

30th

anniversary

EMPLOYMENT LAW UPDATE

2022 virtual edition



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PROGRAM AGENDA

Day 1 – October 25, 2022

8:30 – 8:45	<u>Registration / Login</u>
8:45 – 8:55	<u>Welcome and Introductions</u> <i>J. Travis Hockaday</i>
8:55 – 10:00	<u>Using AI in HR: Best Practices and Avoiding Traps for the Unwary</u> <i>Kimberly J. Korando</i> Software technologies, including candidate sourcing, resume screening, chatbot screening, video interviewing and testing for job or culture “fit”, are fundamentally changing the way hiring and other employment decisions are being made. These artificial intelligence (AI), machine learning, and other emerging technologies offer great efficiencies and promise less bias, but they require special employer attention in their use to avoid running afoul of federal and now a growing number of state laws. In this session, we will discuss best practices for making the most of these technologies while avoiding traps for the unwary employer.
10:00 – 10:45	<u>Wage and Hour Update</u> <i>Kerry A. Shad</i> This session will cover developments at both the state and federal levels on key wage and hour issues and will offer practical advice for compliance.
10:45 – 11:00	<u>Break</u>
11:00 – 11:45	<u>Employee Benefit Plan Hot Topics: What Employers Want to Know</u> <i>Kara M. Brunk</i> It's been another busy year for employee benefit plans. During this program we will provide insight on recent legal developments impacting employer-sponsored retirement and health and welfare plans.
11:45 – 12:45	<u>Panel Discussion: What’s New for 2022 in Employment Law</u> During this panel discussion, several of our veteran employment lawyers will discuss a number of timely topics for employers, including the latest on the worker classification and independent contractor rules, arbitration agreements in the employment context, a helpful primer on I-9 and E-Verify obligations, and more.
12:45 – 1:15	<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 27, 2022

8:30 – 8:45	<u>Login</u>
8:45 - 9:45	<p><u>Employee Health in the Workplace in the Post-Pandemic Era: Hot Topics and Other Challenges under the ADA, the FMLA, and State Laws</u> <i>Rosemary Gill Kenyon</i></p> <p>COVID provided an endless array of challenges in navigating the intersection between employee health and the workplace. With COVID still a concern, and faced now with more remote employees and hybrid workplaces, navigating these intersections is still challenging. This session will provide a practical discussion of some of the most common challenges employers are facing and review recent guidance from agencies under federal and state disability and leave laws.</p>
9:45 – 10:30	<p><u>Marijuana and the Workplace: What the Trend Toward Marijuana Legalization Means for Drug Testing Policies and Programs</u> <i>J. Travis Hockaday</i></p> <p>Cannabis remains illegal under federal law, but more and more states have legalized it for medical and/or recreational use – all creating headaches for employers (especially multi-state employers). This session will provide an update on the state of the laws and the issues employers need to be considering now.</p>
10:30 – 10:45	<u>Break</u>
10:45 – 11:30	<p><u>Long-Term Incentive Compensation Alternatives: Finding the Right Fit for Your Company</u> <i>Caryn C. McNeill and Joshua D. Bryant</i></p> <p>Long-Term Incentive Plans (LTIPs) play an important role in compensating and motivating employees and driving a company's bottom line. In this presentation, we'll walk you through the key decision points that might lead you to choose one type of LTIP over another. Included will be a high-level discussion of how the equity alternatives available to LLCs differ from those available to C corporations.</p>
11:30 – 12:15	<p><u>Panel Discussion: Key Developments for Multi-State Employers</u></p> <p>The patchwork of state-specific employment-related laws and regulations becomes more complicated every day for multi-state employers. During this panel discussion, several of our lawyers will discuss developments in laws on non-competition/non-solicitation laws, pay transparency, paid leave, and limitations on non-disclosure and non-disparagement provisions in employment and severance agreements.</p>
12:15 – 1:00	<p><u>EEO Update</u> <i>Zebulon D. Anderson</i></p> <p>A discussion of EEOC enforcement trends and plans, as well as select cases representative of recent trends in EEO litigation.</p>
1:00 – 1:30	<p><u>Live Questions and Answers</u> <i>J. Travis Hockaday, Moderator</i></p> <p>Our panelists will answer your questions about the day's topics, and more.</p>

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.

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

- 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.
- 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,

All North Carolina State Courts

EDUCATION

University of Virginia, 1994

- Editorial Board, *Virginia Law Review*, 1992-1994
- Order of the Coif

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

trade secret misappropriation, tortious interference and unfair competition.

- Provided advice and counseling to employers in connection with all aspects of employment law, ranging from EEO issues to non-compete agreements and trade secret protection.
- Advised a global financial services technology company on the employment-related aspects of its acquisition of a leading provider of deal analytics and valuation technology.

HONORS & AWARDS

- *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 (2015-2022)
- North Carolina *Super Lawyers* (2012-2022)
- *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 focuses her practice on counseling clients on employment law compliance and the employment aspects of corporate transactions. Jenny advises local, national and global companies of all sizes across a range of industries, including healthcare, pharmaceutical, e-sports and technology. Her practice focuses on providing counseling and risk management advice on significant employment-related matters, particularly those arising in mergers and acquisitions or in nationwide compliance for multi-state workforces. Jenny also represents clients in EEOC investigations and in contract preparation and negotiations with executives.

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 a Nasdaq-listed medical device company in the employment-related matters in the acquisition of a global leader in neuromodulation and rehabilitation medical devices for up \$110 million in up-front and contingent consideration.
- Advised a private equity fund on the employment-related matters of its acquisition of a contract research organization focused on the ophthalmology industry for an undisclosed amount.
- Advised a leading pharmaceutical and biotech contract development and manufacturing organization (CDMO) in a definitive agreement to acquire a preferred provider of cGMP Biostorage and pharma support services for an undisclosed amount.

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 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.
- 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 (2020-2022)
- 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

Attorney

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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

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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

Joshua D. Bryant

Attorney

Wells Fargo Capitol Center
150 Fayetteville Street, Suite 2300
Raleigh, North Carolina 27601
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jbryant@smithlaw.com



Josh Bryant joined Smith Anderson after graduating from Duke University School of Law. His principal practice areas include Tax, Mergers and Acquisitions, Commercial Contracts and Tax-Exempt organizations.

Josh regularly represents clients in matters involving federal, state and local taxation and in business transactions with tax implications. His experience includes tax planning for corporate acquisitions, reorganizations, recapitalizations, divestitures and liquidations, as well as corporate distributions and stock redemptions. He regularly advises limited partnerships and limited liability companies on tax and business law matters relating to formation, financing, operations, restructuring, mergers, conversions, owner retirement or withdrawal, and liquidation.

Josh's practice also includes working on matters involving various federal and North Carolina tax credits, including federal income tax credits for renewable energy production and investment. He frequently advises clients on a variety of information reporting issues.

Josh also advises tax-exempt entities, including both public charities and private foundations, on various corporate law and tax matters, and has served as corporate counsel in mergers involving nonprofit corporations. He regularly assists in all aspects of the administration of decedent's estates,

AA CONTACT INFO

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PRACTICE AREAS

Closely-Held & Family-Owned
Businesses
Commercial Contracts
Energy and Renewable Energy
Mergers and Acquisitions
Mezzanine Finance
Nonprofits
Private Client
Tax

BAR & COURT ADMISSIONS

North Carolina

EDUCATION

including the preparation of federal and state estate tax returns.

Josh also has experience representing taxpayers before the North Carolina Department of Revenue in state income tax controversies.

During his career, Josh has worked with clients in a broad range of industries, including manufacturing, retail, food services, health care, commercial real estate, minerals and natural resources, construction, and professional services.

Prior to attending law school, Josh worked as a tax consultant with the Raleigh office of Ernst & Young LLP, where his practice focused on the federal tax treatment of pass-through entities. He is a licensed certified public accountant.

Duke University, J.D., *magna cum laude*, 2004

Wake Forest University, M.S. in Accountancy, 1999

Wake Forest University, B.S., *summa cum laude*, 1999

EXPERIENCE

- Advised a leading utilities, solar, and electrical contractor in a definitive agreement to be acquired by an independent sponsor for an undisclosed amount of cash and equity.
- Advised a building supply company in the acquisition of a majority of the outstanding membership interests of a siding, roofing and decking installation company.
- 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 contract research organization in a definitive agreement to acquire a specialized contract research organization for the biotechnology industry.
- Represented a NYSE-listed energy company in a strategic alliance with an on-site power generation systems company for repowering a 30 megawatt project involving distributed generation systems at two sites.

- Advised a specialty pharmaceutical company in its acquisition of a private pharmaceutical company focusing on pediatric medications.
- 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 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.
- Advised a semiconductor and global solid state LED lighting manufacturing company in an agreement to purchase the assets of the radio frequency (RF) power business of a publicly traded semiconductor company for €345 million in cash.
- Advised a semiconductor and LED company on 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.
- Representation of a sports blockchain start-up in the launch of the first initial coin offering (ICO) pre-sale on Indiegogo's and MicroVentures' joint global ICO platform and its ongoing preparation for the planned launch of its public utility token offering.
- Advised a SaaS company in its sale to a data integration public company.
- Advised a publicly traded health services company in the acquisition of a health services division of a privately held company for \$105 million in cash.
- Advised an online gaming company in a definitive agreement to acquire an online 3-D modeling company.
- Advised a private equity-backed medical device repair services company in the sale of its wholly-

owned operating subsidiaries to a strategic buyer operating in the medical device repair services industry.

- Represented a hospitality company in formation of an investment fund to acquire hotel property in eastern North Carolina.
- Advised a publicly traded health information technologies and clinical research company in its sale of a consulting line of business.
- Advised a UK-based drug development services organization in its acquisition of an expert clinical pharmacology business.
- Represented a boutique hotel chain in its acquisition of a building for conversion into a hotel and museum and in related formation of its joint venture with other stakeholders.
- Advised a UK-based drug development services organization in its acquisition of a pharmaceutical contract development and manufacturing organization.
- Represented a family-owned business in connection with its acquisition of multiple restaurants in Wake County, North Carolina.
- Advised a privately held leading manufacturer of beverage and foodservice equipment in its sale to a public company for \$108 million in cash.
- Advised a publicly traded health information technologies and clinical research company in its acquisition of a consulting business focusing on orphan drug designations.
- Advised a private technology company in an agreement to purchase development-legal invoice analysis software.
- Represented affiliated multidisciplinary engineering, investigation and construction companies in a sale of assets process involving multiple potential buyers,

culminating in the sale of substantially all of their assets to a wireless network services company.

- Represented an entrepreneur in connection with a formation of entity to acquire and operate multiple restaurants in Durham County, North Carolina.
- Advised a private equity fund in its acquisition of a specialty pharmaceutical company.
- Advised an enterprise storage management company in its sale to a private equity sponsor.
- Advised a frozen foods company in a definitive agreement to acquire a frozen snacks business.

HONORS & AWARDS

- **Best Lawyers**®, Tax Law (2018-2022), Closely Held Companies and Family Businesses Law (2022)
- **Business North Carolina** Legal Elite, Tax and Estate Planning (2012-2015, 2017-2018, 2020-2022)
 - Young Gun (2012-2016, 2018)
- Order of the Coif, Duke Chapter
- Staff Member, **Duke Law Journal**
- North Carolina **Super Lawyers**, Rising Star (2010-2013)
- Member, Phi Beta Kappa, Wake Forest University Chapter

PROFESSIONAL & COMMUNITY AFFILIATIONS

- American Bar Association
- Member, American Institute of Certified Public Accountants
- Member, North Carolina Association of Certified Public Accountants

- Chair, North Carolina Bar Association Tax Section and Tax Section Council (2016-Present)
 - Past Editor of Tax Assessments , a publication of the North Carolina Bar Association Tax Section
- Past Chair of CLE Committee of Tax Section Council
- North Carolina Bar Association
- Wake County Bar Association

Lauren E. Davis

Attorney

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150 Fayetteville Street, Suite 2300
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Lauren Davis joined Smith Anderson in 2021. She is an associate in Smith Anderson's Employment, Labor and Human Resources practice group.

Lauren enjoys Michigan State University basketball and football, dancing, travel and musicals.

ACADEMIC APPOINTMENTS

- University of North Carolina School of Law
 - Institute Editor, *North Carolina Banking Institute Journal*
 - Certified Student Practitioner, *Startup NC Law Clinic*
 - Dean's Fellow
 - Vice President, Carolina Teen Court Assistance Program
 - Vice President, Carolina Law Ambassadors
 - Mentor Coordinator, Women in Law

AA CONTACT INFO

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PRACTICE AREAS

Employment, Labor and Human Resources

BAR & COURT ADMISSIONS

North Carolina

EDUCATION

- UNC Chapel Hill School of Law, J.D., with honors, 2021
- Michigan State University, B.A., Finance, with honors, 2018
 - Honors College

Taylor M. Dewberry

Attorney and Chief Diversity
Officer

Wells Fargo Capitol Center
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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 Nasdaq-listed pharmaceutical development company in the acquisition of a specialty dermatology company for up to \$51 million in up-front and contingent consideration.
- 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 life sciences company on its acquisition of a clinical manufacturing facility for an undisclosed amount.

AA CONTACT INFO

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PRACTICE AREAS

Employment, Labor and Human
Resources

Higher Education

Litigation

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

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

African-American Studies,
2014

CLERKSHIPS

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

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

- American Bar Association
 - District 9 Representative, Young Lawyers Division
- North Carolina Bar Association
 - Co-Chair, Young Lawyers Division, Diversity and Inclusion Committee (2018-2022)

- Co-Chair, Young Lawyers Division, Disaster Legal Services Committee
- 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 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, including discrimination claims, non-competition and employee

AA CONTACT INFO

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PRACTICE AREAS

Employment Litigation
Employment, Labor and Human Resources
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

CLERKSHIPS

Law Clerk to the Honorable Robert.

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.

D. Potter, Chief Judge for the U.S. District Court for the Western District of North Carolina

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 (2013-2023), Litigation - Labor & Employment (2021-2023), Employment Law - Management (2023)
- *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
- 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



John E. Harris

Attorney

Wells Fargo Capitol Center
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jharris@smithlaw.com



John represents businesses and individuals who find themselves in difficult circumstances – particularly when a dispute may be looming or has already burst onto the scene. As a member of the firm's Investigations practice, John helps clients faced with difficult situations get to the bottom of what happened and address issues ethically, effectively and efficiently. He's there to counsel his clients at every step of the way.

Sometimes those steps lead to administrative proceedings or litigation, and as a member of the firm's Litigation practice, he is well equipped to represent clients when a matter gets there. He has handled every stage of civil litigation across a wide range of subject matters, and has tried multiple cases to verdict before judges and juries.

Although John had previous experience in private practice as a litigator, John most recently worked as a federal prosecutor with the United States Attorney's Office for the Eastern District of North Carolina where he represented the United States in civil and criminal matters, including conducting investigations, negotiating resolutions, and litigating cases in federal district court and before the Fourth Circuit.

EXPERIENCE

- Represented clients navigating trust and estate disputes, including will caveats, and advised clients regarding rights and remedies available under revocable trust instruments.
- Represented North Carolina public charter school against contract, employment, and fraud claims brought by a former employee, including obtaining dismissal of several claims and preventing the entry of preliminary injunctive relief. The case was favorably resolved through a confidential settlement.

AA CONTACT INFO

Lorna Bernardo
Phone: 919.838.2042
lbernardo@smithlaw.com

PRACTICE AREAS

Commercial Litigation
Employment Litigation
Appellate Advocacy
Investigations
Litigation
Real Estate Litigation

BAR & COURT ADMISSIONS

North Carolina
United States Court of Appeals for
the D.C. Circuit

EDUCATION

- University of North Carolina, J.D.,
with honors, 2015
 - Order of the Coif
 - Phi Beta Kappa
- University of North Carolina,
B.A., with honors and highest
distinction, 2012



- Represented North Carolina company in pursuing claims against former employee related to breach of confidentiality agreement and violation of the North Carolina Trade Secrets Act. The matter was mediated and favorably resolved by confidential settlement.
- Represented employer in defense of claims related to termination and unemployment compensation, including obtaining dismissal of all claims in North Carolina Superior Court.
- Advised local public entity on open-meetings and public-records law compliance in connection with holding board meetings and disposing of property.

PROFESSIONAL & COMMUNITY AFFILIATIONS

- North Carolina Bar Association

ACADEMIC APPOINTMENTS

- University of North Carolina School of Law
- - Managing Editor, *North Carolina Law Review*, Vol. 93
 - Robertson Scholar
 - James E. & Carolyn B. Davis Society

CLERKSHIPS

Chambers of Judge Karen LeCraft Henderson, United States Court of Appeals for the D.C. Circuit, Washington, D.C.



Jamison H. Hinkle

Attorney

Wells Fargo Capitol Center
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Raleigh, North Carolina 27601
Phone: 919.821.6686
Fax: 919.821.6800
jhinkle@smithlaw.com



Jamie Hinkle advises a wide range of clients on all aspects of their employee benefits and compensation programs. Much of his practice 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

Sarah Herklotz
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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

Attorney

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Travis Hockaday leads the firm's Employment, Labor and Human Resources practice. He is recognized by *Best Lawyers®* 2021 in Litigation - Labor and Employment, and by *Benchmark Litigation* as a North Carolina Labor & Employment Star for 2021. His practice focuses on providing counseling and risk management advice on significant employment-related matters to both public and private companies across a variety of industries, identifying and managing employment-related issues in mergers, acquisitions, and reorganizations, and drafting complex employment and severance agreements for companies and C-suite executives. From 2010 to 2013, Travis provided counseling and risk management services on employment-related matters to a Fortune 500 company's legal department under a secondment arrangement.

Travis has extensive experience assisting employers with worker classification and co-employment issues, work health (ADA, FMLA, GINA) matters, and wage and hour compliance. He also conducts investigations into discrimination and harassment complaints, develops workplace policies, and advises employers on terminations, disciplinary actions and handling employee grievances. Travis regularly defends employers in federal and state courts and agencies (including the EEOC, U.S. DOL and U.S. DOJ) against discrimination, harassment, retaliation, wage and hour and whistleblower claims (including systemic discrimination claims).

Travis frequently develops and delivers training programs for executives, managers and human resources professionals, and is a co-author of the *North Carolina Human Resources Manual*, the 700-page authoritative guide for North Carolina employers.

