2024 EMPLOYMENT LAW UPDATE

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PROGRAM AGENDA
Tuesday, October 29, 2024

8:30 – 9:00 a.m.	**Registration / Breakfast**
9:00 – 9:05 a.m.	**Welcome** *J. Travis Hockaday*
9:05 – 9:50 a.m.	**Successfully Navigating Change: Legal Updates on Diversity, Equity and Inclusion** *Taylor M. Dewberry* This presentation will review the evolving legal landscape of corporate Diversity, Equity, and Inclusion (DEI) after the *Students for Fair Admissions* case, highlighting the case's continued ripple effects on corporate DEI initiatives. We will delve into key legal updates and provide actionable strategies to mitigate risks while continuing to foster an inclusive workplace culture.
9:50 – 10:40 a.m.	**Today's Employee Organizing: What HR Professionals and Corporate Counsel Need to Know, and Do, Now!** *Kimberly J. Korando and Nelson A. McKown* Today's employees, Gen Z to Gen X, want a voice in their workplace. Organizing, whether through a labor union or by creating their own internal employee organizing committee, has captured their attention as a means for getting that voice. Healthcare, technology, professional services, manufacturing, construction, retail, hospitality, federal contractors…no industry is immune. Recent developments in federal law now require non-government employers to take certain actions, and refrain from others, once an internal employee organizing committee or union claims to represent a majority of the employees. Employer mis-steps or a late response risk serious consequences - a federally-mandated order to bargain with the employees' representative on pay, benefits, and other terms and conditions of employment. This session will cover what HR professionals and corporate legal counsel need to know now: the time deadlines for responsive action; the considerations for the strategic decisions that will need to be made within days; and, most importantly, the policies, practices and supervisor/manager training that need to be reviewed and updated now to protect against an unwanted bargaining order later.
10:40 – 10:55 a.m.	**Morning Break**
10:55 – 11:40 a.m.	**The Latest from EEOC on Unlawful Harassment and Health Issues in the Workplace** *J. Travis Hockaday and Kevin M. Ceglowski* For the first time since 1999, the EEOC has issued new guidance on unlawful harassment in the workplace, and it is chock full of examples of conduct that it would consider problematic in today's workplace. We will unpack the new guidance and discuss what HR and in-house counsel need to know and do now. Additionally, we will focus on the EEOC's strategic enforcement efforts around mental health issues in the workplace and its 2023 guidance on hiring and employing individuals with visual impairments and intellectual disabilities and highlight recent EEOC enforcement actions – both lawsuits and settlements – that provide valuable lessons on the risks of discrimination and failure to accommodate claims under the ADA.

11:40 – 12:25 p.m.	**<u>Pregnant Worker Protections: A Developing Landscape</u>** *Kevin M. Ceglowski and Lauren E. Davis* This session will cover recent developments in the federal Pregnant Workers Fairness Act (PWFA) and PUMP Act as well as the patchwork of state-level laws providing similar protections. We will focus on baseline requirements under federal law to avoid discrimination and failure to accommodate claims from employees and applicants. In addition, we will address state-specific requirements important to multi-state employers – including those with remote workers in other states – to ensure employers are aware of relevant accommodation issues, discrimination risks, and policy and procedure requirements.
12:25 – 1:25 p.m.	**<u>Lunch and Panel Discussion</u>** **<u>Multi-State Madness and Other Hot Topics in Employment Law</u>** *Moderator: Rosemary G. Kenyon* During this fast-moving panel discussion, we will cover key developments in employment laws, including state-specific laws that multi-state employers need to know and that all employers should note in anticipation of what may be on the horizon.
1:25 – 2:05 p.m.	***<u>Advice for DIYers: EEOC Charges and Internal Investigations</u>*** *Kerry A. Shad and Shameka C. Rolla* So, you want to do it yourself? Rather than take that decision personally, we will discuss what to do and what not to do when interacting with EEOC investigators and responding to charges of discrimination and also provide some tips for conducting thorough and effective internal investigations into workplace issues.
2:05 – 2:15 p.m.	**<u>Transition to Breakouts</u>**
2:15 – 3:00 p.m.	**<u>Breakout Sessions:</u>**
Session A	**<u>Making Sense of the Non-Compete Landscape: FTC Fallout and What Comes Next</u>** *Isaac A. Linnartz and Dani B. Dobosz* For much of 2024, the use of non-compete agreements was threatened by the FTC's proposed rule banning non-competes. After the final rule was issued, it was challenged in court and invalidated nationwide, though that ruling could still be appealed. This session will cover the FTC's proposed rule, where it stands, what comes next, and best practices for employers in light of the increasing uncertainty around non-competes.
Session B	**<u>When the Dealin's Done: Benefits Integration Following M&A Transactions</u>** *Caryn C. McNeill and Kara Brunk* Often presentations about benefits in mergers and acquisitions focus on what happens during the deal, including efforts to identify and mitigate related risk and determine what will happen to seller's plans in the deal. But when the deal closes, for the HR and benefits teams tasked with benefits integration, the real work has only begun. Join us as we share not only the legal requirements associated with handling seller's plans, but practical insights about communicating with impacted employees and coordinating plan vendors to achieve the intended outcomes.

Session C	**Safeguarding Data Privacy: The Critical Role of Data Privacy in Human Resources** *David A. Senter, Jr.* In an era where data breaches and privacy violations dominate headlines, the significance of data privacy in Human Resources (HR) cannot be overstated. This presentation delves into the critical role HR plays in managing sensitive employee information, highlighting the importance of robust data privacy practices. We will not only explore an overview of relevant laws and real-world examples of data breaches but will also discuss best practices for data protection and how HR can foster an organizational culture that prioritizes privacy and security.
3:00 – 3:10 p.m.	**Afternoon Break**
3:10 – 3:50 p.m.	**Raising the Bar and the Threshold: USDOL's New Final Rules on Independent Contractors and the Salary Threshold for Overtime Exemptions** *J. Travis Hockaday and James C. King* It has been a busy year for the USDOL. Effective as of March 2024, the USDOL's new independent contractor rule rescinded the prior 2021 rule and replaced it with guidance on how it believes employers should analyze employee/independent contractor classifications. And, in April, it issued a final rule raising the salary threshold for the exemptions from overtime effective July 1, 2024, with a more significant increase to be effective January 1, 2025. During this session, we will discuss what employers need to be doing to prepare for the higher salary threshold and to assess their current and future practices around engaging workers as independent contractors.
3:50 – 4:30 p.m.	**EEO Update** *Zebulon D. Anderson* A discussion of EEOC enforcement trends and plans, as well as select cases representative of recent trends in EEO litigation.

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.

EMPLOYMENT LITIGATION

Employment litigation is an unfortunate yet unavoidable part of doing business today. Our firm is experienced and well-equipped to help your company through the challenges and complexities of these cases. We are effective problem solvers and adept at risk management through early case assessment and use of alternative dispute resolution. At the same time, we are aggressive advocates who regularly defend our clients in matters litigated in state and federal courts across the country.

Whether in individual, class or collective actions, we offer our clients experience, value, efficiency and knowledge of their business and its objectives. We provide a high level of skill, responsiveness and partner involvement, all focused on efficiently achieving defined business and litigation objectives. We offer well-informed legal answers and practical solutions.

Our firm represents companies doing business in North Carolina, as well as North Carolina-based companies doing business in other states; our work stretches coast-to-coast, from New York to California and from Florida to Minnesota. We also partner as local counsel with national law firms who need North Carolina lawyers with in-state connections and experience.

NON-COMPETE & TRADE SECRETS

Proprietary information and business relationships are critical business assets, and our attorneys can help employers protect them. From drafting employment agreements and restrictive covenants to managing high-stakes litigation involving injunctions and emergency relief, our non-compete and trade secrets practice offers wide-ranging experience in matters concerning trade secret misappropriation, confidentiality and non-disclosure agreements, covenants not to compete, unfair competition, employee raiding and other issues concerning the protection of confidential information and business relationships.

OSHA

OSHA enforcement is on the rise and with it the need for experienced and practical legal guidance. Smith Anderson's OSHA lawyers provide substantial resources to help clients navigate the maze of worker safety and OSHA regulations, which can critically impact operations, finances, personnel and sustainability. We assist businesses throughout North Carolina and the Southeast, ranging from start-ups to publicly-traded companies, in connection with their worker safety and OSHA-related needs. Our clients include manufacturers, pharmaceutical companies, convenience store chains, technology and biotechnology companies, health care professionals, builders, materials suppliers, developers, contractors, lenders, investors and public utilities.

MEET OUR TEAM

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"Zeb is a fantastic lawyer. He is consistently responsive, pragmatic and practical." ***– Client quote in Chambers USA***

OVERVIEW

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 100 cases in various industries involving the defense of employment-related claims, including alleged discrimination, harassment, retaliation, wrongful discharge, civil rights violations, labor standards and wage and hour violations, denial of employee benefits and workplace violence.
- Served as lead counsel in aviation industry-based class and collective action alleging violation of wage and hour laws in connection with baggage-related tip and service charge practices.
- Represented global pharmaceutical company in series of class and collective actions filed in Arizona, California and New York alleging that the company's failure to pay its pharmaceutical sales representatives overtime for hours worked in excess of 40 hours per week violated the FLSA and state law.
- Defended employer in the material handling industry that was sued in Florida state court by Fortune 100 company that claimed the employer misappropriated its trade secrets, tortiously interfered with its employee relationships and otherwise unfairly competed with it when the employer hired 19 of its at-will employees over the course of several months.

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

CREDENTIALS

Recognition

- *Business North Carolina* Legal Elite, Employment (2017, 2023-2024)
- *Chambers USA: America's Leading Business Lawyers,* Labor & Employment (2015-2024)
- *Benchmark Litigation*, North Carolina Labor and Employment Star (2018-2021, 2023-2024)
- *The Best Lawyers in America*®
  - Litigation - Labor and Employment (2016-2025)
  - Employment Law-Management (2018-2025)
  - Best Lawyers® 2023 Litigation - Labor and Employment "Lawyer of the Year" in Raleigh
- Super Lawyers
  - North Carolina Super Lawyers (2012-2024)
  - North Carolina Super Lawyers Rising Star (2009)
- Martindale-Hubbell AV Preeminent Rated

Education

- University of Virginia School of Law, J.D., 1994
  - Editorial Board, *Virginia Law Review*, 1992-1994
  - Order of the Coif
- Duke University, B.A., *magna cum laude*, 1991

Bar & Court Admissions

- All North Carolina State Courts
- North Carolina
- 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

SMITH ANDERSON
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Kara Brunk

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"Kara is very thorough and very professional. She provides a wealth of insight and knowledge." ***– Client quote in Chambers USA***

OVERVIEW

Kara's practice is focused in the areas of Employee Benefits and Executive Compensation. In a highly technical and complex area of law, Kara is able to break down and clearly explain complicated issues to employers. 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.

EXPERIENCE

- Represented a Nasdaq-listed bank holding company with employee benefits matters related to its assumption of all customer deposits and certain other liabilities, and acquisition of substantially all loans and certain other assets, of a bridge bank, as successor to the failed bank subsidiary of a Nasdaq-listed bank holding company, from the Federal Deposit Insurance Corporation, as receiver for the bridge bank.
- Advised a multistate skilled nursing, home care, and I/DD company with employee benefits-related matters in its definitive agreement to acquire the largest home care company in Rhode Island.
- 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 life sciences company with employee benefits-related matters in its acquisition of a clinical manufacturing facility for an undisclosed amount.
- 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 life sciences company on its acquisition of a clinical manufacturing facility for an undisclosed amount.
- 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 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.
- Advised a closely held company, a leading provider of tailored operational, training and technical solutions in support of national security missions, in the sale of its business.

CREDENTIALS

Recognition

- *Business North Carolina* Legal Elite, Young Guns (2024)
- *Chambers USA: America's Leading Lawyers for Business*, Employee Benefits & Executive Compensation (2021-2024)
- *Best Lawyers: Ones to Watch® in America,* Employee Benefits (ERISA) Law (2021-2024)
- North Carolina *Super Lawyers*, Rising Stars (2020-2023)
- Staff Member and Contributing Editor, *North Carolina Law Review*, 2010-2012

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

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"He has an incredible work ethic and is always available when needed. He offers practical useful advice that you can operationalize. He is a great business partner who relates to and understands employer needs." **– Client quote in *Chambers USA***

OVERVIEW

Kevin Ceglowski is a partner with Smith Anderson's Workplace Law team with deep experience in advising, representing and defending employers in state and federal courts. His extensive experience includes defending discrimination charges, counseling and advice, drafting employee handbooks and policies, providing employment-related support on mergers and acquisitions, executive compensation, litigation avoidance counseling, administrative employment law, drafting restrictive covenants and litigating restrictive covenant matters, and general employment litigation.

Kevin speaks regularly on employment matters and has been recognized by *Best Lawyers*® (Employment Law), *Chambers USA: America's Leading Lawyers for Business* (Labor & Employment) and *Super Lawyers* (Employment & Labor). Prior to joining Smith Anderson, Kevin worked at a North Carolina law firm, where he advised employers in many areas of employment law.

Kevin enjoys spending time with his family and is an avid reader who buys five books for every one that he finishes reading.

EXPERIENCE

- Represented a private equity-backed telecommunications engineering, construction, and infrastructure company in employment matters related to its equity purchase of a regional specialized construction contractor that provides fiber optic, horizontal directional drilling, and underground utility services.

CREDENTIALS

Recognition

- *Chambers USA: America's Leading Business Lawyers*, Labor & Employment (2017-2023)
- *The Best Lawyers in America*®
  - Employment Law - Management (2023-2025)
  - Litigation - Labor and Employment (2025)
- *Benchmark Litigation*, North Carolina Litigation Star (2023)
- *Business North Carolina* Legal Elite: Employment (2015-2017, 2019-2022)
- North Carolina Super Lawyers Rising Star: Employment & Labor (2012-2016)

Education

- Campbell University School of Law, J.D., 2006
  - Executive Editor, *Campbell Law Review*
- North Carolina State University, B.S. Business Administration, 2001

Bar & Court Admissions

- North Carolina

SMITH ANDERSON
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Lauren E. Davis

ATTORNEY

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OVERVIEW

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.

CREDENTIALS

Education

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

Bar & Court Admissions

- North Carolina

SMITH ANDERSON
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Taylor M. Dewberry

CHIEF DIVERSITY OFFICER & ATTORNEY

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OVERVIEW

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.
- 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.

CREDENTIALS

Recognition

- *Best Lawyers: Ones to Watch® in America,* Labor and Employment Law – Management (2022-2025)
- *Triangle Business Journal,* Leaders in Diversity Award (2024)
- *North Carolina Lawyers Weekly,* North Carolina's 50 Most Influential Women (2024)
- The National Black Lawyers Top 100, Top 40 Under 40 (2020)
- Executive Notes Editor, *Washington University Journal of Law and Policy*

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

Education

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

Bar & Court Admissions

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

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Dani B. Dobosz

ATTORNEY

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919.821.6798

OVERVIEW

Dani Dobosz is an attorney with Smith Anderson's Litigation practice, serving clients on a wide range of business disputes, including contract and business tort claims, employment litigation and non-compete and trade secrets.

While in law school, Dani completed an externship for the Honorable Judge James A. Wynn of the United States Court of Appeals for the Fourth Circuit.

In her free time, Dani enjoys international cooking, hiking and exploring North Carolina's many waterfalls.

CREDENTIALS

Education

- University of North Carolina School of Law, J.D., with high honors, 2022
  - Class Rank: 2nd
- Yale University, B.A., magna cum laude, 2016

Bar & Court Admissions

- North Carolina

SMITH ANDERSON
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Hope C. Garber

ATTORNEY

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OVERVIEW

Hope Garber is a member of Smith Anderson's litigation team, where she works to defend the contractual rights and intellectual property of clients from a diverse set of industries, including the agricultural, aviation and pharmaceutical sectors. She has experience with cases involving breach of contract, copyright and trademark infringement, unfair trade practices, non-compete clauses and business torts.

Hope also serves on Smith Anderson's Recruiting Committee.

Before joining Smith Anderson, Hope practiced with a New England law firm, focusing on class action defense and complex commercial litigation. She enjoys spending time outside with her husband and their two daughters.

EXPERIENCE

- Represented an electric aerospace company in dispute with prototype airframe supplier that claimed exclusive rights to participate in aircraft development and manufacturing program and sought hundreds of millions of dollars in damages. We filed counterclaims, obtained a temporary restraining order requiring return of our client's intellectual property, and obtained a declaratory judgment establishing that our client properly terminated the underlying contract and the supplier had no further right to participate in the program. The matter was ultimately resolved without any payment by our client.

