Environment Part 1
<https://www.youtube.com/watch?v=GcSyFvBhoOY>
- The second part demonstrates how effective performance management can lead to organizational success in a virtual environment. Managing in a Virtual Environment Part 2
<https://www.youtube.com/watch?v=1izjqyorGCg>

Employee Training <https://www.telework.gov/training-resources/telework-training/virtual-telework-fundamentals-training-courses/employee-course/index.htm>

Performance Management

Reviews

- Conducted more frequently during the initial months for early identification and remedying of problems
- Evaluated using the same criteria and same expectations as non-remote workers
- Address quality of work, suitability for remote arrangement and focus on any individual concerns (e.g., concerns about self-discipline, ability to meet deadlines, or whether the home environment was conducive to work)

Performance Management (CON'T)

Productivity

- Are assignments being completed and deadlines met?

Quality

- Is there any change in the quality of work?

Communications

- Have there been any problems reaching the employee? Does the employee return messages in a timely manner?

Technology

- Has the employee had problems with equipment or learning new software? Have they been able to troubleshoot themselves or have they sought help from IT?

Work Environment

- Has the employee been able to create a work environment that is relatively free of distractions from family, friends, neighbors, TV, home chores, etc.?

Performance Management (CON'T)

Work Habits

- Has the employee settled into a productive work routine?

Team Interaction

- Is the employee able to communicate effectively with coworkers? Is there any resentment of the employee by in-office colleagues?

Isolation

- Is employee having any feelings of isolation when working at home?

Satisfaction

- Ask the employee if they are satisfied with their decision to telework.

Consult with IT

- How frequently is employee requesting IT assistance? Identify problems that could be reduced with training.

Legal Issue Checklist

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Legal Issue Checklist

- ✓ Electronic signatures
- ✓ FLSA, wages
- ✓ OSHA, safety, health
- ✓ Workers compensation
- ✓ Monitoring, surveillance, searches
- ✓ Mandatory postings
- ✓ Immigration
- ✓ Employee rights laws
- ✓ Taxes
- ✓ Unemployment benefits

Electronic Signatures

Requirements

- Federal and state law governs
 - *Signer intent must be proved*
 - *Documentation of reasonable controls and satisfaction of federal/state evidence rules required*
- Cannot be mandated (I-9 exception)
- Right to decline and sign manually (give notice)

Deciding to Use Electronic Signature

- What are the consequences of losing dispute over signature?
- What is the likelihood that individual will dispute signature?
- If a dispute arises, how difficult/costly will it be for IT and HR staff to prove that the individual (and no one else) really did make the signature perhaps years earlier?

FLSA, wages

Legal Requirements

- **Non-exempt employees**
 - must compensate for all hours worked
 - must maintain records of all hours worked
- **Expense reimbursement**
 - expenses resulting in less than minimum wage being paid must be reimbursed
 - NC considers expense reimbursement a form of wages when employer has policy or practice of making payment
 - some states require expense reimbursement, including data, internet, cell

Best Practices

- **Non-exempt workers**
 - Prohibit, discipline and pay for unwanted hours worked
 - Timekeeping policies should expressly explain remote worker timekeeping procedures
 - Review and verify remote worker time records daily/weekly
- Remote work policies/agreements expressly address whether/what extent expenses are responsibility of employee or reimbursed by employer

OSHA, Safety

Requirements

- Employer responsible for damages/injuries caused by employer required materials, equipment or work processed
- Employer must record work-related illnesses/injuries

Best Practices

- Use safety checklist, incorporate into remote work agreement

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OSHA Regulatory Guidance and Requirements

OSHA will not hold employers liable for employee home office and does not require employers to inspect home offices. Home-Based Worksites, Directive Number CPL 02-00-125, Section VII. <https://www.osha.gov/enforcement/directives/cpl-02-00-125>

OSHA will inspect other home-based work sites if a complaint or referral is received, and employers are responsible for damages caused by employer required materials, equipment or work processed. Id.

Employers must keep records of work-related injuries/illnesses. Whether an injury or illness sustained working at home is “work-related” is addressed in 29 CFR 1904.5(b)(7) (illnesses and injuries that occur while an employee is working at home, including work in a home office, are considered work-related if the injury or illness both occurs while the employee is performing work for pay or compensation in the home and is directly related to the performance of work rather than to the general home environment or setting).

Best Practices

Prepare and update a safety checklist, include ergonomics, and consider including in

telework agreement provisions limiting work area access to employees only and permitting employer home inspections. The latter items are essential for home-based work sites, other than offices. Make safety checklist representations part of the telework agreement and develop a process for periodic updates. See Sample Safety Checklist (Appendix B); OSHA Computer Workstations eTool:

<https://www.osha.gov/SLTC/etools/computerworkstations/checklist.html>

Workers Compensation

Legal Requirements

- Difficult to determine whether at home injuries arose “out of” and “in the course of employment”
- Out of state workers subject to law of state where they work

Best Practices to Minimize Fraudulent Claims

- Develop set work schedule
- Require voicemail/email clock-in, -out procedure
- State time requirements for reporting injury
- Specify activities permitted or prohibited during work hours

Polling Question 6:

Does your organization use any form or employee monitoring software?

- Yes
- No

Polling Question 7:

Is your organization interested in using employee monitoring software?

- Yes
- No
- Maybe, tell me more

Monitoring, Surveillance, Searches

Legal Requirements

- Standard is whether there is expectation of privacy
 - Public employment: Fourth Amendment applies to public employee workplaces and communications. Workplace search is lawful provided it is conducted for
 - Non-investigative work-related purpose or investigation of work-related misconduct
 - Justified at inception, and
 - Methods used are reasonably related to and not excessively intrusive given the objective
- City of Ontario v. Quon*, 560 U.S. 746 (2010)

Best Practices

- Express policy of monitoring, auditing and tracking online activities and communications
- Distributed to, and acknowledged by, employee
- In fact carried out consistently, and
- No more intrusive as to serve its objectives

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Monitoring Remote Workers, SHRM, August 2020 <https://www.shrm.org/hr-today/news/all-things-work/pages/monitoring-remote-workers.aspx>

Best Employee Monitoring Software reviews (updated September 30, 2021):
<https://www.business.com/categories/employee-monitoring-software/>

Mandatory Posting Requirements

Legal Requirements

- Some federal and state laws expressly permit electronic posting
- Electronic posting not sufficient if employer
 - has not taken steps to inform employees of where and how to access the notice electronically
 - does not customarily post notices to affected employees or other affected individuals electronically

Best Practices

- Provide email, website, or intranet notice when permitted
- Mail notices that must be physically posted to individual employees working from their home or another remote site
- Continue to post hard copies of all required posters on the employer's premises, even when electronic or hard copies are sent to remote employees

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Mandatory Posting Legal Requirements

Some federal and state laws expressly provide that workplace posting requirements can be satisfied using electronic (intranet) posting, email or U.S. mail to remote workers. See Federal: <https://www.dol.gov/general/topics/posters>; NC and Federal: <https://www.labor.nc.gov/workplace-rights/employer-responsibilities/all-state-and-federal-workplace-posters>

U.S. DOL recently issued guidance clarifying posting requirements for the laws it enforces (FLSA, FMLA, EPPA, SCA) when employing remote workers. Field Assistance Bulletin 2020-7 (December 23, 2020) https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_2020_7.pdf

DOL will not consider electronic posting on a website or intranet to be an effective means of providing notice if an employer does not customarily post notices to affected employees or other affected individuals electronically. See, e.g., 29 C.F.R. §§ 13.26, 13.5

If the employer has not taken steps to inform employees of where and how to access the notice electronically, DOL will not consider the employer to have complied with the posting requirement. See, e.g., Field Assistance Bulletin No. 2019-3.

Immigration

Legal Requirements

- Onboarding requires *in-person* inspection to verify original documentation authorizing eligibility to work in the U.S. in accordance with Form I-9 and e-Verify
- Reviewing or examining documents via webcam is not permissible

Compliance Options

- Designate an authorized representative to fill out Forms I-9 on behalf of organization (e.g., notary public, third party service)
- Employer remains liable for any violations in connection with the form or the verification process

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Legal Requirements

On-boarding of new hires requires *in-person* inspection to verify original documentation authorizing eligibility to work in the U.S. in accordance with Form I-9 and e-Verify. Reviewing or examining documents via webcam is not permissible.

Compliance Options

USCIS recognizes that employers may designate an authorized representative to fill out Forms I-9 on behalf of their organization, including personnel officers, foremen, agents or notary public. If an authorized representative fills out Form I-9 on behalf on the employer, the employer is still liable for any violations in connection with the form or the verification process. See <https://www.uscis.gov/i-9-central/completing-form-i-9-for-remote-hire>

If the employer hires a notary public, the notary public is acting as an authorized representative of the employer, not as a notary. The notary public must perform the same required actions as an authorized representative. When acting as an authorized representative, the notary public should not provide a notary seal on Form I-9.