AA CONTACT INFO

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snorwood@smithlaw.com

PRACTICE AREAS

Commercial Litigation
Employment Litigation
Employment, Labor and Human Resources
Higher Education
Investigations
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

EXPERIENCE

- Defending employers against claims involving discrimination, wrongful discharge, retaliation, harassment and civil rights claims.
- Defending wage and hour, ERISA, and other benefit-related claims.
- Representing clients in investigations conducted by both federal and state Departments of Labor, the Equal Employment Opportunity Commission and the U.S. Department of Justice.
- Representing clients before the North Carolina Division of Employment Security.
- 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, the Americans with Disabilities 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.
- 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.
- 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.
- 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 an online gaming company in a definitive agreement to acquire an online 3-D modeling company.
- Advised an online gaming company in an acquisition of a UK-based pioneer in the "kidtech" market.

- 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.

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

- Board of Directors, Food Bank of Central & Eastern North Carolina, Inc.
- 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
- Past Ruling Elder, Trustee and Clerk of Session, Grove Presbyterian Church, Dunn, NC (PCUSA)

Rosemary Gill Kenyon

Attorney

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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" and "very strong and practical" (*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

AA CONTACT INFO

Cheryl Baber
Phone: 919.838.2023
cbaber@smithlaw.com

PRACTICE AREAS

Commercial Litigation
Employment Litigation
Employment, Labor and Human Resources
Life Sciences
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

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

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

CLERKSHIPS

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

- 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.
- Advised a leading pharmaceutical and biotech contract development and manufacturing organization (CDMO) in a definitive agreement to acquire a preferred provider of cGMP Biostorage and pharma support services for an undisclosed amount.
- Advised a Nasdaq-listed pharmaceutical development company in the acquisition of a specialty dermatology company for up to \$51 million in up-front and contingent consideration.
- Advised a Nasdaq-listed medical device company in the acquisition of a global leader in neuromodulation and rehabilitation medical devices for up to \$110 million in up-front and contingent consideration.
- Advised a private equity fund on the employment-related matters of its acquisition of a contract research organization focused on the ophthalmology industry for an undisclosed amount.

HONORS & AWARDS

- Fellow, American College of Labor and Employment Lawyers
- *Chambers USA: America's Leading Business Lawyers*, Labor & Employment (2008-2022)
- *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* (2012-2022)
- 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

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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 Privacy
Employment Litigation
Employment, Labor and Human Resources
Higher Education
Investigations
Life Sciences
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 (2005-2022)
- *Business North Carolina* Legal Elite, Employment Law (2022)
- *North Carolina Super Lawyers* (2006-2022)
- Fellow, American Bar Foundation
- Martindale-Hubbell AV Preeminent Rated since 1999
- *Oklahoma Law Review*, Note Editor

PROFESSIONAL & COMMUNITY AFFILIATIONS

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



Isaac A. Linnartz

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Isaac Linnartz focuses on business litigation, employment litigation, and pre-litigation dispute assessment and risk mitigation. He has experience representing companies in high stakes litigation involving complex contract disputes, corporate governance issues, trade secret and confidentiality matters, and various business torts. On the employment side, he represents employers defending against claims of discrimination, retaliation, harassment, wrongful termination, and wage and hour violations. Additionally, Isaac assists with drafting, assessing, and litigating non-compete and non-solicit provisions, including assessing enforceability and litigating requests for emergency injunctive relief.

Isaac serves as 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.

AA CONTACT INFO

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PRACTICE AREAS

Commercial Litigation
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*



- 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 the client over \$100 million, and awarded 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 law firm and its former managing partner against discrimination claims asserted by a former equity partner in federal court. The trial court's decision dismissing the complaint was affirmed by the United States Court of Appeals for the Fourth Circuit in a unanimous published opinion following oral argument.
- 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 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 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

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.

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. 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 (2014-2022)
- *Benchmark Litigation*, 40 & Under List (2018-2022)
- *Benchmark Litigation*, North Carolina Labor and Employment Star (2019-2021)
- 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

Wells Fargo Capitol Center
150 Fayetteville Street, Suite 2300
Raleigh, North Carolina 27601
Phone: 919.821.6746
Fax: 919.821.6800
cmcneill@smithlaw.com



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.

AA CONTACT INFO

Sarah Herklotz
Phone: 919.821.6749
sherklotz@smithlaw.com

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

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 provider. The equity market capitalization of the joined companies was more than \$17.6 billion at closing.
- Advised a leading utilities, solar, and electrical contractor in a definitive agreement to be acquired by an independent sponsor for an undisclosed amount of cash and equity.
- 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 an online gaming company in a definitive agreement to acquire an online 3-D modeling company.
- Advised an online gaming company in an acquisition of a UK-based pioneer in the "kidtech" market.
- 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 (2021-2022)
- North Carolina *Super Lawyers* (2014-2022)
- *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
- Fellow, American Bar Foundation

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)

David R. Ortiz

Attorney

Wells Fargo Capitol Center
150 Fayetteville Street, Suite 2300
Raleigh, North Carolina 27601
Phone: 919.821.6637
Fax: 919.821.6800
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

Susan Milner Parrott

Attorney

Wells Fargo Capitol Center
150 Fayetteville Street, Suite 2300
Raleigh, North Carolina 27601
Phone: 919.821.6664
Fax: 919.821.6800
sparrott@smithlaw.com



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

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.

AA CONTACT INFO

Claire Dodd
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cdodd@smithlaw.com

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

- 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.
- 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

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

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 Foundation

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.

AA CONTACT INFO

Cheryl A. Baber
Phone: 919.838.2023
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PRACTICE AREAS

Asbestos and Toxic Torts
Commercial Litigation
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

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

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

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, United States District Court for the Middle District of North Carolina

Tommy Postek

Attorney

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Tommy Postek is an attorney with Smith Anderson's Employment, Labor and Human Resources practice.

Prior to joining Smith Anderson, Tommy worked for an international law firm as a member of its employment practice, representing employers before state and federal administrative agencies in discrimination claims, workers' compensation actions and other employment-related matters and assisting clients on other multifaceted legal issues. Prior to that, he practiced employment law with an international law firm in Denver, Colorado and served as Law Clerk to the Honorable Edward Bronfin in Denver District Court.

Tommy enjoys woodworking, cooking, basketball, golf and spending time with his family and brood of pets on a farm that he owns in Stokesdale, North Carolina. Born and raised in Sweden, Tommy speaks several languages, including English, Swedish, Polish, Danish and Norwegian.

NOT ADMITTED TO PRACTICE IN NORTH CAROLINA

PROFESSIONAL & COMMUNITY AFFILIATIONS

- Swedish American Chamber of Commerce: Carolinas, 2021-present
 - Chair, Membership Committee

AA CONTACT INFO

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PRACTICE AREAS

Employment, Labor and Human Resources

BAR & COURT ADMISSIONS

Colorado

EDUCATION

- University of Notre Dame Law School, J.D., 2017
- Lynn University, B.S. in Business Administration, summa cum laude, 2014

CLERKSHIPS

Law Clerk to the Honorable Edward Bronfin, Denver District Court

- Board Director
- Swedish American Chamber of Commerce:
Colorado, 2019-2021
 - Vice President
 - Board Director
- Member, William E. Doyle Inn of Courts, 2018-2021
- Executive Committee Member, Colorado Notre Dame
Lawyers Committee, 2018
- American Bar Association
- Colorado Bar Association
- Denver Bar Association

ACADEMIC APPOINTMENTS

- University of Notre Dame Law School
 - Article Editor, *Notre Dame Journal of
International & Comparative Law*
 - Treasurer, International Law Society
- Lynn University
 - President, Honors Club
 - President, Sustainability Club

Edward F. Roche

Attorney

Wells Fargo Capitol Center
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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

- Represented a California software company in contract disputes in California and Minnesota.
- Enforced a local business's intellectual property rights against an international retailer.

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PRACTICE AREAS

Litigation
Commercial Litigation
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

- Represented a bank in emergency proceedings to prevent harm to customers due to technology vendor's actions.
- Represented 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.
- 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.

- 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
- 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 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.
- 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*
- North Carolina *Super Lawyers*, Rising Star (2022)

PROFESSIONAL & COMMUNITY AFFILIATIONS

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

Shameka C. Rolla

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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.

EXPERIENCE

- Defended employers against employment claims, including, without limitation, claims of discrimination, wrongful discharge, and retaliation, and wage and hour claims.
- Conducted internal investigations for employers regarding allegations of workplace misconduct, including, without limitation, claims of discrimination, harassment and retaliation.
- Represented a software company in federal district court in defending against breach of contract claim involving resale of software and related services and pursued numerous counterclaims; successfully obtained orders denying plaintiff's requests for TRO and preliminary injunction; case dismissed upon reaching a settlement.
- Successfully obtained a pre-trial dismissal of claims of intentional infliction of emotional distress and

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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

negligent supervision and retention against corporate clients.

- Successfully obtained a contested default judgment after oral argument in state court on behalf of client.
- Represented an individual against claims of breach of non-competition agreement, misappropriation of trade secrets, unfair competition, and unjust enrichment; successfully defended against motion for TRO; case dismissed upon reaching a settlement.
- Assisted clients in responding to third-party subpoenas.

PROFESSIONAL & COMMUNITY AFFILIATIONS

North Carolina Bar Association

- Co-Chair, Young Lawyers Division, Diversity and Inclusion Committee

Kerry A. Shad

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

AA CONTACT INFO

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PRACTICE AREAS

Commercial Litigation
Employment Litigation
Employment, Labor and Human
Resources
Life Sciences
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

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.
- 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

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

- 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 (2012-2022)
- *Benchmark Litigation*, Top 250 Women in Litigation (2021-2022)

- *North Carolina Lawyers Weekly*, Power List 2021, Employment Law
- *Benchmark Litigation*, North Carolina Labor and Employment Star (2018-2021)
- Martindale-Hubbell AV Preeminent Rated
- North Carolina *Super Lawyers* (2012-2022)
- *Business North Carolina* Legal Elite, Employment Law (2008, 2014-2015, 2022)
- *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

Using AI in HR: Best Practices and Avoiding Traps for the Unwary

Using AI in HR:

Best Practices and Avoiding Traps for the
Unwary



Kimberly J. Korando

October 25, 2022

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Polling Question No. 1

Does your organization use software to scan and prioritize or score resumes using keywords, or use a chat bot to ask screening questions?

- ☐ Yes
- ☐ No
- ☐ Unsure

Polling Question No. 2

Does your organization use online assessments to assess personality, aptitude, cognitive skills or perceived “cultural fit”?

- ☐ Yes
- ☐ No
- ☐ Unsure

Polling Question No. 3

Does your organization use video interview technology to assess candidate responses, facial expressions or speech patterns?

- ☐ Yes
- ☐ No
- ☐ Unsure

AI Defined

A form of technology where the software:

- "learns" from the data it analyzes or tasks it performs, and
- adapts its "behavior" based on what it learns from the data to improve its performance of certain tasks over time

How does AI work?

Two key elements

- Data set
- Algorithm: sets of code with instructions to perform specific tasks over a data set

Computer software programmed to execute **algorithms** over a **data set** to, among other things:

- Recognize patterns
- Reach conclusions
- Make informed judgments
- Optimize practices
- Predict future behavior
- Automate repetitive functions

Simply put



AI is technology that mimics human intelligence to perform tasks ordinarily performed by humans

*Remember HAL?
2001: A Space Odyssey (1968)*

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How HR is Using AI

Recruiting and hiring

Employee onboarding

Performance management and productivity

Managing remote workers

Career coaching

Employee retention

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How AI Is Being Used

Recruiting and hiring. Software containing AI may assist HR professionals and recruiters by:

- Sourcing and screening candidates, including predictive hiring that identifies a company's performance drivers to improve the quality of hires:
 - Show job ads to targeted groups
 - Scan resumes and prioritize applications using certain keywords;
 - Score applicant resume
 - Decide if applicant meets job qualification
- Scheduling interviews
- Using virtual assistants or chatbots that ask or answer questions about preliminary job qualifications, salary ranges, and the hiring process, potentially rejecting candidates lacking certain defined requirements

- Testing software that provides “job fit” scores for applicants or employees regarding their personalities, aptitudes, cognitive skills, or perceived “cultural fit” based on their performance on a game or on a more traditional test
- Conducting video and recorded interviews, with candidate responses, facial expressions and speech patterns analyzed by AI
- Using depersonalized information to make salary determinations

Employee onboarding. Chatbots may answer new employee questions and direct them to the appropriate corporate resources

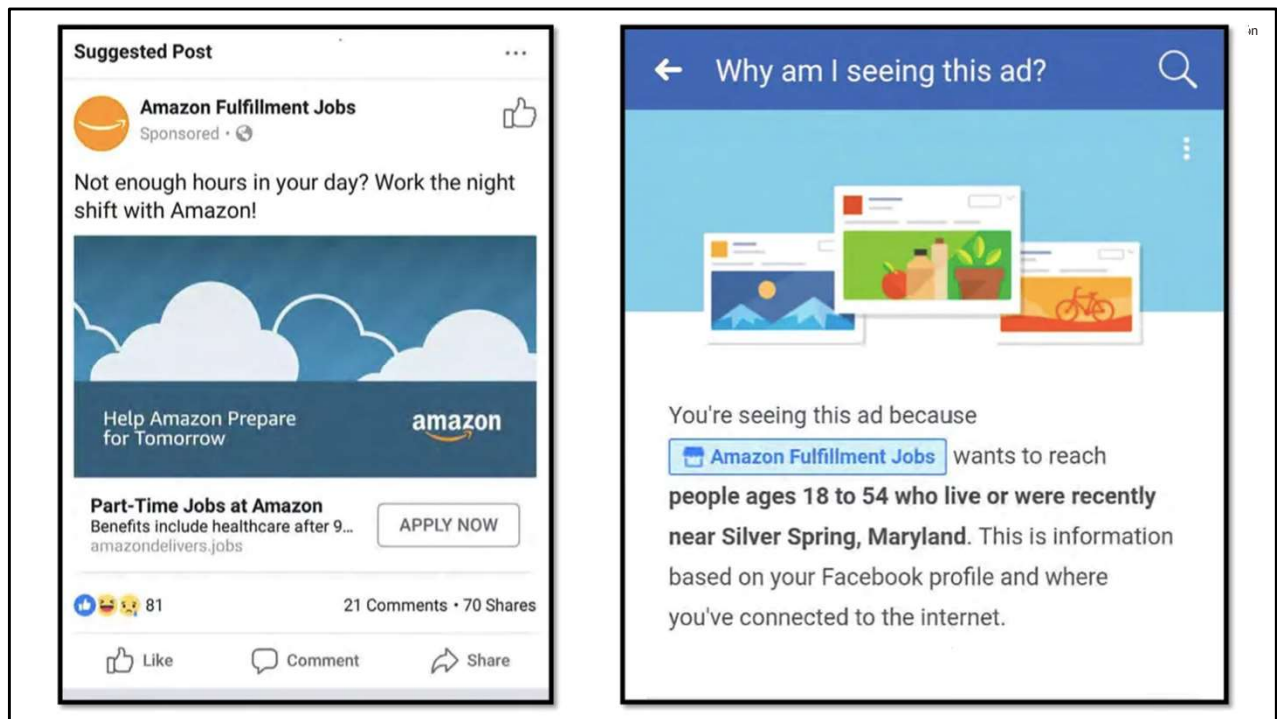
Performance management and productivity. AI tools are available to:

- Determine the profiles of successful employees
- Measure individual employee performance
- Select candidates for promotion
- Rate employee productivity by monitoring keystrokes or other factors

Managing remote workers. Employers may use data analytics, AI, and other technologies to track remote workers, especially given the increase in remote and hybrid work arrangements and "wandering" or work from anywhere (WFA) employees

Career coaching. AI tools may suggest new positions, training, and available professional development resources based on an employee's career interests.

Employee retention. AI tools can be used to predict which employees are likely to leave a job and coach managers about how to retain those employees



Evidence submitted in age discrimination civil action filed in United States District Court for the Northern District of California, Bradley et al. v. T-Mobile et al., Civil Action 5:17-cv-07232

AI in Recruiting and Hiring

Sourcing and Screening Candidates

- Show job ads to targeted groups
- Scan resumes and prioritize using keywords
- Score resumes
- Use chat bot to ask questions about preliminary qualifications, desired salary

Online Testing

- “Job fit” scores on:
 - personalities
 - aptitudes
 - cognitive skills
 - perceived “cultural fit”

Video interview Analysis

- Analyze:
 - candidate responses
 - facial expressions
 - speech patterns

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The risks

- Systemic discrimination
- Unknown “black box” of algorithms
- Disability accessibility and accommodation challenges
- Unlawful inquiries or screening criteria
- Vendor violation liability
- Patchwork of state laws

Systemic discrimination

Depending on the available data set and the algorithms used,

AI recruiting tools may duplicate and proliferate past discriminatory practices in:

- Identifying who gets the job ad
- Identifying and evaluating candidates

Algorithm “black box”

- Lack of transparency in the algorithmic process may render it impossible to determine how or why an AI tool reached a decision or made a prediction

Why is this a problem?

- Employers unable to satisfy legal obligation to articulate a "legitimate nondiscriminatory" reason for a decision because they do not know how or why the AI tool did what it did

Disability accessibility

When using online recruiting tools for

- interviews
- initial screening
- testing

...ensure that the platform is accessible to individuals who are hearing, sight or manually impaired

Web site features must be accessible. *See Web Content Accessibility Guidelines (WCAG) and Section 508 Standards.*

EEOC May 2022 Technical Guidance

Three ways AI tools can violate the ADA:

- Fail to provide a reasonable accommodation needed for the algorithm to rate the individual accurately
- Use a tool that "screens out" a disabled individual who is otherwise qualified to do the job, with or without a reasonable accommodation
- Use a tool that makes impermissible disability-related inquiries and medical examinations

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The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees, U.S. Equal Employment Opportunity Commission, Technical Assistance Guidance (May 12, 2022)

<https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence> ("EEOC Technical Guidance")

Disability accommodation

When is obligation triggered?

- Individual says they have medical condition that may make taking the test difficult or reduce accuracy of assessment result

How must employer respond?