CREDENTIALS

Recognition

- *Best Lawyers: Ones to Watch® in America,* Commercial Litigation (2025)

Clerkships

- Law Clerk to the Honorable Don R. Willett, U.S. Court of Appeals for the Fifth Circuit
- Law Clerk to the Honorable Donald W. Molloy, U.S. District Court for the District of Montana

Education

- Duke University School of Law, J.D., magna cum laude
  - Order of the Coif
  - National Order of Scribes
  - Co-Director, Veterans Assistance Project
  - Managing Editor, *Alaska Law Review*
- Bates College, B.A, magna cum laude
  - Phi Beta Kappa

Bar & Court Admissions

- Maine
- Massachusetts
- North Carolina

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Jamison H. Hinkle

ATTORNEY

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919.821.6686

OVERVIEW

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 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

- Advised numerous employers on 401(k) plan and design changes and regulatory amendments in response to COVID-19 concerns.
- Coordinated company-wide stock option repricing and exchange program for underwater stock options.
- Advised a Nasdaq-listed medical device company 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 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 leading provider of patient support services on employee benefit issues in a definitive agreement to acquire a provider of mobile-based solutions.
- Designed and drafted equity compensation and bonus plans for various start-up companies.
- Represented employer in overhauling existing equity compensation awards for C-Suite officers.
- Prepared and filed corrective Top Hat Plan filings under DOL's Delinquent Filer Voluntary Compliance Program (DFVCP) for Fortune 100 company.
- Advised a leading pharmaceutical and biotech contract development and manufacturing organization (CDMO) on benefits and compensation issues in a definitive agreement to acquire a preferred provider of cGMP Biostorage and pharma support services for an undisclosed amount.
- Coordinated benefit plan corrections arising in sale of major pharmaceutical company.
- Advised terminating Multiple Employer Welfare Arrangement (MEWA) and Voluntary Employees' Beneficiary Association (VEBA) on IRS and DOL compliance issues and distribution of surplus assets.
- Advised insolvent client and officers and directors on potential criminal law violations associated with improper benefit plan terminations.
- Represented employer on 401(k) plan coverage and participation issues in connection with IRS contractor misclassification audit.
- Designed and drafted bespoke nonqualified deferred compensation retention plan for key executives of venture-backed start-up.
- Advised public pharmaceutical company on cash-out of target's stock options, coordination of severance benefits, and post-closing benefits integration.
- Represented a global biopharmaceutical and outsourcing services company in favorably resolving DOL audit of 401(k) Plan reporting failures.
- Coordinated revisions to major pharmaceutical company's self-insured health plan to comply with health care reform rules.
- Designed Section 409A-compliant staggered severance benefits plan for departing executives of publicly-traded pharmaceutical company.
- Advised 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.

CREDENTIALS

Recognition

- *Chambers USA: America's Leading Business Lawyers*, Employee Benefits & Executive Compensation (2023-2024)
- *The Best Lawyers in America*®, Employee Benefits (ERISA) Law (2013-2025)
- North Carolina Super Lawyers Rising Star, ERISA (2013)

Education

- University of North Carolina, J.D., *with honors*, 1996
- Duke University, A.B., 1991

Bar & Court Admissions

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

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J. Travis Hockaday

ATTORNEY
Chair, Workplace Law

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OVERVIEW

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.

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.
- Represented a North Carolina mutual insurance holding company in its merger with a Minnesota mutual insurance holding company, combining two of the nation's leading providers of medical professional liability insurance in the first-ever merger by a North Carolina-domiciled mutual insurance holding company, resulting in a combined company with over $2 billion in consolidated assets.
- 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.
- Represented a private equity fund in its acquisition of a leading digital patient recruitment company.

CREDENTIALS

Recognition

- *Business North Carolina* Legal Elite, Employment (2024)
- *Benchmark Litigation*, North Carolina Labor and Employment Star (2020-2021, 2023-2024)
- *The Best Lawyers in America*®
  - Litigation - Labor and Employment (2019-2025)
  - Employment Law - Management (2025)
- North Carolina Super Lawyers Rising Star (2011, 2018)

Education

- University of North Carolina, J.D., 2003
- Campbell University, B.A., *summa cum laude*, 2000

Bar & Court Admissions

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

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Rosemary Gill Kenyon

ATTORNEY

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OVERVIEW

Rose Kenyon's professional experience involves over 45 years of practice that includes all aspects of employment and labor law in a wide variety of industries. Rose has advised both private and public companies, including their senior executives and boards of directors, on significant employment law risk management matters and potential claims, government audits and investigations, serious discrimination, harassment and misconduct investigations, corporate governance matters, executive employment agreements and compensation and employment matters in mergers and acquisitions.

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 is a past Chair of the firm's Pro Bono Committee.

Early in her career, Rose practiced with a business law firm in Richmond, Virginia.

EXPERIENCE

- Served as lead in-house employment and labor counsel to a Fortune 500 company for 13 years, during a period of rapid change that included major workforce restructurings, union organizational activity, numerous employment based lawsuits and claims (including several multiple plaintiff suits and systemic claims), multiple OFCCP audits (including corporate headquarters and glass ceiling), among other things.
- Lead employment lawyer in numerous merger and acquisition transactions in a wide range of industries that included the resolution of significant transition issues regarding the misclassifications of workers (e. g., wage and hour, independent contractor), leased employee arrangements, liability for significant paid-time-off balances, professional employer organization arrangements, non-competition agreements, executive employment agreements, and cross-border issues, among other things.

- Conducted internal investigations into misconduct, embezzlement, harassment, threats of workplace violence and other wrongdoing, for both publicly-traded and private companies.
- Represented employers in the development of employment agreements, severance and non-competition agreements for senior level officers of both private and publicly-traded companies and private institutions of higher education.
- Represented CEOs and senior level officers of both private and publicly-traded companies, and private institutions of higher education, in connection with their employment agreements in a wide range of industries, including the institutional health care, pharmaceutical, banking, technology and manufacturing industries, and in higher education.
- Represented national and global companies in major reorganizations and downsizings of their workforces, including the relocation of offices, in a wide-variety of industries including the pharmaceutical, hospitality, technology, utility and manufacturing industries.
- Provided strategic and risk management advice on sensitive and high-risk employment decisions and processes, corporate governance and the development of system-wide policies and handbooks.
- Successfully defended employers in federal and state court and before administrative agencies against whistleblower claims under federal and state laws, systemic and individual claims of race discrimination, and sensitive harassment and gender discrimination claims, employment contract claims, wage and hour claims, classification issues, and in government audits.

CREDENTIALS

Recognition

- North Carolina Bar Foundation (NCBF), Endowed Justice Fund Honoring Rosemary Gill Kenyon (2024)
- Fellow, American College of Labor and Employment Lawyers
- *Chambers USA: America's Leading Business Lawyers,* Labor & Employment (2008-2024)
- *The Best Lawyers in America*®
    - Employment Law - Management (2016-2025)
    - Litigation - Labor and Employment (2024-2025)
- Women of Justice Award, *North Carolina Lawyers Weekly* (2012, 2019)
- North Carolina Pro Bono Honor Society
- *Business North Carolina* Legal Elite*,* Employment (2024)
- Super Lawyers
    - North Carolina Super Lawyers (2012-2024)
    - 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

Clerkships

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

Education

- University of Notre Dame, J.D., 1979
- Saint Mary's College (Notre Dame, IN), B.A., *magna cum laude*, 1976

Bar & Court Admissions

- Michigan
- North Carolina
- U.S. Court of Appeals for the Fourth Circuit
- U.S. District Court for the Eastern District of Virginia
- U.S. District Courts for the Eastern, Middle and Western Districts of North Carolina
- Virginia

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James C. King

ATTORNEY

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OVERVIEW

James is an attorney with Smith Anderson's Workplace Law team with a focus on labor and employment matters. He regularly advises employers on compliance with state and federal employment laws, assists with internal investigations, and drafts employment and severance agreements. Outside of his consulting work, James has represented employers through claims involving allegations of discrimination, harassment, retaliation, and wage and hour violations in both federal and state court as well as before regulatory agencies (including the EEOC and NLRB).

Prior to joining Smith Anderson, James was an attorney for an international law firm, where he represented employers through all phases of litigation up to and through trial. He also gained extensive experience representing clients in mediations, arbitrations and settlement negotiations.

James and his wife enjoy spending time with their dog Ramona, cheering on the Hurricanes and trying out new restaurants.

CREDENTIALS

Education

- University of North Carolina School of Law, J.D., with honors, 2017
  - Order of Barristers
  - National Moot Court Team
- North Carolina State University, B.A., magna cum laude, 2013

Bar & Court Admissions

- North Carolina
- U.S. District Court for the District of Columbia

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

SMITH ANDERSON
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Kimberly J. Korando
ATTORNEY

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"Kimberly Korando is a first-class employment lawyer and a brilliant legal mind." ***– Client quote in Chambers USA***

OVERVIEW

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."

As general outside employment and labor and human resources counsel, Kim advises public and private companies in a wide variety of industries including hospitals and healthcare, government contractors, utilities, technology, 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.

A thought leader who frequently speaks and writes on human resources compliance and risk management issues in the business and legal community, Kim regularly collaborates with 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

- Advised technology companies developing AI-powered tools for employee selection and assessment.
- 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.

CREDENTIALS

Recognition

- *Chambers USA: America's Leading Business Lawyers,* Labor & Employment (2005-2024)
- *The Best Lawyers in America*®
  - Employment Law - Management (2007-2025)
  - Labor Law - Management (2007-2025)
  - Best Lawyers® 2024 Employment Law "Lawyer of the Year" in Raleigh
  - Best Lawyers® 2013 and 2021 Labor Law - Management "Lawyer of the Year" in Raleigh
- *Business North Carolina* Legal Elite, Employment Law (2022)
- North Carolina Super Lawyers (2006-2024)
- Fellow, American Bar Foundation
- Martindale-Hubbell AV Preeminent Rated since 1999
- *Oklahoma Law Review*, Note Editor

Education

- University of Oklahoma, J.D., with honors, 1986
- University of Oklahoma, B.S., in psychology, 1980

Bar & Court Admissions

- North Carolina
- 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

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Isaac A. Linnartz

ATTORNEY

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OVERVIEW

Isaac Linnartz focuses on business litigation, employment litigation and pre-litigation dispute assessment and risk mitigation. He has represented businesses across a variety of industries 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, non-solicit and confidentiality agreements, including assessing enforceability and litigating requests for emergency injunctive relief and damages.

EXPERIENCE

Business Litigation

- Represented an electric aerospace company in dispute with prototype airframe supplier that claimed exclusive rights to participate in aircraft development and manufacturing program and sought hundreds of millions of dollars in damages. We filed counterclaims, obtained a temporary restraining order requiring return of our client's intellectual property, and obtained a declaratory judgment establishing that our client properly terminated the underlying contract and the supplier had no further right to participate in the program. The matter was ultimately resolved without any payment by our client.
- Represented one of the nation's largest public utilities in complex contract litigation involving a long-term supply contract. Obtained a favorable judgment on an important remedies provision of the agreement after a bench trial in the North Carolina Business Court.
- Represented an internet marketing company in bringing trade secret and breach of contract claims against public company for misappropriating trade secrets and misusing confidential information obtained during due diligence for a potential business transaction. Obtained preliminary and permanent injunctions barring the defendant from using our client's confidential information or engaging in wrongful competition.
- Represented a publisher of telephone directories in a breach of contract case against a national telecommunications company. After a bench trial, the Court ruled in our client's favor on all issues, issued a declaratory judgment that saved 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 military contractor against race, national origin, and disability discrimination claims and retaliation claims brought by two former employees and obtained summary judgment in federal court.
- Defended a global provider of biopharmaceutical development services and commercial outsourcing services against sex and national origin discrimination claims brought by former pharmaceutical sales representative. The matter was favorably resolved by confidential settlement agreement.
- Defended a global provider of biopharmaceutical development services and commercial outsourcing services against national origin and pregnancy discrimination claims brought by former pharmaceutical sales representative. Obtained summary judgment in federal court in Florida.
- Defended a global provider of biopharmaceutical development services and commercial outsourcing services and supervisor against sex discrimination, disability discrimination, FMLA non-compliance, and FMLA retaliation claims brought by former pharmaceutical sales representative. 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.

CREDENTIALS

Recognition

- North Carolina Super Lawyers Rising Star (2014-2022)
- *The Best Lawyers in America*®
  - Commercial Litigation (2024-2025)
  - Litigation - Labor and Employment (2024-2025)
- *Benchmark Litigation*
  - 40 & Under List (2018-2023)
  - North Carolina Future Star (2024)
  - North Carolina Labor and Employment Star (2019-2021, 2023-2024)
- Selected, North Carolina Bar Association's Leadership Academy, Class of 2016
- Executive Editor, *Duke Law Journal*

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.

Education

- Duke University, J.D., cum laude, 2009
  - *Order of the Coif*
- Duke University Divinity School, Master of Theological Studies, summa cum laude, 2009
- Duke University, B.A., History, 2004

Bar & Court Admissions

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

SMITH ANDERSON
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Justin B. Lockett

ATTORNEY

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919.821.6638

"Do what you can, with what you have, where you are." – ***Theodore Roosevelt***

OVERVIEW

Justin Lockett is an attorney with Smith Anderson's Litigation group and focuses his practice on advising clients on employment and general business litigation matters. Justin has assisted clients with contractual, business tort and general litigation matters in state courts, and has also represented clients in race, sex, age and disability discrimination and retaliation claims in front of state and federal agencies. Justin has represented a variety of clients including automobile dealerships, hospitals, law firms, packaging companies and software companies.

Justin's interests include chess, having served as Lead Chess Coach and Assistant Chief Tournament Director for Triangle Chess.

CREDENTIALS

Education

- Campbell Law School, J.D., with honors, 2022
  - The Order of Barristers
  - Dean's Excellence Merit Scholarship
  - Chief Comments Editor, *Campbell Law Review*
- North Carolina State University, B.A., summa cum laude, 2019

Bar & Court Admissions

- North Carolina

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

SMITH ANDERSON
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Nelson A. McKown

ATTORNEY

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OVERVIEW

Nelson McKown joins us from a national law firm where he began his legal career focusing on significant traditional labor matters and representing companies in employment-related litigation in state and federal courts. He guides companies through union organizing campaigns, unfair labor practice charges, issues with collective bargaining negotiations and related supervisory training, and represents companies before the National Labor Relations Board.

Nelson also focuses his practice on defending employers and supervisors in a broad range of employment-related litigation including discrimination, harassment, retaliation, wrongful discharge, contract and tort claims. He has extensive experience handling issues under the ADA, FLSA, FMLA, NLRA and the WARN Act.

Nelson is a huge sports fan, especially college football and basketball, and he's a diehard West Virginia University fan. One of his "bucket list" goals is to see all 134 NCAA Division I football teams play live.

NOT ADMITTED TO PRACTICE IN NORTH CAROLINA

EXPERIENCE

- Successfully guided manufacturing employers through complex union organizing campaigns as lead counsel and subsequent Representation Hearings before the National Labor Relations Board.
- Successfully obtained dismissal from a multitude of union unfair labor practice blocking charges in a successful decertification election for a coal company.
- Represented hospitals in contentious union organizing campaigns by planning and implementing successful campaign strategies.
- Defend employers and supervisors against employment claims, including, without limitation, claims of discrimination, wrongful discharge and retaliation.
- Successfully obtained summary judgment in federal district court defending against age, disability and FMLA discrimination claims for an industrial storage company.
- Successfully obtained summary judgment in federal district court in a collective bargaining dispute related to the arbitrability of union retiree benefits.

- Played a key role in the passage of business-friendly legislation by lobbying and testifying before the West Virginia Legislature.

CREDENTIALS

Recognition

- West Virginia Super Lawyers – Employment & Labor Rising Star (2022-2024)

Education

- West Virginia University College of Law, J.D., 2020
  - U.S. Supreme Court Clinic
  - Mountain Honorary
  - Merit Scholarship Recipient
- Washington & Jefferson College, B.A., 2017
  - NCAA Division III, Baseball

Bar & Court Admissions

- U.S. Court of Appeals for the Seventh Circuit
- U.S. District Court for the Eastern District of Michigan
- U.S. District Court for the Southern District of West Virginia
- West Virginia

SMITH ANDERSON
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Caryn Coppedge McNeill

ATTORNEY
Management Committee

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OVERVIEW

Caryn McNeill leads Smith Anderson's Employee Benefits and Executive Compensation practice group. Caryn receives a Band 1 ranking in *Chambers USA*. Clients say she is a "*seasoned expert, incredibly knowledgeable and intelligent*" (*Chambers USA* 2021). The firm's Employee Benefits and Executive Compensation group is also highly credentialed, having consistently received the highest ranking (metropolitan Tier 1) from *U.S. News & World Report* and *Best Lawyers*® "Best Law Firms" since 2010 and recently been ranked in Band 1 of *Chambers USA* Employee Benefits & Executive Compensation. Caryn regularly advises public and private companies on all aspects of the design, implementation and administration of employee benefit plans and executive compensation arrangements, including stock option plans and other types of equity-based compensation arrangements. A significant part of her practice is devoted to counseling and negotiating on behalf of clients in connection with mergers and acquisitions.

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

EXPERIENCE

- Represented a Nasdaq-listed bank holding company with employee benefits matters related to its assumption of all customer deposits and certain other liabilities, and acquisition of substantially all loans and certain other assets, of a bridge bank, as successor to the failed bank subsidiary of a Nasdaq-listed bank holding company, from the Federal Deposit Insurance Corporation, as receiver for the bridge bank.
- Represented a North Carolina mutual insurance holding company with employee benefits matters in connection with its merger with a Minnesota mutual insurance holding company, combining two of the nation's leading providers of medical professional liability insurance in the first-ever merger by a North Carolina-domiciled mutual insurance holding company, resulting in a combined company with over $2 billion in consolidated assets.
- 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 special materials company on the acquisition of a leading manufacturer of wear-resistant metallic and ceramic alloy coatings.
- Advised a special materials company on the purchase of substantially all of the assets of a leading manufacturer of value-added ferrotitanium, titanium sponge, titanium powders, and specialty forms.
- 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.
- Represented a private equity fund in its acquisition of a leading digital patient recruitment company.