Policies and Agreements

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Remote Work Policy-Topics to Consider

- Define types of remote work available (cross-reference applicable procedures for requesting arrangement as reasonable accommodation)
- Employee eligibility/selection/approval requirements
- Employee, supervisor and HR responsibilities
- Performance management issues
- Time and attendance (work hours, timekeeping, accessibility)
- Reporting responsibilities
- Application/integration of other employer policies - privacy, monitoring, personal use, etc.
- Equipment issues - who provides, maintains, insures; develop procedure for maintaining equipment inventory and authorization for payroll deductions for loss, damage, failure to return
- Security issues - especially access/security of confidential information
- Expense reimbursement
- Safety and accidents, including ergonomics
- Liability, compliance and responsibility
- Insurance coverage
- Tax
- Zoning

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See Appendix A SAMPLE Remote Work Policy, Appendix C Remote Work Conduct Policy

Remote Work Agreement-Topics to Consider

- Statement of what activities, circumstances and locations are involved
- Equipment expenses, technical support, training, supplies employer will provide
- Space, equipment, furniture the employee will provide
- Specific schedule requirement
- Responsibility for insurance and maintenance on equipment and work area
- Return of employer-provided equipment at termination
- Employee's responsibility for equipment, maintenance and repairs
- Employee's responsibility for workplace safety of home office and injury reporting
- Requirement that employee record and submit time regularly - how, when and where wages will be paid
- Any limitations on work hours, and prior approval for overtime if non-exempt
- Confidentiality of computer data and other employer records
- Limitations on personal use of employer provided equipment
- Limitations on access to employer-provided equipment and employee workplace
- Acknowledgment that arrangement is temporary and may be terminated or modified by the employer at any time
- Employment at will disclaimer

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See Appendix D SAMPLE Remote Work Assignment Agreement

**The Here, There and Everywhere Workforce:
Tips, Traps and Best Practices
Appendices**

APPENDIX A

**SAMPLE
Remote Policy**

[ABC] recognizes that remote work may be a viable regular secondary work arrangement for some, but not all, jobs, employees or supervisors. These arrangements will be considered on a case-by-case basis and approval is within [ABC]'s sole discretion. Remote work will not be approved in cases where the employee, the job or the supervisor is not best suited to such an arrangement or where the remote work arrangement would be apparent to [ABC]'s customers, vendors, or any third parties relative to our business.

This policy does not apply to employees hired as remote workers whose principle place of employment is designated as their personal residence, nor apply to office-based employees who may be working from home or another location during a short-term project, during business travel, or other informal, short term arrangements (less than 4 weeks). All such temporary arrangements are made on a case by case basis, focusing on the business needs of the organization first. Such arrangements are **NOT** the focus of this policy. Similarly, this policy does not apply to requests for remote work arrangements as a reasonable accommodation under the Americans with Disabilities Act (ADA). Such requests should be made directly to human resources and follow the ADA reasonable accommodation process.

Eligibility

To be eligible for a remote work arrangement, employees must have completed at least 12 months of continuous regular employment with [ABC], met all performance expectations and not have any corrective or disciplinary actions within the last 12 months.

Requesting a Remote Work Arrangement

1. Employees interested in a remote work arrangement are responsible for providing all information, as requested, to assess the proposed arrangement and must submit a written proposal to their immediate supervisor.

The proposal should include (i) the desired weekly schedule, designating the days that will be worked from home and those that will be worked in the office; (ii) any duties that could not be performed as proficiently from the home location as they are performed in the office; (iii) how communication with supervisors, coworkers and business third parties will be maintained throughout the work day; (iv) how security and confidentiality of all [ABC] information will

be maintained; (v) whether there is a separate office within the employee's residence from which they will be working or whether the work would be performed in a common or shared space in the home; (vi) whether and how the employee will be as or more productive working from home than in the office and how this can be measured.

2. Upon receipt, the immediate supervisor will evaluate the proposal for, among other things, employee suitability including needs and works habits of the employee, job responsibilities to determine if the job is appropriate for a telecommuting arrangement and potential effect on providing service to internal/external customers and vendors. Additionally, consideration will be given to whether the employee has the proper equipment for the arrangement to include an appropriate home computer, high speed internet access, phone, and appropriate home work space.
3. Following the immediate supervisor's review of the proposal, the proposal will be submitted to the immediate supervisor's manager and human resources for final review and disposition. Approval of telecommuting arrangements will be in the sole discretion of [ABC].

Conditions for Remote Work Arrangements

Schedules and Work Hours. The supervisor and employee will agree in advance to the remote work schedule. The maximum number of days allowed to work remotely is [INSERT NUMBER] days per week. The schedule must remain consistent, and not change each week unless so required or approved by the supervisor on a temporary basis and/or for a specific business or departmental reason.

Work hours during remote work days must be the employee's regularly scheduled work hours, and the employee must remain at the home work location and in telecommunications contact with the immediate supervisor and [ABC] personnel during the scheduled work hours. Communication between the employee and the supervisor should be at a level consistent with, or better than, the level that exists the employee is working at the office. All deviations from the scheduled work hours must be approved in advance by the immediate supervisor.

Employees must attend office or other offsite meetings on remote work days, as requested. Remote workers shall not meet with customers, vendors, or any third parties relative to [ABC] business in their home, and [ABC] specifically disclaims any liability for such activities in the employee's home. Management retains the right to modify this schedule and any remote work arrangement as a result of business necessity.

Non-exempt employees must accurately and contemporaneously record all hours worked in a manner designated by [ABC] and must follow applicable meal and rest period policies. All hours worked in excess of those specified per day and per week SHALL require the advanced approval from the immediate supervisor. Remote work employees will be held to a higher standard of compliance than office based employees due to the nature of the work arrangement. Any failure to comply with this requirement can result in immediate cessation of the remote work agreement.

During regularly scheduled work hours and other approved work times, employees must work exclusively on [ABC] projects. Work on personal or other business matters regardless of whether the employee is being compensated for such work is not permitted. Employees may not hire or use assistants to perform work for [ABC]. Remote work arrangements are not substitutes for arranging primary care for children or other dependents, and employees may not undertake such responsibilities during scheduled or other approved work time. Employees may not work second jobs while approved remote work arrangements are in place.

[ABC] property and policies. Remote work employees must take all necessary and appropriate steps to protect [ABC] property from theft, damage or unauthorized use and to protect [ABC] information from access by or disclosure to other persons, including persons residing or visiting in the home. The following apply regardless of whether or not the information is confidential information: (i) no forwarding or copying of electronic files, data, emails or other [ABC] information to home, personal or external email or storage accounts even for the purpose of working remotely; (ii) no use of thumb drives, flash drives or other portable devices or copying methods without the express written consent of [INSERT APPROPRIATE OFFICIAL]; (iii) emails, voicemails or other communications, whether written, verbal, electronic or otherwise, sent to employees in connection with their work are for employee eyes/ears only and are not to be shared with any other employee or person, except with the express consent of the sender; (iv) no installation of unapproved software and no cleaning or defragmentation of any [ABC] computer or device; and (vi) violation of policies and procedures regarding [ABC] information is grounds for immediate termination.

Employment, including the work performed at the employee's home, remains subject to all agreements between the employee and [ABC] and all [ABC] policies, procedures and practices (including but not limited to confidentiality, computer use, intellectual property and non-competition agreements). In cases where the terms of such agreements, policies, procedures and practices do not expressly mention their application to work performed at home or other non-[ABC] locations, this policy operates to modify them to the extent necessary to render them applicable to such work. Employees working from home must perform all job duties and responsibilities while logged into [ABC]'s terminal server.

Work location and equipment. All remote work must be performed from the employee's principal residence and not from internet cafes or any other non-secured public work sites. Remote work employees must maintain an appropriate work environment within their home for work purposes. [ABC] is not be responsible for any costs associated with the setup or continued maintenance of the home office space, including but is not limited to, software, equipment, remodeling, lighting, repairs, or modifications to the home office space. [Expenses for services such as electrical, phone, data and internet are the employee's sole responsibility and not reimbursed by [ABC].] All responsibility for tax or other legal implications for the business use of the home, based on all applicable IRS, state, other federal or local government restrictions or restrictive covenants, rests solely with the employee. [ABC] has no responsibility to the employee should tax or legal problems arise from the remote work arrangement.

Equipment supplied by [ABC] will be maintained by [ABC] and must be used for business purposes only. Employees must refrain from personal or other non-[ABC] business use of the

equipment and prohibit all use by others. Unless applicable law provides otherwise, employees shall be financially responsible for any [ABC] equipment that is lost, stolen or damaged.

In the event of equipment failures or connection issues that prevent or restrict the employee's ability to work at home, employees must contact their supervisor immediately to discuss arrangements to report to the office.

Employees with exclusive use workstations who are approved for remote work arrangements may be reassigned to a shared work arrangement when working on [ABC] premises.

Safety and injuries. Injuries sustained by an employee while working in the course and scope of the job duties at home may be covered by [ABC]'s workers' compensation policy. Remote workers are responsible for notifying their supervisor and Human Resources immediately of such injuries, however minor.