- If condition is unknown, employer may request supporting medical documentation
- Once documentation is provided, provide alternative testing format or more accurate assessment of skills unless doing so would involve undue hardship
- Must give individual equal consideration with other candidates not receiving reasonable accommodation

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EEOC Technical Guidance:

5. May an employer announce generally (or use software that announces generally) that reasonable accommodations are available to job applicants and employees who are asked to use or be evaluated by an algorithmic decision-making tool, and invite them to request reasonable accommodations when needed?

Yes. An employer may tell applicants or employees what steps an evaluation process includes and may ask them whether they will need reasonable accommodations to complete it. For example, if a hiring process includes a video interview, the employer or software vendor may tell applicants that the job application process will involve a video interview and provide a way to request a reasonable accommodation. Doing so is a “[promising practice](#)” to avoid violating the ADA.

6. When an employer uses algorithmic decision-making tools to assess job applicants or employees, does the ADA require the employer to provide reasonable accommodations?

If an applicant or employee tells the employer that a medical condition may make it difficult to take a test, or that it may cause an assessment result that is less

acceptable to the employer, the applicant or employee has requested a reasonable accommodation. To request an accommodation, it is not necessary to mention the ADA or use the phrase “reasonable accommodation.”

Under the ADA, employers need to respond promptly to requests for reasonable accommodation. If it is not obvious or already known whether the requesting applicant or employee has an ADA disability and needs a reasonable accommodation because of it, the employer may request supporting medical documentation. When the documentation shows that a disability might make a test more difficult to take or that it might reduce the accuracy of an assessment, the employer must provide an alternative testing format or a more accurate assessment of the applicant’s or employee’s skills as a reasonable accommodation, unless doing so would involve significant difficulty or expense (also called “undue hardship”).

For example, a job applicant who has limited manual dexterity because of a disability may report that they would have difficulty taking a knowledge test that requires the use of a keyboard, trackpad, or other manual input device. Especially if the responses are timed, this kind of test will not accurately measure this particular applicant’s knowledge. In this situation, the employer would need to provide an accessible version of the test (for example, one in which the applicant is able to provide responses orally, rather than manually) as a reasonable accommodation, unless doing so would cause undue hardship. If it is not possible to make the test accessible, the ADA requires the employer to consider providing an alternative test of the applicant’s knowledge as a reasonable accommodation, barring undue hardship.

Other examples of reasonable accommodations that may be effective for some individuals with disabilities include extended time or an alternative version of the test, including one that is compatible with accessible technology (like a screen-reader) if the applicant or employee uses such technology.

Employers must give individuals receiving reasonable accommodation equal consideration with other applicants or employees not receiving reasonable accommodations.

The ADA requires employers to keep all medical information obtained in connection with a request for reasonable accommodation confidential and must store all such information separately from the applicant’s or employee’s personnel file.

Online assessments

Remember things that may improperly screen out individuals with disabilities

- **Assessment *FORMAT***
- **Assessment *SCORING***

Disability accommodation (cont'd)

FORMAT examples

- Limited manual dexterity impacting use of keyboard, track pad or other manual input device => *allow oral responses or extended response time*
- Visual impairment => *screen reader compatibility*

Unlawful screening or scoring criteria

May occur if the disability prevents the individual from meeting minimum selection criteria or performing well on an on-line assessment

Remember

Assessments must measure only relevant skills and abilities -- not impaired sensory, manual or speaking skills

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EEOC Technical Guidance

8. When is an individual “screened out” because of a disability, and when is screen out potentially unlawful?

Screen out occurs when a disability prevents a job applicant or employee from meeting—or lowers their performance on—a selection criterion, and the applicant or employee loses a job opportunity as a result. The ADA says that screen out is unlawful if the individual who is screened out is *able to perform the essential functions of the job* with a reasonable accommodation if one is legally required. [\[1\]](#) [Questions 9 and 10](#) explain the meaning of “screen out” and [Question 11](#) provides examples of when a person who is screened out due to a disability nevertheless can do the job with a reasonable accommodation.

9. Could algorithmic decision-making tools screen out an individual because of a disability? What are some examples?

Yes, an algorithmic decision-making tool could screen out an individual because of a disability if the disability causes that individual to receive a lower score or an assessment result that is less acceptable to the employer, and the individual loses a job opportunity as a result.

An example of screen out might involve a chatbot, which is software designed to engage in communications online and through texts and emails. A chatbot might be programmed with a simple algorithm that rejects all applicants who, during the course of their “conversation” with the chatbot, indicate that they have significant gaps in their employment history. If a particular applicant had a gap in employment, and if the gap had been caused by a disability (for example, if the individual needed to stop working to undergo treatment), then the chatbot may function to screen out that person because of the disability.

Another kind of screen out may occur if a person’s disability prevents the algorithmic decision-making tool from measuring what it is intended to measure. For example, video interviewing software that analyzes applicants’ speech patterns in order to reach conclusions about their ability to solve problems is not likely to score an applicant fairly if the applicant has a speech impediment that causes significant differences in speech patterns. If such an applicant is rejected because the applicant’s speech impediment resulted in a low or unacceptable rating, the applicant may effectively have been screened out because of the speech impediment.

11. Screen out because of a disability is unlawful if the individual who is screened out is able to perform the essential functions of the job, with a reasonable accommodation if one is legally required. If an individual is screened out by an algorithmic decision-making tool, is it still possible that the individual is able to perform the essential functions of the job?

In some cases, yes. For example, some employers rely on “gamified” tests, which use video games to measure abilities, personality traits, and other qualities, to assess applicants and employees. If a business requires a 90 percent score on a gamified assessment of memory, an applicant who is blind and therefore cannot play these particular games would not be able to score 90 percent on the assessment and would be rejected. But the applicant still might have a very good memory and be perfectly able to perform the essential functions of a job that requires a good memory.

Even an algorithmic decision-making tool that has been “validated” for some purposes might screen out an individual who is able to perform well on the job. To say that a decision-making tool has been “validated” means that there is evidence meeting certain professional standards showing that the tool accurately measures or predicts a trait or characteristic that is important for a specific job. Algorithmic decision-making tools may be validated in this sense, and still be inaccurate when applied to particular individuals with disabilities. For example, the gamified assessment of memory may be validated because it has been shown to be an accurate measure of memory for most people in the general population, yet still screen out particular individuals who have good memories but are blind, and who therefore cannot see the computer screen to play the games.

An algorithmic decision-making tool also may sometimes screen out individuals with disabilities who could do the job because the tool does not take into account the possibility that such individuals are entitled to reasonable accommodations on the job. Algorithmic decision-making tools are often designed to predict whether applicants can do a job under typical working conditions. But people with disabilities do not always work under typical conditions if they are entitled to on-the-job reasonable accommodations.

For example, some pre-employment personality tests are designed to look for candidates who are similar to the employer's most successful employees—employees who most likely work under conditions that are typical for that employer. Someone who has Posttraumatic Stress Disorder (“PTSD”) might be rated poorly by one of these tests if the test measures a trait that may be affected by that particular individual's PTSD, such as the ability to ignore distractions. Even if the test is generally valid and accurately predicts that this individual would have difficulty handling distractions under typical working conditions, it might not accurately predict whether the individual still would experience those same difficulties under modified working conditions—specifically, conditions in which the employer provides required on-the-job reasonable accommodations such as a quiet workstation or permission to use noise-cancelling headphones. If such a person were to apply for the job and be screened out because of a low score on the distraction test, the screen out may be unlawful under the ADA. Some individuals who may test poorly in certain areas due to a medical condition may not even need a reasonable accommodation to perform a job successfully.

Screening or scoring criteria may be unlawful when...

Examples	Issue
Screens out candidates with employment gaps	Gap may be due to medical condition (or pregnancy, child or family care)
Analyzes and evaluates speech patterns to evaluate problem-solving skill	Speech impediment may result in lower rating not reflective of problem-solving skill
Analyzes ability to ignore distractions	AI may use “typical” working conditions and not take into account performance with an accommodation (e.g., noise cancelling head phones)
Chat bot asks whether individual can stand for 3 hours and stops the screening when the answer is No	Candidates using a wheelchair who could perform the essential functions seated (as an accommodation) are excluded from consideration without accommodation consideration

Unlawful inquiries

AI tool asks questions that are likely to elicit information about a disability **before** giving the candidate a conditional offer of employment

- These questions violate the ADA even if the individual does not have a disability

Practice Tip

Before purchasing AI tool, ask the vendor to confirm that the tool does not ask questions likely to elicit information about physical or mental impairments or health

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EEOC Technical Guidance:

13. How could an employer's use of algorithmic decision-making tools violate ADA restrictions on disability-related inquiries and medical examinations?

An employer might violate the ADA if it uses an algorithmic decision-making tool that poses “disability-related inquiries” or seeks information that qualifies as a “medical examination” before giving the candidate a conditional offer of employment. This type of violation may occur even if the individual does not have a disability.

An assessment includes “disability-related inquiries” if it asks job applicants or employees questions that are likely to elicit information about a disability or directly asks whether an applicant or employee is an individual with disability. It qualifies as a “medical examination” if it seeks information about an individual’s physical or mental impairments or health.

An algorithmic decision-making tool that could be used to identify an applicant’s medical conditions would violate these restrictions if it were administered prior to a conditional offer of employment. Not all algorithmic decision-making tools that ask for health-related information are “disability-related inquiries or medical examinations,” however. For example, a personality test is not posing “disability-

related inquiries” because it asks whether the individual is “described by friends as being ‘generally optimistic,’” even if being described by friends as generally optimistic might somehow be related to some kinds of mental health diagnoses.

Note, however, that even if a request for health-related information does not violate the ADA’s restrictions on disability-related inquiries and medical examinations, it still might violate other parts of the ADA. For example, if a personality test asks questions about optimism, and if someone with Major Depressive Disorder (“MDD”) answers those questions negatively and loses an employment opportunity as a result, the test may “screen out” the applicant because of MDD. As explained in [Questions 8–11](#) above, such screen out may be unlawful if the individual who is screened out can perform the essential functions of the job, with or without reasonable accommodation.

Once employment has begun, disability-related inquiries may be made and medical examinations may be required only if they are legally justified under the ADA.

For more information on disability-related inquiries and medical examinations, see [Pre-Employment Inquiries and Medical Questions & Examinations](#), and [Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA](#).

EEOC Promising Practices:

Before purchasing an algorithmic decision-making tool, an employer should ask the vendor to confirm that the tool does not ask job applicants or employees questions that are likely to elicit information about a disability or seek information about an individual’s physical or mental impairments or health, unless such inquiries are related to a request for reasonable accommodation. (The ADA permits an employer to request reasonable medical documentation in support of a request for reasonable accommodation that is received prior to a conditional offer of employment, when necessary, if the requested accommodation is needed to help the individual complete the job application process.)

Vendor violation liability

- Employers are liable for using AI tools that violate the law
- Beware products that claim to be “validated” or “bias-free”

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EEOC Technical Guidance:

3. Is an employer responsible under the ADA for its use of algorithmic decision-making tools even if the tools are designed or administered by another entity, such as a software vendor?

In many cases, yes. For example, if an employer administers a pre-employment test, it may be responsible for ADA discrimination if the test discriminates against individuals with disabilities, even if the test was developed by an outside vendor. In addition, employers may be held responsible for the actions of their agents, which may include entities such as software vendors, if the employer has given them authority to act on the employer's behalf.

7. Is an employer responsible for providing reasonable accommodations related to the use of algorithmic decision-making tools, even if the software or application is developed or administered by another entity?

In many cases, yes. As explained in [Question 3](#) above, an employer may be held responsible for the actions of other entities, such as software vendors, that the employer has authorized to act on its behalf. For example, if an employer were to contract with a software vendor to administer and score on its behalf a pre-employment test, the employer likely would be held responsible for actions that the

vendor performed—or did not perform—on its behalf.

Thus, if an applicant were to tell the vendor that a medical condition was making it difficult to take the test (which qualifies as a request for reasonable accommodation), and the vendor did not provide an accommodation that was required under the ADA, the employer likely would be responsible even if it was unaware that the applicant reported a problem to the vendor.

10. Some algorithmic decision-making tools may say that they are “bias-free.” If a particular tool makes this claim, does that mean that the tool will not screen out individuals with disabilities?

When employers (or entities acting on their behalf such as software vendors) say that they have designed an algorithmic decision-making tool to be “bias-free,” it typically means that they have taken steps to prevent a type of discrimination known as “adverse impact” or “disparate impact” discrimination under Title VII, based on race, sex, national origin, color, or religion. This type of Title VII discrimination involves an employment policy or practice that has a disproportionately negative effect on a group of individuals who share one of these characteristics, like a particular race or sex.

To reduce the chances that the use of an algorithmic decision-making tool results in disparate impact discrimination on bases like race and sex, employers and vendors sometimes use the tool to assess subjects in different demographic groups, and then compare the average results for each group. If the average results for one demographic group are less favorable than those of another (for example, if the average results for individuals of a particular race are less favorable than the average results for individuals of a different race), the tool may be modified to reduce or eliminate the difference.

The steps taken to avoid that kind of Title VII discrimination are typically distinct from the steps needed to address the problem of disability bias. If an employer or vendor were to try to reduce disability bias in the way described above, doing so would not mean that the algorithmic decision-making tool could never screen out an individual with a disability. Each disability is unique. An individual may fare poorly on an assessment because of a disability, and be screened out as a result, regardless of how well other individuals with disabilities fare on the assessment. Therefore, to avoid screen out, employers may need to take different steps beyond the steps taken to address other forms of discrimination. (See [Question 12.](#))

Vendor violation liability

Employer Best Practices

- Vet the vendor and tool carefully
 - If the tool requires applicants or employees to engage a user interface: Did the vendor make the interface accessible to as many individuals with disabilities as possible?
 - Are the materials presented to job applicants or employees in alternative formats? If so, which formats?
 - Are there any kinds of disabilities for which the vendor will not be able to provide accessible formats, in which case the employer may have to provide them (absent undue hardship)?
 - Did the vendor attempt to determine whether use of the algorithm disadvantages individuals with disabilities? For example, did the vendor determine whether any of the traits or characteristics that are measured by the tool are correlated with certain disabilities?
- Seek an indemnity provision in contracts with AI vendors

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EEOC Technical Guidance:

12. What could an employer do to reduce the chances that algorithmic decision-making tools will screen out someone because of a disability, even though that individual is able to perform the essential functions of the job (with a reasonable accommodation if one is legally required)?

First, if an employer is deciding whether to rely on an algorithmic decision-making tool developed by a software vendor, it may want to ask the vendor whether the tool was developed with individuals with disabilities in mind. Some possible inquiries about the development of the tool that an employer might consider include, but are not limited to:

- If the tool requires applicants or employees to engage a user interface, did the vendor make the interface accessible to as many individuals with disabilities as possible?
- Are the materials presented to job applicants or employees in alternative formats? If so, which formats? Are there any kinds of disabilities for which the vendor will not be able to provide accessible formats, in which case the employer may have to provide them (absent undue hardship)?
- Did the vendor attempt to determine whether use of the algorithm disadvantages individuals with disabilities? For example, did the vendor determine whether any of

the traits or characteristics that are measured by the tool are correlated with certain disabilities?

What EEOC is telling job seekers

- Ask employer about its use of AI tools and what it is testing for to determine if they might impose problem related to your disability
- If so, notify the employer that you have a medical condition and need an accommodation to ensure you are evaluated accurately
- If you discover the AI poses a problem after the process is underway, notify the employer asap and request an accommodation
- If you have received a poor decision based on AI, think about whether your condition may have prevented you from getting a better result and ask to be reassessed with an accommodation
- If the employer says No, tell them about the EEOC Technical Guidance or contact EEOC to assistance in “next steps”

EEOC “Promising Practices”

AI Selection	Candidate Notification	Processing Requests
Confirm AI tool does not seek health information	Inform individuals that disability accommodations are available along with process for requesting them	Train staff to recognize and promptly process accommodation requests
Ensure AI measures abilities or qualifications for the position's essential functions directly, and not by mere correlation	Clearly explain in an accessible format: -the traits the algorithm assesses; -how it assesses those traits; and -what factors may affect the rating	Train staff to use alternative means of rating individuals when the evaluation process is inaccessible or otherwise unfairly disadvantages someone who has requested a reasonable accommodation
Use tools designed to be accessible to as many different disabilities as possible and that engage in user testing		Ensure third party test administrators either: -promptly forward all accommodation requests to the employer; or -contractually agree to provide reasonable accommodations on the employer's behalf

EEOC Promising Practices:

- Confirm with vendor that the tool does not impermissibly seek or elicit information about an individual's disability or health, except and as allowed regarding reasonable accommodation request.
- Ensure that the tools measure abilities or qualifications for the essential functions of the position directly, and not by mere correlation.
- Use tools designed to be accessible to individuals with as many different disabilities as possible and engage in user testing.

- Inform job applicants and employees that reasonable accommodations are available for individuals with disabilities. Clearly communicate in an accessible format the process for requesting an accommodation.
- Train staff to recognize and promptly process reasonable accommodation requests. Accommodations may include:
 - allowing an applicant to retake an assessment test in another format; or
 - reassessing an applicant's poor test results.
- Train staff to use alternative means of rating job applicants and employees when the current evaluation process is inaccessible or otherwise unfairly disadvantages someone who has requested a reasonable accommodation because of a disability.
- Ensure third party test administrators either:
 - promptly forward all accommodation requests to the employer; or
 - contractually agree to provide reasonable accommodations on the employer's behalf.

Patchwork of state laws

Existing

- **Illinois:** Mandatory pre-use candidate disclosure and consent; video sharing limitations; video destruction obligation; annual race/ethnicity demographic disclosure to state for decisions based solely on AI analysis of video interview
- **Maryland:** Pre-interview written consent is required
- **NYC (January 2023):** Mandatory annual pre-use independent audit for race/gender bias; audit results must be posted on web site prior to use; NYC resident candidates must be given 10 days' notice of use of test and job qualification and characteristics that will be assessed, and allowed to request an alternative selection process or accommodation; data AI tool is collecting must be disclosed publicly or on request

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Illinois: Artificial Intelligence Video Interview Act
 Sec. 5. *Disclosure of the use of artificial intelligence analysis.* An employer that asks applicants to record video interviews and uses an artificial intelligence analysis of the applicant-submitted videos shall do all of the following when considering applicants for positions based in Illinois before asking applicants to submit video interviews:

(1) Notify each applicant before the interview that artificial intelligence may be used to analyze the applicant's video interview and consider the applicant's fitness for the position.