CREDENTIALS

Recognition

- *The Best Lawyers in America*®
    - Employee Benefits (ERISA) Law (2010-2025)
    - Best Lawyers® 2013, 2016, 2018, 2020 and 2024 Employee Benefits (ERISA) Law "Lawyer of the Year" in Raleigh
- *Chambers USA: America's Leading Lawyers for Business*, Employee Benefits & Executive Compensation (2021-2024)
- North Carolina Super Lawyers (2014-2024)
- *North Carolina Lawyers Weekly*
    - Class of 2024 Icons & Phenoms
    - "Women of Justice" Award Recipient (2019)
    - "Leaders in the Law" Honoree (2017)
- Martindale-Hubbell AV Preeminent Rated
- Triangle Business Leader Media's Pro Bono Impact Award
- Fellow, American Bar Foundation

Education

- Duke University, J.D., 1991

- Davidson College, B.A., with honors in English, 1988
- Holton-Arms School, 1984

Bar & Court Admissions

- North Carolina

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Kelsey I. Nix

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OVERVIEW

Kelsey Nix is one of the most experienced and successful patent litigation attorneys in North Carolina. He has been lead counsel in dozens of litigated patent, trade secret, trademark and copyright cases nationwide, including all of the principal patent venues: the Eastern and Western Districts of Texas, Delaware, Northern and Central Districts of California, New Jersey, Southern District of New York, the International Trade Commission, and the U.S. Patent Office's Patent Trial and Appeals Board (PTAB). Kelsey co-leads Smith Anderson's Intellectual Property Litigation practice. Clients describe him as a strategic and creative litigator who focuses on the end result.

Kelsey joined Smith Anderson after practicing with international law firms in New York City for three decades in a wide range of technologies, including medical devices, aviation and avionics, pharmaceuticals, biotechnology, banking and trading platforms, encryption, e-commerce, microprocessors, telephony, security systems, modems and clean technologies such as LEDs.

During his career, Kelsey has represented and counseled Fortune 1000, privately-held, and private equity and venture capital portfolio companies in their most important IP disputes. He is an experienced trial lawyer and negotiator with a history of protecting major product lines and driving favorable litigation and business results.

EXPERIENCE

- Lead counsel for a major life sciences and clinical diagnostics manufacturer in successfully resolving parallel U.S. and European patent infringement actions, and related inter partes reviews in the U.S. Patent Office, against a competitor, enforcing client's patents relating to fluorescence detection apparatuses useful in polymerase chain reaction (PCR).
- Lead counsel in successfully defending an international spirits manufacturer against patent infringement allegations in the ITC and in New York and Texas district courts.
- Lead counsel for a clinical diagnostics manufacturer in successfully resolving a U.S. patent infringement action against a competitor, enforcing client's patent relating to temperature control reaction modules useful in polymerase chain reaction (PCR).
- Co-chair in an ITC investigation involving digital signal processors, successfully represented semiconductor manufacturer in defending against claims of patent infringement. Following a two-week

trial, the judge found the asserted patent invalid, unenforceable for inequitable conduct, and not infringed. The Commission affirmed.

- A member of teams that successfully represented pharmaceutical manufacturer in multiple Hatch-Waxman patent infringement actions in the district courts, and inter partes reviews (IPRs) in the U.S. Patent and Trademark office, related to abbreviated new drug applications and new drug applications to the FDA seeking approval of generic versions of analgesic oral and patch dosage forms.
- Lead counsel in successfully representing a global leader in the development and manufacture of aviation flight simulators and pilot training programs in enforcing antitrust claims and defending against trade secret and copyright claims involving business jets.
- Lead counsel in obtaining complete defense victory on summary judgment in copyright and trademark infringement case concerning aviation maintenance manuals, *Gulfstream v. Camp*, 428 F.Supp.2d 1369 (S.D. Ga. 2006).

CREDENTIALS

Education

- Duke University School of Law, J.D., 1987
- Columbia University, B.S., Mechanical Engineering, 1984
- Hendrix College, B.A., Physics, 1984

Bar & Court Admissions

- New York
- North Carolina
- Supreme Court of the United States
- U.S. Courts of Appeals for the Federal and Sixth Circuits
- U.S. District Courts for the Eastern, Middle and Western Districts of North Carolina
- U.S. District Courts for the Southern and Eastern Districts of New York
- U.S. Patent and Trademark Office (USPTO)

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Stephen T. Parascandola

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"Stephen's super-responsive; he's good about managing his clients and checking if I need more information or assistance." ***– Client quote in Chambers USA***

OVERVIEW

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

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

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

He regularly counsels clients on risk management, particularly with respect to mergers and acquisitions, due diligence, insurance matters, investigations and audits, and public company environmental disclosures. He also has extensive experience representing clients before regulatory agencies and has handled a broad range of complex transactions for the purchase, sale, leasing, construction and development of commercial, industrial, and public utility properties.

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

View Less

EXPERIENCE

- Advised a special materials company on the purchase of substantially all of the assets of a leading manufacturer of value-added ferrotitanium, titanium sponge, titanium powders, and specialty forms.
- Advised an investment company in a definitive agreement to purchase the outstanding equity interests of the largest independent blender and packager of lubricants to the automotive, agriculture, commercial and heavy duty markets in North America.
- Served as local environmental counsel for Fortune 100 company that owns and operates large scale waste-to-energy facilities.
- Represented a major convenience store chain for over 20 years in connection with acquisitions, enforcement defense, environmental permitting, and private party settlements throughout 14 states.
- Represented a leading North Carolina developer in connection with contaminated property redevelopments throughout North Carolina.
- Represented a global developer and manufacturer of pharmaceuticals, biopharmaceuticals and agrochemicals in connection with defense of one of the single largest OSHA enforcement actions ever brought by the N.C. Department of Labor.
- Represented an international privately-held soft drink manufacturer, seller and distributing company in connection with its acquisitions and environmental and OSHA compliance at facilities across the United States.
- Represented one of North Carolina's largest community banks in connection with financing of Brownfields Program projects throughout North Carolina.
- Advised a semiconductor and LED company on the environmental aspects of the divestiture of its lighting products business unit for an initial cash payment of $225 million plus the potential to receive an earn-out payment based on the business's post-closing performance.
- Assisted the largest electric utility in the United States for over 16 years with acquisitions, dispositions, and regulatory compliance regarding the utility's power plant properties, lakes, substations, transmission and distribution projects across North and South Carolina.
- Represented a national paper product company in connection with its environmental permitting and OSHA compliance at several North Carolina facilities.
- Represented a major convenience store chain with environmental insurance coverage disputes throughout the Southeast.
- Represented the largest electric utility in the United States who is a performing party in a CERCLA removal action at the largest Superfund Site in North Carolina and also in related contribution litigation brought against over 150 parties.

- Represented the nation's third-largest poultry producer in OSHA enforcement defense, managing OSHA inspections, and with responses to employee complaints made to NCDOL's OSH Division.
- Represented one of the nation's largest convenience store chains with the acquisition of 47 stores and 6 ethanol distribution facilities in Kansas and Missouri.
- Assisted a global developer and manufacturer of pharmaceuticals, biopharmaceuticals and agrochemicals with OSHA compliance, document requests and inspections by NCDOL's OSH Division.
- Represented various clients to defend against and avoid to third-party claims for property damage and personal injury related to off-site contamination from underground storage tanks and general facility operations.

CREDENTIALS

Recognition

- *Chambers USA: America's Leading Business Lawyers,* Environmental (2013-2024)
- *The Best Lawyers in America*®, Environmental Law (2007-2025)
- *Business North Carolina* "Legal Elite," Environmental
- Martindale-Hubbell AV Preeminent Rated
- North Carolina Super Lawyers (2010-2013, 2016-2021)
- Marquis *Who's Who in American Law*
- Fluent in Italian and Spanish; conversational and written Portuguese

Education

- Stetson University, J.D., 1988
  - *Law Review*
- Eckerd College, B.A. 1984
- Universidad Complutense de Madrid, 1982-1983

Bar & Court Admissions

- Florida
- New York
- North Carolina

SMITH ANDERSON
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Susan Milner Parrott

ATTORNEY

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OVERVIEW

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

EXPERIENCE

- Served as lead employment lawyer in the representation of a publicly-traded specialty pharmaceutical company in its acquisition of a privately-traded specialty pharmaceutical company.
- Served as lead employment lawyer for numerous acquisitions by a multi-state, publicly-traded convenience store operator.
- Prepared executive employment agreement for the president and chief executive officer of a publicly-traded bank holding company.
- Responsible for executive employment agreements required for the succession of the chief executive officer of a publicly-traded, global manufacturer of consumable products.
- Successfully defended U.S. Department of Labor investigations of wage and hour exemption classification in various industries including banking, software, retail distributing, restaurant, civil engineering and pharmaceutical manufacturing.
- Successfully defended North Carolina Department of Labor investigation of wage payment practices for retail distributing company.
- Conducted internal audits of wage and hour and wage payment matters for clients in various industries, including banking, pharmaceutical manufacturing and sales, retail and internet/technology.
- Advised a multinational Fortune 500 provider of product development and integrated healthcare services on employment-related matters in its merger with a NYSE-listed global information and technology services company, creating a leading information and tech-enabled healthcare service provider. The equity market capitalization of the joined companies was more than $17.6 billion at closing.
- Advised a private equity fund on employment-related matters in connection with its acquisition, equity and debt financing of a reference laboratory.

- Advised a leading contract research organization on the employment law aspects of a definitive agreement to acquire a provider of contract research, clinical and regulatory and other consulting services.
- Advised a leading healthcare services provider on employment-related matters in connection with its $60 million cash acquisition of a global sourcing company.
- Advised a leading provider of pharmacy-based patient care solutions and medication synchronization services to independent and chain pharmacies on employment-related matters in its approximately $41 million sale of the company to a publicly-traded buyer.
- Advised a French multinational industrial and steel distributor on employment-related matters in connection with its acquisition of a controlling interest in a Virginia-based steel service center.
- Advised a frozen foods company on employment-related matters in connection with a definitive agreement to acquire a frozen snacks business.
- Appellate advocacy practice has included representation of clients before the North Carolina appellate courts, the Fourth Circuit Court of Appeals and the Supreme Court of the United States.

CREDENTIALS

Recognition

- *The Best Lawyers in America®,* Employment Law - Management (2025)
- Martindale-Hubbell AV Preeminent Rated
- Fellow, American Bar Foundation

Education

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

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

Duke University, B.A., with honors 1974

Bar & Court Admissions

- North Carolina
- 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

SMITH ANDERSON
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David A. Pasley

ATTORNEY

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OVERVIEW

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

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

EXPERIENCE

- Represented a company in successfully protecting and enforcing intellectual property rights.
- Represented multiple corporations in defending claims of false advertising.
- Represented owner of commercial real estate in action brought to enforce property rights.
- Represented a private individual in dispute with the United States involving tax refund.
- Represented a company in defending claim arising out of breach of contract claim involving medical devices.
- Represented various employers in defending against sex, gender, and disability discrimination claims, as well as claims of wrongful termination and/or retaliation.
- Represented an electric aerospace company in dispute with prototype airframe supplier that claimed exclusive rights to participate in aircraft development and manufacturing program and sought hundreds of millions of dollars in damages. We filed counterclaims, obtained a temporary restraining order requiring return of our client's intellectual property, and obtained a declaratory judgment establishing that our client properly terminated the underlying contract and the supplier had no further right to participate in the program. The matter was ultimately resolved without any payment by our client.

CREDENTIALS

Recognition

- *Best Lawyers: Ones to Watch® in America,* Commercial Litigation (2023-2025)
- Articles Editor, *North Carolina Law Review,* 2017
- 2015 Gressman-Pollitt Award for Best Overall Oral Advocacy

Clerkships

Honorable Thomas D. Schroeder, United States District Court for the Middle District of North Carolina

Education

- University of North Carolina School of Law, J.D., *with high honors*, 2017
  - Order of the Coif
- University of North Carolina, B.A., Philosophy*, with distinction*, 2012

Bar & Court Admissions

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

SMITH ANDERSON
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Edward F. Roche

ATTORNEY

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OVERVIEW

Ed Roche helps businesses navigate a wide range of challenging disputes. He is an adept copyright and trademark lawyer. Representing both copyright and trademark holders and those accused of infringement, he has successfully resolved dozens of intellectual property disputes for clients both in the early stages and deep into lengthy litigations. Ed also handles complex trade secret and non-compete cases, many of which intersect with intellectual property law and draw on his copyright and trademark experience. Ed's practice also includes a large volume of cases involving claims for breach of contract, unfair trade practices, breach of fiduciary duty and violations of securities laws.

Ed prioritizes every client's business interests in every dispute. He works with clients to optimize their positions and evaluate their litigation risks. Ed is comfortable taking cases to trial when necessary but frequently finds creative business solutions that serve a client's overall business goals.

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

As the Vice President of the Triangle Chapter of the British-American Business Council, he helps British businesses navigate the American market and cultivates business and cultural connections between his native United Kingdom and his adopted home of North Carolina.

Ed cherishes time with his wife and two young children. He is a fan of college basketball, Premier League soccer and live music.

EXPERIENCE

Copyright and Trademark

- Defended against copyright and trademark claims, and pursued IP counterclaims, on behalf of a major national auto products retailer and an auto goods manufacturer.
- Defended a construction company in a copyright dispute, prevailing after a two-day arbitration.
- 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").

Non-Compete and Trade Secret Litigation

- Represented digital marketing company pursuing claims against former employees for theft of software code for a proprietary marketing tool.
- Defended global technology company against competitor's claims of trade secret misappropriation and interference with contract.
- Represented various employers in enforcing employee non-compete provisions.

Other Business Litigation

- Defended against two successive motions for preliminary injunctions in a multimillion-dollar case between software competitors.
- Represented a bank in emergency proceedings to prevent harm to customers due to technology vendor's actions.
- Defended a government contractor against a whistleblower complaint, involving administrative proceedings in the Department of State and an appeal to a federal appeals court.
- Helped litigate and resolve disputes between CROs, sponsors, and sites concerning clinical trial obligations and charges.
- Represented CRO in responding to subpoena in multi-district litigation alleging medical device defects.
- Defended directors against shareholder derivative actions alleging securities violations, breaches of fiduciary duties and various related claims in state and federal courts.
- Represented mutual fund advisors against claims of excessive fees.
- Advised a university on potential antitrust dispute concerning the competitive opportunities open to the university's athletic program.
- Represented multinational technology companies responding to regulators' allegations of antitrust violations.
- Provided advice on First Amendment arguments for a news website to raise in appealing trial verdicts obtained by a public figure based on the website's news report.
- Represented a major pharmaceutical company in an investigation launched in response to a federal government subpoena seeking information on compliance with Anti-Kickback Statute.
- Served as counsel to the American Bar Association and individual plaintiffs in a lawsuit against the Department of Education, challenging the department's conduct in relation to the Public Interest Loan Forgiveness Program.
- Wrote briefs and delivered arguments to the U.S. Court of Appeals for the Sixth Circuit on behalf of a federal habeas petitioner.
- 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.

CREDENTIALS

Recognition

- *Best Lawyers: Ones to Watch® in America*
  - Commercial Litigation (2022-2025)
  - Litigation – Intellectual Property (2022-2025)
  - Litigation – Labor and Employment (2024-2025)
- North Carolina Super Lawyers Rising Star (2022-2024)

Clerkships

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

Education

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

Bar & Court Admissions

- District of Columbia
- Massachusetts
- North Carolina
- Supreme Court of the United States
- U.S. Court of Appeals for the District of Columbia Circuit
- U.S. Court of Appeals for the Eleventh Circuit
- U.S. Court of Appeals for the Fifth Circuit
- U.S. Court of Appeals for the Fourth Circuit

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

SMITH ANDERSON
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Shameka C. Rolla

ATTORNEY

srolla@smithlaw.com
919.821.6652

OVERVIEW

Originally from Eastern North Carolina, Shameka attended Duke University and Wake Forest University School of Law before joining Smith Anderson's Business Litigation and Workplace Law practice groups.

Her practice focuses on a wide range of business disputes, including contract, intellectual property, non-compete and trade secrets and business tort claims, as well as employment disputes, in which she defends employers against claims involving discrimination, wrongful discharge, retaliation, harassment and civil rights claims. As a result of witnessing her parents' experiences running their own small business, Shameka approaches her client's business and employment disputes with compassion, a desire to understand her client's business and goals, and a focus on efficiency, minimal business disruption and conflict resolution.

She enjoys live sporting events, attending Pilates and Barre classes, walks with her dog and Duke University basketball – Shameka served as a "line monitor" for student attendance at men's basketball games while attending Duke University.

EXPERIENCE

- Defend employers against employment claims, including, without limitation, claims of discrimination, wrongful discharge, and retaliation, and wage and hour claims.
- Conduct 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 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.

- Assist clients in responding to third-party subpoenas.
- Defended a global technology company against competitor's claims of trade secret misappropriation and interference with contract.
- Represented claimant client in multi-million-dollar arbitration involving breach of contract claim resulting in award of full damages with pre- and post-judgment interest and attorneys' fees and costs for client.

CREDENTIALS

Education

- Wake Forest University School of Law, J.D., 2020
  - The Order of Barristers
  - Appellate Advocacy Clinic
  - National Trial Team
  - Moot Court Board
  - *Wake Forest Journal of Law and Policy*
- Duke University, B.A., 2017
  - Phi Alpha Theta History Honor Society

Bar & Court Admissions

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

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David A. Senter, Jr.

ATTORNEY

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919.821.6763

OVERVIEW

David focuses his practice on data privacy matters, regularly advising technology companies and healthcare providers on all matters pertaining to privacy and data security, including contract review and negotiation, breach investigation, notification and reporting, and compliance with state, federal and foreign privacy and data security laws such as HIPAA, FERPA, CCPA, GDPR and PIPL. Having served as the Interim Associate Compliance Officer and Director of Privacy of an academic medical center in North Carolina, David offers a unique business perspective for clients that blends awareness of the intricacies of relevant laws with practical advice.

David leads Smith Anderson's Data Privacy practice and is certified in Healthcare Privacy Compliance (CHPC®). He has extensive experience providing oversight of privacy and security compliance matters, advising on day-to-day emergent issues in an outside general counsel role. David has designed and managed privacy compliance training infrastructure, prepared and revised privacy and information-related policies, procedures and external-facing documentation and managed breach investigation triage and response. He regularly counsels clients in connection with health information management, data use and other vendor contract negotiation and execution.