Evaluation. Approved remote work arrangements made will be on a trial basis and may be discontinued at any time for any or no reason by [ABC] in its sole discretion. Employees are expected to be as or more productive and produce work of the same or better quality when working from home as when working in the office.

Immediate supervisors and managers of remote work employees are responsible for establishing audits and methods of verification that can directly evaluate the employee's productivity on a regular basis. Particular attention will be given at that time to the remote worker's work output and completion of his/her goals/objectives.

After the conclusion of the first 6 months, an evaluation of the employee's performance and arrangement will be conducted. Consideration will be given to whether the arrangement should be continued, modified or discontinued. After an initial 6 month evaluation, the employee's performance and the arrangement will be evaluated on the same schedule as evaluations for non-remote work employees.

Failure to comply with the requirements of the remote work arrangement may result in discontinuation of the arrangement and/or disciplinary action, up to and including immediate termination of employment. Any deviations from this policy must be approved in writing by the manager with the concurrence of human resources.

APPENDIX B

Safety Checklist (from www.telework.gov)

The following checklist is designed to assess the overall safety of an alternative worksite.

General		Yes	No
1	Workspace is away from noise, distractions, and is devoted to your work needs?		
2	Workspace accommodates workstation, equipment, and related material?		
3	Floors are clear and free from hazards?		
4	File drawers are not top-heavy and do not open into walkways?		
5	Phone lines and electrical cords are secured under a desk or along wall, and away from heat sources?		
6	Temperature, ventilation, and lighting are adequate?		
7	All stairs with four or more steps are equipped with handrails?		
8	Carpets are well secured to the floor and free of frayed or worn seams?		
Fire Safety			
9	There is a working smoke detector in the workspace area?		
10	A home multi-use fire extinguisher, which you know how to use, is readily available?		
11	Walkways aisles, and doorways are unobstructed?		
12	Workspace is kept free of trash, clutter, and flammable liquids?		
13	All radiators and portable heaters are located away from flammable items?		
14	You have an evacuation plan so you know what to do in the event of a fire?		
Electrical Safety			
15	Sufficient electrical outlets are accessible?		
16	Computer equipment is connected to a surge protector?		
17	Electrical system is adequate for office equipment?		
18	All electrical plugs, cords, outlets, and panels are in good condition? No exposed/damaged wiring?		
19	Equipment is placed close to electrical outlets?		
20	Extension cords and power strips are not daisy chained and no permanent extension cord is in use?		
21	Equipment is turned off when not in use?		
Computer Workstation		Yes	No
22	Chair casters (wheels) are secure and the rungs and legs of the chair are sturdy?		

- 23 Chair is adjustable?
- 24 Your back is adequately supported by a backrest?
- 25 Your feet are on the floor or adequately supported by a footrest?
- 26 You have enough leg room at your desk?
- 27 There is sufficient light for reading?
- 28 The computer screen is free from noticeable glare?
- 29 The top of the screen is at eye level?
- 30 There is space to rest the arms while not keying?

Other Safety/Security Measures

- 31 Files and data are secure?
- 32 Materials and equipment are in a secure place that can be protected from damage and misuse?
- 33 You have an inventory of all equipment in the office including serial numbers?
- 34 If applicable, do you use up-to-date anti-virus software, keep virus definitions up-to-date, and run regular scans?

APPENDIX C

Remote Work Conduct Policy (from SHRM)

Expectations for employees to avoid issues that may cause disruption to the workday and/or during virtual meetings.

General Expectations

- Remote employees are expected to be available and communicative during scheduled work hours.
- [Employer name] work rules and other policies continue to apply to offsite work locations.
- Consumption of alcohol during work hours is never acceptable.
- Employees should seek a quiet and distraction-free working space, to the extent possible.
- Employees are expected to maintain their workspace in a safe manner, free from safety hazards.

Virtual Meetings

- While distractions are often unavoidable, try to keep them to a minimum. No music or television in the background during meetings.
- Keep yourself muted during video or audio conferencing unless you are speaking.
- Turning on video is encouraged but not required.
- Avoid eating a meal during a virtual meeting unless invited to do so by the meeting host.
- Smoking or vaping is not permitted during a video conference.
- Casual dress is acceptable; however, use discretion. No sleeveless tops, pajamas or other apparel that would not be appropriate to wear outside of your home.
- Avoid multi-tasking. Give your full attention to the meeting as if you were face to face.

We appreciate the effort that all of our employees have shown in the transition to remote work, and we hope these guidelines help to clarify our expectations when teleworking.

APPENDIX D

REMOTE WORK ASSIGNMENT AGREEMENT

This Remote Work Assignment Agreement sets forth the terms of the remote work assignment for *[insert name of employee]*. Throughout this agreement, “you” or “your” means the employee.

1. Work Location. Beginning *[insert date]*, your work location will be your home located at *[insert street complete address]*.

2. Compensation. During this assignment, your *[hourly rate/weekly salary/monthly salary]* will be *[insert amount]* (less applicable withholdings), payable on the regular payday following your submission of a properly completed time sheet to *[insert name]*. You may continue to participate in all employee benefit plans and programs (subject to the terms, conditions and eligibility requirements of the plans and programs as they may exist from time to time) which the [ABC] makes available to employees at your level.

3. Work Schedule. Your regular work schedule will be *[insert hours/days, e.g., 7 a.m. to 3:30 p.m. Monday through Friday (which includes two 10-minute paid breaks and a 30-minute unpaid meal break each day)]*. Deviations from this schedule (e.g., “absences,” late starts, early quits, working different days than the regular schedule and all overtime) must be approved by *[insert title]* in advance.

4. Duties. Your duties will include: *[insert list of duties, deliverables, etc.]*. During your regular work schedule and other approved work times, you must work exclusively on [ABC] projects. In other words, you may not work on personal or other business matters regardless of whether you are being compensated for such work. Additionally, you must be present and available by telephone and email to communicate with [ABC] personnel during those hours and permit access to your work premises during these times. You will not hire or use assistants to perform work for [ABC].

5. Safety and Security. You are responsible for maintaining a separate designated work location at your home and complying with all applicable safety standards, rules, guidance and direction. All work-related injuries, however minor, must be reported to *[insert appropriate title]* immediately and, in no event, more than four hours after the injury. Except in life threatening emergencies, you must contact *[insert appropriate title]* before seeking medical treatment for work-related injuries. You also must take all necessary and appropriate steps to protect [ABC] and to protect [ABC] information from access by or disclosure to other persons, including persons residing or visiting in your home.

6. Equipment. [ABC] will provide the following equipment and property to you: *[insert description of property and inventory numbers]*. [ABC] property may be used only for [ABC] business. Upon the termination of this assignment or upon the [ABC]’s request, you must return all [ABC] property and information. You authorize [ABC] to deduct the following amount from any amount owed to you, if you fail to return all such [ABC] property: *[insert amount]*. You

will be responsible for providing and maintaining, at your own cost, all other equipment and telecommunications subject to approved expenses in accordance with [ABC] policy.

7. Outside Employment. You may not engage in work, whether for another person, employer or self-employment, while working a remote work assignment. During scheduled or other approved work time, you will not undertake primary care responsibilities for children or other dependents.

8. Compliance. You will carry out your services and maintain the premises on which work at home is performed in strict compliance with all applicable federal, state and local laws and restrictive covenants and will maintain throughout this arrangement insurance coverage for all losses incurring on or related to the use of the property, including but not limited to those resulting from the use of the property to perform work for [ABC]. Your employment, including the work you perform at your home, remains subject to all agreements between you and [ABC] and all [ABC] policies, procedures and practices (including confidentiality, computer use, intellectual property). In cases where the terms of these agreements, policies, procedures and practices do not expressly mention their application to work at home locations, this agreement operates to modify them to the extent necessary to render them applicable to such work. Failure to abide by the remote work policy and this agreement may result in termination of this assignment and disciplinary action up to and including termination of employment.

9. At-Will. This remote work arrangement is strictly at-will and may be terminated by either you or [ABC] at any time for any reason or no reason. This agreement does not alter the at-will nature of your employment relationship with [ABC].