(2) Provide each applicant with information before the interview explaining how the artificial intelligence works and what general types of characteristics it uses to evaluate applicants.

(3) Obtain, before the interview, consent from the applicant to be evaluated by the artificial intelligence program as described in the information provided.

An employer may not use artificial intelligence to evaluate applicants who have not consented to the use of artificial

intelligence analysis.

Sec. 10. *Sharing videos limited.* An employer may not share applicant videos, except with persons whose expertise or technology is necessary in order to evaluate an applicant's fitness for a position.

Sec. 15. *Destruction of videos.* Upon request from the applicant, employers, within 30 days after receipt of the request, must delete an applicant's interviews and instruct any other persons who received copies of the applicant video interviews to also delete the videos, including all electronically generated backup copies. Any other such person shall comply with the employer's instructions.

Sec. 20. *Report of demographic data.*

(a) An employer that relies solely upon an artificial intelligence analysis of a video interview to determine whether an applicant will be selected for an in-person interview must collect and report the following demographic data:

(1) the race and ethnicity of applicants who are and are not afforded the opportunity for an in-person interview after the use of artificial intelligence analysis; and

(2) the race and ethnicity of applicants who are hired.

(b) The demographic data collected under subsection (a) must be reported to the Department of Commerce and Economic Opportunity annually by December 31. The report shall include the data collected in the 12-month period ending on November 30 preceding the filing of the report.

(c) The Department must analyze the data reported and report to the Governor and General Assembly by July 1 of each year whether the data discloses a racial bias in the use of artificial intelligence.

Maryland: Labor and Employment – Use of Facial Recognition Services – Prohibition

3–717.

(A)

(1) In this section the following words have the meanings indicated.

(2) “Facial recognition service” means technology that analyzes facial features and is used for recognition or persistent tracking of individuals in still or video images.

(3) “Facial template” means the machine–interpretable pattern of facial features that is extracted from one or more images of an individual by a facial recognition service.

(B) An employer may not use a facial recognition service for the purpose of creating a facial template during an applicant’s interview for employment unless an applicant consents under subsection (c) of this section.

(C)(1) An applicant may consent to the use of facial recognition service technology during an interview by signing a waiver.

(2) The waiver signed under paragraph (1) of this subsection shall state in plain language:

- (I) The applicant’s name;
- (II) The date of the interview;
- (III) That the applicant consents to the use of facial recognition during the interview; and
- (IV) Whether the applicant read the consent waiver.

New York City: Subchapter 25: Automated Employment Decision Tools

§ 20-870 Definitions.

For the purposes of this subchapter, the following terms have the following meanings:

Automated employment decision tool. The term “automated employment decision tool” means any computational process, derived from machine learning, statistical modeling, data analytics, or artificial intelligence, that issues simplified output, including a score, classification, or recommendation, that is used to substantially assist or replace discretionary decision making for making employment decisions that impact natural persons. The term “automated employment decision tool” does not include a tool that does not automate, support, substantially assist or replace discretionary decision-making processes and that does not materially impact natural persons, including, but not limited to, a junk email filter, firewall, antivirus software, calculator, spreadsheet, database, data set, or other compilation of data.

Bias audit. The term “bias audit” means an impartial evaluation by an independent auditor. Such

bias audit shall include but not be limited to the testing of an automated employment decision tool to assess the tool's disparate impact on persons of any component 1 category required to be reported by employers pursuant to subsection (c) of section 2000e-8 of title 42 of the United States code as specified in part 1602.7 of title 29 of the code of federal regulations.

Employment decision. The term “employment decision” means to screen candidates for employment or employees for promotion within the city.

§ 20-871 Requirements for automated employment decision tools.

a. In the city, it shall be unlawful for an employer or an employment agency to use an automated employment decision tool to screen a candidate or employee for an employment decision unless:

1. Such tool has been the subject of a bias audit conducted no more than one year prior to the use of such tool; and

2. A summary of the results of the most recent bias audit of such tool as well as the distribution date of the tool to which such audit applies has been made

publicly available on the website of the employer or employment agency prior to the use of such tool.

b. *Notices required.* In the city, any employer or employment agency that uses an automated employment decision tool to screen an employee or a candidate who has applied for a position for an employment decision shall notify each such employee or candidate who resides in the city of the following:

1. That an automated employment decision tool will be used in connection with the assessment or evaluation of such employee or candidate that resides in the city. Such notice shall be made no less than ten business days before such use and allow a candidate to request an alternative selection process or accommodation;

2. The job qualifications and characteristics that such automated employment decision tool will use in the assessment of such candidate or employee. Such notice shall be made no less than 10 business days before such use; and

3. If not disclosed on the employer or employment agency's website, information about the type of data collected for the automated employment

decision tool, the source of such data and the employer or employment agency's data retention policy shall be available upon written request by a candidate or employee. Such information shall be provided within 30 days of the written request. Information pursuant to this section shall not be disclosed where such disclosure would violate local, state, or federal law, or interfere with a law enforcement investigation.

§ 20-872 Penalties.

a. Any person that violates any provision of this subchapter or any rule promulgated pursuant to this subchapter is liable for a civil penalty of not more than \$500 for a first violation and each additional violation occurring on the same day as the first violation, and not less than \$500 nor more than \$1,500 for each subsequent violation.

b. Each day on which an automated employment decision tool is used in violation of this section shall give rise to a separate violation of subdivision a of section [20-871](#).

c. Failure to provide any notice to a candidate or an employee in violation of paragraphs 1, 2 or 3 of subdivision b of section [20-871](#) shall constitute a separate violation.

d. A proceeding to recover any civil penalty authorized by this subchapter is returnable to any tribunal established within the office of administrative trials and hearings or within any agency of the city designated to conduct such proceedings.

§ 20-873 Enforcement.

The corporation counsel or such other persons designated by the corporation counsel on behalf of the department may initiate in any court of competent jurisdiction any action or proceeding that may be appropriate or necessary for correction of any violation issued pursuant this subchapter, including mandating compliance with the provisions of this chapter or such other relief as may be appropriate.

§ 20-874 Construction.

The provisions of this subchapter shall not be construed to limit any right of any candidate or employee for an employment decision to bring a civil action in any court of competent jurisdiction, or to limit the authority of the commission on human rights to enforce the provisions of [Title 8](#), in accordance with law.

Patchwork of state laws

Proposed

- **D.C.: Stop Discrimination by Algorithms Act**
 - Prohibits algorithm using a range of personal characteristics
 - Requires notice to candidates with adverse AI results, including the factors used to reach the determination and the opportunity for the candidate to submit corrective information
 - Requires annual bias audit and report to the Office of the Attorney General, including algorithm performance metrics, the reason for using the algorithm, and disclosure of any algorithmic determination complaints received
- **California: Discrimination in Employment regulations** extensively revised to expressly cover AI in all provisions, including provisions that:
 - AI measuring an individual's reaction time may unlawfully screen out individuals with certain disabilities
 - AI analyzing an individual's tone or facial expressions during a video-recorded interview may unlawfully screen out individuals based on race, national origin, gender, or a number of other protected characteristics
 - Personality-based questions, including those asked using an automated-decision system, may constitute a medical or psychological examination or inquiry. Personality-based questions include, but are not limited to, tests or questions that measure: optimism and/or positive attitudes; personal or emotional stability; extroversion or introversion; and/or intensity

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D.C.: <https://trackbill.com/bill/district-of-columbia-bill-558-stop-discrimination-by-algorithms-act-of-2021/2172272/>

California: www.dfeh.ca.gov › [AttachB-ModtoEmployRegAutomated-DecisionSystems](#)

Resources to vet AI tools

Data and Trust Alliance, Algorithmic Bias Safeguards for Workforce Overview, January 2022

https://dataandtrustalliance.org/Algorithmic_Bias_Safeguards_for_Workforce_Overview.pdf

World Economic Forum, Human-Centered Artificial Intelligence for Human Resources, A Toolkit for Human Resources Professionals, December 2021

<https://www.weforum.org/reports/human-centred-ai-for-hr-state-of-play-and-the-path-ahead#report-nav>

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Data & Trust Alliance Safeguards include 4 components: Evaluation (55 questions in 13 categories for completion by the HR vendor), Education and Assessment (detailed guidance for HR teams assessing vendor response), Scorecard (to grade and compare vendors and document issues) and Implementation Guidance (for integrating the safeguards into an organization's systems).

World Economic Forum Toolkit includes a guide covering key topics and steps in the responsible use of AI-based HR tools, and two checklists - one focused on strategic planning and the other on the adoption of a specific tool.

Using AI in HR:

Best Practices and Avoiding Traps for the
Unwary



Kimberly J. Korando

October 25, 2022

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Wage and Hour Update

Wage and Hour Update

//////
Kerry A. Shad


October 25, 2022

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US DOL WHD - 2021 Activity

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- 
- Wage and Hour Division's tally totaled 24,727 cases
 - Down from last year
 - Most were minimum wage and overtime issues
 - 7,287 cases with minimum wage violations (down 10%)
 - employers paid almost \$26 million in back wages
 - 7,159 cases with overtime violations (down 15%)
 - employers paid almost \$139 million in back wages

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US DOL WHD - 2021 Activity

- “Low wage, high violation industries”
- The top offenders:
 - Food Services -
 - 4,237 cases
 - 29,209 employees
 - over \$34.7 million in back wages

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US DOL WHD - 2021 Activity

Top Offenders

- Construction
 - 3,034 cases
 - 21,341 employees
 - over \$36 million in back wages
- Retail
 - 2,705 cases
 - 14,734 workers
 - over \$13.4 million in back wages

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US DOL WHD - 2021 Activity

Top Offenders

- Health Care
 - 1,194 cases
 - 17,079 employees
 - almost \$14 million in back wages
- Agriculture
 - 1,000 cases
 - 10,379 workers
 - Nearly \$8.4 million in back wages

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FLSA Lawsuits - Fewer Filed

- Wage and hour cases filed under the FLSA dropped to a decade low of 5,786 cases in 2021
 - 81 filed in North Carolina federal courts in last 12 months
- Filings reached a high in 2015, with 9,386
- Decrease due in part to use of arbitration which has increased since 2015

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DOL Focuses on FLSA Retaliation

- March 10, 2022 - Field Assistance Bulletin No. 2022-02
 - Anti-retaliation protections safeguard the basic rights afforded to workers
 - “Retaliation, or the fear of it, prevents the most vulnerable workers including those making the lowest wages, immigrant workers, workers of color, and women from exercising their workplace rights”

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DOL Focuses on FLSA Retaliation

- Retaliation occurs when an employer, including through a manager, supervisor, administrator or other agent, takes an ***adverse action*** against an employee because they engaged in a ***protected activity***

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DOL Focuses on FLSA Retaliation

- Examples of “protected activity”:
 - making a complaint to a manager, employer or WHD
 - Oral and written complaints are protected
 - cooperating with a WHD investigation
 - requesting payment of wages
 - refusing to return back wages to the employer

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DOL Focuses on FLSA Retaliation

- Examples of “Protected Activity”
 - complaints by a third party on behalf of an employee
 - consulting with WHD staff
 - exercising rights or attempting to exercise rights, such as requesting OT
 - testifying at trial

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DOL Focuses on FLSA Retaliation

- Employee can be protected even if the employee's complaint is based on a mistaken belief
 - For example, if a worker believes, and tells an employer, that he is owed overtime pay for the hours he worked, the worker has engaged in a protected activity, even if the worker's belief that he is due overtime turns out to be mistaken because he has been correctly paid.

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DOL Focuses on FLSA Retaliation

- “Adverse action” is any action that could dissuade an employee from raising a concern about a possible violation or engaging in other protected activity.
- Examples:
 - termination
 - disciplinary actions
 - threats to employees, their families or co-workers

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DOL Focuses on FLSA Retaliation

- Examples of “Adverse Action”
 - reduction of work hours or rate of pay
 - shift changes or elimination of premium pay
 - blacklisting
 - demotion
 - excluding an employee from a regularly scheduled meeting

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DOL Focuses on FLSA Retaliation

- An employer’s actions may constitute retaliation even if the employer has a mistaken belief that the worker participated in a protected activity.
 - For example, if an employer suspects that a worker filed a complaint with WHD and terminates the worker’s employment, the employer engaged in retaliation even if the worker never actually filed a complaint

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DOL Focuses on FLSA Retaliation

- FLSA also requires that employers provide:
 - “reasonable break time for an employee to express breast milk for her nursing child for one year after the child’s birth each time such employee has need to express the milk”
 - “a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.”
- 29 U.S.C. § 207(r)

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DOL Focuses on FLSA Retaliation

- Example: Employee asks for additional break time to express breast milk.

Aisha is a new mother who works for a call center. She uses her lunch break to express breast milk and needs additional time to finish pumping before she is able to return calls at her work station. Her boss complains when she is late returning from lunch and tells her she cannot use any time beyond her meal break for “personal stuff.” When Aisha asks if she has a right to take another break for pumping later in the day, her boss sends her home for the rest of her shift without pay.
- After investigating, WHD, in addition to requiring the employer to provide the requisite time and space for nursing mothers in compliance with the law, determines Aisha may also be entitled to back pay and liquidated damages for wages she lost when her boss sent her home in retaliation for requesting a break

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DOL Focuses on FLSA Retaliation

- WHD may pursue administrative or legal remedies, including:
 - lost wages
 - reinstatement or front pay
 - liquidated damages (2x back wages) and civil money penalties
 - compensatory and punitive damages

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DOL Focuses on FLSA Retaliation

- Emotional distress damages likely are recoverable
 - No limit
 - 4th Circuit has not decided this issue yet
 - 5th, 6th and 7th Cir. have expressly allowed (Louisiana, Mississippi, Texas, Kentucky, Michigan, Ohio, Tennessee, Illinois, Indiana, Wisconsin)

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Private Settlement of Individual FLSA Claims?

- Courts have generally held that FLSA claims can only be released with authorization by: (1) the U.S. Department of Labor (“DOL”); or (2) judicial approval by a federal judge
- FLSA does not say this
- Eleventh (Florida, Georgia, Alabama) and Second Circuit (New York, Connecticut, Vermont) expressly require approval
- Fourth (North Carolina, South Carolina, Virginia, Maryland, West Virginia), Seventh (Illinois, Indiana, Wisconsin) and Ninth (Alaska, Arizona, California, Hawaii, Guam) also have indicated approval is required

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Private Settlement of Individual FLSA Claims?

- Fifth Circuit (Texas, Louisiana, Mississippi) allows private settlements of “bona fide disputes” as opposed to a compromise of guaranteed rights
- Some district courts in Colorado, Utah, New Mexico, Oklahoma (all Tenth Circuit), Kentucky (Sixth Circuit) and Pennsylvania (Third Circuit) also allow

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Private Settlement of Individual FLSA Claims?

- Where parties agree that Plaintiff is receiving full compensation on the FLSA claim, no approval is necessary

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Private Settlement of Individual FLSA Claims

- Employer may want to avoid the public disclosure of the settlement
 - Copycat claims
 - Plaintiffs' lawyers may see as a target
 - Adverse publicity
 - Desire for ancillary settlement terms (no reemployment, nondisparagement)
- Calculated risk if do not seek court approval
- Settlement Agreement should detail the facts in dispute

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Remote Work

- Fertile ground for allegations of off-the-clock work
- Similarly situated employees = class/collective action
- Risk Mitigation
 - Have a meal and rest break policy for remote employees
 - State in their remote work policy that off-the-clock work is not permitted, condoned or expected – and then ensure that managers are trained on this matter
 - Requiring employees to record or report all time worked, even if away from the office or performed on personal device

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State Law MW/Salary Changes

- 10 states scheduled for minimum wage increases - Alaska, Arizona, Colorado, Maine, Minnesota, Montana, Ohio, South Dakota, Vermont and Washington
- Will also affect salary thresholds
- Check local laws

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Salary Thresholds/Minimum Wage Increases - Select States

- California - \$64,480 annually (\$5,373.33 monthly); \$15.50/hour; computer professionals - \$112,065.20 annually/\$53.80/hour
- Colorado - \$961.54 per week (\$50,000 per year); \$112,500 for persons that meet the duties for “highly compensated employees”; \$13.65/hour
- New York - \$58,500 (\$1,125 per week except professionals same as federal) in New York City, Nassau County, Suffolk County, and Westchester County; \$55,328 (\$1,064 per week) in the rest of the state effective December 31, 2022; \$14.20 effective December 31, 2022, everywhere (except NYC, Nassau, Suffolk and Westchester County where it already is \$15/hour)
- Washington - Small employers (1-50) - \$57,293.60 (\$1,101.80 per week); large employers (51+) - \$65,478.40 (\$1,259.20 per week); \$55.09 per hour for hourly computer professionals; \$15.74/hour

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‘Tis the Season: Bonuses, Gifts, Paid Holidays and the Regular Rate

- Overtime is at least 1.5 times the employee’s regular rate of pay for all hours worked over 40 in a workweek
- Regular rate of pay generally includes all compensation for employment
- Bonuses
 - discretionary bonuses can be excluded from calculating the regular rate
 - employer must retain sole discretion to determine both the fact of payment and the amount
 - payment cannot be made as part of a contract, agreement, or promise that would cause employees to expect the payments

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'Tis the Season: Bonuses, Gifts, Paid Holidays and the Regular Rate

- Non-discretionary bonuses
 - hiring/sign on
 - recognize attendance
 - based on production or quality goals
 - for continued employment for a specific time
 - made as part of an earlier contract, agreement or promise
 - because of collective bargaining

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'Tis the Season: Bonuses, Gifts, Paid Holidays and the Regular Rate

- Gifts can be excluded
- A gift *cannot* be:
 - A payment made under a contract or other legal obligation
 - Measured by an employee's production or efficiency
 - So much that an employee would consider it part of their wages
- A gift *could* be:
 - holiday bonus equal to a weeks' salary for all employees
 - discounts on merchandise not based on hours worked
 - longevity payments not paid under an employment contract or agreement
 - a reward for service that does not depend on the employee's wages, efficiency or production

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'Tis the Season: Bonuses, Gifts, Paid Holidays and the Regular Rate

- Holiday Pay
 - Paid holidays off are excluded
 - Holiday pay for working on a holiday is excluded when employee receives it in addition to compensation at their customary rate for the work performed on that day

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'Tis the Season: Bonuses, Gifts, Paid Holidays and the Regular Rate

- Premium rate for working on the holiday
 - If the premium rate is more than 1.5 times the employee's customary rate this compensation qualifies as a true overtime premium
 - It can be excluded from the regular rate and credited toward OT compensation

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THANK YOU!