David has additional experience with business litigation in state and federal court.

In his spare time, David enjoys running, Wake Forest sports, NASCAR and Canes hockey. David is also an Eagle Scout and a member of Providence Church.

EXPERIENCE

- Advised clients on data processing, use, and transfer agreements, vendor contracts, and data transfer mechanisms regarding issues related to state and foreign privacy laws, including CCPA, GDPR, and PIPL.
- Conducted privacy and security risk assessments and privacy impact assessments and implemented resulting mitigation efforts.
- Advised educational institution on issues related to FERPA compliance and incident and complaint response.
- Developed and implemented HIPAA privacy compliance employee training program for academic medical center.

- Prepared policy and procedure manuals and trainings for health information management departments to address HIPAA privacy requirements related to medical records and release of information.
- Advised institutional review boards on privacy considerations related to research protocols.
- Managed investigations of and advised clients on privacy and data security incidents, including breach reporting and notification requirements to federal and state agencies such as the Office for Civil Rights and state attorneys general.
- Coordinated responses to multiple investigations by federal and state agencies arising from reported complaints and privacy incidents.
- Counseled healthcare providers on HIPAA, Part 2 substance use confidentiality regulations, and Information Blocking compliance, including drafting of contract terms, policies, procedures, and training.

CREDENTIALS

Recognition

- *The Best Lawyers in America®*
  - Health Care Law (2024-2025)
  - Product Liability Litigation – Defendants (2024-2025)
  - Transportation Law (2025)
- *Best Lawyers: Ones to Watch® in America*
  - Health Care Law (2023)
  - Privacy and Data Security (2023)
- *North Carolina Lawyers Weekly*, Health Care Power List (2023)
- North Carolina Super Lawyers Rising Star (2017-2022)

Education

- Wake Forest University School of Law, J.D., 2012
  - Moot Court Board
  - Super Regional Champion, Philip C. Jessup International Law Moot Court Team
  - Student Trial Bar Board
  - CALI Award of Excellence – Products Liability, Criminal Procedure, Pre-Trial Practice
- Wake Forest University, B.A., 2007

Bar & Court Admissions

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

Certifications

Healthcare Privacy Compliance, Healthcare Compliance Certification Board

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Amelia L. Serrat

ATTORNEY

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919.821.6747

OVERVIEW

Amelia Serrat concentrates her practice in the areas of business litigation and products liability. She has experience litigating claims for breach of contract, unfair trade practices, fraud, breach of fiduciary duty and other business-related claims. In addition, she defends manufacturers, distributors, and insurers of consumer, automotive and industrial products.

While attending law school, Amelia completed an internship with Chief Judge Solomon Oliver, Jr. of the Northern District of Ohio.

EXPERIENCE

- Represented a closely-held company and its majority members in a conversion, breach of fiduciary duty, tortious interference, and unfair trade practices lawsuit before the North Carolina Business Court. Obtained a temporary restraining order and favorable settlement following expedited mediation.
- Defended former director of insolvent corporation against claims for breach of contract, fraud, and unjust enrichment brought by corporation's supplier, who also attempted to pierce the corporate veil to hold director individually liable for claims against corporate entities. Obtained pre-discovery dismissal of all claims in federal court, which was affirmed on appeal by the United States Court of Appeals for the Fourth Circuit.
- Represented an internet marketing company in bringing trade secret and breach of contract claims against a public company for misappropriating trade secrets and misusing confidential information obtained during due diligence for a potential business transaction. Obtained preliminary and permanent injunctions barring the defendant from using our client's confidential information or engaging in wrongful competition.
- Represented a venture capital firm and two of its principals in a defamation action against a once-anonymous individual.
- Defended a major automotive distributor in a warranty and consumer protection lawsuit. Obtained summary judgment in trial court and dismissal of appeal by the North Carolina Court of Appeals.
- Defends national manufacturers and retailers of asbestos-containing products in toxic tort lawsuits brought in North Carolina and South Carolina.

- Defends global component manufacturer of an agent used to extinguish certain fires in multidistrict litigation involving claims for alleged personal injuries, property damage, and environmental contamination.
- Provides strategic risk management advice and negotiates settlements of pre-litigation disputes in a broad range of matters including disputes involving complex contracts, software license agreements, consumer warranties, and non-compete and trade secret issues.
- Represents commercial landlords and management companies in enforcement of property rights.
- Assists clients in responding to government and third-party subpoenas and public records requests.

CREDENTIALS

Recognition

- *Best Lawyers: Ones to Watch® in America,* Commercial Litigation (2022-2025)

Education

- University of North Carolina School of Law, J.D., *with honors*, 2015
- University of North Carolina, B.A., English and Women's Studies, 2012
    - Buckley Public Service Scholar

Bar & Court Admissions

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

Academic Appointments

- Symposium Editor, *North Carolina Journal of Law and Technology*
- Pro Bono Coordinator, Domestic Violence Action Project
- Vice President, Women in Law
- Honor Court Member, Undergraduate Honor System

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Kerry A. Shad

ATTORNEY

Management Committee | Co-Chair, D&I Committee

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919.821.6672

"Kerry is easy to work with. She is approachable, knowledgeable and very practical." – ***Client quote in Chambers USA***

OVERVIEW

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

Kerry's practice also focuses on United States Department of Labor wage and hour investigations and related disputes. Kerry was part of the defense team that successfully represented GlaxoSmithKline in a case that went to the Supreme Court where the issue was whether pharmaceutical sales representatives are exempt as outside sales people under the FLSA.

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

Kerry holds key leadership roles in the firm, including as an elected member of the Management Committee and Co-Chair of the Diversity & Inclusion Committee.

EXPERIENCE

- Successfully represented leading employers before the United States Equal Employment Opportunity Commission and state and local fair employment practices commissions across the country in connection with investigations of single claimant and class allegations.
- Retained as lead counsel for global pharmaceutical company to defend claims filed in arbitration under the company's ADR program.

- Represented hospital in two lawsuits filed in federal court in North Carolina alleging discrimination in violation of the ADA (secured dismissal under Rule 12(c)) and national origin discrimination and retaliation in violation of Title VII (stipulation of dismissal with prejudice with no payment after successful deposition of Plaintiff).
- Conducted in depth analysis for acquiring companies to determine whether target companies had properly classified employees as exempt under the FLSA, determined financial risk of misclassifications to support indemnity provision, and recommended changes to classifications to avoid future liability.
- Represented global pharmaceutical company in series of class and collective actions filed in Arizona, California, Florida and New York alleging that the company's failure to pay its pharmaceutical sales representatives overtime for hours worked in excess of 40 per week violated the FLSA and state law. The Supreme Court ultimately affirmed the entry of summary judgment for the company.
- Retained as special counsel by employers in a variety of industries to conduct internal corporate investigations into allegations of:
    - harassment, discrimination and employee misconduct, including allegations of pattern and practice sexual harassment and racial discrimination
    - retaliation against "whistleblowers"
    - misconduct by high-ranking company officials
- Successfully defended wage and hour audits and complaint investigations conducted by the federal and state departments of labor involving donning/doffing in manufacturing plants, overtime, and misclassification issues (in a variety of industries) with exposure well in excess of $1 million.
- Represented publicly-traded company in action brought under the anti-retaliation provisions of the Sarbanes-Oxley Act ("SOX") by former Internal Auditor who asserted his termination was in retaliation for having reported accounting and reporting irregularities to the company.
- Represented convenience store chain in action filed in federal court in North Carolina by a member of the Sikh religion alleging religious and national origin discrimination in application of dress and grooming standards to screen out applicants.
- Represented global pharmaceutical company in action filed in federal court in Tennessee and the Sixth Circuit Court of Appeals by former manufacturing plant employee alleging race and gender discrimination and harassment and retaliation.
- Represented global pharmaceutical company in federal court action alleging race discrimination by employee in research and development.
- Represented employers to secure (and to defend against) TROs and preliminary/permanent injunctions to enforce confidentiality, non-solicitation and non-competition agreements against former employees, and protect employers' trade secrets in many industries, including technology, logistics/transportation, health care (physicians/physical therapists), insurance (agents/brokers), construction, and contract research organizations.
- Represented medical group in action filed by former physician-employee alleging that miscalculations of compensation due under an employment contract violated the NCWHA.
- Retained by employers after EEOC issued cause findings for representation during the conciliation process and risk management of potential liability exposure.

- Served as "in-house" employment litigation counsel to large company managing employment litigation in jurisdictions across the country.
- Represented clients in arbitrations arising out of business sales and alleged violations of non-competition agreements.
- Developed highly participatory and mock trial training exercise for HR professionals and investigators for large global pharmaceutical company in which they experienced first-hand how their decisions and actions play out in front of a jury. The program was customized to client's policy and workforce.

CREDENTIALS

Recognition

- *Chambers USA: America's Leading Business Lawyers,* Labor & Employment (2012-2024)
- *Business North Carolina* Legal Elite, Employment Law (2008, 2014-2015, 2022, 2024)
- *Benchmark Litigation*
  - Top 50 Labor & Employment Litigators (2024)
  - North Carolina Litigation Star (2023-2024)
  - North Carolina Labor and Employment Star (2018-2024)
  - Top 250 Women in Litigation (2021-2024)
- *The Best Lawyers in America®*
  - Employment Law - Management (2009-2025)
  - Litigation - Labor and Employment (2009-2025)
  - Best Lawyers® 2022 Employment Law - Management "Lawyers of the Year" in Raleigh
- Super Lawyers
  - North Carolina Super Lawyers (2012-2024)
  - Top 50: Women North Carolina Super Lawyers (2024)
- *North Carolina Lawyers Weekly*, Power List, Employment Law (2021, 2023-2024)
- *Triangle Business Journal*'s "Women in Business Award" (2015)
- Martindale-Hubbell AV Preeminent Rated

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

Bar & Court Admissions

- North Carolina

Successfully Navigating Change: Legal Updates on Diversity, Equity and Inclusion


SMITH ANDERSON
Successfully Navigating Change: Legal Updates on Diversity, Equity and Inclusion
Taylor M. Dewberry
October 29, 2024
EXPECT EXCELLENCE®

Today's Agenda

- Briefly review the SCOTUS decision and its impact
  - More detailed review of the decision can be found in the accompanying notes
- Legal effect of the rulings in employment and supplier practices
- Practical implications with mitigation tips
- Mitigation tips summary

Supreme Court Ruling and Its Impact on Admissions

More on Supreme Court Rulings Regarding Race and Admissions

College Admissions Prior to SFFA (*Grutter v. Bollinger*, 539 U.S. 306 (2003)

Law school applicants to the University of Michigan alleged that the admissions policy encouraging student body diversity violated their equal protection rights.

The Supreme Court held that the school had a compelling interest in attaining a diverse student body and that the admissions program was narrowly tailored to serve its compelling interest in obtaining the educational benefits that flow from a diverse student body and, therefore, did not violate the Equal Protection Clause.

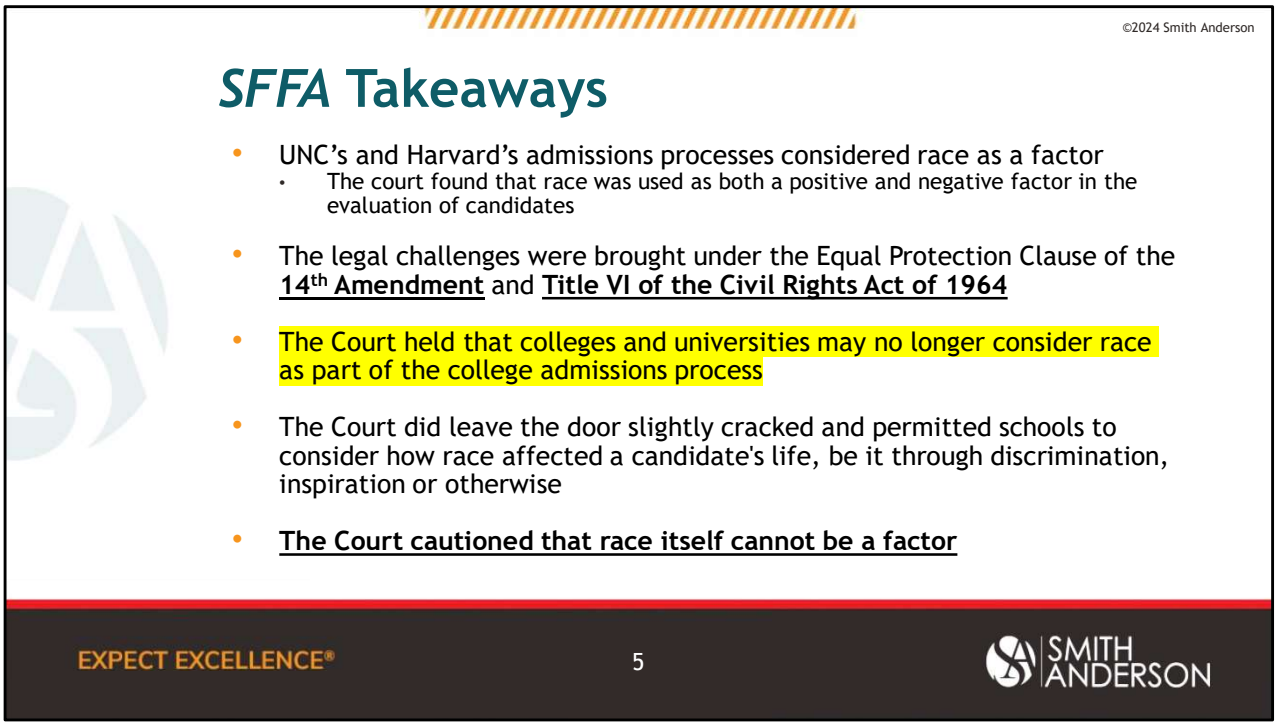
Students for Fair Admissions, Inc. ("SFFA") v. President and Fellows of Harvard College, and SFFA v. University of North Carolina, et al., 600 U.S. 181 (2023)

SFFA Organization Background

SFFA "is a nonprofit membership group of more than 20,000 students, parents and others who believe that racial classifications and preferences in college admissions are unfair, unnecessary, and unconstitutional." Some of Blum's previous efforts include *Shelby Co.*

Alabama v. Holder (voting rights) and *Fisher v. University of Texas (I and II)* (higher education).
STUDENTS FOR FAIR ADMISSIONS, https://studentsforfairadmissions.org (last visited Oct. 9, 2024).

Edward Blum is a conservative legal strategist and the founder of SFFA. Blum has orchestrated dozens of lawsuits challenging affirmative action and diversity, equity, and inclusion practices in higher education and other industries. *See* The Federalist Society, Edward J. Blum Visiting Fellow, PROJECT ON FAIR REPRESENTATION, https://fedsoc.org/contributors/edward-blum (last visited Oct. 9, 2024) (profiling Mr. Blum); Lulu Garcia-Navarro, NEW YORK TIMES, Jul. 8, 2023, https://www.nytimes.com/2023/07/08/us/edward-blum-affirmative-action-race.html (last visited Oct. 9, 2024) (profiling Mr. Blum).



More on Harvard and UNC Admissions Practices and Results

The admissions policies for both UNC and Harvard permitted a student applicant's race to be considered as part of an overall holistic assessment of the individual, along with things like grades, references, and extracurricular activities.

UNC's Admissions Process

One of UNC's 40 admissions officers reviewed the candidate's application and "readers [were] required to consider 'race and ethnicity as one factor' in their review." Readers considered other factors in their evaluation including: (1) academic performance and rigor; (2) standardized test results; (3) extracurricular involvement; (4) essay quality; (5) personal factors; and (6) student background. Readers provided a numerical rating for the test results, extracurricular activities, essay quality, personal, and essay categories.

Following the first read process, the application then went to the "school group review" where an experienced staff member reviewed every initial decision. This group either approved or rejected each admission recommendation from the first reader. The review committee was allowed to consider the applicant's race.

Harvard's Admissions Process

Every application was similarly reviewed by a first reader who assigned scores in six categories: (1) academic, (2) extracurricular, (3) athletic, (4) school support, (5) personal, and (6) overall. Readers considered the applicant's race in the overall rating.

After the first read, Harvard convened a subcommittee to review applicants from particular geographic regions. The subcommittees could similarly consider a candidate's race.

The full committee then reviewed and voted on each applicant. The committee then discussed the overall breakdown of admitted applicants based on race. Harvard's goal was to not have a dramatic drop-off in minority admissions from the prior class.

Race was the "determinative tip" for a significant percentage of African American and Hispanic applicants.

Basis for Legal Challenge

The UNC case alleged discrimination against White and Asian American students in violation of the Equal Protection Clause of the 14th Amendment.

The Harvard case alleged discrimination against Asian Americans in violation of Title VI of the Civil Rights Act of 1964 which prohibits discrimination on the basis of race, color or national origin by federally funded programs.

Ruling and Reasoning

The universities' admissions programs did not satisfy strict scrutiny because there was no way to measure progress towards the universities' stated goals. The Court reasoned that "[a]lthough these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny." The Court found that according to the admissions rates of different races of candidates, race was used as both a positive and negative factor in evaluations. The Court expressed concern that there was no "end point" to the schools' race-based admissions policies.

Result for Colleges and Universities

Colleges and universities may no longer consider race as part of the college admissions process.