Employee Date

Approved by:

[INSERT NAME/TITLE] Date



The Here, There and Everywhere Workforce:

Tips, Traps and Best Practices



Kimberly J. Korando

October 2021

EXPECT EXCELLENCE®

Navigating Disability and Leave Laws in the Workplace - During a Pandemic and Beyond



Navigating Disability and Leave Laws in the Workplace:

During a Pandemic and Beyond



Rosemary Gill Kenyon

October 26, 2021

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Getting back to “normal”

- Key work health issues:
 - OSHA obligations, CDC guidance, vaccine mandates, testing
 - High risk employees, anxiety, accommodations
 - Absences due to illness, parental obligations



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Infectious disease policies

- **Written safety protocols (OSHA, CDC)**
 - Barring sick employees from workplace
 - Daily health checks, office hygiene, visitors
 - COVID-19 testing
 - Vaccine requirements
 - Masking, social distancing (may vary based on vaccination status, level of transmission)

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Health inquiries allowed - COVID-19

ADA, GINA, FMLA obligations:

- Limit scope to what necessary
- Keep confidential and private
- Do not discriminate
- Use medically reliable processes
- Stay within parameters of CDC or other official guidance

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COVID-19 Vaccine

- EEO laws do not prevent an employer from requiring COVID vaccination under most circumstances
- OSHA began recommending that employers require employees to be vaccinated, as of August 13, 2021

COVID vaccines to be discussed during COVID panel on October 28, 2021

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COVID-19 Vaccine

EEOC has stated:

- Nothing prevents an employer from requiring the vaccine
- A vaccination itself is not a medical examination when administered by the employer or a third party.
- If employer administers, then caution: prescreening vaccination questions may elicit information about a disability; questions must be “job-related and consistent with business necessity”

COVID vaccines to be discussed during COVID panel on October 28, 2021

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COVID-19 vaccine and testing

President Biden's Plan - Vaccine mandates:

- Federal contractors and subcontractors (deadline for vaccinations, December 8, 2021)
- Employers with 100+ employees (OSHA ETS) (vaccination or testing)
- Certain healthcare facilities with Medicare/Medicaid revenue (vaccination & testing)

COVID vaccines to be discussed during COVID panel on October 28, 2021

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COVID-19 vaccine

- Subject to potential accommodations due to disability (ADA) or for religious reasons (Title VII), unless undue hardship results

COVID vaccines to be discussed during COVID panel on October 28, 2021

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Vaccine accommodations under the ADA

Use traditional ADA analysis

- Is there a covered disability?
- Request medical documentation
 - Employer is entitled to a diagnosis
- Use the interactive process

COVID vaccines to be discussed during COVID panel on October 28, 2021

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What is possible?

- Case-by-case analysis
- Is there a direct threat or undue harm
 - Safety of workplace
- Remote work? Frequent testing? Masking? Social distancing? Leave?
- Consider making only temporary accommodations

COVID vaccines to be discussed during COVID panel on October 28, 2021

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COVID-19 vaccine

- Written policy
- Proof of vaccination?
 - Federal contract rule requires proof
- HR should handle information and keep confidential
 - Not in personnel files

COVID vaccines to be discussed during COVID panel on October 28, 2021

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Getting back to normal . . .

High risk employees, anxiety, others

- Traditional analysis
- Review and reconsider what are *essential functions* vs. *marginal functions* in the COVID-19 and post-COVID-19 era
 - Everyone dispensed with important functions temporarily during COVID remote work period
- Making exceptions during COVID-19 will not necessarily bind an employer down the road, if proper justification is provided, but, these exceptions may open more possibilities

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Parents and caregivers

- Attendance may be unpredictable
- Retention strategies
- Most will not be eligible for FMLA leave
 - Does not cover children's school closed or a quarantined symptom-free child

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What is a disability?

- COVID? (depends)
- Underlying condition that puts employee at risk (depends)
- Short stature?

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Common employer ADA mistakes

- **Failing to:**
 - recognize medical issue is affecting performance or safety
 - recognize that employee has provided enough information *to put employer on notice* that an accommodation is being requested or is needed

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Common employer ADA mistakes

- **Failing to:**
 - obtain *actual medical information*
 - engage in the interactive process
 - get HR involved
 - train managers and supervisors to recognize issues and call HR

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Reasonable accommodation process

- Employer never has to eliminate or change “essential functions”
- What is an essential function is slippery at times, and requires close analysis
- Document terms and conditions for accommodation and require periodic review and evaluation

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Employee leave laws

Federal paid leave

- Congress continues to consider enacting a paid employee leave program, but passage in 2021 unlikely
- Business getting frustrated with patchwork of state and local leave laws

State legislatures

- Continue to expand employee paid sick leave or family leave

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Common employer FMLA mistakes

Employers:

- Fail to recognize an employee has provided information triggering employer notice obligations
- Fail to give required FMLA notices, including designation notice
- Fail to closely manage process including certification of health care provider

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Common employer FMLA mistakes

Employers:

- Fail to train or rein in managers, so they make comments or express irritation at leave-takers, and then retaliate
- Fail to document and address performance issues until leave is taken

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FMLA tips

Use the tools allowed:

- Regularly request fitness to return to work certificates
- Get recertification as allowed for changing circumstances
- Ensure all required documentation is provided by employee and healthcare provider
- Hold employees to employer policies on notification of absences in advance and separate performance issues for noncompliance from FMLA protected absences

Stay Safe and Healthy!



Navigating Disability and Leave Laws in the Workplace: During a Pandemic and Beyond



Rosemary Gill Kenyon

October 26, 2021

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Wage and Hour Update

Wage and Hour Update

2021 Edition



J. Travis Hockaday

October 26, 2021

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New Administration, New Priorities

- What to expect:
 - Stronger enforcement from USDOL
 - More focus on independent contractors/gig workers
 - More to come on joint employer rule
 - Efforts to increase minimum wage
 - Paid leave proposals

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Pandemic-Related Wage and Hour Questions

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FLSA Classification Changes?

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- Remember:
 - Generally, duties and salary basis tests must be met for executive, administrative, professional exemptions from overtime to apply
- Assess whether pandemic-related changes to primary duties could result in duties tests not being met such that reclassification is appropriate

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What is compensable during remote work?

- Employer must pay for all hours of telework actually performed - including all reported and unreported hours of telework that employer knows or has reason to believe has been performed
 - True even for hours that employer did not request or desire or authorize, or are worked in violation of policy
 - Employer has obligation to control and prevent unauthorized/unwanted work
- But, question is what employer *should* have known, not what it *could* have known
 - For instance, generally no obligation to review employer-issued electronic devices to uncover time worked outside of scheduled work hours (but could be practical for employer to consult such records)
- Establish reasonable processes for employees to report unscheduled work time and report uncompensated work

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What is compensable during remote work?

- Mixing personal and family obligations during workday
 - If completely relieved from duty for long enough to use time effectively for own purpose, time is “off duty” and not hours worked
 - Applies regardless of whether employee/employer agree in advance on schedule or if employer allows employee flexibility to choose

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What is compensable during remote work?

COVID-19 and the Fair Labor Standards Act Questions and Answers

<https://www.dol.gov/agencies/whd/flsa/pandemic#19>

USDOL Wage and Hour Division Field Assistance Bulletin No. 2020-5

https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_20_20_5.pdf

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Is time between home and office “work”?

- Remember:
 - Work time
 - Time spent primarily for employer’s benefit; periods when completely relieved of duties that are long enough to effectively use time for own purposes are not work time
 - Travel time
 - Time spent in normal commute or ordinary travel from home to work and vice versa is not compensable
 - Period between starting and ending work on same workday is generally compensable
 - Employee generally not “on duty” until performs first work task of day
 - Travel that is part of employee’s duties between start and end of workday is compensable

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Is time between home and office “work”?

- Scenario: employee chooses to telework for part of day and work in office part of day, with time to perform personal tasks in between home and office
- Question: is the time between home and office compensable?
- Answer: no
 - Choosing to perform work before traveling to office or at home after leaving office does not make the commuting time compensable when time in between is sufficient to use for own purposes
- See USDOL Wage and Hour Opinion Letter, FLSA 2020-19
 - https://www.dol.gov/sites/dolgov/files/WHD/opinion-letters/FLSA/2020_12_31_19_FLSA.pdf

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What about time spent testing?

- If COVID-19 testing required during workday, employer must pay for time spent waiting for and receiving medical attention at employer's direction or on its premises during normal work hours
- If testing required on day off as a condition of returning to work, pay likely required because testing necessary for safe and effective performance of job
- Check state and local laws for greater protections

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Effect of home office expenses on pay

- FLSA: employer may not require employee to pay for items that are the employer's business expenses if doing so reduces earnings below minimum wage or overtime due in any workweek
- State laws may impose broader reimbursement requirements
- Think about office supplies, utilities (internet/phone), other expenses

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Independent Contractor Rule

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Last year...

- Trump DOL:
 - January 7, 2021 - announced independent contractor rule
 - Scheduled to take effect March 8, 2021
 - New test would have made it “easier to identify employees” under FLSA and easier to support contractor classification by focusing on nature and degree of control over work and worker’s opportunity for profit/loss based on initiative and/or investment

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Now, right back to where we started from

- Biden DOL:
 - Withdrew independent contractor rule effective May 6, 2021
 - DOL: new rule was inconsistent with FLSA’s text and purpose and would have been “confusing and disruptive” to workers and businesses because of its “departure from longstanding judicial precedent”
 - Prior guidance from Obama DOL remains in effect
 - Higher likelihood of “employee” finding
 - See Wage and Hour Division Fact Sheet #13
<https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship>

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Factors

- Extent to which services are integral part of business
- Permanency of relationship
- Worker's investment in facilities/equipment
- Nature and degree of control by principal
- Worker's opportunity for profit/loss
- Worker's amount of initiative, judgment, foresight
- Degree of independent business organization/operation

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Remember...