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Wage and Hour Update



Kerry A. Shad
October 25, 2022

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Employee Benefit Plan Hot Topics – What Employers Want to Know



Employee Benefit Plan Hot Topics

What Employers Want to Know



Kara Brunk

October 25, 2022

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Agenda

- Retirement Plans
 - Pre-approved Plan Restatement Cycles
 - SECURE Act and CARES Act Amendment Extensions
 - IRS Correction Procedure Changes
- Health and Welfare Plans
 - No Surprises Act Guidance
 - Affordability Standards for Family Coverage
 - Post-Dobbs Employee Benefits Issues

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Retirement Plans

Pre-Approved Plan Restatement Cycles

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Restatement Cycles

- Pre-approved company-sponsored retirement plan documents must be updated every 6 years for changes in plan qualification requirements

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Restatement Cycles (cont'd)

- Defined Contribution Plan Cycle 3: ended July 31, 2022
- Defined Benefit Plan Cycle 2: ended July 31, 2020
- 403(b) Plan Cycle 1: ended June 30, 2020

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IRS Guidance on Untimely Restatements

- No longer a pre-approved plan and loses uninterrupted reliance on the opinion letter; however, not a qualification issue
- Code Section 401(a) Defined Benefit Plans
 - Any prior interim and discretionary amendments made while the plan was a pre-approved plan will need to be reviewed and corrected if not compliant
 - The rules for individually designed plans would govern the remedial amendment period applicable for those, and all other required changes, to determine how far back the form error goes, if one exists
- Code Section 403(b) Plans
 - Never became a pre-approved plan and would be an individually designed plan for the period between the restatement deadline and the date the restatement is adopted

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Applicable Correction Procedure

- Employee Plans Compliance Resolution System of Revenue Procedure 2021-30 (“EPCRS”)
- Self-correction is available so long as the plan satisfies all requirements for the self-correction program, including timing requirements and the requirement for a favorable prior letter
 - Qualified plans meet the requirement of a “prior letter” through the plan’s reliance on an opinion or advisory letter from the prior adoption of a pre-approved plan, as such letter is equivalent to a determination letter
 - 403(b) plans meet the prior letter requirement if the employer had a written plan document in place in 2009 (or in the year the plan was first adopted, if later)
- Voluntary Correction Program (“VCP”) application would only be necessary to correct the failure if the defect has been ongoing for more than three years

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Retirement Plans

SECURE Act and CARES Act Amendments

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SECURE Act

- Required Distributions
 - Permanently increased beginning date
 - Eliminated many beneficiaries' ability to stretch out their distributions
- Multiple Employer Plans
- Nondiscrimination Safe Harbors
- Long-term Part-time Employees
 - Required elective deferral eligibility for long-term part-time employees starting in 2024
- Childbirth or Adoption
 - Eases withdrawals from retirement plans by new parents for birth or adoption expenses

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CARES Act

- CARES Act-Related Distributions (CRDs)
- CARES Act-Related Loans (CRLs)
- Loan Suspension
- Suspension of RMDs

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IRS Notices 2022-33 and 2022-45

- Extended deadline for amendments to adopt provisions enacted under the SECURE Act and CARES Act
- New deadline for non-governmental plans is December 31, 2025

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Retirement Plans

IRS Correction and Audit Procedure Changes

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Anonymous VCP Conference

- Began January 1, 2022
- IRS no longer permits VCP submissions to be made anonymously
- Anonymous written request for pre-submission conference can be made if an authorized representative wishes to discuss a potential VCP submission with the IRS

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IRS 90-Day Pre-Examination Compliance Pilot

- Notification from IRS
 - IRS sends letter notifying plan sponsors by letter that their retirement plan was selected for an upcoming examination
 - 90-day window to review plan document and operations to determine if they meet current tax-law requirements
 - If a plan sponsor does not respond within 90 days, the IRS will contact them to schedule an exam
- Conduct Internal Review and Correction
 - Review plan's documents and operations
 - Use Employee Plans Compliance Resolution System (EPCRS) to correct mistakes
 - Self-correction, if eligible
 - If not eligible for self-correction, request a closing agreement

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Health and Welfare Plans

No Surprises Act Guidance

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Final Regulations & FAQ Part 55

- Final regulation focused on independent dispute resolutions (IDR) process
 - Factors for making a payment determination
 - Requirements for an IDR written decision
 - QPA disclosures by plans and insurers
- FAQ clarifies prior guidance regarding QPA calculations, disclosures, including initial denials and the IDR process, and air ambulances

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Health and Welfare Plans

Affordability Standards for Family Coverage

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Fixing the “Family Glitch”

- Treasury and the IRS have proposed regulations to “fix” the affordability calculation to assist low-income families in qualifying for the subsidy
 - Offer of employer-sponsored plan is affordable for family members if the cost of family coverage does not exceed 9.5% of household income
 - Minimum value (60%) determination also based on the level of coverage provided to the family under the employer plan, rather than the employee-only coverage
- Final regulations apply for tax years beginning after Dec. 31, 2022
- Open enrollment period for the 2023 plan year is Nov. 1, 2022, through Jan. 15, 2023, according to Healthcare.gov

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Impact on Employer Mandate

- Leaves the affordability calculation for employees “as is”
- No impact on employer mandate

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Health and Welfare Plans

Post-*Dobbs* Employee Benefits Issues

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Contraceptive Coverage

- FAQs Part 54 issued July 28, 2022
- Confirm and clarify existing guidance regarding requirement to provide certain contraceptive coverage for non-grandfathered plans under the Affordable Care Act
- Reaffirmed requirement to provide certain contraceptive coverage as preventative care and reiterated Federal law preemption and intent to enforce federal law as related to preventative service requirements

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Group Health Plans and Abortion Coverage

- No federal laws or regulations that require an employer-sponsored group health plan to provide coverage for elective abortions
- Some employers are adding express provisions to group health plans stating that the plan does not cover any services or drugs which are illegal under the law of the applicable jurisdiction in which incurred or procured

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Abortion-Related Travel Benefits

- Group health plan can only reimburse, on a non-taxable basis, “medical care” as that term is defined under Internal Revenue Code Section 213(d)
 - 1973 IRS Revenue Ruling, IRS stated that services for an abortion, in a state where it is legal, are considered medical care under Code Section 213(d)
 - Code Section 213(d)(1)(B) provides that medical care includes amounts paid “for transportation primarily for and essential to medical care”
- Generally subject to ERISA, the Affordable Care Act, HIPAA and COBRA

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Abortion-Related Travel Benefits (cont'd)

- Fully-insured group health plans: governed by the law of the state in which the policy is issued
 - If issued in a state in which abortion is legal, then may be able to add this benefit to major medical policy but would have to ask the carrier and the carrier may have to wait for state approval before adding travel benefits to its policies
 - If issued in a state where abortion is outlawed, then no longer able to cover abortion, including travel benefits for obtaining an abortion
- May be possible to offer the travel benefit outside of the policy, but that should be done through a Health Reimbursement Arrangement (HRA)
 - Integrate with the group health plan, meaning that only employees who participate in the health plan would be eligible for HRA benefits
 - Third-party administration issues
 - Ultimately employer is responsible for compliance
 - Coordinate with HDHP

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Abortion-Related Travel Benefits (cont'd)

- Self-insured group health plans:
 - ERISA generally preempts state civil laws that relate to the ERISA plan
 - ERISA does not preempt criminal laws of general applicability

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Abortion-Related Travel Benefits (cont'd)

- Potential issues if offered through general travel reimbursement policy
 - Taxable benefit
 - No ERISA preemption
 - Careful not to ask for any protected health information in connection with the program

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Employee Benefit Plan Hot Topics

What Employers Want to Know



Kara Brunk

October 25, 2022

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Panel Discussion – What’s New for 2022 in Employment Law

Panel Discussion: What's New for 2022 in Employment Law



J. Travis Hockaday
Panelist



Jenny E. Bobbitt
Panelist



Taylor M. Dewberry
Panelist




Kerry A. Shad
Panelist

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ICE ▸ NEWSROOM

DECEMBER 15, 2021 • WASHINGTON, DC • STUDENT AND EXCHANGE VISITOR PROGRAM, COVID-19, LABOR EXPLOITATION

ICE announces extension to I-9 compliance flexibility

 **Update: Oct. 11, 2022**

The Department of Homeland Security (DHS), U.S. Immigration and Customs Enforcement (ICE), today announced an extension of the Form I-9 flexibilities first announced in March 2020 and updated in March 2021. On February 18, 2022, President Biden issued a notice on the continuation of the state of the National Emergency concerning the COVID-19 pandemic ("COVID-19"). A further extension was granted on April 25, 2022.

Due to the continued safety precautions related to COVID-19, DHS will **extend the updated flexibilities until July 31, 2023.**

RELATED ARTICLES

[DHS announces flexibility in requirements related to Form I-9 compliance](#)

REPORTING




Department of Homeland Security
U.S. Citizenship and Immigration Services

Form I-9
OMB No. 1615-0047
Expires 10/31/2022

Section 2. Employer or Authorized Representative Review and Verification

(Employers or their authorized representative must complete and sign Section 2 within 3 business days of the employee's first day of employment. You must physically examine one document from List A OR a combination of one document from List B and one document from List C as listed on the "Lists of Acceptable Documents.")

Employee Info from Section 1 Last Name (Family Name) Washington First Name (Given Name) George M.I. N/A Citizenship/Immigration Status 2

List A Identity and Employment Authorization	OR List B Identity	AND List C Employment Authorization
Document Title N/A	Document Driver's License Refresh iManage View	Document Title Social Security card (unrestricted)
Issuing Authority N/A	Issuing Authority Virginia	Issuing Authority Social Security Administration
Document Number N/A	Document Number 123456	Document Number 123456789
Expiration Date (if any) (mm/dd/yyyy) N/A	Expiration Date (if any) (mm/dd/yyyy) 02/22/2022	Expiration Date (if any) (mm/dd/yyyy) N/A
Document Title N/A	Additional Information Remote inspection completed on 03/30/2020	QR Code - Section 2 Do Not Write in This Space 
Issuing Authority N/A		
Document Number N/A		
Expiration Date (if any) (mm/dd/yyyy) N/A		
Document Title N/A		
Issuing Authority N/A		
Document Number N/A		
Expiration Date (if any) (mm/dd/yyyy) N/A		

Certification: I attest, under penalty of perjury, that (1) I have examined the document(s) presented by the above-named employee, (2) the above-listed document(s) appear to be genuine and to relate to the employee named, and (3) to the best of my knowledge the employee is authorized to work in the United States.

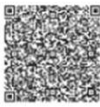
The employee's first day of employment (mm/dd/yyyy): 03/30/2020 (See instructions for exemptions)

Signature of Employer or Authorized Representative Abigail Adams	Today's Date (mm/dd/yyyy) 03/30/2020	Title of Employer or Authorized Representative HR Manager
Last Name of Employer or Authorized Representative Adams	First Name of Employer or Authorized Representative Abigail	Employer's Business or Organization Name Department of Defense
Employer's Business or Organization Address (Street Number and Name) 123 Independence Avenue NW		City or Town Washington
		State DC
		ZIP Code 20210

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Document Title N/A	Additional Information Remote inspection completed on 03/30/2020 COVID-19 Documents physically examined on mm/dd/yyyy by HR Manager Betty Ross	QR Code - Section 2 Do Not Write in This Space 
Issuing Authority N/A		
Document Number N/A		
Expiration Date (if any) (mm/dd/yyyy) N/A		
Document Title N/A		
Issuing Authority N/A		
Document Number N/A		
Expiration Date (if any) (mm/dd/yyyy) N/A		

Employee Health in the Workplace in the Post-Pandemic Era: Hot Topics and Other Challenges under the ADA, the FMLA, and State Laws

Employee Health in the Workplace in the (Almost) “Post-Pandemic” Era


//////
Rosemary Gill Kenyon
October 27, 2022

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The new normal . . .

- 
- COVID is still here . . .
 - Vaccines are not perfect
 - Remote and hybrid schedules may be here to stay
 - Absenteeism persists due to COVID-related issues
 - Ongoing challenges with employee performance
 - New and old challenges managing requests for accommodations and leave

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Impact of COVID on workforce

“Long Social Distancing”

- While many have moved on, COVID fear persists with some individuals
- Believed to have kept 3 million people out of the workforce in first half of 2022, amounting to 2% of workforce
- Reduced nation’s output by \$250 billion during same period

Barrero, Bloom, Davis, *Long Social Distancing*, National Bureau of Economic Research, October 2022, <https://www.nber.org/papers/w30568>

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Impact of COVID on workforce

Long Covid

- Impacts almost 16 million working-age adults (aged 18 to 65)
- 2 to 4 million are out of work due to condition
- Annual cost of lost wages is around \$170 billion a year (and potentially as high as \$230 billion)

Brookings Institute, <https://www.brookings.edu/research/new-data-shows-long-covid-is-keeping-as-many-as-4-million-people-out-of-work/#footnote-5>

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Impact of COVID on workforce

COVID-related absences and disabilities remain a concern for employers

- 34% concerned with COVID-related absences (acute illness, quarantine, isolation)
- 14% concerned with leaves related to long COVID
- 12% concerned with productivity losses related to long COVID

Mercer's 10-minute survey on 3 Big Issues for Health Programs 2022, based on respondents with 500 or more employees, <https://www.mercer.us/our-thinking/healthcare/survey-reveals-covids-continuing-impact-on-us-business.html#contactForm>

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Infectious disease policies - COVID-19

OSHA General Duty Clause

- Perform job hazards assessment relating to COVID-19
- Provide PPE and contact tracing
- OSHA recommends employers follow CDC guidance
- Written policy and safety protocols, to include barring sick employees from workplace
- Consider more expansive state rules (e.g., CA)

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Employer vaccine mandates

Most employers have decided one way or another . . .

- 41% have adopted mandates
- 56% have not

The Littler Annual Employer Survey, May 2022, <https://www.littler.com/publication-press/publication/littler-employer-survey-report-2022>

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Employer vaccine mandates

Many use “soft” mandates

- 45% allow unvaccinated to test and use protocols
- 28% bar unvaccinated from working on site
- 27% terminate employment (no testing) if unvaccinated and no accommodation approved

The Littler Annual Employer Survey, May 2022, <https://www.littler.com/publication-press/publication/littler-employer-survey-report-2022>

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Employer vaccine mandates

Most employers are tracking vaccination status

- 47% use internal software
- 27% use third party or alternative method
- 27% are not tracking

The Littler Annual Employer Survey, May 2022, <https://www.littler.com/publication-press/publication/littler-employer-survey-report-2022>

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Employer vaccine mandates

- EEO laws do not prevent an employer from requiring COVID vaccinations under most circumstances
- Subject to potential accommodations due to disability (ADA) or for religious reasons (Title VII), unless undue hardship results
- State laws may limit process and cause multi-state employers to consider variations in requirements (e.g., AL, AK, FL, IN, KS, MT, ND, SC, UT, WV . . .)

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Employer vaccine mandates

- Discrimination charges filed in response to employer denials of requests for accommodations are starting to make their way to and through the EEOC and state agencies

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EEOC Updated Guidance on COVID-19 testing

- “Business necessity” is required to make medical inquiries or require exams, including COVID-19 testing
- Considerations in determining “business necessity” include:
 - Level of community transmission, vaccination status of employees, accuracy and speed of processing COVID-19 tests, degree of breakthrough infections for employees who are “up to date” on vaccinations, ease of transmissibility of current variant, possible severity of illness from current variant, types of contacts for employees in workplace, potential impact on operations if an employee enters workplace with COVID-19
- COVID testing will meet “business necessity” standard if consistent with CDC guidance

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Other ADA vaccine/testing compliance concerns

- Keep confidential and share only with HR or those who “need to know”
 - vaccination status, test results, medical reasons for accommodation requests, etc.
- Keep separate from personnel files or records accessible by management or others
- Use medically reliable processes
- Stay within parameters of CDC or other official guidance

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Adults with disabilities

- Second largest minority group in the U.S.
- 42.5 million, or 13% of the civilian population

U.S. Census Data, released September 2022, <https://data.census.gov/cedsci/table?tid=ACSST1Y2021.S1810>

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Adults with disabilities

- Historically high levels of employment
 - 5.6 million employed in August 2022
 - 37.6% working or looking for work
- Result of more remote work opportunities and tight labor market

U.S. Census Data, released September 2022, <https://data.census.gov/cedsci/table?tid=ACST1Y2021.S1810>

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Key ADA trends and pitfalls

More conditions are recognized as covered disabilities

- EEOC guidance suggests that COVID-19 and long COVID might be considered
- Be alert for requests based on pre-existing underlying conditions that increase risk from COVID-19

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Key ADA trends and pitfalls

More conditions are recognized as covered disabilities (cont.)

- Gender Dysphoria

Williams v. Kincaid, 4th Cir. August 6, 2022

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Key ADA trends and pitfalls

Mental health issues on the rise

- The percentage of adults who received mental health treatment increased between 2019 and 2021 among adults aged 18-44, from 18.5% to 23.2%*
- 30% of ADA EEOC charges in FY 2021 were based on mental health discrimination claims (up from 10% in 2010)
- Anxiety and PTSD are the leading conditions, accounting for nearly 60% of all mental health EEOC charges and 17.6% of all ADA charges in FY 2021

*Centers for Disease Control and Prevention, September 2022,
<https://www.cdc.gov/nchs/products/databriefs/db444.htm#fig1>

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Key ADA trends and pitfalls

Employers often fail to obtain medical documentation when considering accommodations

- Permitted under the ADA
- Clarifies the condition and how it impacts work and avoids blurriness when things go wrong or get more complicated
- Employees sometimes overstate the need for accommodations, inadvertently or deliberately

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Key ADA trends and pitfalls

Scope of medical documentation needed:

- Diagnosis?
- How condition impacts major life activities?
- How condition impacts ability to perform job duties?
- How long condition will last?
- Recommended accommodations?