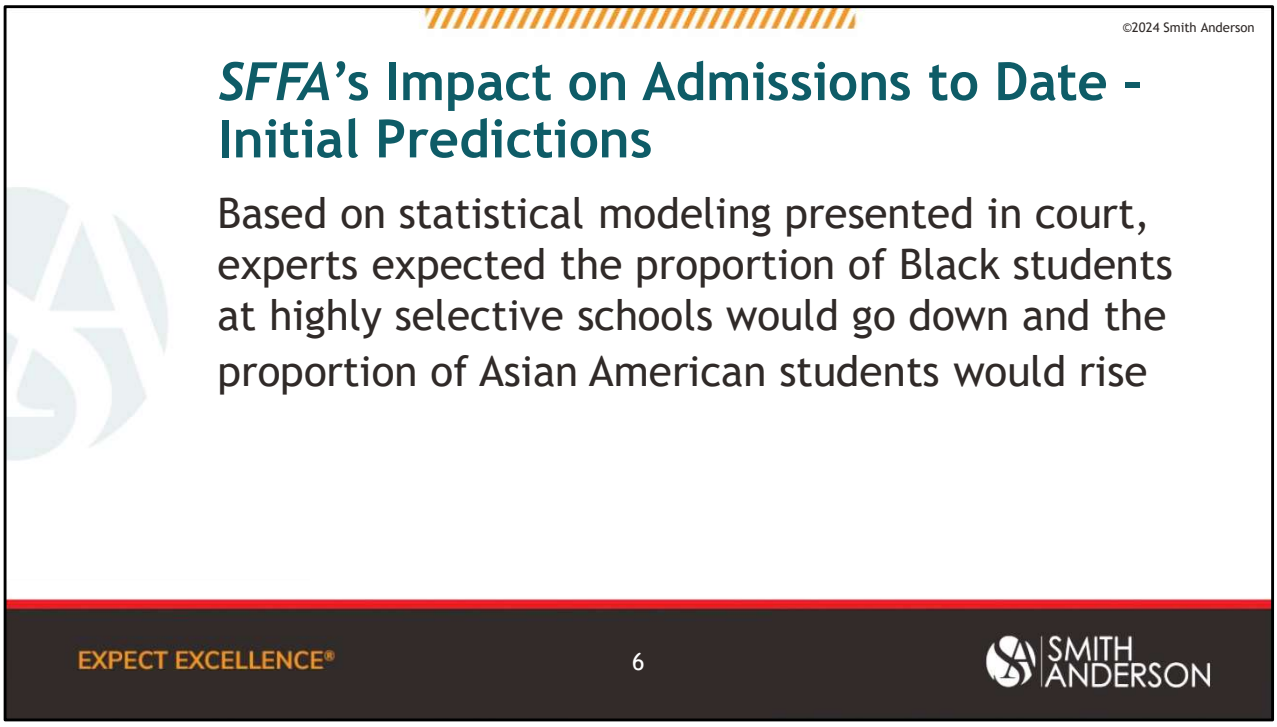
The Court left the door slightly cracked open to allow for the discussion of "how race affected [a candidate's] life, be it through discrimination, inspiration or otherwise." But, the Court cautioned that race itself cannot be a factor:

> A benefit to a student who overcame racial discrimination, for example, must be tied to that student's courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to that student's unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.

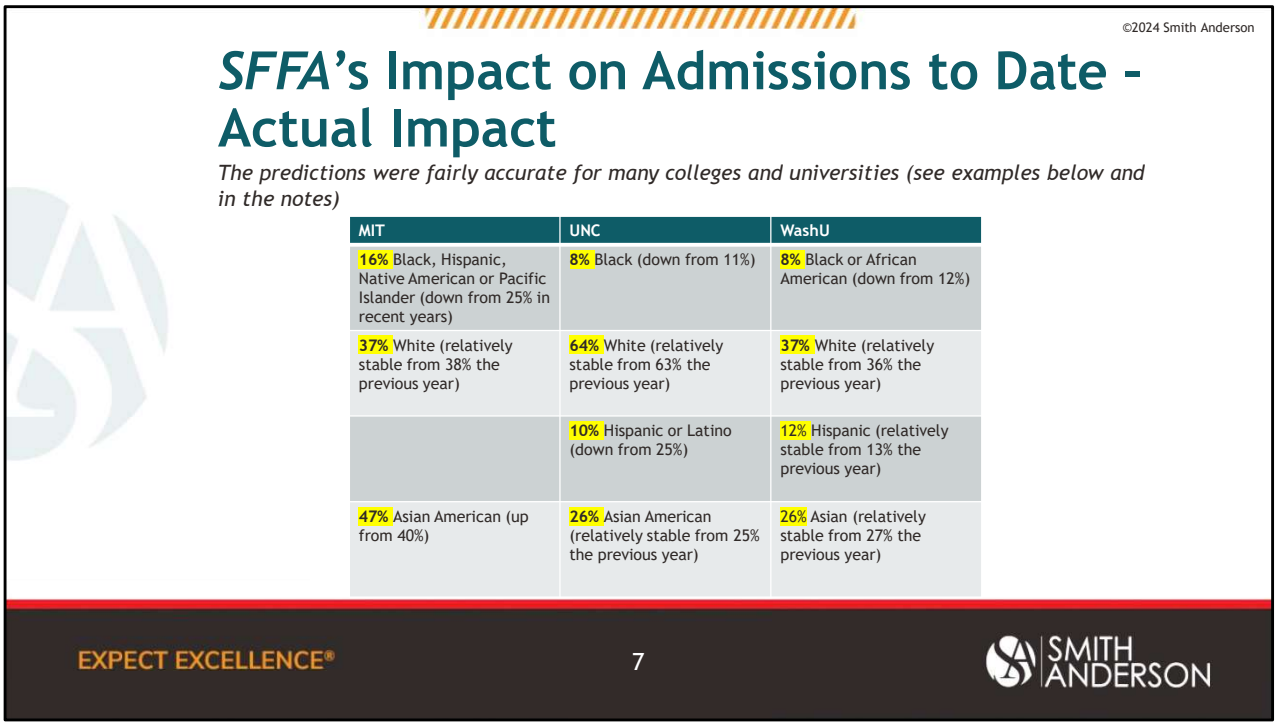
Military Academies

Notably, in a footnote the Court stated "no military academy is a party to these cases, however, and none of the courts below addressed the propriety of race-based admissions systems in that context. This opinion also does not address the issue, in light of the potentially distinct interests that military academies may present."

On February 2, 2024, the Court denied an emergency request from SFFA seeking to bar the use of race as a factor in admissions at the United States Military Academy at West Point. *Students for Fair Admissions, Inc. v. United States Mil. Acad. at W. Point*, 144 S. Ct. 716 (2024).



Anemona Hartocollis and Stephanie Saul, Affirmative Action Was Banned. What Happened Next Was Confusing., N.Y. TIMES (Jan. 22, 2024), https://www.nytimes.com/2024/09/13/us/affirmative-action-ban-campus-diversity.html.



The predictions were fairly accurate for many colleges and universities. *Id*. For example, at MIT, only 16% of the incoming freshman class identifies as Black, Hispanic, Native American, or Pacific Islander. The proportion of White students remained about the same (37 percent in 2024 and 38 percent in 2025). The proportion of Asian American students rose from 40 to 47 percent.

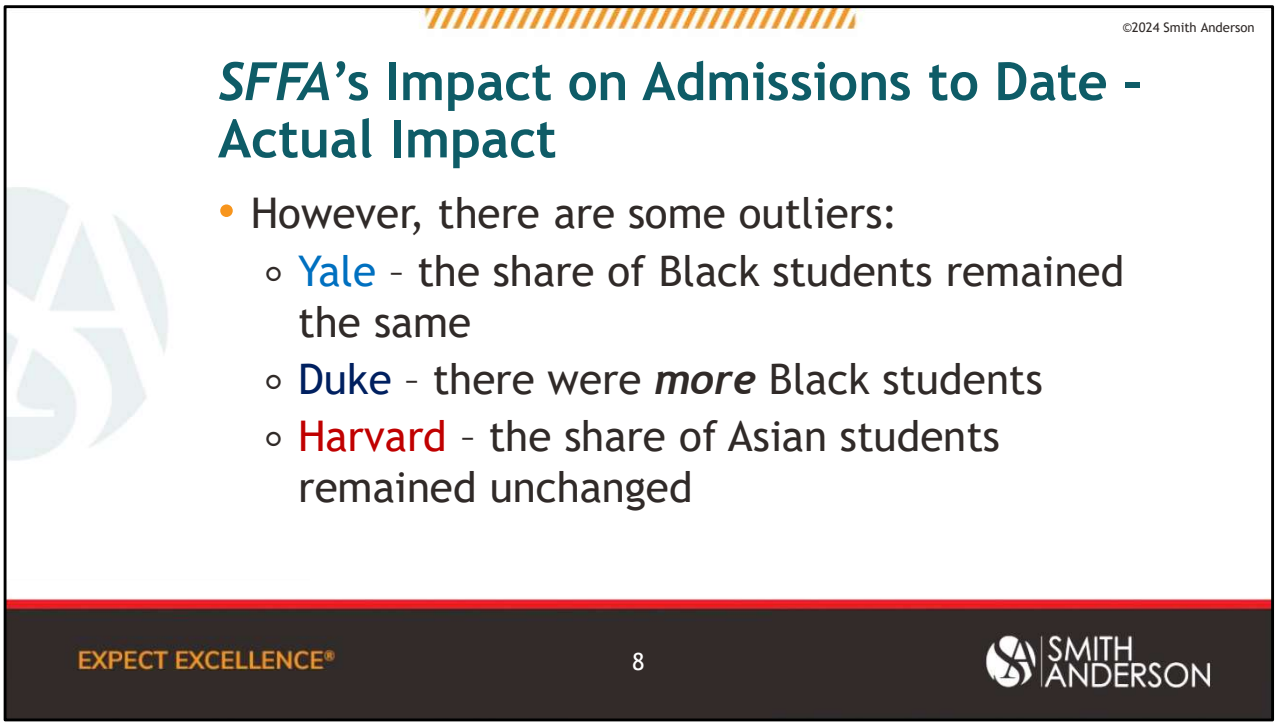
Jessica Blake, MIT's Incoming Freshman Class is Less Diverse Data Shows, INSIDE HIDER ED (Aug. 22, 2024), https://www.insidehighered.com/news/quick-takes/2024/08/22/mits-incoming-freshman-class-less-diverse-data-shows.

Similarly, at UNC-Chapel Hill, the "newest first-year class includes a lower proportion of Black students compared to the previous year…" The most recent incoming class includes 8% Black, 64% White, 10% Hispanic or Latino, and 26% Asian American students. The previous year's class included 11% Black, 63% White, 25% Hispanic or Latino, and 25% Asian American students.

Korie Dean, UNC shares enrollment data for first post-affirmative action class. What does it show?, THE NEWS & OBSERVER (Sept. 5, 2024), https://www.newsobserver.com/news/local/education/article291920935.html#storylink=cpy.

Washington University in St. Louis also saw a decrease in their share of Black students. their incoming class includes 8% Black, 37% White, 12% Hispanic, and 26% Asian students. The previous year's class included 12% Black, 36% White, 13% Hispanic, and 27% Asian students.

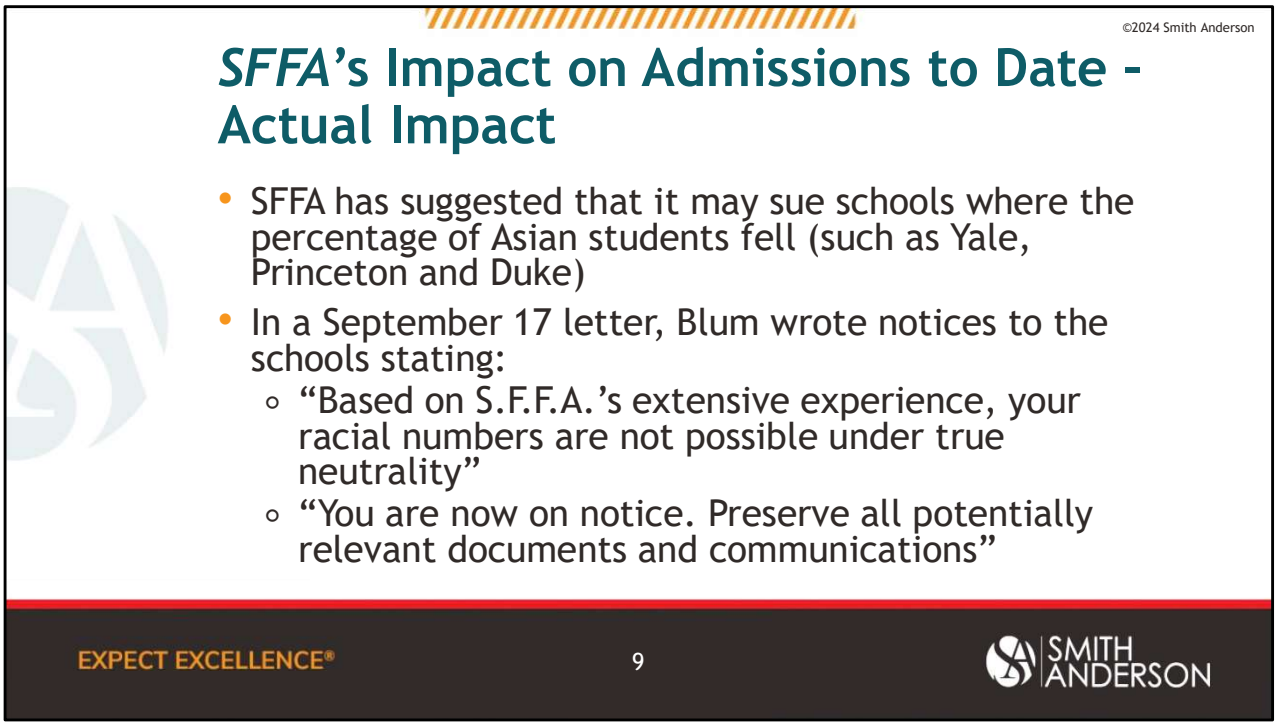
Diane Toroian Keaggy, WashU enrolls more limited-income, first-generation students; share of Black students decreases, WASHU THE SOURCE (Aug. 28, 2024), https://source.washu.edu/2024/08/embargoed-washu-admits-more-limited-income-first-generation-students-share-of-black-students-decreases/.



However, there are some outliers to that trend. Yale's share of Black students remained the same. Duke's share of Black students increased. Harvard's share of Asian students remained the same. The overall results have confused experts. An additional confounding factor is the myriad of ways that schools categorize and supply the data.

Anemona Hartocollis and Stephanie Saul, Affirmative Action Was Banned. What Happened Next Was Confusing., N.Y. TIMES (Jan. 22, 2024), https://www.nytimes.com/2024/09/13/us/affirmative-action-ban-campus-diversity.html.

For more information, Education Reform Now (as cited by the New York Times) has created a tracker of fifty selective school's demographic breakdowns and changes.
James Murphy, Tracking the Impact of the SFFA Decision on College Admissions, EDUCATION REFORM NOW ("ERN") (Last Visited Oct. 9. 2024) https://edreformnow.org/2024/09/09/tracking-the-impact-of-the-sffa-decision-on-college-admissions/.

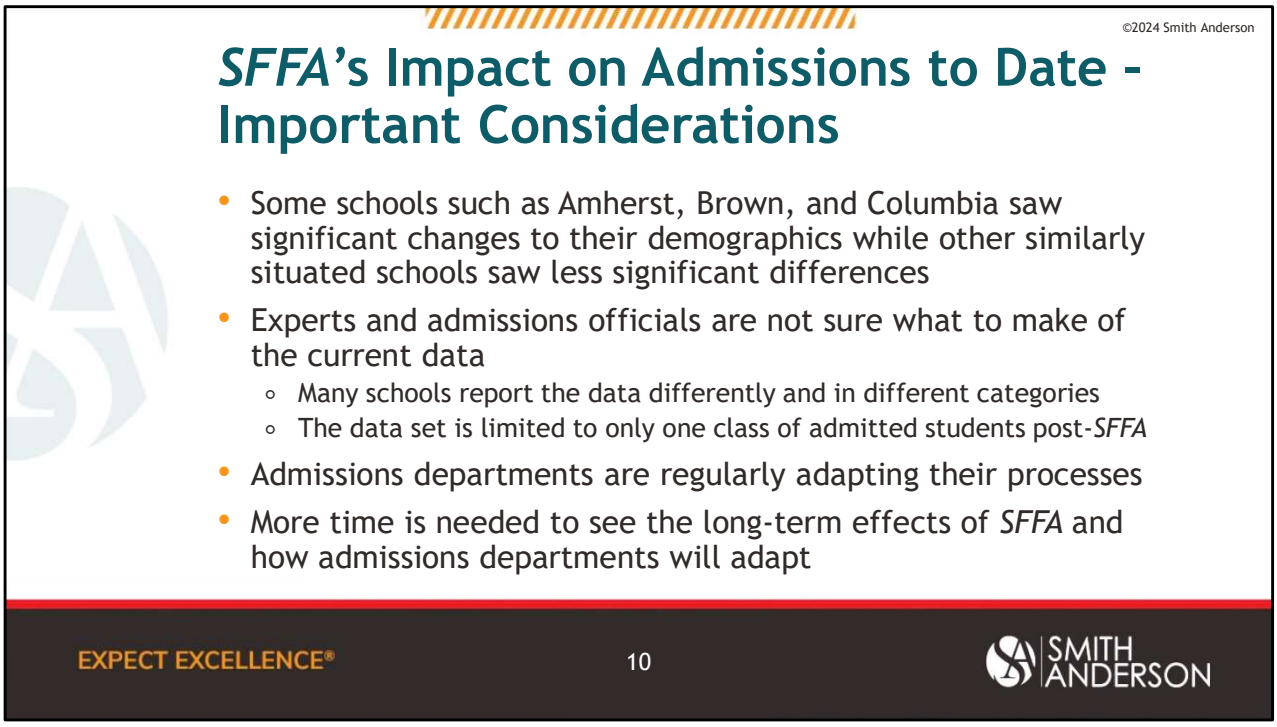


Groups like SFFA appear to be playing close attention to the school's reported statistics as well. In September 2024, SFFA wrote letters to Yale, Princeton, and Duke regarding the decrease of Asian students.