- Only relevant to worker classification analysis under FLSA
- No impact on other tests under:
 - State laws (CA's AB 5, ABC tests, etc.)
 - Other federal laws (NLRB, IRS, etc.)
- Must consider all applicable tests, some of which may be even more likely to result in employee status

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Higher Minimum Wage for Federal Contractors

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Federal contractors/minimum wage

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- Proposed rule published July 22, 2021
- Final regulations to be issued by November 24, 2021
- Increased minimum wages to be effective January 30, 2022

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Federal contractors/minimum wage

- Initial minimum wage of \$15.00 per hour (with increases for inflation starting in 2023)
- Applies to:
 - Employees performing specific services provided in connection with federal government contracts or subcontracts, and employees performing other duties necessary to performance of contracts or subcontracts
 - Employees under Davis-Bacon Act construction contracts, Service Contract Act service contracts, concessions contracts, and certain contracts in connection with federal property/lands and related to offering services for federal employees or general public

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Federal contractors/minimum wage

- Impacts on tipped employees:
 - As of January 30, 2022, hourly cash wage must be at least \$10.50 per hour
 - If tipped employee's wages plus tips do not total \$15 per hour, contractor must make up difference
 - Until January 1, 2024, if minimum wage for non-tipped employees increases, minimum for tipped employees will increase by 85% of new rate
 - After January 1, 2024, tipped employees must receive same minimum base wage as non-tipped employees (no tip credit)

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Federal contractors/minimum wage

- NO impact on requirements for non-federal contractors
- Will apply to:
 - New contracts (includes contracts entered into on/after January 30, 2022)
 - Pre-existing contracts renewed/extended on/after January 30, 2022
 - Options on existing contract exercised on/after January 30, 2022
- Bids will include new wage starting in January 2022
- Does not apply to:
 - Grants; contracts with Indian Tribes under Indian Self-Determination and Education Assistance Act; manufacturing or furnishing of materials, supplies, articles or equipment sold to federal government
- IT'S COMPLICATED - consult counsel with questions

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NC Wage and Hour Act (Changes Effective July 8, 2021)

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Notice at hiring

- Must provide written notice of promised wages and day and place of payment at time of hire
 - Previously, oral notice was sufficient
 - Statute does not require any particular form of notice
 - Employee's signature on written notice of promised wages is presumptive evidence of notification

To do: check offer letters/hiring paperwork

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Notice of change in pay

- Written notice of change in pay must be provided “at least one pay period” prior to the change
 - Previously, the notice period was “at least 24 hours”
 - Wages may be retroactively increased without prior notice
 - Change most important for reductions of pay

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Methods of delivering final pay

- Separated employees must be paid all wages due on or before the next regular payday either through regular pay channels or by trackable mail if requested by the employee in writing
 - Previously, final pay could be sent by mail if requested by employee
 - Now, mail must be trackable and employee must request in writing

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Wage and Hour Update

2021 Edition

J. Travis Hockaday
October 26, 2021

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Trends, Targets and Hotspots in Employment-Related COVID-19 Litigation

Trends, Targets and Hotspots in Employment Related Litigation COVID - 19



Kerry A. Shad
October 28, 2021

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Volume of Cases Nationwide

- March 2020 - Mid-October 2021
 - Federal - > 1,700
 - State - > 2,200
 - Total - Nearly 4,000



Information in slides 1-12 based on data collected and reported by national firms, including Littler Mendelson and Fisher Phillips.

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What types of claims are being filed?

- Top 3
 - Retaliation/Whistleblower
 - Discrimination
 - Disability
 - Age
 - Wage and Hour
 - Overtime
 - Off-the-clock

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What types of claims are being filed?

- Mostly single-plaintiff claims
- Some class/collective actions
 - Wage and hour
 - Discrimination
 - Retaliation

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What industries are targeted?

- Federal
 - Healthcare
 - Service providers
 - Nursing home/LTC
 - Hospitals
 - Manufacturing
 - Retail
 - Construction
- State
 - Healthcare
 - Service providers
 - Nursing home/LTC
 - Hospitals
 - Retail
 - Manufacturing
 - Construction

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Where is the (legal) action?

Pop Quiz #1

Q: True or False

Only 2 states or territories have 0 total COVID-19-related claims filed?

A: True

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Where is the (legal) action?

Extra Credit

Q: Which two?

Guam

Wyoming

Montana

North Dakota

Rhode Island

A: Wyoming and North Dakota

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Where is the (legal) action?

Pop Quiz #2

Q: In what state have the most cases been filed?

Pennsylvania, New York, California, Illinois, or Florida?

A: Illinois

Just kidding - of course its California



30% of all cases with over, with over 1,000 in state court

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Where is the (legal) action?

- Top 5 States
 - California
 - New Jersey (most per capita)
 - New York
 - Florida
 - Ohio

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How about North Carolina?

Pop Quiz #3

Q: How many cases filed in North Carolina?
12, 26, 58, 109

A: 26! (ranked 27th overall, and 40th when you consider population)
23 in federal court
3 in state court
10 filed since 8/11/2021

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What about North Carolina?

- Most common claims:
 - Retaliation
 - Wrongful termination
 - Disability discrimination

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Does Size (of employer) matter?

- Over 1/3 of all cases filed against employers with 1-50 employees
- Nearly ½ of all cases filed against employers with < 500 employees

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COVID-19 Wage & Hour Claims

- Time spent on symptom screening
- Time spent donning/doffing PPE
 - Before shifts
 - After breaks
 - Shortened meal breaks
- Remote work and lack of recordkeeping
- Reimbursement

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COVID-19 Whistleblower/Retaliation Claims

- Raising concerns about health & safety issues
 - *King v. Trader Joe's* (Kentucky)
 - Complained about lack of safety protocols, failure to comply with health & safety guidelines
 - Created Facebook group page to complain
 - Terminated

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COVID-19 Whistleblower/Retaliation Claims

- Multiple cases filed against healthcare employers
 - Unsafe work conditions
 - Inadequate PPE
 - Requirement to work in person
- Raising concerns about “legality” of mask or vaccine mandates or temperature checks
- Employee does not have to be right

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COVID-19 Whistleblower/Retaliation Claims

- NC REDA
 - Complaining about lack of PPE
 - Refusing to come to work because felt violated stay-at-home order
 - Nurse's aide asked for assignment not on COVID floor due to hypertension

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COVID-19 Whistleblower/Retaliation Claims

- Risk is increased when:
 - Management does not embrace compliance with safety protocols
 - Management questions the need for the protocols
 - Supervisors do not follow the rules
 - Subordinate's "reminder" is protected

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Risk Mitigation

- Speak-up culture
- Strong policy
- Options for reporting concerns
- Train supervisors to recognize complaints of unsafe or illegal actions and to report it to HR
- Robust investigations

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Risk Mitigation

- Be aware of the timing
- Consistent approach
- Factual support - documentation of issues is key
- Watch out for “not a team player”; “can’t get along”; “insubordination”

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COVID-19 - Age Discrimination

- Not allowing older workers to return to work/terminating/not hiring
- Terminating older workers but allowing younger workers to take voluntary leaves or reduced pay/hours
- Failure to rehire older workers after reopening
 - Class action against the Kimberly Hotel in NYC

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Risk Mitigation

- Follow policies (if any) on rehiring
- Know local laws re rights to rehire (e.g. California)
- Review prior communications (e.g. “temporary” layoff?)
- Consider offering everyone their job back

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Risk Mitigation

- If publicize open positions encourage all former employees to apply
- Clearly state any change in duties/pay
- Document reasons for laying off/terminating or returning some but not others

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NC Immunity Laws

- Only protects against claims that conduct caused someone to *contract* COVID-19
 - Unless there was gross negligence, recklessness or intentional infliction of harm
 - Separate protections for health care providers and facilities
 - **No protection against retaliation or discrimination claims**

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Covid-19 Litigation

THANK YOU!

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Trends, Targets and Hotspots in Employment Related Litigation COVID - 19



Kerry A. Shad
October 28, 2021

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Top 10 Mistakes Employers Make with Non-Compete and Confidentiality Agreements

Top 10 Mistakes Employers Make with Non-Compete and Confidentiality Agreements




Isaac A. Linnartz
October 28, 2021

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Who cares?

- 
- Perhaps you rarely touch non-competes, non-solicits, and confidentiality agreements—maybe only when onboarding new employees
 - Perhaps you rarely encounter disputes over those agreements
 - Who knows if those agreements are actually effective—employees will do whatever they want to do, right?

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Who cares now?

- Your VP of Sales left and joined your main competitor, possibly taking along confidential customer and pricing information.
- An employee who left your company is now recruiting other employees to leave and join another company.
- You just received a lawyer letter that accuses your new hire of violating a non-compete and threatens immediate litigation.