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Key ADA trends and pitfalls

Employers too often fail to recognize when the interactive process has been triggered

- Triggered when employer is on notice that a physical condition may impact performance
- No magic words
- May be informal or arise in casual conversation with supervisor or co-worker
- HR might not have necessary information

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Key ADA trends and pitfalls

Employers too often fail to adequately identify the essential functions of the job

- Employee must be able to perform essential functions to be “qualified”
- Employer never has to eliminate or change “essential functions”
- What is an essential function is slippery at times and requires close analysis

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Key ADA trends and pitfalls

Essential functions (cont.)

- With changing duties during the pandemic, essential functions may have changed or been redefined
- In person attendance may or may not be essential

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Key ADA trends and pitfalls

Use “interactive process” in making decisions on reasonable accommodations

- Listen to employee suggestions, but employer gets to choose
- Allowing remote work may open the door to more requests for remote work as an accommodation
- Memorialize accommodations in writing
- Explicitly make them temporary and subject to review as circumstances and needs change
- Keep discussions about performance and medical conditions separate
- Limit discussions of medical conditions between supervisor and employee

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Key ADA trends and pitfalls

EEOC enforcement focus on staffing agencies and temporary workers

- Complicated in ADA cases where a reasonable accommodation is necessary
- Decisions about temporary workers often do not follow the same discipline used for regular workers, making them vulnerable to claims
- Beware and do not assume employer is off the hook

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Paid leave trends

Growing patchwork of state and local paid leave laws

- Paid family and medical leave - 12 states, DC, and growing number of municipalities
- Paid sick leave - 15 states, DC, PR, and more than 30 municipalities

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Paid leave trends

Challenging for multi-state employers

- Notice and posting requirements
- Various rules for accrual and use, definition of family members
- Most state laws prohibit retaliation

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Paid leave trends

Multi-state employers (cont.)

- Policy development - one policy that complies with most generous law or different rules for different states/municipalities?
- Business getting frustrated with patchwork of state and local leave laws (US Chamber)
- Congress periodically considers enacting paid employee leave legislation, but . . .

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Key FMLA trends and pitfalls

Employers often fail to provide appropriate notices

- 3+ FMLA notices are required:
 - Posting/handbook
 - Notice to specific employee when employer acquires knowledge of need for leave, with Notice of Rights (within 5 business days)
 - Designation Notice after employer receives enough information to determine if leave qualifies (e.g., receipt of medical certification) (within 5 business days)

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Key FMLA trends and pitfalls

Employer fails to recognize when the need for leave has arisen

- No magic words
- May be informal, arise in casual conversation
- Employer has an obligation to request more information if needed

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Key FMLA trends and pitfalls

Employee's notice of need for leave

- Employee may be required to use the employer's "usual and customary" method to notify of need for leave
- Dispute when informal practice inconsistent with written policy

Roberts v. Gestamp West Virginia, LLC., 4th Circuit,
August 15, 2022

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Key FMLA trends and pitfalls

Employer takes action that interferes with leave

- US Department of Labor issued guidance on retaliation and interference with FMLA rights

Field Assistance Bulletin No. 2022-02

<https://www.dol.gov/agencies/whd/field-assistance-bulletins>

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Key FMLA trends and pitfalls

FMLA interference claims

- Manager who discouraged employee from taking leave will result in jury trial on employee's claim

Zicarelli v. Dart, 45 F. 4th 1079 (7th Cir. 2022)

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Key FMLA trends and pitfalls

Liability under the FMLA

- Generally, no liability to employer for a procedural infraction that does not result in harm to the employee
- Fix procedural irregularities as soon as discovered to avoid claims

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Practice Pointers

- ✓ Create and follow disciplined practices and procedures for employee requests for accommodations and for leave and centralize handling as much as possible
- ✓ Use all available tools and employer rights under the ADA and FMLA, including requesting medical documentation and certifications, recertifications, return to work certifications, etc.
- ✓ Provide all required notices and stay on top of deadlines, both the employer's and the employee's

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Practice Pointers

- ✓ Train managers to:
 - ✓ Spot ADA and employee leave issues (including absenteeism) and get HR involved immediately and often
 - ✓ Avoid medical discussions with employees, while showing compassion
 - ✓ Avoid expressing irritation at leave-takers
 - ✓ Refrain from any form of retaliation
- ✓ Keep discussions about performance and medical conditions separate

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Employee Health in the Workplace in the (Almost) “Post-Pandemic” Era



Rosemary Gill Kenyon

October 27, 2022

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Marijuana and the Workplace – What the Trend Toward Legalization Means for Employers



Marijuana and the Workplace - What the Trend Toward Legalization Means for Employers



J. Travis Hockaday
October 27, 2022

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What the numbers show . . .

- Test positivity rate of 4.6% for 2021, up from 4.4% in 2020 (but way down from 13.6% in 1988)
- Positivity rate at highest level since 2001; up more than 30% from all-time low of 3.5% in 2010-2012

(Quest Diagnostics Drug Testing Index, released March 2022)

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What the numbers show . . .

- Largest driver is increased positivity for marijuana (especially in recreational use states)
 - In last 5 years, marijuana positivity increased by 50%
 - Marijuana positivity now at 14.8% for oral fluid tests
- Cocaine and meth positivity rates also up - cocaine by 46.6% (from 0.58% to 0.85%) and meth by 26.4% (from 0.53% to 0.67%)

(Quest Diagnostics Drug Testing Index, released March 2022)

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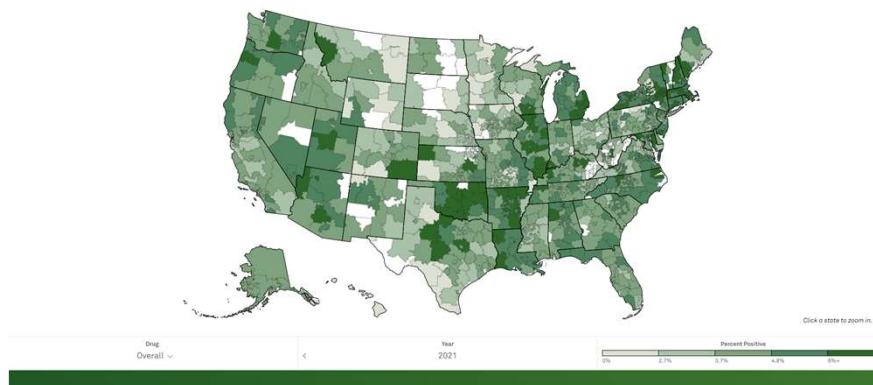
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Who's high(est)?

Drug Testing Index™: Overall Positivity Rate in 2021

This interactive map shows urine drug test positivity for 5 right-to-raise in the United States. The Quest Diagnostics Drug Testing Index™ is a comprehensive analysis of workplace drug use trends. This map is an analysis of the combined U.S. workforce.



Quest Diagnostics Drug Testing Index, released March 2022

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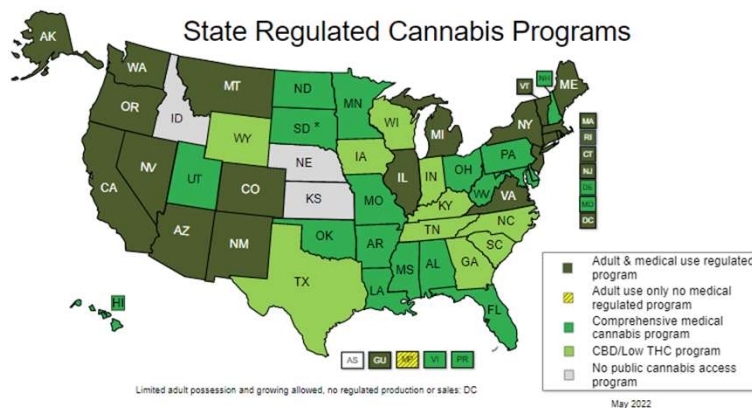
State laws on marijuana

- **ILLEGAL** in all 50 states (per federal law)
- **LEGAL** for recreational and medical use in 19 states and D.C.
 - MN, VT, NY, MA, CT, NJ, VA, MI, IL, NM, CO, MT, WA, OR, NV, CA, AZ, AL, DE (and SD?)
- **LEGAL** for CBD/low-THC in 10 states
 - NC, SC, GA, TN, KY, IN, WI, IA, WY, TX
- **LEGAL** for medical use in 18 states
 - NH, RI, PA, OH, WV, MD, FL, AL, MS, LA, AK, MO, OK, MN, ND, UT, SD, HI
- **NO legal access** in 3 states
 - ID, NE, KS

State laws on marijuana

- **CONSTANTLY CHANGING** and **INCONSISTENT**
- **CONFUSION** across the board for employers

State laws on marijuana



National Conference of State Legislatures, May 2022

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Trends in state laws

- Some states with medical/recreational use laws provide little to no job-related protections for off-duty use of marijuana
- Others (generally states with newer laws) provide more protections for both medical/recreational use
 - States with earlier medical and recreational laws are taking steps to catch up with employee protections

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Trends in state laws

- Based on premise that testing is meant to identify impairment, but most tests show only presence of THC metabolites, which have no correlation to impairment
- Require clear policies regarding impairment (underscores need for defensible reasonable suspicion tests)
- Prohibit discriminating against or penalizing applicants/employees for use off the job and away from work (outright and/or through lawful use laws)

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Trends in state laws

- Still do not require permitting employees to possess, be impaired by, or use while working or on company premises
- Generally permit exceptions for DOT-covered employees, safety sensitive employees, compliance with federal contracts, applicants/employees requiring federal gov't background investigation/security clearance, etc.

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Employee Protections for Medical Use

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

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Employee Protections for Medical Use

- In other medical use states, applicants/employees may have no or no explicit protection
 - Generally, no accommodation obligation, no private right of action, no restriction on discipline
- Status of protection unclear in some states
- Again, trending toward more express protections for medical use

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Restrictions on pre-employment tests

- New York City / Philadelphia
 - Prohibit employers from requiring prospective employees to submit to testing for presence of any THC or marijuana as condition of employment
 - Exemptions exist for certain safety-sensitive roles, DOT-covered workers, and where testing required by applicable law

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Restrictions on pre-employment tests

- New York (state)
 - Per DOL, no testing for cannabis unless employer permitted to do so under applicable state or other laws

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Restrictions on pre-employment tests

- New Jersey
 - Can require pre-employment testing, but cannot take adverse action solely based on presence of marijuana (effectively bans pre-employment testing for marijuana)
 - Must meet “reasonable suspicion” standard - be able to articulate observable signs of impairment while employee on the job
 - Requires use of “WIRE”s

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Restrictions on pre-employment tests

- Nevada
 - Can still test for marijuana, but unlawful to fail/refuse to hire prospective employee because of presence of marijuana in test
 - Exceptions exist for certain public safety positions, DOT-covered workers, workers whose positions could affect safety of others, etc.

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What about pre-employment testing in NC?

- Still OK
- But, more to come on a potential wrinkle . . .

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State of the law per the feds

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

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State of the law per the feds

- Changing politics
 - October 2009 - Obama administration memo encourages federal prosecutors not to prosecute people who distribute for medical purposes under state law
 - August 2013 - Obama administration / “Cole Memorandum” deferred to state enforcement and gave discretion regarding enforcement to U.S. Attorneys
 - January 2018 - AG Sessions rescinded Cole Memorandum, giving prosecutors authority to prosecute anyone violating federal drug laws
 - March 2018 - AG Sessions advised that focus would be on drug gangs
 - Prosecutors “haven’t been working small marijuana cases before” and “are not going to be working them now.”
 - October 2022 - President Biden pardons those who committed or were convicted of offense of simple possession under federal law

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State of the law per the feds

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

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To test or not to test?

- Many employers forging ahead with testing as usual (where they can)
- Other employers are:
 - concerned about staffing shortages resulting from marijuana positivity, especially in states where marijuana is legal
 - removing marijuana from testing panels in light of new laws and because it stays in body for long periods and positive test may not necessarily mean that the person is impaired at work
 - evaluating applicants/positions on case-by-case basis and considering whether marijuana use is/should be a bar (but be careful about disparate treatment)
 - testing only for regulated/safety-sensitive positions

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To test or not to test? - options

- Stop all testing for marijuana
 - Unless required to test specific classes of employees under applicable law (for example, DOT regulated employees)

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To test or not to test? - options

- Tolerate use only if allowed under applicable law; states will fall in different “buckets”
 - States in which marijuana is illegal - keep testing
 - States in which only medical use is legal - keep testing, but keep ADA in mind for those testing positive for claimed medical use
 - States in which all use is legal - stop testing for it, or, if permitted, keep testing but use approach above for medical users
 - States in which all use is legal and testing is illegal - don't test for it

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Pot, or not?

- CBD
- delta-8 THC

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delta-8 THC

- Psychoactive substance found in small traces in hemp and cannabis plants
 - Reported to have psychoactive effects, though weaker
- Chemical structure similar to delta-9 THC, the main psychoactive compound in marijuana
- 2018 Agricultural Improvement Act (“Farm Bill”) - made hemp-derived products below 0.3% THC by volume legal
 - This 0.3% limit is what makes hemp different from marijuana
- Hemp contains over 100 different cannabinoids, including CBD (cannabidiol), but also delta-8 THC

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delta-8 THC and Drug Tests

- Testing looks for THC (that is, delta-9 THC)
- But delta-8 THC is so similar in chemical structure, positive test is possible
- Presumptive test for user of legal delta-8 product may give false positive for illegal delta-9 THC
- If CBD product contains enough THC, could also result in positive test
- Talk to testing provider and consider use of test that is specific enough to determine source of THC (for MRO's use)

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Impact of delta-8 THC/CBD on NC employers

- Must consider lawful use of lawful products statute

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NC Lawful Use of Lawful Products

- Unlawful employment practice for employer of 3 or more employees to fail or refuse to hire a prospective employee, or discharge or discriminate against any employee, because they engage in or have engaged in the lawful use of lawful products:
 - if the activity occurs off the premises of the employer during nonworking hours, and
 - does not adversely affect:
 - the employee's job performance or ability to properly fulfill the responsibilities of the position, or
 - the safety of other employees

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NC Lawful Use of Lawful Products

- Not a violation for an employer to:
 - Restrict lawful use of lawful products by employees during nonworking hours if restriction relates to (1) a bona fide occupational requirement and is reasonably related to employment activities, or (2) fundamental objectives of the organization
 - Discharge, discipline, or take any action against an employee because of their failure to comply with requirements of employer's substance abuse prevention program or recommendations of substance abuse prevention counselors employed or retained by the employer

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Bottom line . . .

- NC's lawful use of lawful products statute generally will provide employees the right to use lawful CBD/delta-8 THC products off duty, provided use does not undermine fundamental objectives of employer
- Are the products lawful?
 - That's complicated . . .

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Recommendations

- Keep current on evolving laws in states/localities in which you operate
 - use a color-coded map
- Decide how marijuana will be treated, considering state/local laws
- Always clearly prohibit possession, use or impairment while working or in workplace
- Avoid advising applicants or employees regarding positivity risk of using delta-9 THC or CBD products - you just don't know

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Recommendations

- Review and solidify reasonable suspicion processes and procedures
 - Train managers and supervisors!
 - Determinations should be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odor of the employee
 - Summarize facts and circumstances surrounding the incident/observation
 - Test right away

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Recommendations

Physical Indicators

- ☐ Bloodshot or watery eyes
- ☐ Flushed or very pale complexion
- ☐ Extensive sweating/skin clamminess
- ☐ Dilated or constricted pupils
- ☐ Disheveled clothing/unkept grooming
- ☐ Unfocused, blank stare
- ☐ Runny or bleeding nose
- ☐ Jerky eye movement
- ☐ Body odor

Behavioral Indicators

- ☐ Fidgety/agitated
- ☐ Irregular breathing
- ☐ Nausea/vomiting
- ☐ Slow reactions
- ☐ Unstable walking
- ☐ Poor coordination
- ☐ Hand tremors
- ☐ Suspicious, paranoid
- ☐ Depressed, withdrawn
- ☐ Lackadaisical attitude
- ☐ Irritable, moody
- ☐ Extreme fatigue

Speech Indicators

- ☐ Slurred or slowed speech
- ☐ Loud, boisterous
- ☐ Incoherent, nonsensical
- ☐ Repetitious, rambling
- ☐ Rapid, pressured
- ☐ Excessive talkativeness
- ☐ Exaggerated enunciation
- ☐ Cursing, inappropriate speech
- ☐ Inability to concentrate
- ☐ Impulsive, unusual risk-taking
- ☐ Delayed decision-making
- ☐ Reduced alertness

ADA/other considerations

- No ADA duty to accommodate illegal drug use
 - But, what is “illegal” now?
- Interactive process for employees with disabilities who are medical marijuana users or are legally using other products
- Protections for addicts
- Leave for treatment

Handling requests for use of CBD/delta-8 THC

- HR to analyze request on case-by-case basis under applicable state law
- If no express state law covering circumstances (for example, if employee not seeking approval for medical use), tell employee company cannot “approve” and remind of risk of THC content
- If state law applicable to use for medical purposes, require employee to:
 - provide documentation to support request for accommodation under ADA, including certification of HCP
 - keep label from product being used in event of positive test

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Long-Term Incentive Compensation Alternatives: Finding the Right Fit for Your Company



Long-Term Incentive Compensation Alternatives: Finding the Right Fit for Your Company

2022 Employment Law Update
October 27, 2022



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Why long-term incentive (LTI) compensation?