Anemona Hartocollis, Yale, Princeton and Duke Are Questioned Over Decline in Asian Students, NEW YORK TIMES, (Sept. 17, 2024) https://www.nytimes.com/2024/09/17/us/yale-princeton-duke-asian-students-affirmative-action.html

Edward Blum, Students for Fair Admissions Sends Letters to Yale, Princeton, and Duke Questioning Class of 2028

Admissions Processes and Outcomes, STUDENTS FOR FAIR ADMISSIONS, (Sept. 17, 2024) https://studentsforfairadmissions.org/students-for-fair-admissions-sends-letters-to-yale-princeton-and-duke-questioning-compliance-with-sffa-v-harvard/.



Anemona Hartocollis and Stephanie Saul, Affirmative Action Was Banned. What Happened Next Was Confusing., NEW YORK TIMES (Jan. 22, 2024), https://www.nytimes.com/2024/09/13/us/affirmative-action-ban-campus-diversity.html.

Post-*SFFA* Corporate Shifts

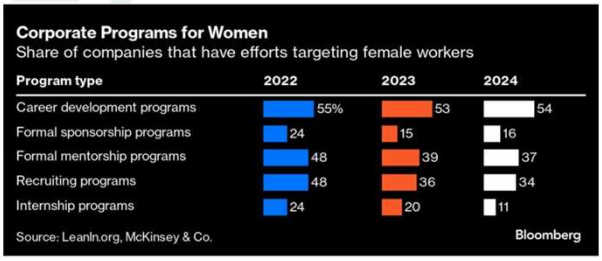
Corporate Pressure

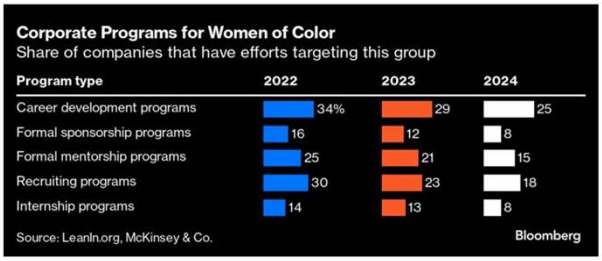
- Some large companies have scaled back their DEI initiatives
  - For example, amid pressures from Anti-DEI activists, Ford said it would no longer engage in the Human Rights Campaign Corporate Equality Index and it refocused employee resource groups and opened them to all workers
  - Tractor Supply Co., Deere & Co. and Harley-Davidson said they would revise their DEI initiatives

Jeff Green and Simone Foxman, Ford Joins Harley in Scaling Back DEI Policies Amid Backlash, BLOOMBERG LAW NEWS (Aug. 28, 2024), https://www.bloomberg.com/news/articles/2024-08-28/ford-joins-harley-in-scaling-back-dei-policies-amid-backlash.

Corporate Pressure

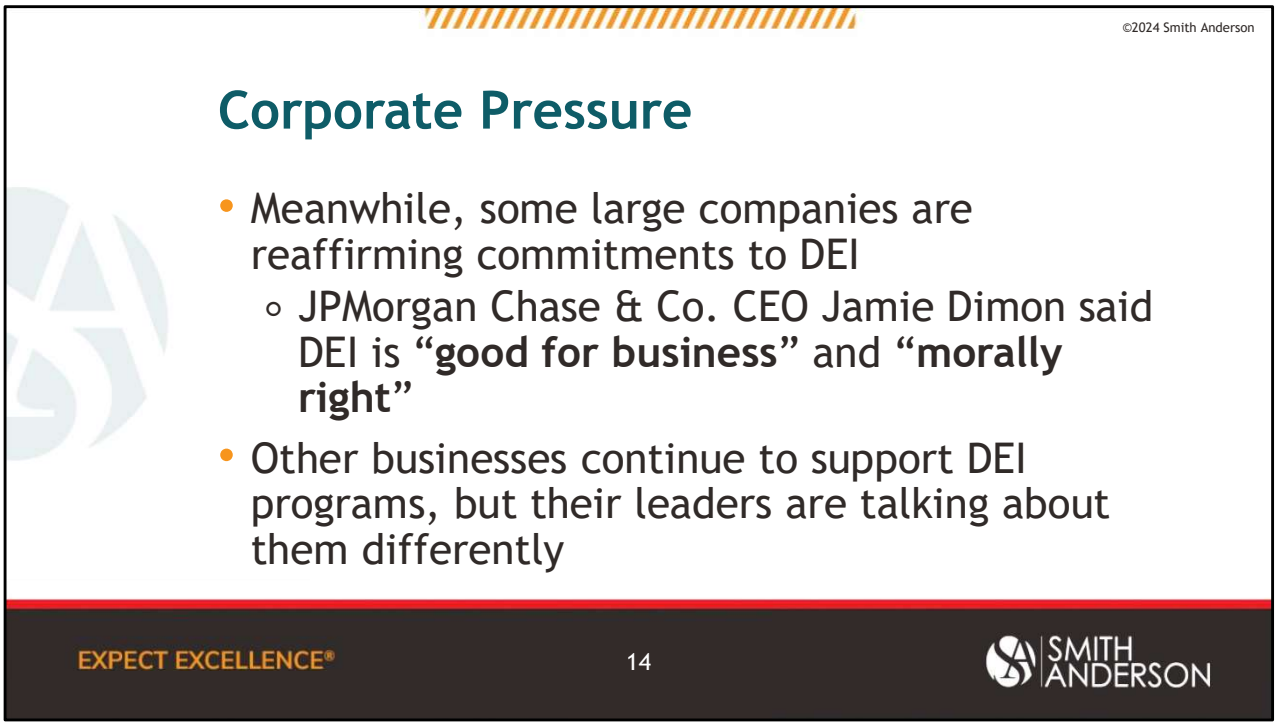
Some employers are cutting programs meant to boost the careers of women and grow the pipeline of women employees, with the pullback especially sharp for programs supporting women of color (see LeanIn.Org and Mckinsey & Co. data)





Bloomberg Law Graphics of LeanIn.org and Mckinsey & Co. Data

Kelsey Butler and Emily Chang, US Companies Nix Career Programs for Women Amid DEI Backslide, BLOOMBERG LAW (Sept. 17, 2024), https://www.bloomberg.com/news/articles/2024-09-17/leanin-mckinsey-see-dei-backlash-hurting-programs-for-women?embedded-checkout=true.



Kelsey Butler and Emily Chang, US Companies Nix Career Programs for Women Amid DEI Backslide, BLOOMBERG LAW (Sept. 17, 2024), https://www.bloomberg.com/news/articles/2024-09-17/leanin-mckinsey-see-dei-backlash-hurting-programs-for-women?embedded-checkout=true.

Clara Hudson, Jamie Dimon Among Fortune 500 CEOs Defying Diversity Backlash, BLOOMBERG LAW (Sept. 13, 2024), https://news.bloomberglaw.com/esg/jamie-dimon-among-fortune-500-ceos-defying-diversity-backlash.

See Avani Kalra, Companies Change How They Talk About Diversity Amid ESG Backlash, BLOOMBERG LAW (Aug. 19, 2024), https://www.bloomberglaw.com/bloombergterminalnews/bloomberg-terminal-news/SIH56PDWX2PS ("Nearly one-third (31%) of 125 major corporations surveyed in the past year by the Association of Corporate Citizenship Professionals, say they have adjusted their language describing DEI projects this year, and 17% have reduced external communication on diversity initiatives. Still, the study found companies remain committed to DEI projects, with 83% saying their initiatives remain the same").

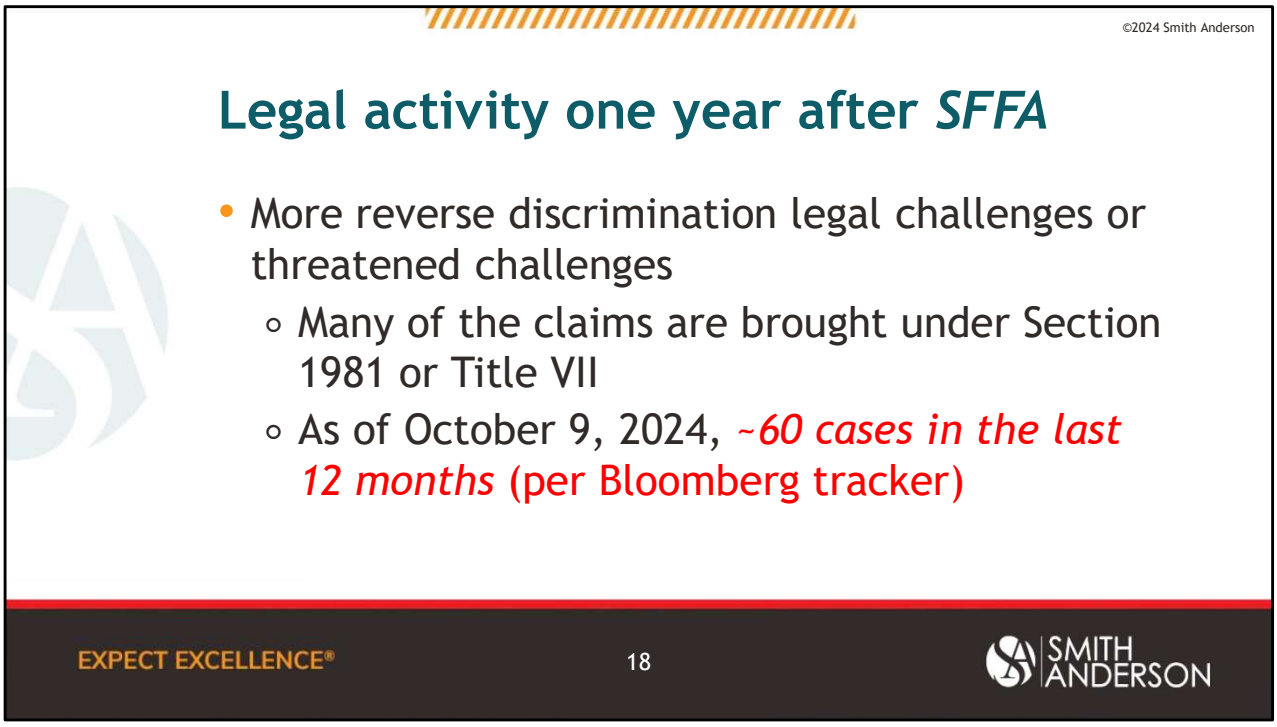
Legal Implications for Employers

Legal Effect of Ruling on Private Employers

SFFA HAD NO IMMEDIATE DIRECT LEGAL IMPACT ON PRIVATE EMPLOYERS

- Not a decision based on federal law that applies to employers – Title VII
- Employers are not legally required to make any changes to DEI, EEO, or affirmative action policies **if such practices comply with existing employment law**
- Employers can still have a focus on diversity as a core value
- Employers can still commit to a culture of inclusion
- Employers can and should maintain their EEO policies

Practical Implications



"Reverse discrimination" cases are becoming more prominent. These are claims brought under Title VII of the Civil Rights Act and/or Section 1981. Title VII protects employees against discrimination based on race, among other things. Section 1981 prohibits race discrimination in the making and enforcement of contracts. This means that White employees are also protected from discrimination under Title VII and Section 1981.

For example, on October 9, 2024, we conducted a search for reverse discrimination cases involving DEI issues on Bloomberg's dockets and found approximately sixty cases filed within the last twelve months. The search terms were:

("diverse" OR "diversity" OR "inclusion" OR "DEI" OR "D&I" OR "equity" OR "discriminatory") NP/3 (program OR initiative OR fellowship OR Mentor! OR ERG) AND (employer OR employers OR hire OR hiring OR promotion) AND "§1981". Of course, this search does not account for threatened reverse discrimination suits that are not yet filed with the court.

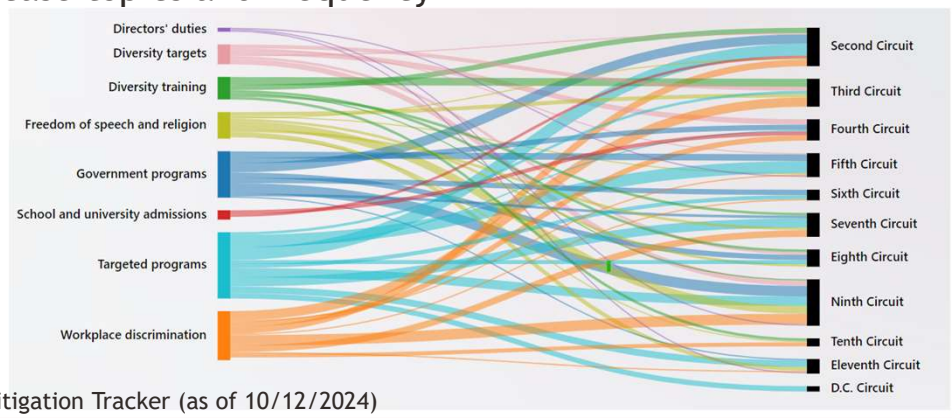
Legal activity one year after *SFFA*

NYU Law's Meltzer Center for Diversity, Inclusion, and Belonging estimates that there have been **over 120 Anti-DEI Cases since 2021**

https://advancingdei.meltzercenter.org/

Legal activity one year after *SFFA*

Their website has an interactive map that tracks the case topics and frequency



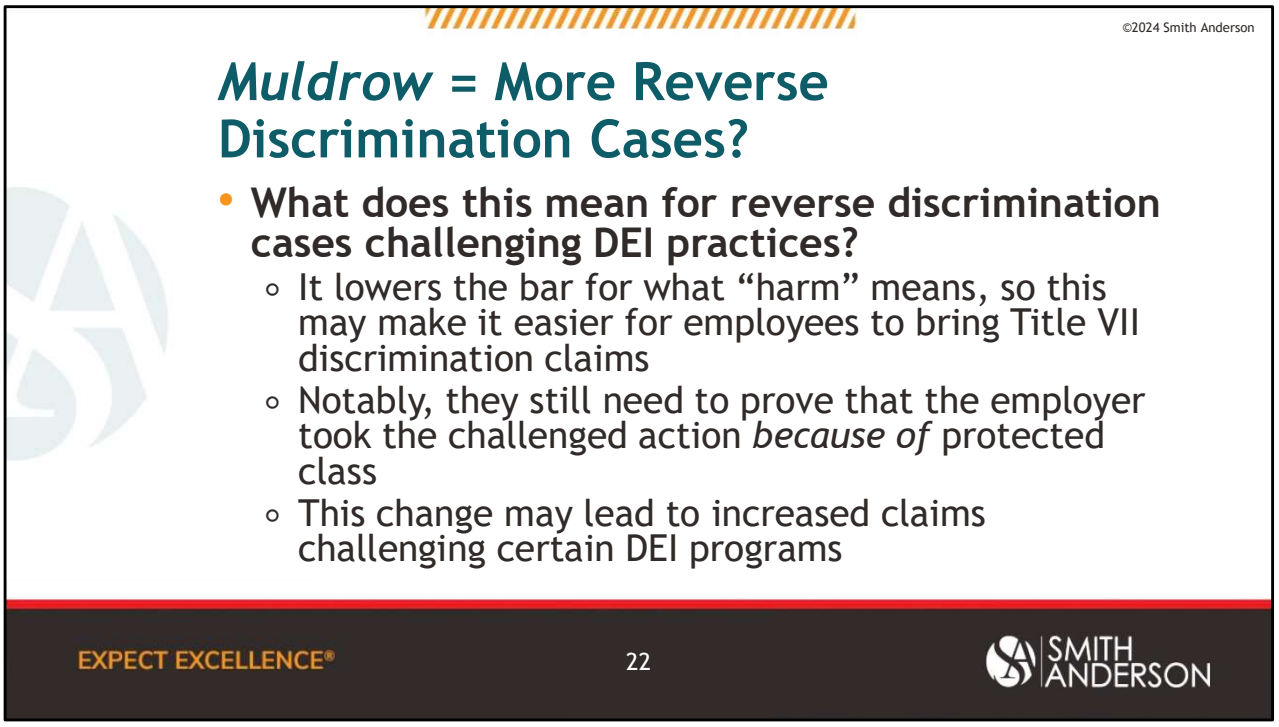
Meltzer Center Litigation Tracker (as of 10/12/2024)

https://advancingdei.meltzercenter.org/

Muldrow = More Reverse Discrimination Cases?

- *Muldrow v. City of St. Louis* (April 17, 2024)
  - The Supreme Court resolved a split among the federal circuit courts over whether an employee challenging a job transfer under Title VII must meet a heightened threshold of harm to bring suit
  - Rejecting lower court decisions that required employees to show "material," "serious," "significant," or "substantial" harm, the Court held that **employees need only show that a job transfer caused them "some harm" with respect to an identifiable term or condition of employment**

Muldrow v. City of St. Louis, Missouri, 601 U.S. 346 (2024).



Muldrow v. City of St. Louis, Missouri, 601 U.S. 346 (2024).

Various employers and organizations have been affected by reverse discrimination lawsuits across industries, including but not limited to broadcasting, technology, banking, mining, telecommunications, healthcare, mass media, and retail.

Broadcasting

See Complaint, *Jeff Vaughn v. CBS Broadcasting, Inc. et al*, No. 2:24-CV-05570 (C.D. Cal. Jul 01, 2024), ECF No. 1. (alleging that Jeff Vaughn, a white male anchor, was terminated and replaced with a Black man because the company was adhering to illegal diversity policy and quotas against white men); *See* Complaint, *Brian Beneker v. CBS*

Studios, Inc. et al, No. 2:24-CV-01659 (C.D. Cal. Feb 29, 2024) (alleging that CBS failed to hire him as a staff writer due to his race, gender, and sexual orientation, while hiring and promoting less experienced individuals who were non-white, LGBTQ, or female).