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1. No non-compete when you should have one

- You can't enforce a non-compete that you don't have
- Do you need a non-compete?
 - Not necessary for every employee
 - Most important for employees who have access to customer relationships, confidential information, or trade secrets
 - Assess based on employee roles/categories
- Protectable interests
 - Customer relationships
 - Confidential information

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1. No non-compete when you should have one

- Non-protectable interests
 - Retaining employees
 - Punishing disloyal employees for leaving
 - Preventing competitors from benefiting from your former employees' skills and abilities
- Ask: If this employee left and joined a competitor, would that be a problem?
 - If so, why? Does the answer involve confidential information or customer relationships?

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2, 3, and 4. No enforceable non-compete

- An unenforceable non-compete is almost as bad as no non-compete
 - While it may affect some employee/former employee behavior, it will not stand up if push comes to shove
- How do unenforceable non-competes come about?
- Let's count (a few of) the ways

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2. No consideration

- A non-compete must be supported by consideration—some benefit the employee receives for entering into the non-compete
- In some states, including NC, continued employment is not adequate consideration
- “Sign the non-compete or you’re finished here” doesn’t cut it
- An employer must provide something more: a raise, a promotion, a bonus, or something else of value
- The consideration must also be contingent on the employee agreeing to the non-compete—if the employee would receive the consideration either way, it cannot support the non-compete

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2. No consideration

- New employment can serve as consideration, but in states like NC, the non-compete must be part of what the parties agree on when the employee was hired
- Having a new employee sign a non-compete after they have begun work only suffices if the non-compete was part of the original agreement or the employer provides some additional consideration
 - Mention the non-compete in the offer letter
 - Have the employee execute it with first-day paperwork
- Ask: What would this employee receive in return for agreeing to the non-compete?

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3. Overbroad in scope

- Non-competes are disfavored
- Courts balance the employer's right to protect its legitimate interests against the hardship on the employee
- Courts will strike down and refuse to enforce non-competes that are overbroad in scope
- In some states, including NC, courts will not attempt to rewrite an overbroad non-compete to be more reasonable

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3. Overbroad in scope

- Must be reasonable in time (length of time) and territory (geographic area)
- Must be tailored to protect the employer's legitimate interests
- Three common pitfalls:
 - Prohibiting any type of employment with a competing business (the "janitor problem")
 - Prohibiting competing "directly or indirectly" with the employer
 - Prohibiting competing with the employer or its "affiliates"

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4. Overbroad customer restrictions

- A non-compete can be based on customers instead of geography
- In NC, a customer-based restriction should be tied to the customers with whom the employee had actual business contact
- Broad prohibitions that are based on all of the employer's customers are problematic
- Tie the restriction to the customers that the employee actually had contact with during their employment

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5. Assuming that different states treat non-competes the same

- There are enormous differences between states on non-compete law
 - Non-competes are prohibited in CA, ND, and OK
 - States differ wildly on what types of restriction are enforceable
 - State courts have very different approaches to handling non-compete litigation
- Non-compete law is in flux now more than ever
 - Pending legislation in a number of states
 - Rumblings about potential federal regulation by the FTC

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5. Assuming that different states treat non-competes the same

- What does this mean?
 - Don't assume that a non-compete form that was drafted for one state will work well (or at all) in another state
 - Don't assume that a time-tested form is timeless
 - Think about choice of law and choice of forum provisions

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6. No confidentiality agreement (“But’s it in the handbook!”)

- Handbook confidentiality provisions are not confidentiality agreements
- In general, you do not want your employee handbook to be considered a contract
- Have a separate confidentiality agreement, either as a standalone agreement or within a broader employment agreement or restrictive covenants agreement
- Confidentiality agreements are not disfavored the way that non-competes are

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7. No carveout for protected activity

- A confidentiality agreement should include a carveout that allows an employee or contractor to engage in protected activity without violating the agreement
- To preserve the opportunity to recover exemplary damages and attorneys' fees under the Defend Trade Secrets Act, a company must provide specific notice to the employee or contractor about their right to disclose trade secret information

7. No carveout for protected activity

- Sample notice: Notwithstanding any other provision of this Agreement, [Employee/Contractor] will not be held criminally or civilly liable under any federal or state trade secret law for the disclosure of a trade secret that is made (i) in confidence to a federal, state, or local government official, either directly or indirectly, or to an attorney and (ii) solely for the purpose of reporting or investigating a suspected violation of law, or that is made in a complaint or other document that is filed under seal in a lawsuit or other proceeding; and in the event that [Employee/Contractor] files a lawsuit for retaliation by the Company for reporting a suspected violation of law, [Employee/Contractor] may disclose the Company's trade secrets to [Employee's/Contractor's] attorney and use the trade secret information in the court proceeding if [Employee/Contractor] files each document containing the trade secret under seal and does not disclose the trade secret, except pursuant to court order.

8. Lack of trade secret protections

- What is a trade secret?
- NC law: A trade secret is “business or technical information” that “[d]erives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering” and is “**the subject of efforts that are reasonable under the circumstances to maintain its secrecy.**” N.C. Gen. Stat. § 66-152(3).
- Federal law: Trade secrets are “all forms and types of financial, business, scientific, technical, economic, or engineering information” for which “the owner thereof has taken **reasonable measures to keep such information secret**” and “the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.” 18 U.S.C. § 1839(3).

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8. Lack of trade secret protections

- Reasonable efforts/measures are necessary to maintain trade secret status
- What are reasonable measures to maintain secrecy?
 - Confidentiality agreements with employees
 - Confidentiality agreements with contractors, vendors, and suppliers
 - Need-to-know access
 - Other physical, electronic, and procedural safeguards

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9. Inadequate onboarding

- Confirm the employee has no non-compete/non-solicit obligations to prior employers
- Confirm no confidentiality agreements or other agreements with prior employers
- Review any agreements
- Instruct the employee not to bring or use any confidential information or trade secrets from prior employers
- Document the responses

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10. Inadequate exit interview

- Remind the employee of their non-compete, non-solicit, and confidentiality obligations and provide copies of the relevant agreements
- Ask them where they are going and what they will be doing
- Ask them if they have (or have taken) any company documents or information
- Document their responses
- Talk to their managers to learn more about their future plans and ensure consistent messaging

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11. Waiting to address potential problems

- When non-compete, non-solicit, confidentiality, or trade secret issues arise, don't wait
- Litigation over these issues moves quickly, since the goal is often to obtain emergency relief from the court
- Delay makes it more difficult to show that emergency relief is necessary or would be appropriate, and by the time you obtain that relief, the damage may be done
- Trust your instincts and be proactive—ask, document, investigate, and call your lawyer if needed

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Top 10 Mistakes Employers Make with Non-Compete and Confidentiality Agreements



Isaac A. Linnartz
October 28, 2021

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EEO UPDATE

EEO UPDATE



Zebulon D. Anderson

October 28, 2021

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EEOC Developments

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Administrative Statistics

- Volume

- FY 2020 = 67,448 charges
- Total charges ↓ each of last 5 years
- Fewest since 1992 and a 7% decrease from prior year
- Disability, color, and GINA claims only ones that ↑
- Over last 10 years, retaliation and disability claims have increased the most
- Retaliation has remained most common claim for a decade - now 56% of all charges and continuing to ↑
- Cause finding in only 2.8% - lowest since 1996

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Administrative Statistics

- Location

- While nationwide charge filings is down, NC is up
- FY 2020: NC - 5.1% of all charges nationwide
- 8 States (Texas, Florida, California, Georgia, Illinois, Pennsylvania, New York, and North Carolina) account for over 53% of all charges nationwide

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Litigation Statistics

- In FY 2020 - 93 new merits lawsuits filed by EEOC
 - Down 35% from FY 2019, which was down 28% from FY 2018
 - Much less litigation than 10-15 years ago
 - When EEOC pursues litigation, its results were very successful -- \$106.1m (most since 2004)
 - 96% success rate (settlements and jury verdicts)
 - 50% jury trial success rate (1 win and 1 loss)
 - 2021 already looks like a successful year for EEOC, which obtained a \$125m verdict in a single plaintiff disability case against large employer (\$150k damages and \$125m punitive)

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Systemic Statistics

- Systemic cases are EEOC priority, and EEOC published new systemic web page
- Systemic cases involve 20+ employees and are focused on matters in which the alleged discrimination has a broad impact
- FY 2020
 - 558 systemic investigations
 - 412 systemic investigation resolutions = \$24m
 - Systemic charges: far more likely to result in “cause” determination - 43% vs. 3%
 - New lawsuits: 19% were systemic and 17% were multi-victim
 - Active lawsuits: 29% are systemic and 15% are multi-victim
 - EEOC litigation is *heavily* focused on systemic and multi-victim cases
 - EEOC had 100% success rate (settlement and verdict)

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Systemic Examples from EEOC

- **Hiring/Promotion/Assignment/Referral**
 - Criminal/credit background checks
 - Steering of applicants to certain jobs or assignments based on race or gender
 - Historically segregated occupations or industries
 - Job ads showing preference
 - Customer preference