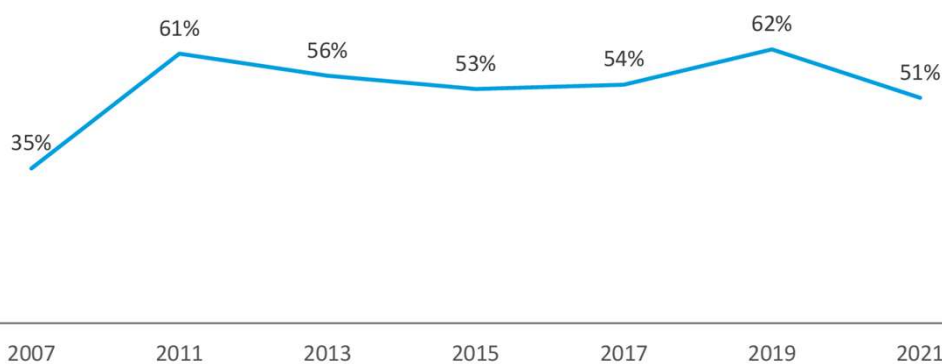
- Four R's: Recruit, Retain, Reward, Retire
- Align management's interests with those of shareholders
- Motivate performance to achieve targeted financial and other company goals

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Prevalence of LTI at privately-held companies (from 2021 WorldatWork survey)



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Know How You Compare

Base + Bonus + LTI = Total Direct Compensation

TCC

TDC

- Consider the mix of pay and the importance of LTI in combination with Total Cash Compensation (TCC) to TDC
- Perform compensation benchmarking

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Setting the Compensation Bar

Balance

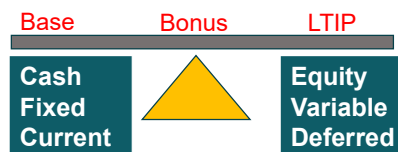
- Among components

Alignment

- With owner and company goals

Results

- Program should drive results for the company, owners and executives



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Some threshold questions:

- Reward based on value of company or financial performance?
- If value, real equity or “synthetic” (aka phantom) equity?
- If value, appreciation only or full value?

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Corporations Real and Synthetic Equity Alternatives

	Appreciation Only	Full Value
Real Equity	Stock Options	Restricted Stock and Restricted Stock Units (RSUs)
Synthetic Equity (aka Phantom Equity)	Stock Appreciation Rights (SARs)	Cash-Settled RSUs (aka Phantom Stock)

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Real equity or synthetic equity?

- Considerations:
 - Ownership dilution (economic is inherent either way)
 - Corporate form (S corp or C corp)
 - Statutory rights (e.g., dividends, voting)
 - Tax treatment
 - Perceived value
 - Accounting treatment (equity vs. liability)

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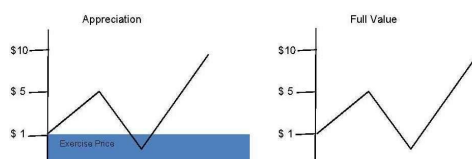
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Appreciation only or full value?

- Considerations

- Growth versus value company?
- Relative value (1:3 or 1:4)
- Underwater awards



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Corporations Stock Options

- The right to purchase a share of stock at a fixed price (the “exercise” or “strike” price) over a set period of time.
- May be incentive stock options (ISOs) or nonqualified stock options (NSOs).
- Exercise price generally equals FMV on date of grant.

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Corporations Restricted Stock (RS) and Restricted Stock Units (RSUs)

- RS is the grant of a share of stock subject to time- and/or performance-based vesting or other restrictions.
- RSUs represent the right to receive the value of a share of stock in the future. RSUs may be settled in stock or cash.

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Corporations Stock Appreciation Rights (SARs)

- SARs represent the right to receive the difference in value between the strike price and the then-FMV of a share of stock in the future usually in cash.
- Like a stock option except no need to come out of pocket to pay exercise price.

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Corporations Cash-Settled RSUs (aka “Phantom Stock”)

- “Phantom stock” can mean different things to different people.
- Cash-settled RSUs are a classic phantom stock award as they represent the right to receive the value of a share of stock in cash in the future.

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The bottom line on taxation:

Only real equity held for the requisite holding period will qualify for long-term capital gains treatment. Otherwise payouts will be ordinary income or taxed at the same rate as if they were.

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Other Value-Based Alternatives

- Instead of value tied directly to FMV of underlying shares, value can be based on the overall value of the company.

	Appreciation Only	Full Value
Aggregate Value of Company	Percentage of increase in overall value (either above value on date of grant or fixed amount)	Percentage of overall value

Evaluating other value-based alternatives

- Considerations
 - Eliminates need to adjust for changes to shares (e.g., stock splits)
 - Solves for dilution resulting from later-in time grants
 - Could eliminate need for regular valuations if pays only on change in control

Performance-Based Alternatives

	Allocation	Objectives-Based
Profit/Cash Flow	Cash plan allocating a % of a pool	
Other Metrics (e.g., EBITDA)		Cash plan paying an objectively determinable amount (often a % (or multiple of a %) of base salary)

Evaluating performance-based alternatives

- Considerations
 - Focuses attention on particular metrics
 - Allows for a bottom-up approach that starts with the individual and aligns to market compensation data

LLCs/Partnerships Real and Synthetic Equity Alternatives

	Appreciation Only	Full Value
Real Equity	Profits Interests Options	Capital Interests
Synthetic Equity	Equity Appreciation Rights	Phantom Equity

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LLCs/Partnerships Profits Interests

- The right to share in distributions representing post-issuance value accretion and/or income.
- Cannot be “in the money” under a hypothetical liquidation at FMV scenario at time of issuance. Typically achieved by setting a “Distribution Threshold” that must be met before recipient shares in distributions.
- May include “catch up” to potentially put recipient in same position as full value award (assuming sufficient value accretion).

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LLCs/Partnerships Profits Interest

- Neither grant nor vesting is a taxable event if certain requirements are satisfied.
- Recipient may have pass-through income.
- Greater potential for long-term capital gain relative to options.

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LLCs/Partnerships Options

- Less common than profits interests, due to less favorable tax treatment.
- Recipient does not own equity (or become a partner for tax purposes) until option is exercised.
- Sometimes used to make appreciation-only awards without immediately triggering additional tax compliance burden.

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LLCs/Partnerships Capital Interest

- Equity award that is “in the money” on a hypothetical liquidation at FMV at time of issuance.
- Can be purchased at full value, purchased at a discount or issued for no consideration other than services.
- Common scenario is “buy-in” for professional services firms.

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LLCs/Partnerships Real Equity - Tax Reporting Complexity

- Recipient becomes “partner” for income and payroll tax purposes and ceases to be an employee.
- Pass-through taxation/phantom income.
- Self-employment tax vs. FICA.
- Estimated tax payments.
- State income tax implications.

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LLCs/Partnerships Synthetic Equity

- Appreciation-Only
 - Equity appreciation rights: Similar to options but no exercise required.
- Full Value
 - Phantom equity: Cash payments equivalent to distributions made to equity holders.

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Design Decisions

- Who is eligible?
 - If payout will be delayed to termination or beyond, may need to limit to “select” group
- Authority to make awards
- Vesting and/or performance periods
- Forfeiture

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Questions?

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Long-Term Incentive Compensation Alternatives: Finding the Right Fit for Your Company

2022 Employment Law Update

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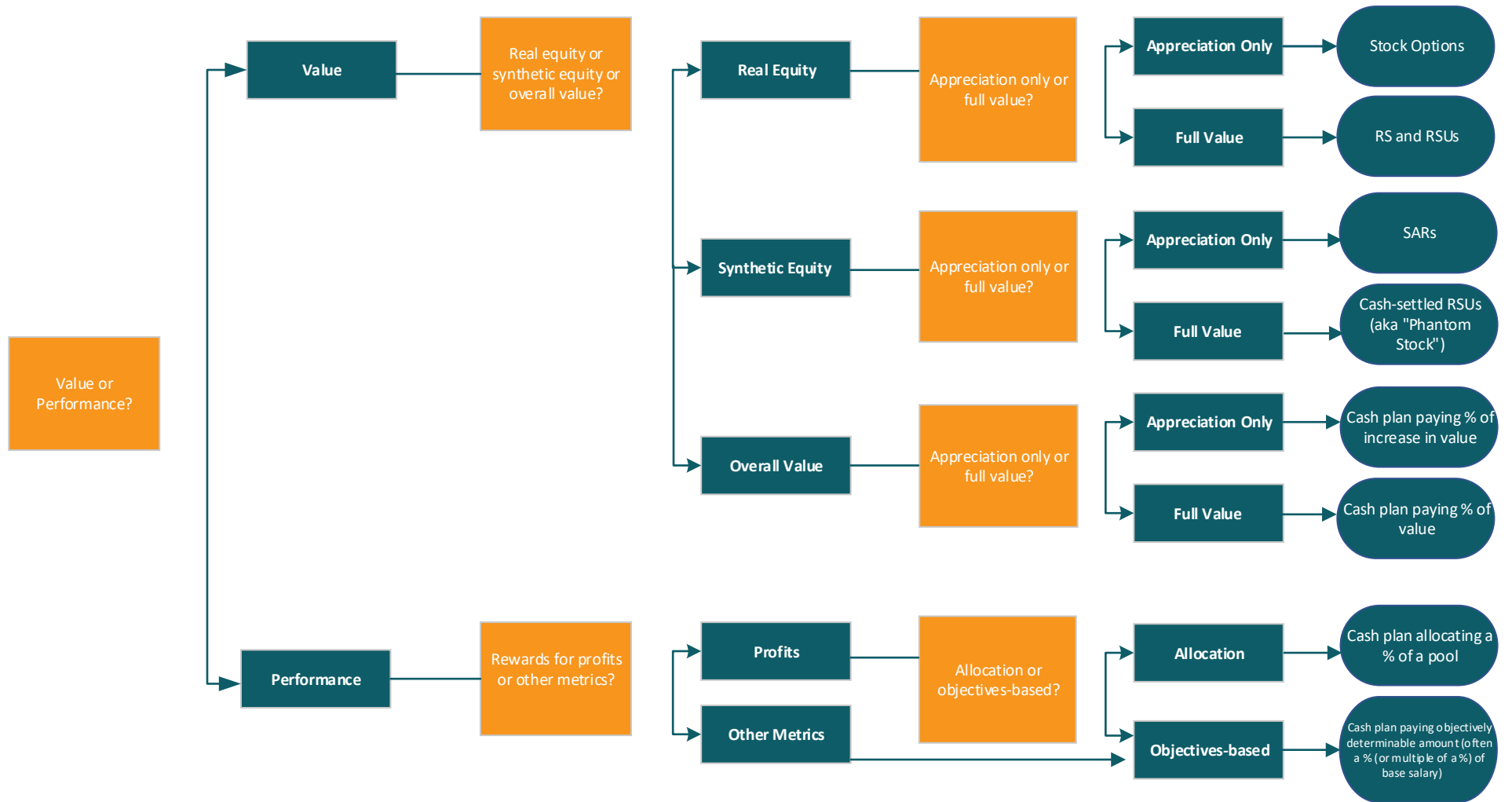


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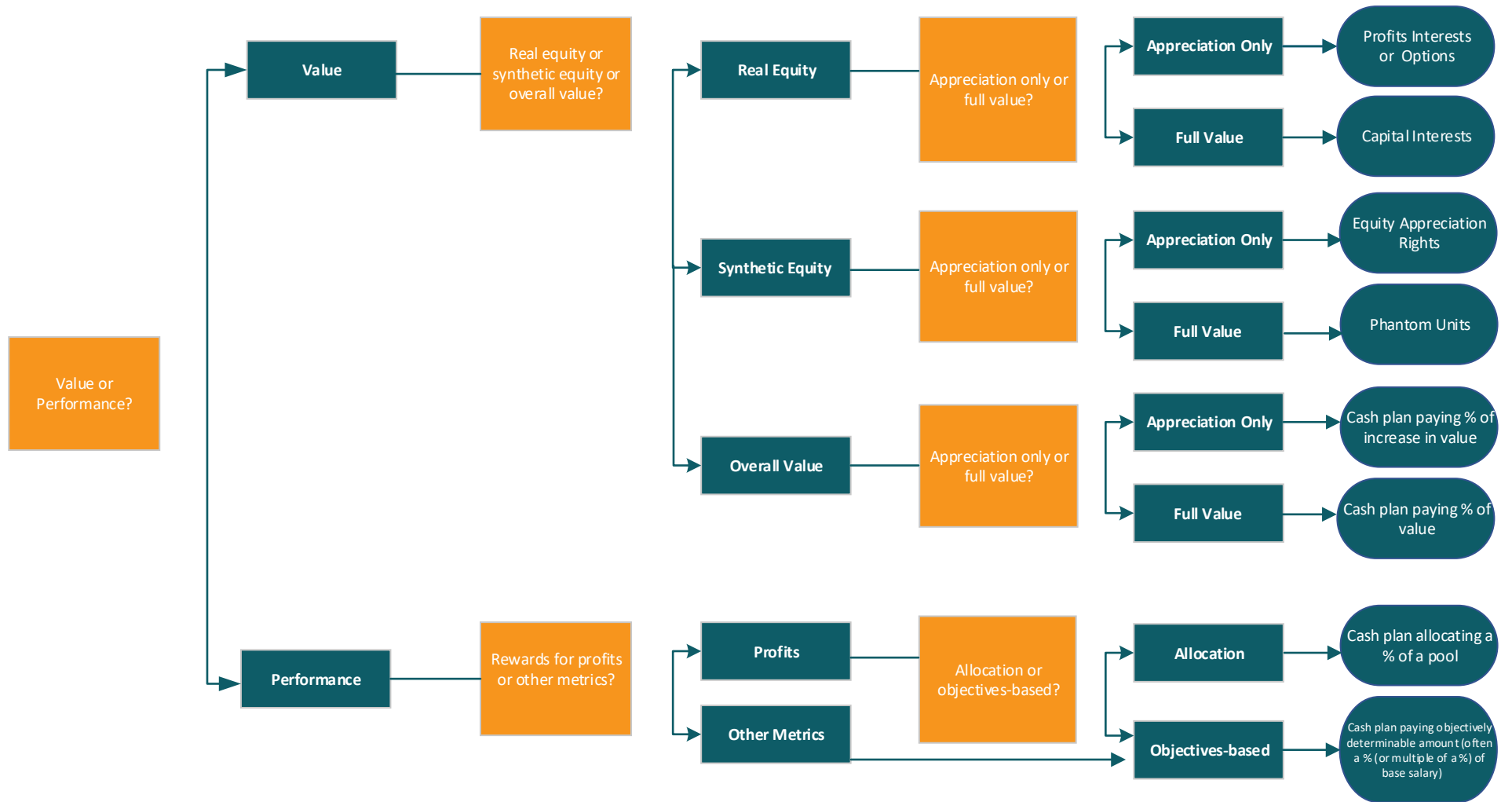
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Long-Term Incentive Compensation Alternatives for Corporations



Long-Term Incentive Compensation Alternatives for LLCs/Partnerships



EEO Update

EEO UPDATE



Zebulon D. Anderson

October 27, 2022

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EEOC DEVELOPMENTS

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Administrative Statistics

- Volume

- FY 2021 = 61,331 charges
- Total charges ↓ each of last 6 years
- Fewest since before 1992 and a 9% decrease from prior year
- Over last 10 years, retaliation and disability claims have increased the most
- Retaliation has remained most common claim for over a decade - now 56% of all charges and continuing to ↑
- Cause finding in only 2.7% - lowest since 1996

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Administrative Statistics (Cont.)

- Location

- Like elsewhere, charge filings are down in NC—fewest since before 2009
- FY 2021: NC - 5% of all charges nationwide
- 8 States (Texas, Florida, California, Georgia, Illinois, Pennsylvania, New York, and North Carolina) account for over 52% of all charges nationwide

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Litigation Statistics

- In FY 2021 - 116 new merits lawsuits filed by EEOC
 - 25% ↑ from FY 2020
 - Nonetheless, much less litigation than 10-15 years ago
 - When EEOC pursues litigation, its results are successful
 - 96% success rate (settlements and jury verdicts)
 - \$34m recovery (lowest since 2014)

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Systemic Statistics

- Systemic cases are EEOC priority
- Systemic cases involve 20+ employees and are focused on matters in which the alleged discrimination has a broad impact
- FY 2021
 - 505 systemic investigations
 - 378 systemic investigation resolutions = \$24.4m
 - Systemic charges: far more likely to result in “cause” determination - 47% vs. 3%
 - New lawsuits: 11% were systemic
 - Active lawsuits: 16% are systemic
 - Litigation resolutions: 26 for \$22.7m benefiting 1,671 employees
 - EEOC litigation is *heavily* focused on systemic cases

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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 (Cont.)

- **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 (Cont.)

- **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**
 - Vacant
 - Karla Gillbride - D - Senior Lawyer with Public Justice -- Nominee
- **Five Commissioners**
 - Janet Dhillon - R - confirmed May 2019 and term ends July 2022
 - Kalpana Katagul - D - Employee-Side - Civil Rights Lawyer -- Nominee
 - 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 Republican controlled, but that likely will change by year-end
 - If Democrats gain control, litigation decision-making likely left to GC and staff
 - More litigation by EEOC

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Strategic Enforcement Plan: FY 2017-2021

- No changes in 2022, though EEOC forecasts an update within 9 months
- 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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Strategic Enforcement Plan: FY 2017-2021 (Cont.)


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

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Strategic Enforcement Plan: FY 2017-2021 (Cont.)


- 
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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EEOC Priorities for 2023

- 
- In connection with its budget request for 2023, EEOC identified its target priorities
 - 1. Racial Justice and Systemic Discrimination
 - Systemic Harassment
 - Systemic Barriers to Entry
 - 2. Pay Equity
 - Women working FT earn 82 cents to a dollar when compared to white men

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EEOC Priorities for 2023 (Cont.)

3. Civil Rights Impact of Covid

- Re-entry to Workplace
- Vaccine Mandates
- Testing and Masking Requirements
- The “Future of Work” - presumably remote-work issues

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EEOC Activities in 2022

- Strange time procedurally
 - Majority of Commission appointed by Republican
 - Chair of Commission appointed by Democrat
 - No GC
 - Pending Nominations will Change the dynamic
- So, not many major initiatives
- Mostly seemed focused on setting stage for next year

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Caregiver Discrimination

- On March 14, 2022, EEOC issued a technical assistance document that applies anti-discrimination laws to caregivers in connection with pandemic
- No new laws or regulations
- Instead, it simply provides EEOC's analysis of existing law to this context

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Caregiver Discrimination (Cont.)

- Federal law does not directly prohibit caregiver discrimination
- But, caregiver discrimination does violate federal law when it is based on a protected characteristic, such as sex or race

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Caregiver Discrimination (Cont.)

- For example:
 - Refusing to hire a female applicant because of concerns that she has caregiver responsibilities is unlawful
 - Refusing to consider a female employee for a position that requires travel because of concerns that she has caregiver responsibilities is unlawful

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Caregiver Discrimination (Cont.)