Technology

See Complaint, *Kascsak v. Expedia, Inc. et al*, No. 1:23-CV-01373 (W.D. Tex. Nov 08, 2023), ECF No. 1 (alleging that Micheal Kascak, a white male corporate executive candidate, was orally offered a position and the job search was impermissibly extended allegedly to find a diverse candidate); *See* Complaint, *Wood v. Red Hat, Inc*., No. 2:24-CV-00237 (D. Idaho May 08, 2024), ECF No. 1 (alleging discriminatory treatment and termination due to Red Hat's DEI efforts).

Banking

See Complaint, *Smith v. Ally Financial, Inc*., No. 3:24-CV-00529 (W.D.N.C Jun 04, 2024), ECF No. 1 (alleging that Christopher Smith, a white male employee and applicant for an intelligence manager position was not selected due to the company's illegal Diversity, Equity, and Inclusion program).

Mining

See Powers v. Broken Hill Proprietary Inc., No. 4:21-CV-01334 (S.D. Tex. Apr 22, 2021) (alleging that the company

used impermissible means to achieve diversity goals to increase the hiring of women).

Telecommunications

See DiBenedetto v. AT&T Servs., Inc., No. 121-CV-04527, 2022 WL 1682420 (N.D. Ga. May 19, 2022) (alleging that the employer terminated a white male employee in order to replace him with diverse candidates).

Healthcare

See Duvall v. Novant Health, Inc., 95 F.4th 778 (4th Cir. 2024) (after a lengthy jury trial and appeal, the court held that sufficient evidence was presented at trial to sustain the jury's finding of liability for reverse discrimination).

Mass Media

See Bradley et al v. Gannett Co., Inc*.,* No. 1:23-CV-01100 (E.D. Va. Aug 18, 2023) (challenging a policy under which the organization committed that by 2025 the staff of the publications would reflect the racial and ethnic demographics of the nation).

Retail

See Craig v. Target, et al, No. 2:23-CV-00599 (M.D. Fla. Aug 8, 2023) (a derivative suit challenging Target's support of

LGBT initiatives and Target's adoption of ESG/DEI initiatives in the 2022 and 2023 Proxy statements).

Legal activity one year after *SFFA*

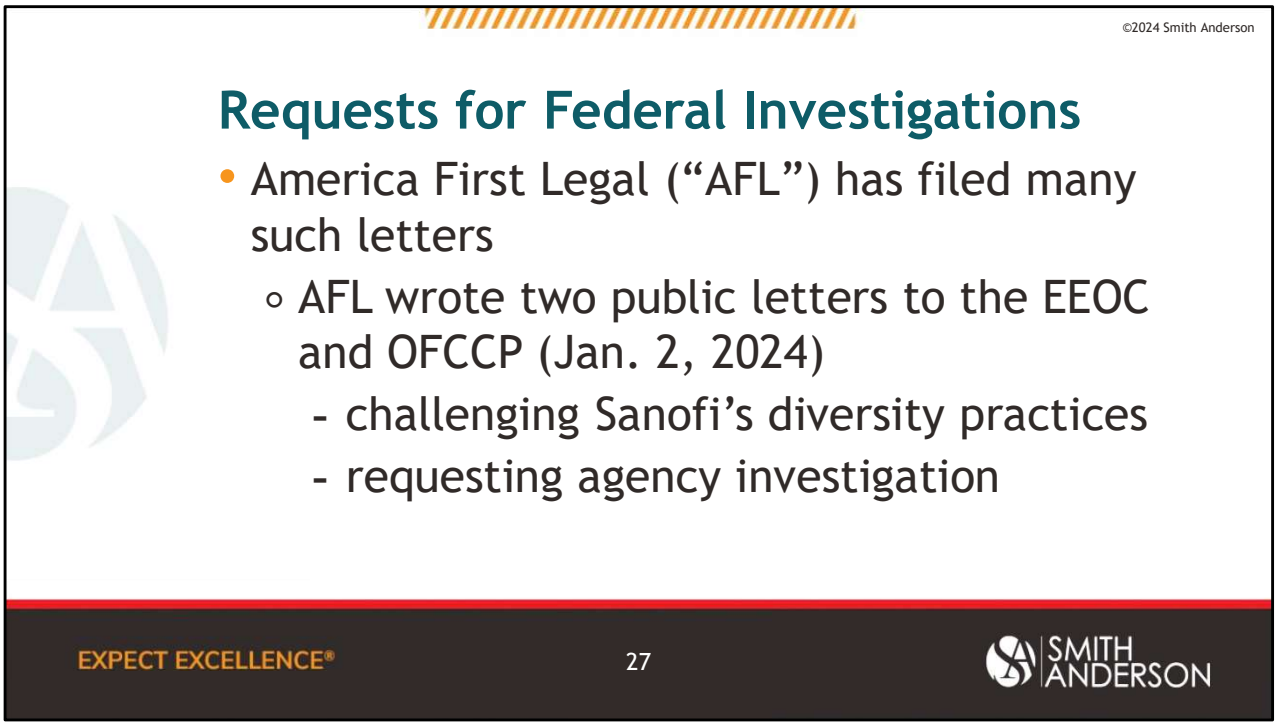
- These claims could take the form of:
  - Requests for Agency Investigation
  - Challenges to DEI Training
  - Challenges to the Termination of Executives Amid Diversity Initiatives
  - Challenges to Supplier Diversity Initiatives

Legal activity one year after *SFFA*

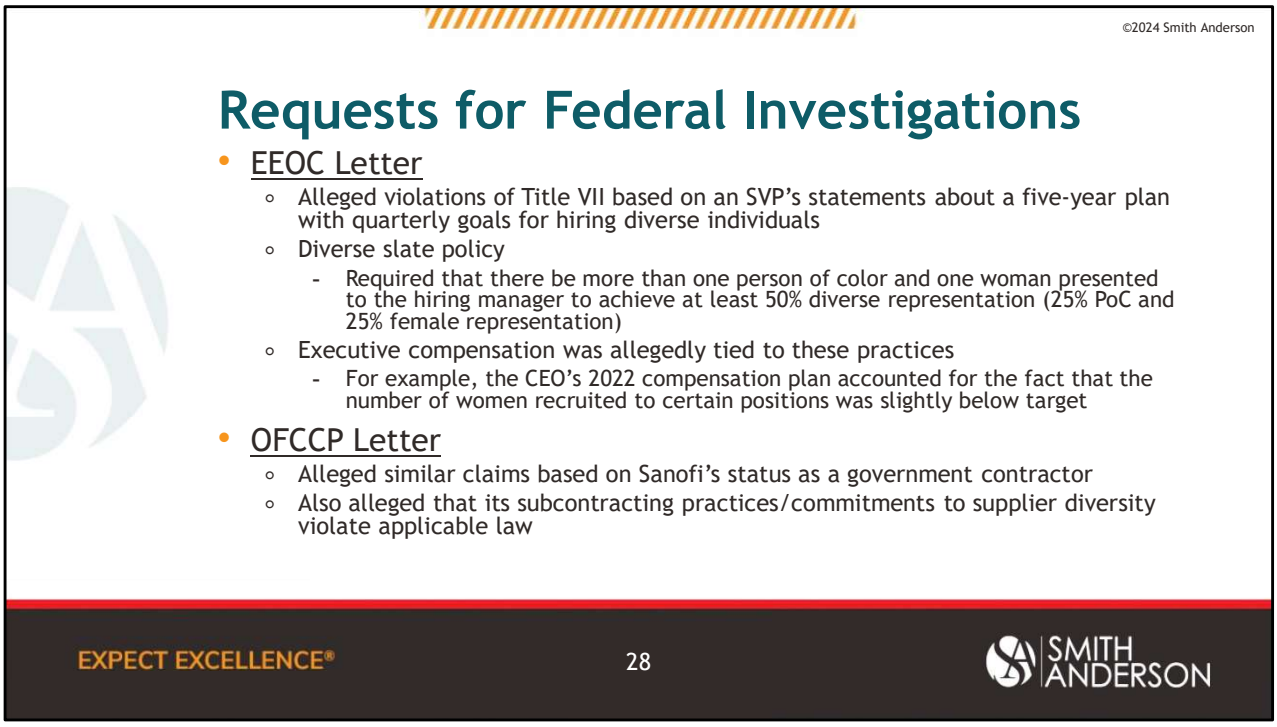
After each case or group of similar cases, we will pause for a “fix it” moment to discuss ways we could mitigate risk of similar claims in the future

Legal Demand Letters

- Plaintiffs and anti-DEI interest groups pen public demand letters to employers alleging that the employer's DEI practices are illegal under applicable law
- Often, the letters will request that the EEOC initiate a commissioner's charge to investigate the allegations



See America First Legal, America First Legal Slams French Big Pharma Vaccine Maker, Sanofi, for Racial Discrimination: Files Federal Civil Rights Complaints, AMERICA FIRST LEGAL (Jan. 5, 2024), https://aflegal.org/america-first-legal-slams-french-big-pharma-vaccine-maker-sanofi-for-racial-discrimination-files-federal-civil-rights-complaints/ (containing links to both letters and a summary of their position).



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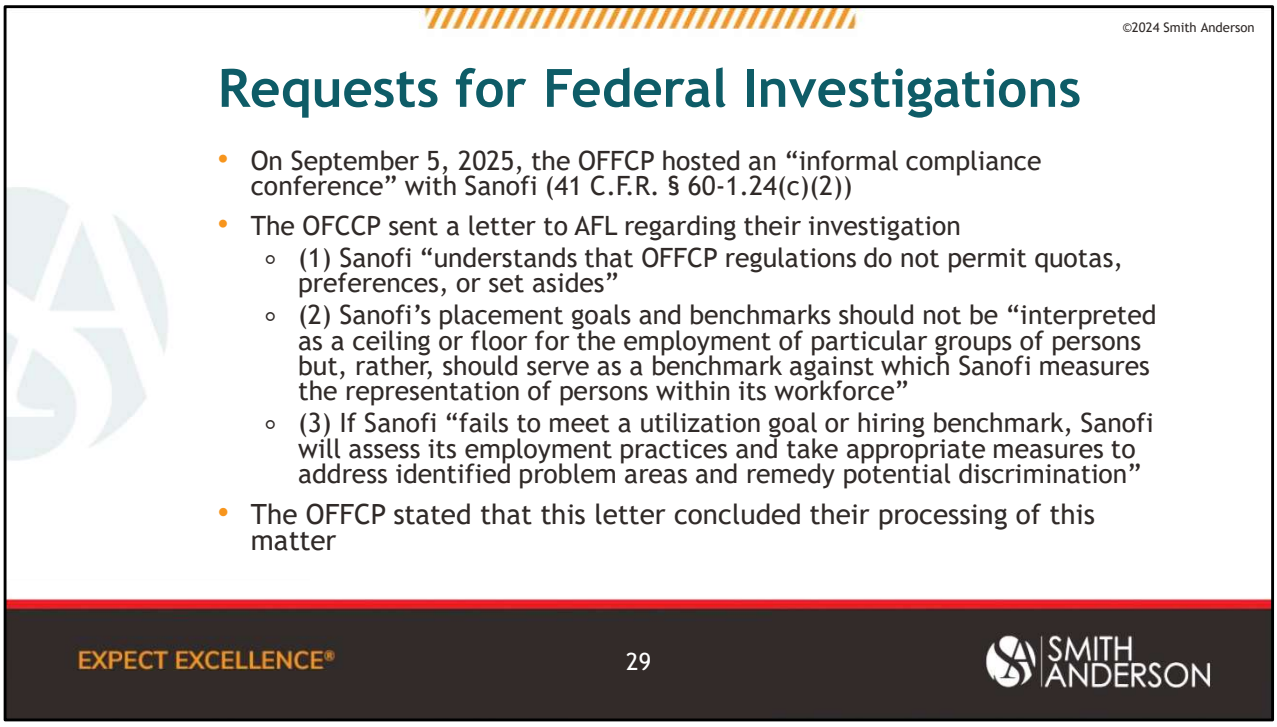


See (41 C.F.R. § 60-1.24(c)(2)) (listing the requirements for OFFCP complaints).

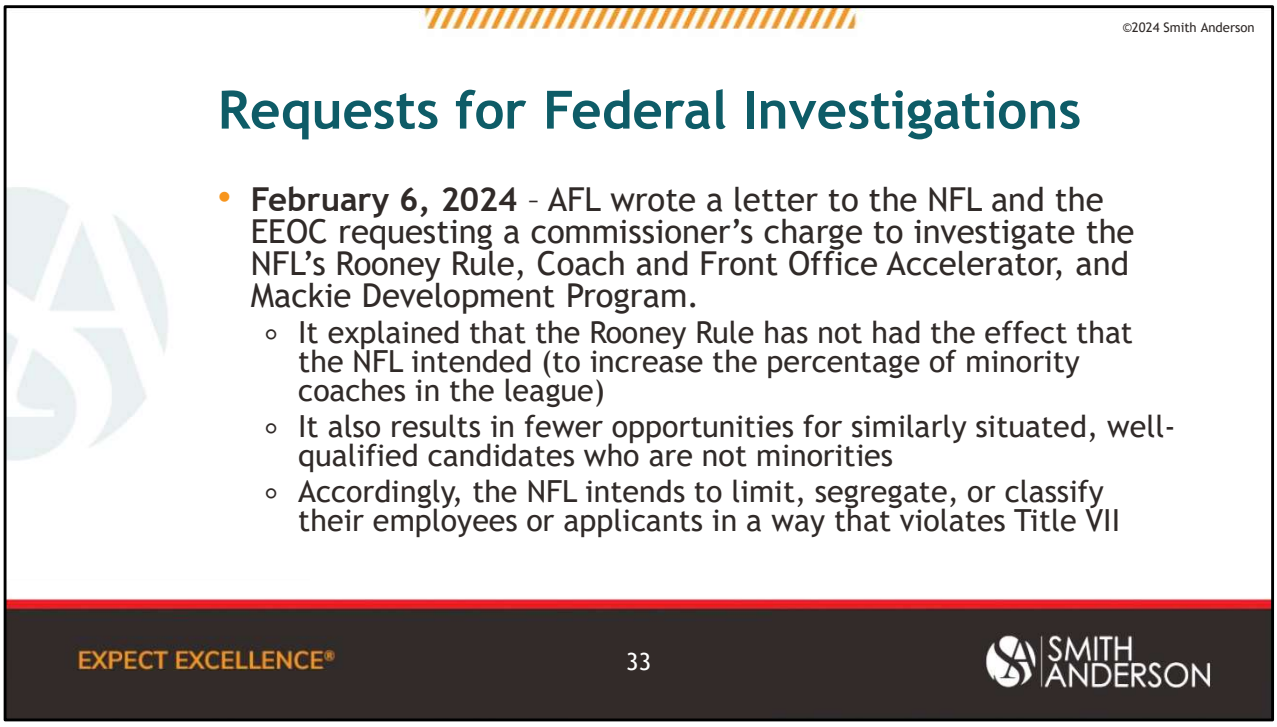
See America First Legal, VICTORY — Global Healthcare Company Sanofi Walks Back Illegal, Discriminatory Hiring Practices Following Federal Civil Rights Complaint from AFL, AMERICA FIRST LEGAL (Jan. 5, 2024), https://aflegal.org/victory-global-healthcare-company-sanofi-walks-back-illegal-discriminatory-hiring-practices-following-federal-civil-rights-complaint-from-afl/ (containing a copy of letter from the OFFCP and AFL's characterization of the letter).

Fix it Moment!

- Refrain from tying compensation to diversity hiring metrics
- Consider flexibility within diverse slate policies and commitments to outreach for positions
- Educate executives and leaders on the differences between goals and quotas (be careful not to characterize goals as quotas)
- Consider whether goals are grounded in availability data for positions

Requests for Federal Investigations

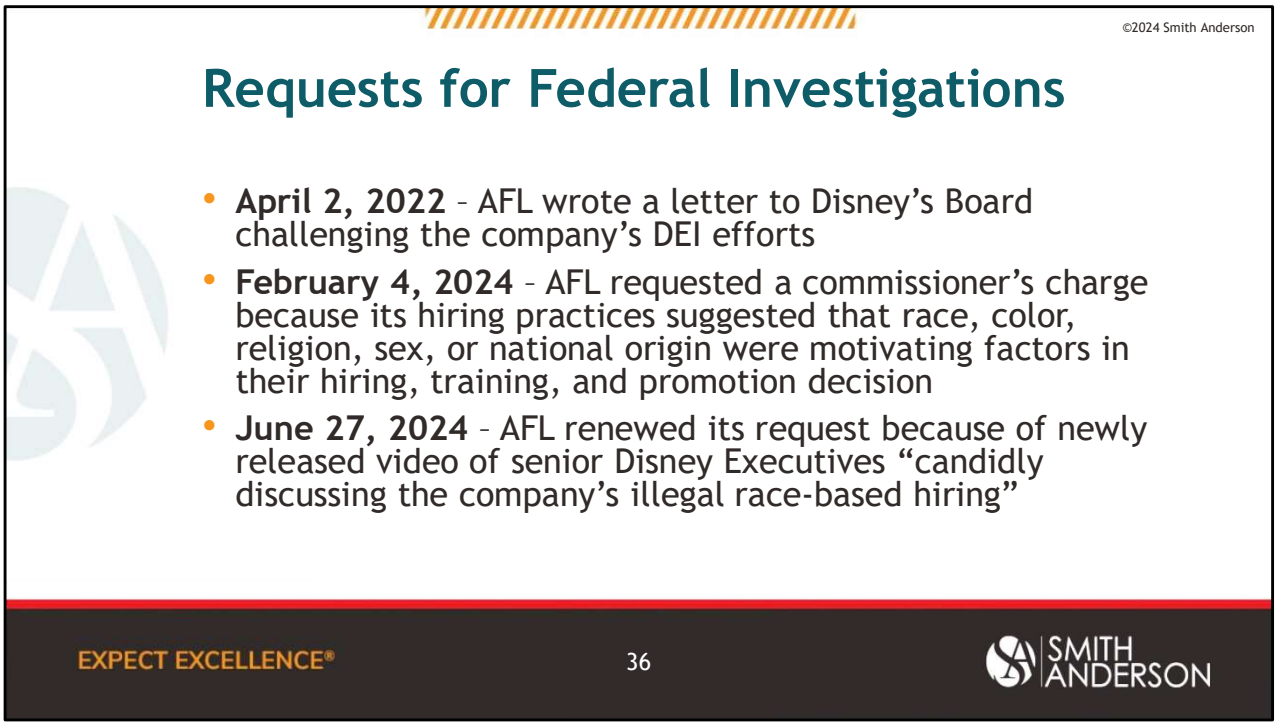
- AFL has not posted similar agency responses to their requests for EEOC commissioner's charges
- In fact, in some cases, they have requested a second commissioner's charge for the same company



See America First Legal, America First Legal Blasts the NFL's Illegal and Racist "Rooney Rule," Files Federal Civil Rights Complaint, AMERICA FIRST LEGAL (Feb. 6, 2024), https://aflegal.org/america-first-legal-blasts-the-nfls-illegal-and-racist-rooney-rule-files-federal-civil-rights-complaint/ (containing a link to the complaint and summary of their position).