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Systemic Examples from EEOC

- **Policies/Practices**
 - Mandatory religious practices by employers who do not qualify as religious organizations
 - Paternal leave policies that do not give the same benefits for men and women
 - Mandatory maternity leave
 - Fetal protection policies
 - English only rules
 - Age-based limits on benefits or contributions to pension or other benefits

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Systemic Examples from EEOC

- **Lay-off/Reduction in Force/Discharge policies**
 - Mandatory retirement
- **ADA/GINA**
 - “No fault” attendance policies
 - Non-accommodation for medical leave
 - Light duty policies for only-work-related injuries

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EEOC Composition

- **General Counsel**
 - Sharon Gustafson - R- confirmed August 2019 and term ends July 2023
- **Five Commissioners**
 - Janet Dhillon - R - confirmed May 2019 and term ends July 2022
 - Keith Sonderling - R - confirmed September 2020 and term ends July 2024
 - Andrea Lucas - R - confirmed September 2020 and term ends July 2025
 - Charlotte Burrows (Chair) - D - Confirmed August 2019 and term ends July 2023
 - Jocelyn Samuels (Vice-chair) - D - Confirmed September 2020 and term ends July 2026
- **What it Means**
 - EEOC will be Republican controlled until at least July 2022

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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

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2017-21

3. Addressing selected emerging and developing issues
 - Inflexible leave policies
 - Duty to accommodate pregnancy-related limitations
 - LGBTQ protection
 - Temporary worker and “independent contractor” protection
 - Muslim protection

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2017-21

- 4. Ensuring equal pay for all workers
- 5. Preserving access to legal system
 - Releases; arbitration; and retaliation
- 6. Preventing Systemic Harassment

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SCOTUS, EEOC, and Religion Discrimination

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Religion Discrimination

- On January 15, EEOC issued new religious discrimination guidance
- It was approved by a 3-2 vote of EEOC commissioners along party lines
- It is the first update to such guidance since 2008
- It addresses recent SCOTUS decisions

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Religion Discrimination

- As you may recall, last year SCOTUS issued two cases involving religion discrimination
- In *Our Lady of Guadalupe School v. Morrissey-Berru*, the Court broadly interpreted the “ministerial” exemption to federal anti-discrimination laws based on the First Amendment and its protection for the free exercise of religion
 - So, a broad group of educators at religious schools may not pursue discrimination claims

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Religion Discrimination

- In *Little Sisters of the Poor v. Pennsylvania*, the Court enforced federal rules issued under the Religious Freedom Restoration Act (RFRA) to create religious and moral exemptions from the contraceptive mandate under the Affordable Care Act
 - The RFRA was passed with near unanimous bipartisan support in 1993 under President Clinton
 - RFRA determined to be unconstitutional when applied to states, but not when applied to federal government
 - It prevents the federal government from substantially burdening a person's free exercise of religion even if the burden results from a generally applicable law
 - If a generally applicable law furthers a compelling government interest and is the least restrictive way to protect that interest, it does not violate the RFRA

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Religion Discrimination

- These decisions made clear that the Court is interested in the intersection between generally applicable federal laws (like federal non-discrimination laws) and religion (including the First Amendment and the RFRA)
- And, decisions issued by the Court in its most recent term reinforce that interest

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Tanzin v. Tanvir

- Plaintiffs were Muslims
- The FBI placed them on no-fly list in retaliation for their failure to act as informants against other Muslims
- They filed suit and sought money damages under the RFRA
- The RFRA allows “appropriate relief” for violations
- In a unanimous decision, the Court ruled that money damages are “appropriate relief”
- This expands the remedies for RFRA violations
- This incentivizes the pursuit of RFRA claims

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Fulton v. Philadelphia

- Catholic Social Services (CSS) is a foster care agency that places children in foster homes through a contract with Philadelphia
- CSS will not place children with same-sex couples or unmarried couples for religious reasons
- After a newspaper article was published about this issue, Philadelphia refused to refer children to CSS unless it changed its policy because the policy was inconsistent with Philadelphia’s general non-discrimination policies, laws, and contract provisions
- CSS sued, alleging First Amendment violations
- The case made its way quickly to SCOTUS

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Fulton v. Philadelphia

- The majority first discussed a prior decision
 - In *Employment Division v. Smith* (1990), which prompted the RFRA Congressional response, Justice Scalia wrote a majority opinion that concluded that when a person's free exercise of religion conflicts with "neutral laws of general applicability," a lower level of scrutiny is applied and the general laws may be enforced
 - Scalia was worried that a different approach would create a "private right to ignore generally applicable laws," which might require religious exemptions for things like "compulsory vaccination laws . . . to . . . laws providing for the equality of opportunity for the races"

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Fulton v. Philadelphia

- The majority, however, concluded that *Smith* was inapplicable because the Philadelphia policies, laws, and contracts allowed individual exemptions and were not "generally" applicable
- So, applying strict scrutiny it concluded that Philadelphia impermissibly burdened CSS's free exercise of religion
- And, the Court unanimously ruled in favor of CSS, preventing Philadelphia from refusing to contract with it
- Perhaps most notably, Justices Alito (joined by Justices Thomas and Gorsuch) wrote a 75-page concurring opinion, advocating that *Smith* be overruled because it inadequately protected religious rights
 - This clearly forecasts that at least several justices are prepared to permit individual religious exemption from general rules

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Tandon v. Newsom

- The latest in a series of cases that address COVID restrictions imposed by a state
- California issued a law that restricted all at-home gatherings (religious or secular) to no more than 3 households
- The 5-4 majority concluded that this was not a law of general applicability and that the law treated religious activities (at-home gatherings of >3 households prohibited) differently than secular ones (at-business [e.g., hair salon and theater] gatherings of >3 households permitted if masks worn, etc.)
- Thus, applying strict scrutiny, the Court concluded that the state had failed to justify the differential treatment and enforcement of the law was prohibited

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Tandon v. Newsom

- The dissent argued that the majority made the wrong comparison
 - It argued that the comparison should be: at-home religious gatherings to at-home secular gatherings *not* at-home religious gatherings to at-business gatherings
- The dissent also argued that the majority ignored evidence that justified differential treatment
 - California offered evidence that COVID risks were greater with at-home gatherings than public ones for a variety of reasons

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Significance

- Why discuss these non-employment cases?
- Because they forecast that sometime soon the Court will directly confront the intersection of generally applicable employment laws (such as Title VII) and the free-exercise of religion under the First Amendment and/or the RFRA (such as religious beliefs regarding marital status, gender identity, etc.)
- And, these cases suggest that the Court is increasingly supportive of religious rights, even when they conflict with generally applicable laws

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EEOC Religious Discrimination Guidance

- Which, brings us back to the new EEOC guidance
- While the EEOC explains that this document does not create law, it also states that it is “intended to provide clarity to the public,” especially based on recent legal developments, and to explain “how the Commission will analyze these matters”
- So, employers should pay attention

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Guidance

- “Overview: Religion is very broadly defined for purposes of Title VII. The presence of a deity or deities is not necessary for a religion to receive protection under Title VII. Religious beliefs can include unique beliefs held by a few or even one individual; however, mere personal preferences are not religious beliefs. Individuals who do not practice any religion are also protected from discrimination on the basis of religion or lack thereof. Title VII requires employers to accommodate religious beliefs, practices and observances if the beliefs are “sincerely held” and the reasonable accommodation poses no undue hardship on the employer.”
- And, just to leave no doubt, the EEOC explains that an “employer should ordinarily assume that an employee’s request for religious accommodation is based on a sincerely held religious belief”

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Guidance

- Religious organizations are exempt from claims based on application of religious principles
- And employees of religious organizations who perform vital religious duties (such as educators) may not pursue discrimination claims - (the ministerial exemption)
 - This is a Constitutional issue, not just a legal defense

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Guidance

- The guidance then confronts the intersection between First Amendment rights/RFRA rights and anti-discrimination laws that we have been discussing, and it states:
 - “It is not within the scope of this document to define the parameters of the First Amendment or RFRA. However, these provisions are referenced throughout this document to illustrate how they arise in Title VII cases and how courts have analyzed them. For example:
 - a private sector employer or a religious organization might argue that its rights under the First Amendment’s Free Exercise or Free Speech Clauses, or under RFRA, would be violated if it is compelled by Title VII to grant a particular accommodation or otherwise refrain from enforcing an employment policy;
 - . . .
 - *EEOC investigators must take great care in situations involving both (a) the statutory rights of employees to be free from discrimination at work, and (b) the rights of employers under the First Amendment and RFRA. Although a resolution satisfactory to all may come from good faith on the part of the employer and employee through mutual efforts to reach a reasonable accommodation, on occasion the religious interests of the employer and employee may be in conflict. EEOC personnel should seek the advice of the EEOC Legal Counsel”*

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Guidance

- Religious discrimination in hiring, promotion, and compensation is prohibited
- Discrimination because of religious expression also is prohibited
- Religious discrimination based on customer preference is prohibited
 - The EEOC explains the “best practice” for employer in this situation: “If an employer is confronted with customer biases, e.g., an adverse reaction to being served by an employee due to religious garb, the employer should consider engaging with and educating the customers regarding any misperceptions they may have and/or the equal employment opportunity laws.”