- Refusing caregiver leave to male employees, while allowing it for female employees is unlawful
- Refusing caregiver leave to employee with same-sex partner because of the employee's sexual orientation is unlawful

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Caregiver Discrimination (Cont.)

- No laws enforced by the EEOC require employers to provide caregiver leave as an accommodation
 - Of course, other laws such as the FMLA may apply
- Employers cannot require pregnant employees to telework to keep them safe from Covid

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Caregiver Discrimination (Cont.)

- Employers, however, must provide pregnant employees with light duty schedules if other employees are offered such schedules
 - For example, if employees who have severe fatigue and difficulty with breathing because of Covid are granted light duty, then pregnant employees also must be provided with such light duty options

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Caregiver Discrimination (Cont.)

- Discriminating against an employee because of the employee's association with someone who is disabled is unlawful
 - For example, refusing an employee's request for unpaid leave to provide care to a spouse who is disabled as a result of Covid is unlawful if such requests are approval for other employees who have personal needs

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Caregiver Discrimination (Cont.)

- The ADEA does not give older employees any right to telework accommodation
 - At the same time, the ADEA does not prohibit employers from providing such an accommodation to older employees, even if it does not provide such an accommodation to employees under 40

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Caregiver Discrimination (Cont.)

- Employers are not required to excuse poor performance caused by caregiver responsibilities
- Harassment based on caregiver responsibilities could violate federal law
 - For example, disparaging female employees for focusing on careers and not caregiver responsibilities could contribute to a hostile environment

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Caregiver Discrimination (Cont.)

- Retaliation against caregivers who reported discrimination concerns is unlawful

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SCOTUS

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SCOTUS

- Very few employment cases
- A few emergency Covid-related decisions
 - Several justices articulate ongoing concerns about regulations and vaccination requirements that do not carve out exemptions for religious objections
 - We anticipate that, following the Supreme Court's lead, courts will continue to look closely at employment law impacts on religion and religious rights

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SCOTUS (Cont.)

- *Kennedy v. Bremerton School Dist.* (2022)
 - First Amendment protects public school coach's right to pray on football field during games
 - A public employer employment decision without a direct impact on private employment
- Several arbitration decisions
 - Fleshed out some nuances to recent decisions that were favorable to compelled arbitration
 - No ground-breaking changes in the law

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SCOTUS (Cont.)

- *Dobbs v. Jackson Women's Health Organization* (2022)
 - Ground-breaking decision that overruled prior decisions
 - Other speakers are covering its impact on the employment arena
- *Students for Fair Admissions v. Harvard* and *Students for Fair Admissions v. UNC*
 - These cases tackle the issue of whether race can be used as a factor in college admissions decisions
 - Oral argument set for October 31
 - The decisions may have a ripple effect on the issue of affirmative action in the employment context

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ARBITRATION

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Arbitration

- The Federal Arbitration Act authorizes the use of arbitration agreements
- SCOTUS has issued numerous decisions over the past 10-20 years that have resulted in the expansion of the use of arbitration agreements
- For example, in 2018, in *Epic Systems*, SCOTUS ruled that arbitration agreements that included the waiver of class action rights were enforceable

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Arbitration (Cont.)

- Earlier this year, a new law was passed that limits arbitration in certain circumstances
- The “Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act” amended the FAA by adding a provision that states:
“[A]t the election of the person alleging conduct constituting a sexual harassment dispute or a sexual assault dispute . . . no pre-dispute arbitration agreement or pre-dispute joint-action waiver shall be valid or enforceable with respect [to a sexual harassment or sexual assault case].”

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Arbitration (Cont.)

- As a result, employees who have sexual harassment or sexual harassment claims can pursue them in court, regardless of any arbitration agreement
- While current federal law favors arbitration, current public opinion does not, and there have been bipartisan efforts to limit mandatory arbitration in certain types of disputes
- So, similar legislation further limiting arbitration would not be surprising

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DISCRIMINATION, RETALIATION, AND EQUAL PAY

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Sempowich v. Tactile Systems Technology (4th Cir. 2021)

- Tactile sells compression devices to treat chronic swelling and wounds
- Tactile hired Sempowich (a woman) in 2007 in a sales position
- She was promoted to Regional Manager in 2014
 - She supervised a 15-person sales team
- In 2014, Tactile also hired Seeling (a man) as a Regional Sales Manager for a different territory

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Sempowich (Cont.)

- On February 12, 2018, Tactile told Sempowich she was being removed from the Regional Sales Manager position for performance reasons
 - She would get a newly created job at same pay rate
 - But, she would have no supervisees
- At the same time, Seeling was reassigned to Sempowich's former region and was promoted to Area Director
- On February 22, Sempowich submitted an internal discrimination complaint
- On March 23, she was told that she would be fired if she did not take the new job

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Sempowich (Cont.)

- Sempowich rejected the new position, and her employment was terminated
- She sued, alleging discrimination, retaliation, and equal pay violations
- The District Court granted summary judgment to Tactile
- She appealed, and the 4th Circuit reversed

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Sempowich (Cont.)

- Discrimination
 - Tactile argued that Sempowich could not establish a claim because she was not meeting their expectations, particularly with regard to team development, and she acknowledged some issues in that area on her performance reviews
 - Tactile argued that Tactile had the right as an employer to identify the performance criteria upon which it based its decision (i.e., team development) and that Tactile and the Court could not substitute their assessment of the proper criteria for what was identified by the employer
 - The District Court agreed

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Sempowich (Cont.)

Sempowich, however, offered evidence that:

- Her overall rating on her performance reviews was positive in 2015 and 2016 (evidently, there was no evaluation for 2017)
- In fact, those overall ratings were better than the ratings that were received by Seeling
- Furthermore, there were abundant positive comments throughout various sections of her performance reviews
- And she received multiple discretionary pay awards throughout her employment
- In fact, she received a raise, combined with an equity grant, less than three weeks before the decision to reassign

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Sempowich (Cont.)

- The 4th Circuit sided with Sempowich, concluding that she had offered sufficient evidence of discrimination to defeat summary judgment
 - Tactile claimed that her performance was unsatisfactory, but if that was true then she should not have received overall positive performance reviews, annual raises, or discretionary pay awards
 - Tactile argued that performance reviews from 2015 and 2016 were not relevant to its decision in 2018, but the court noted that there were no more recent reviews that demonstrated any performance concerns
 - Tactile argued that it had the right to focus on a subset of her performance, and the court did not disagree - but it concluded that the evidence Sempowich offered raised doubts about the offered reason

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Sempowich (Cont.)

- For example, the salary increases and equity awards that she received occurred shortly before she was informed of the reassignment decision, casting doubt on the legitimacy of *any* performance concerns
 - Likewise, Sempowich was replaced by Seeling, who was rated worse than she was overall, further casting doubt on the validity of the job performance rationale
- Accordingly, the Court concluded that Sempowich offered sufficient evidence to permit her discrimination claim to be decided by a jury and that summary judgment had been entered for the employer improperly

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Sempowich (Cont.)

- Retaliation
 - Retaliation claims require: (i) protected activity, (ii) adverse action, and (iii) a causal connection between the two
 - Sempowich's retaliation claim was based on her argument that the decision to terminate her employment if she did not accept the reassignment was motivated by her February 22 internal discrimination complaint
 - The District Court rejected this claim because the reassignment decision took place on February 12 *before* the February 22 protected activity - so, the protected activity could not have caused the adverse action

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Sempowich (Cont.)

- The 4th Circuit, however, concluded that at the time Sempowich was told of the reassignment on February 12, she was not told she would be fired if she did not accept the new position
- Instead, she did not receive that message until March 23, which was after her February 22 internal complaint
- Accordingly, the Court concluded that a jury would need to decide whether Tactile terminated her employment because of the internal complaint

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Sempowich (Cont.)

- Equal Pay Act
 - The EPA prohibits paying a different wage to someone of a different sex who is doing the same job
 - The sole issue in this case was whether Seeling was paid a higher wage than Sempowich - there was no dispute that they were doing the same job
 - Seeling was paid a higher annual base salary at all times, but Sempowich earned more in commissions and thus, overall, was paid more
 - Accordingly, the District Court rejected her claim
 - The 4th Circuit, however, concluded that the claim had to be analyzed by looking just at the pay rate, not aggregate compensation
 - Accordingly, the District Court decision was reversed

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Sempowich (Cont.)

- Lessons:
 - Accurate performance reviews are key
 - Beware of narrative comments that are overly positive if not true
 - If you are doing annual performance reviews, don't skip a year because the missing information might work against you
 - Beware of overall job performance ratings that do not reflect the substance of the entire review - In other words, if there are serious concerns about an aspect of job performance that is important, then the "overall" performance rating should not be overly positive
 - Paying bonuses and discretionary awards to employees who are not meeting expectations may hinder your ability to credibly take adverse action for performance reasons

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Sempowich (Cont.)

- When you make a decision, make sure it is dated and there is documentary evidence
 - It seems likely that when Tactile reassigned Sempowich, it had decided to terminate her employment if she rejected the job, but it failed to document the decision.
- You cannot explain away disparate pay *rates* with bonuses
- With EEOC's expressed focus on equal pay issues, now might be a good time to assess whether your workplace suffers from pay inequality in any positions

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DISABILITY DISCRIMINATION

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Williams v. Kincaid (4th Cir. 2022)

- Williams is a transgender woman (identifies as female, but was assigned male at birth) with gender dysphoria who was incarcerated for a criminal violation
- Gender dysphoria is “discomfort or distress that is caused by a discrepancy between a person’s gender identity and that person’s sex assigned at birth”
- Williams had required hormone therapy treatment for this condition for over 15 years
- At the outset of her incarceration, she was assigned to the women’s side of the prison

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Williams (Cont.)

- But, when prison officials realized that she retained the genitalia with which she was born, they moved her to the men’s side of the prison
- There, she was persistently harassed because of her sex and identity
- When she was released from prison after 6 months, she filed a lawsuit asserting, among other things, disability discrimination claims under the ADA and the Rehabilitation Act
- The District Court dismissed those claims, concluding that gender dysphoria is not a disability under the statutes
- Williams appealed
- The 4th Circuit reversed, 2-1

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Williams (Cont.)

- ADA prohibits discrimination against qualified individuals who have a disability
- A “disability” is a “physical or mental impairment that substantially limits one or more major life activities”
- Everyone agreed that gender dysphoria fits within this definition
- But, the ADA also excluded “certain conditions” from the definition of disability, including “transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairment, or other sexual behavior disorders”

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Williams (Cont.)

- According to the defendants (as well as the District Court and the opinion of the dissenting judge), “gender dysphoria” is excluded from the disability definition because it is a “gender identity disorder not resulting from physical impairment”
- The majority of the 4th Circuit, in a case of first impression throughout the circuits, held otherwise

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Williams (Cont.)

- First, the majority concluded that “gender dysphoria” is not a “gender identity disorder” and thus is outside the statutory exclusion
 - The ADA does not define “gender identity disorder”
 - In 1990, when the ADA was passed, the medical community recognized that “gender identity disorder” was “an incongruence between assigned sex . . . and gender identity”
 - In other words, at that time, “the gender identity diagnosis marked *being transgender* as a mental illness”
 - By 2013, the medical community had rejected entirely “gender identity disorder” and instead recognized “gender dysphoria” as a new condition that had not yet been recognized in 1990

Williams (Cont.)

- In contrast to the no longer valid “gender identity disorder” that was recognized in 1990, the newer “gender dysphoria” condition is not focused exclusively on a person’s gender identity, but instead is defined as a “clinically significant distress” felt by some people who experience an “incongruence between their gender identity and their assigned sex”
- In other words, the majority concluded that the “gender identity disorder” that was recognized in 1990 is entirely different from “gender dysphoria,” which is focused on a type of clinically significant distress, not a state of being
 - The dissent, in contrast, believed that 1990’s “gender identity disorder” included distress related to gender identity and accuses the majority of letting changes in medical understanding modify statutory text

Williams (Cont.)

- As a second and independent basis for its decision, the majority concluded that the statutory exclusion applied only to gender identity disorders “not resulting from physical impairment”
- The majority concluded that Williams’ condition *did* result from a “physical impairment” as reflected by her years of hormone therapy
- Thus, even if gender dysphoria is a type of gender identity disorder (which the majority believes is not the case), Williams has a viable claim because her condition results from physical impairment

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Williams (Cont.)

- Finally, the majority also observed that if it reached the opposite conclusion, it believes it would face a Constitutional problem because a law that excluded gender identity disorder and gender dysphoria would discriminate against transgender people as a class
- The majority believed this would implicate Equal Protection concerns

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Williams (Cont.)

- Because of the history of discrimination against transgender people, laws targeting them must survive “intermediate scrutiny” under the Equal Protection analysis and be supported by “exceedingly persuasive justification”
- And here, the majority saw no justification for excluding transgender people from the protections of the ADA beyond what would have been a desire to harm a politically improper group
- Thus, the majority believes it is prudent to interpret the law in a manner that does not raise such constitutional issues and that does not exclude an entire class of people from the ADA’s protections

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Williams (Cont.)

- Lessons:
 - The ADA is interpreted broadly, and employers generally should assume that conditions are covered by the statute
 - In the 4th Circuit, gender dysphoria is a disability
 - While Williams was not an employment case, its ADA analysis applies to ADA employment claims
 - This case involves an issue of statutory interpretation that is similar to the issue the Supreme Court decided recently when it concluded in *Bostock* that Title VII’s prohibition on sex discrimination applied to sexual orientation and identity discrimination
 - So, it would not be a surprise to see this issue before that court at some point

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PREGNANCY DISCRIMINATION

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EEOC v. Wal-Mart (7th Cir. 2022)

- Wal-Mart operated a distribution center in Wisconsin where it employed workers who unloaded and packed boxes
- In 2014, Wal-Mart implemented a Temporary Alternate Duty Policy that offered light duty assignments to workers injured on the job, allowing them to retain full pay
- Wisconsin has a workers' compensation law that provides compensation for on-the-job injury, and Wal-Mart enacted the policy to reduce costs and improve morale in such situations
- Wal-Mart did not offer light duty to pregnant workers or workers injured off-the-job

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Wal-Mart (Cont.)

- So, pregnant employees who required lifting restrictions were required to go on unpaid leave and were not allowed light-duty
- For example, Cassandra Lein was denied light duty while she was pregnant
 - She continued to work despite increasing pain
 - She avoided reporting restrictions as long as possible, but when she could no longer manage the situation, she was placed on leave
- Likewise, Evelyn Welch “begged for light duty” while pregnant
 - Her request was denied because her boss said it would show favoritism
 - She worked as long as possible but eventually had to quit

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Wal-Mart (Cont.)

- EEOC filed a systemic pregnancy discrimination lawsuit against Wal-Mart on behalf of a class of pregnant workers
- District Court denied a motion to dismiss, and contentious discovery commenced
- Both parties filed motions for summary judgment
- Wal-Mart prevailed
- The EEOC appealed, and the 7th Circuit affirmed

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Wal-Mart (Cont.)

- Title VII prohibits discrimination because of sex
- The Pregnancy Discrimination Act was passed in 1976 to override a Supreme Court decision that concluded that pregnancy discrimination was not sex discrimination
- The PDA accomplished this objective by amending Title VII in two ways:
 - It declared that sex discrimination includes discrimination because of “pregnancy, childbirth, or related medical conditions”
 - It provided that women affected by pregnancy, childbirth, and related medical conditions “shall be treated the same . . . as other persons not so affected but similar in their ability or inability to work”

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Wal-Mart (Cont.)

- In *Young v. UPS* (2015), the Supreme Court addressed the issue of pregnancy discrimination and light duty assignments
 - Young was pregnant and had lifting restrictions
 - She asked for light duty
 - UPS refused
 - UPS did allow light duty to workers injured on-the-job, to workers who needed an accommodation because of a disability, and to workers who were injured off-the-job
 - Essentially, only pregnant employees were denied light duty

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Wal-Mart (Cont.)

- Supreme Court held that an employee could establish a *prima facie* case of pregnancy discrimination by showing that she was pregnant, sought an accommodation, and was denied the accommodation while the employer did accommodate other employees who had similar work restrictions
- The employer then must offer a legitimate non-discriminatory reason for denying the accommodation (which must be more than just the cost associated with allowing it)

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Wal-Mart (Cont.)

- The employee then can show pretext by showing that the employer's policies impose a significant burden on pregnant employees and that the employer's reasons for denying the accommodation are not sufficiently strong
- The Supreme Court concluded that Young had established pretext
 - A large percentage of non-pregnant workers received the light duty restriction, but *no* pregnant workers received it
 - In short, pregnant workers were treated worse than other employees who had similar restrictions

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Wal-Mart (Cont.)

- Turning to this case, there was no dispute that the EEOC had set forth a prima facie case of pregnancy discrimination
- Wal-Mart then articulated a non-discriminatory reason for its policy
 - It reduced workers' compensation liability exposure by continuing to employ injured workers on light duty and it increased morale and loyalty
- The analysis advanced to the pretext stage, and EEOC argued that the Court should follow *Young* and conclude that it had established its claim

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Wal-Mart (Cont.)

- The 7th Circuit disagreed
 - In *Young*, pregnant employees were *the only* employees with restrictions who did not get light duty
 - Here, like pregnant employees, employees with off-the-job injuries or similar non-work-related injuries received no light duty -- only employees with work-related injuries received light duty
 - Accordingly, the Court found insufficient evidence of pretext
- The 7th Circuit noted that in a similar situation, the 2nd Circuit had reached a different conclusion (*Legg v. Ulster County*)
 - But, the 7th Circuit distinguished that case because in *Legg*, the employer offered inconsistent reasons for its policy
 - In this case, however, Wal-Mart's reasons never changed

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Wal-Mart (Cont.)

- Lessons:

- The EEOC is very focused on pregnancy-related leave issues and accommodations, so be very careful when making decisions in this context
- The *Wal-Mart* case is one of the rare examples of the EEOC being unsuccessful with systemic litigation efforts
- If an employer declines to offer light duty to pregnant employees, while offering it to some non-pregnant employees:
 - It needs a clear and consistent non-discriminatory reason
 - It should not treat pregnant employees worse than *all* other similarly situated employees

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EEO UPDATE

Zebulon D. Anderson
October 27, 2022

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