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Guidance

- Harassment because of religion is prohibited:
 - “Overview: Religious harassment is analyzed and proved in the same manner as harassment based on other traits protected by Title VII—race, color, sex, and national origin. However, the facts of religious harassment cases may present unique considerations, especially where the alleged harassment is based on another employee’s religious practices. Such a situation may require an employer to reconcile its dual obligations to take prompt remedial action in response to alleged harassment and to accommodate certain employee religious expression.”

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Guidance

- Compare this:
 - “The president of Printing Corp. regularly mocked and berated an employee who asked for Sundays off to attend Mass. Although he granted the time off, the president teased the employee for refusing to look at a Playboy magazine, called him a “religious freak,” and used vulgar sexual language when speaking to or about the employee. He mocked him for “following the Pope around” and made sexual comments about the Virgin Mary. A reasonable person could perceive this to be a religiously hostile work environment.”
- To this:
 - “Bob, a supervisor, occasionally allowed spontaneous and voluntary prayers by employees during office meetings. During one meeting, he referenced Bible passages related to “slothfulness” and “work ethics.” Amy complained that Bob’s comments and the few instances of allowing voluntary prayers during office meetings created a hostile environment. The comments did not create an actionable harassment claim. They were not severe, and because they occurred infrequently, they were not sufficiently pervasive to state a claim.”

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Guidance

- Title VII requires religious accommodations:
 - “Overview: Title VII requires an employer, once on notice, to reasonably accommodate an employee whose sincerely held religious belief, practice, or observance conflicts with a work requirement, unless providing the accommodation would create an undue hardship. . . . Title VII’s undue hardship defense to providing religious accommodation has been defined by the Supreme Court as requiring a showing that the proposed accommodation in a particular case poses ‘more than a *de minimis*’ cost or burden. “

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Guidance

- Perhaps the trickiest issue arises with the intersection between accommodation of religious expression while avoiding claims of harassment
 - “Some employees may seek to display religious icons or messages at their workstations or use a particular religious phrase when greeting others. Others may seek to proselytize by engaging in one-on-one discussions regarding religious beliefs or distributing literature. Still others may seek to engage in prayer at their workstations or to use other areas of the workplace for either individual or group prayer, study, or meeting. In some of these situations, an employee might request accommodation in advance to permit such religious expression. . . .
 - To determine whether allowing or continuing to permit an employee to pray, proselytize, or engage in other forms of religiously oriented expression in the workplace would pose an undue hardship, employers should consider the potential disruption, if any, that will be posed by permitting the expression of religious belief. [R]elevant considerations may include the effect the religious expression has had, or can reasonably be expected to have, if permitted to continue, on coworkers, customers, or business operations.”

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Guidance

- Here is an example:
 - “Each December, the president of XYZ corporation directs that several wreaths be placed around the office building and a tree be displayed in the lobby. Several employees complain that to accommodate their non-Christian religious beliefs, the employer should take down the wreaths and tree, or alternatively should add holiday decorations associated with other religions. Title VII does not require that XYZ corporation remove the wreaths and tree or add holiday decorations associated with other religions.”

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Lessons

- The contours of religion discrimination is an “emerging issue”
- The EEOC’s most notable regulatory activity in the last fiscal year was issuing new religion discrimination guidance
- SCOTUS has issued multiple decisions in this area in last two years
- So, while such claims may be infrequent, employers should be very careful

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4th Circuit

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Roberts v. Glenn Industrial Group

- Roberts was employed by Glenn Industrial as a diver assistant
- Glenn Industrial had an anti-harassment policy that directed complaints to Glenn, the CEO
- All field employees, such as Roberts, were men

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Roberts v. Glenn Industrial Group

- Roberts' supervisor, Rhyner:
 - Repeatedly call Roberts "gay"
 - Regularly made sexually explicit comments to Roberts
 - Called Roberts a "f***** r*****" with "r***** strength"
 - Asked Roberts "how many ***** [he] would **** for money"
 - Slapped Robert's face, pushed him, and put him in choke hold
 - Hit Roberts in the head and knocked his helmet off
- Roberts complained to Evans, Rhyner's supervisor
 - Evans told Roberts to "suck it up"

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Roberts v. Glenn Industrial

- Roberts complained to Glenn's wife in HR in January 2016
 - Rhyner was not disciplined
 - Harassment continued
- In March 2016, Roberts was disciplined by Glenn for not wearing safety gear that contributed to injury
 - Roberts did not inform Glenn of harassment
- In April 2016, a supervisor reported that Roberts' appeared to be intoxicated at work
 - He passed a drug test
 - Glenn fired him anyway

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Roberts v. Glenn Industrial

- Roberts filed suit, alleging hostile environment and retaliation claims under Title VII
- District Court granted summary judgment to the employer on both claims
- Roberts appealed to 4th Circuit

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Roberts v. Glenn Industrial

- Hostile Environment
 - Pointing to SCOTUS precedent, the District Court concluded that there were 3 ways to prove unlawful same-sex harassment
 - The harasser is homosexual and makes proposals of sexual activity
 - The harassment suggests general hostility to people of the plaintiff's sex
 - People of one sex are treated better than the other sex in a mixed-sex workplace
- The District Court concluded
 - No evidence Rhyner was homosexual
 - No evidence of hostility to all men
 - Not a mixed sex workplace
 - So, no claim

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Roberts v. Glenn Industrial

- 4th Circuit rejected this argument
 - District Court misinterpreted SCOTUS precedent
 - Those are not the *only* ways to establish a claim
 - *Bostock* made plain that: (i) discrimination based on sexual orientation was unlawful, and (ii) discrimination for non-conformance with sex-stereotypes is unlawful
 - So, sexual harassment based on sexual orientation and sex-stereotype non-conformance also is unlawful

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Roberts v. Glenn Industrial

- Retaliation
 - District Court rejected the retaliation claim for two reasons:
 - Glenn made the termination decision alone and he had no knowledge of the protected activity (*i.e.*, the complaints were made to his wife, not him)
 - 3 months passed between protected activity and adverse action and that is too long to suggest causal connection
 - 4th Circuit agreed

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Smith v CSRA

- Smith was employed by the DEA as a geospatial intelligence expert
- In 2013, she informed her supervisor she had a disability and needed an accommodation for mobility issues
 - She was allowed to work remotely 50% of time
 - She was given a parking pass that limited walking
- In 2017, a senior DEA official, Quinn, decided:
 - To move the work location to a new facility
 - To move Smith to another supervisor
- Quinn also had concerns about Smith's technical skills

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Smith v. CSRA

- Smith asked to keep the same accommodations
- For weeks she did not get an answer
- Eventually, DEA told her that they could not continue the parking accommodation, that she had to work on site, but that she could work part-time
- Smith filed a complaint with DEA EEO office
- A few days later, the parking pass accommodation was approved

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Smith v. CSRA

- A few days after that, Quinn revoked Smith's security clearance
 - She gave no reason
- As a result, Smith's employment was terminated
- Later, Quinn wrote an email suggesting the revocation was a result of Smith storing DEA records on a personal computer
- But, another DEA official stated that it was revoked because of performance and attendance concerns, including Smith continuing to work remotely while accommodation request was being evaluated

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Smith v. CSRA

- Smith sued under ADA & Rehabilitation Act
 - Failure to accommodate
 - Retaliatory discharge
- District Court granted summary judgment to DEA
 - Accommodation:
 - DEA *did* eventually provide accommodation
 - Retaliation:
 - Granting accommodation suggests no retaliatory intent
 - Quinn did not know of protected activity
 - Performance issues were non-retaliatory

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Smith v. CSRA

- 4th Circuit
 - Failure to Accommodate
 - Agrees with District Court
 - While it took weeks, DEA eventually provided the parking accommodations
 - While it did not provide the 50% remote work request, it did allow a schedule modification
 - Smith wasn't entitled to the request she sought if what was offered satisfactorily addressed mobility issue
 - Just because DEA allowed 50% remote work before did not mean it had to continue

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Smith v. CSRA

- Retaliation
 - While Smith eventually got the accommodation, it was only after she complained
 - And, there was evidence showing that Smith did know about the complaint
 - And, the adverse action happened soon after the protected activity
 - So, Smith established a prima facie case of retaliation
 - She also showed pretext
 - DEA's rationales changed over time
 - No contemporaneous documentation of reason at time of termination decision
 - Reverses District Court

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Lessons

- Same-sex harassment is treated the same way as sex harassment
- So, as soon as you get knowledge, investigate and take appropriate action
- Beware of adverse action soon after protected activity
- Pay attention to what knowledge is held by the decision maker
- Carefully document reasons for decision and do not provide inconsistent reasons

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EEO UPDATE

Zebulon D. Anderson
October 28, 2021

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