Fix it Moment!

- There is little case law on diverse slate policies
- Questions remain about the lawfulness of diverse slate policies to the extent that they require a certain number of diverse candidates to be considered for ***every*** opening
  - It could create a "zero-sum" equation where diverse candidates are advanced at the exclusion of other qualified candidates who do not identify as diverse
- Risk mitigation tactics could be providing flexibility within the diverse slate policy. Some examples could include:
  - Goals to interview a certain percentage of diverse candidates in the aggregate
  - Commitment to additional outreach to seek diverse candidates for positions



See America First Legal, America First Legal Files Federal Civil Rights Complaint Against The Walt Disney Company For Illegal Race and Sex Discrimination, AMERICA FIRST LEGAL (Feb. 14, 2024), https://aflegal.org/america-first-legal-files-federal-civil-rights-complaint-against-the-walt-disney-company-for-illegal-race-and-sex-discrimination/ (containing a link to the complaint and summary of their position).

See America First Legal, *America First Legal Foundation Demands Follow-up Civil Rights Investigation of Disney Based on Recent Video Evidence,* AMERICA FIRST LEGAL (Jun. 27, 2024), https://aflegal.org/america-first-legal-foundation-demands-follow-up-civil-rights-investigation-of-

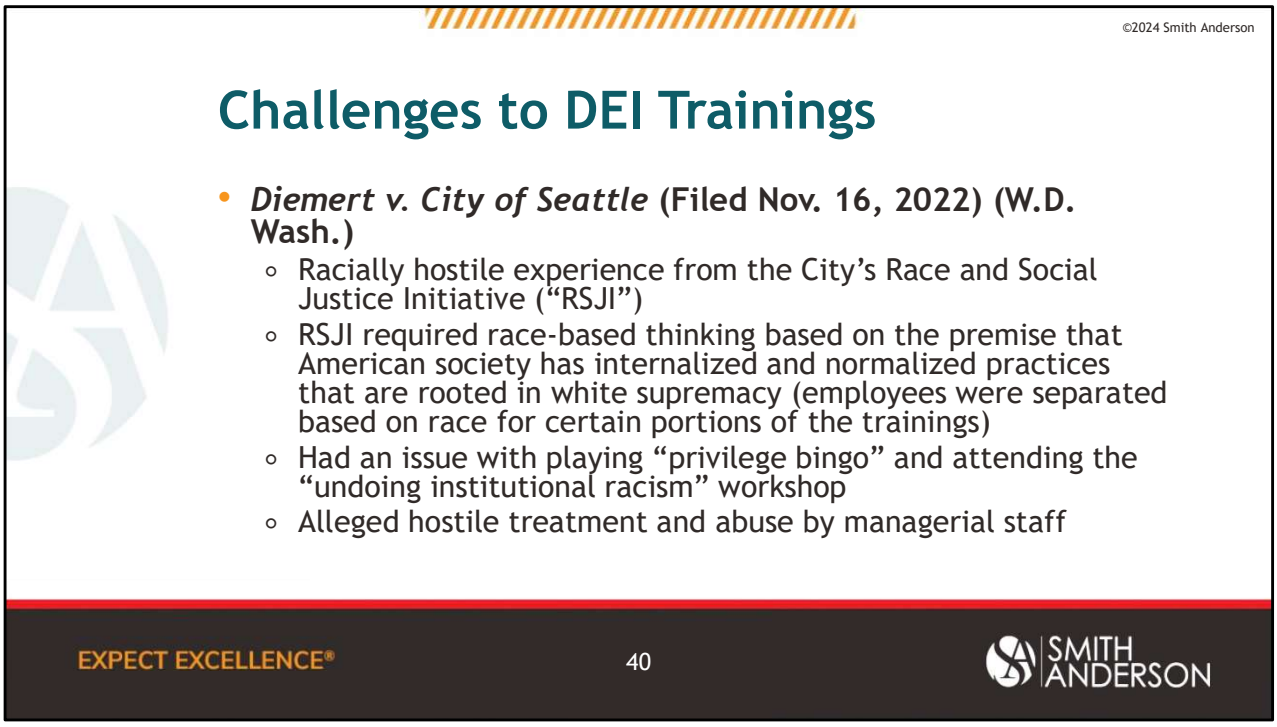
disney-based-on-recent-video-evidence/ (containing a link to the complaint and summary of their position).

Quick Fix it Moment!

- Again, educate executives on how to discuss and implement DEI policies

Challenges to DEI Trainings

Employees have begun to challenge employer's DEI training programs alleging that the training at issue is racial discrimination or cultivates a hostile work environment



Diemert v. City of Seattle, 689 F. Supp. 3d 956 (W.D. Wash. 2023).

Complaint, *Diemert v. City of Seattle*, No. 2:22-cv-01640 (W.D. Wash. Nov 16, 2022), ECF No. 1.

Challenges to DEI Trainings

- ***Diemert v. City of Seattle* (con.)**
  - City filed a motion to dismiss the claims
  - Court held employee alleged enough facts to state plausible claims for hostile work environment and disparate treatment based on race (Aug. 28, 2023)
    - citing to the verbal abuse by managers (beyond the training alone)
  - Court also held he had a plausible Equal Protection claim regarding the City's affinity group policy that encouraged employees to attend different trainings based on their race
  - City moved for summary judgment (Aug. 16, 2024)

Diemert v. City of Seattle, 689 F. Supp. 3d 956 (W.D. Wash. 2023).

Challenges to DEI Trainings

- ***Vavra v. Honeywell* (filed December 23, 2021) (7th Circuit)**
  - White engineering employee refused requests from management to participate in mandatory diversity, equity, and inclusion training
  - Employee alleged he had a reasonable belief that training was an unlawful employment practice in violation of state law and Title VII
    - Never watched the video to understand its content or application
    - Assumed it would vilify white people and treat people differently based on their race

Vavra v. Honeywell Int'l, Inc., 106 F.4th 702, 703 (7th Cir. 2024).

Challenges to DEI Trainings

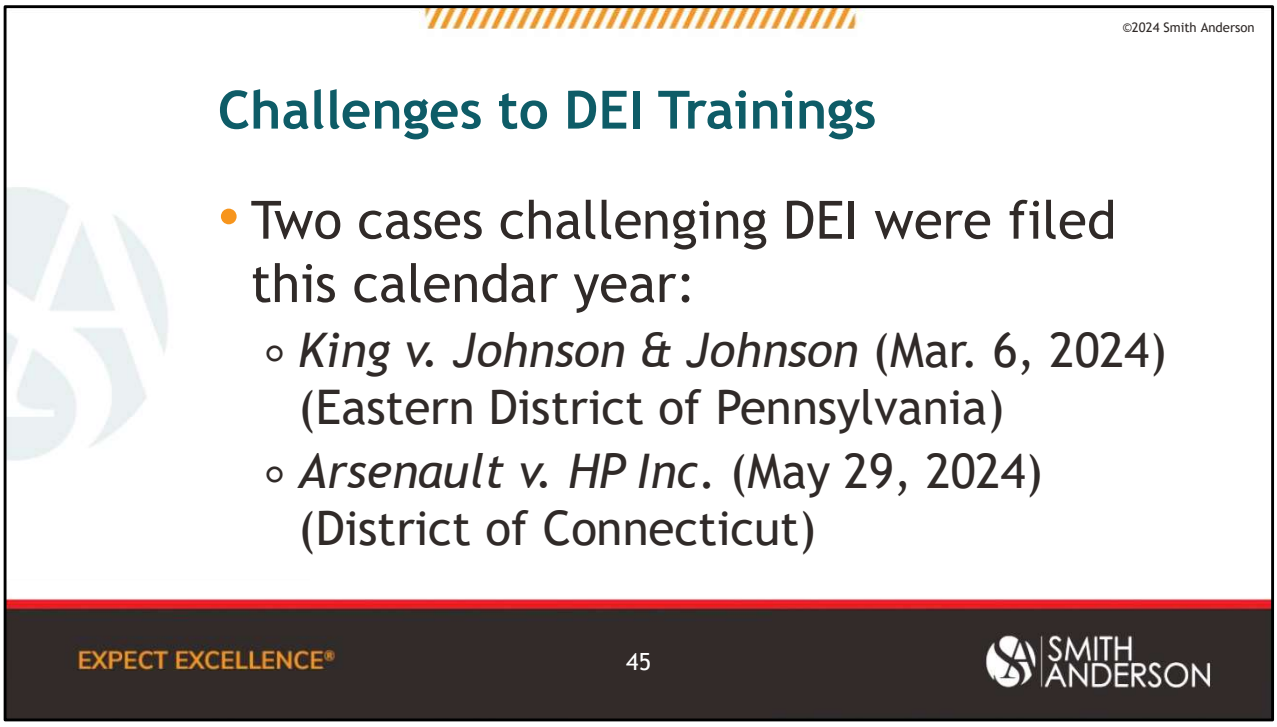
- ***Vavra v. Honeywell* (con.)**
  - The court held that there was no evidence that Honeywell retaliated against the employee because he did not have a reasonable belief that the training was an unlawful employment practice
  - The only information he had about the training contradicted his assumptions

Vavra v. Honeywell Int'l, Inc., 106 F.4th 702, 703 (7th Cir. 2024).

Challenges to DEI Trainings

- ***Vavra v. Honeywell* (con.)**
  - Notably, the EEOC filed an amicus brief in this case stating: "anti-discrimination trainings, including unconscious bias trainings, are not per se discriminatory and may serve as vital measures to prevent or remediate workplace discrimination"
  - While also noting that opposition to DEI training "may constitute protected activity" under Title VII if the plaintiff "provides 'a fact-specific basis' for his belief that the training" violates Title VII

Vavra v. Honeywell Int'l, Inc., 106 F.4th 702, 703 (7th Cir. 2024).



See Complaint, *Arsenault v. HP Inc.*, No. 3:24-cv-00943 (D. Conn. May 29, 2024) (Arsenault, a solution architect, made a comment that the employer was giving more DEI training and awareness than was necessary. He was subjected to a shaming session in the presence of his co-workers that portrayed his comment in an unfavorable light. He was terminated as a result of a RIF). This matter is still pending.

See Complaint, *King v. Johnson & Johnson*, No. 2:24-cv-00968 (E.D. Pa. Mar 06, 2024) (King, a staff engineer, objected to several elements of the new DEI program, particularly trainings that messaged that White males were "the problem" and several non-white individuals were promoted. He was terminated as part of a restructuring). This matter settled in July.

Fix it Moment!

- Conduct regular legal review of DEI training materials (even if the material is from a third-party)
- Ensure that a wide array of examples/hypos are included
- Make careful decisions about what training is mandatory and what is optional
- Take employee objections or complaints about trainings seriously and carefully consider whether an exemption from training is needed or could be granted without creating legal risk

Termination of Executives

- *Duvall v. Novant* (4th Cir. 2024)
  - White male executive alleged that he was terminated amid an ongoing diversity and inclusion initiative that aimed to displace White male executives to meet diversity targets
  - He was not provided with a reason for termination other than that Novant was going in a different direction
  - During the case, Novant alleged that there were performance concerns, but none were documented, and some evidence suggested Duvall's performance was strong

Duvall v. Novant Health, Inc., 95 F.4th 778 (4th Cir. 2024).

Termination of Executives

- *Duvall v. Novant* (con.)
  - This dispute resulted in lengthy litigation with a seven-day trial that included ten witnesses and over 100 exhibits
  - The jury found that Duvall's race and/or his sex was a motivating factor in Novant's decision to terminate his employment and there were multiple motions filed about the structure and amount of damages owed
  - Ultimately, Novant appealed the jury's finding of liability and award of punitive damages

Duvall v. Novant Health, Inc., 95 F.4th 778 (4th Cir. 2024).

Termination of Executives

- *Duvall v. Novant* (con.)
  - On March 12, 2024, the Fourth Circuit affirmed the jury's finding of liability holding that Novant's inconsistent reasoning for a White male executive's termination "amid a substantial D&I initiative that called for remaking Novant Health's workforce to reflect a different racial and gender makeup" was more than sufficient evidence for a reasonable jury to conclude that Duvall's race and sex were motivating factors in his termination
  - The court noted:
    - Novant had the express goal of "adding additional dimensions of diversity to the executive and senior leadership team,"
    - provided incentive bonuses to team leaders to diversify,
    - and had a drastic increase in women in leadership shortly after being presented with demographic data about the overrepresentation of White males in leadership
  - This, together with all the evidence presented, helped support the Plaintiff's claims

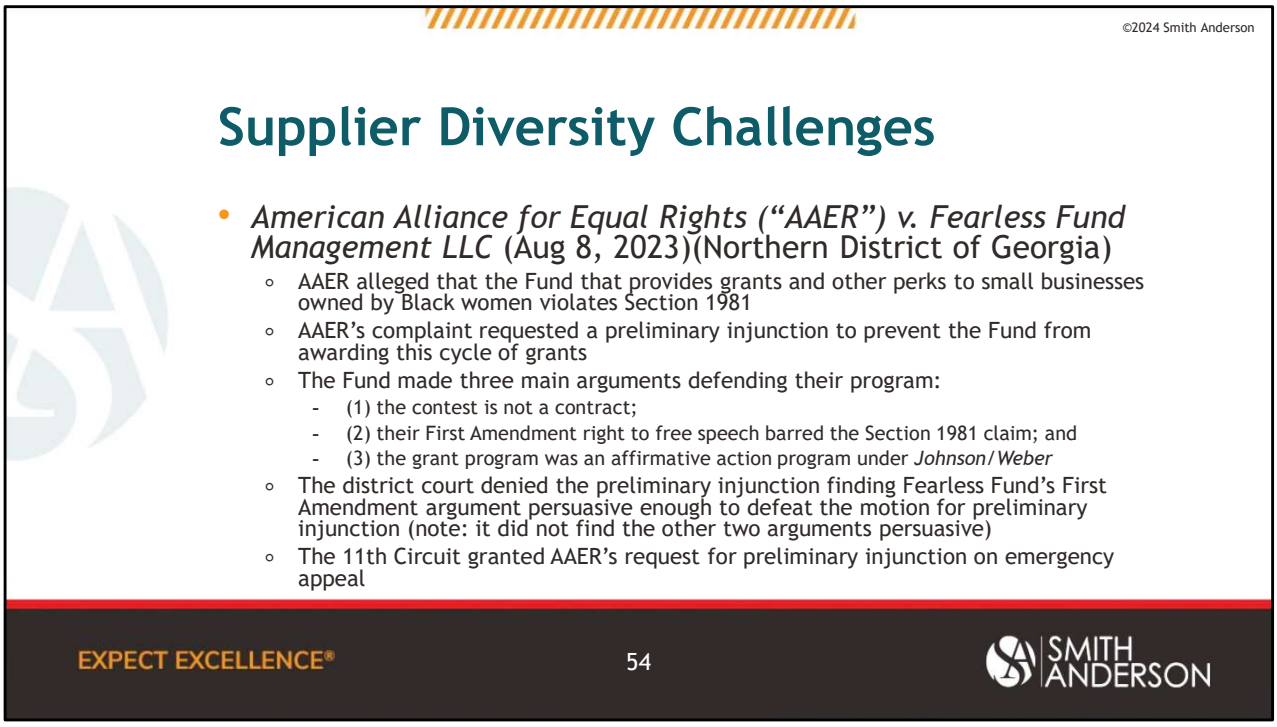
Duvall v. Novant Health, Inc., 95 F.4th 778 (4th Cir. 2024).

Fix It Moment!

- Carefully select the language used in DEI programming and **discussion of it (particularly by executive leaders)**
  - Ensure you are not considering or representing to consider protected class in employment decisions
- Accurately document the reasons for employment decisions

Supplier Diversity Challenges

- **Supplier Diversity Generally**
  - Supplier diversity challenges are largely brought under Section 1981
    - Which prohibits race discrimination in making and enforcing contracts
  - Courts have applied Title VII's voluntary affirmative action standard in both the employment and education-related space
  - We have yet to see if courts would apply a similar voluntary affirmative action standard in the supplier diversity space



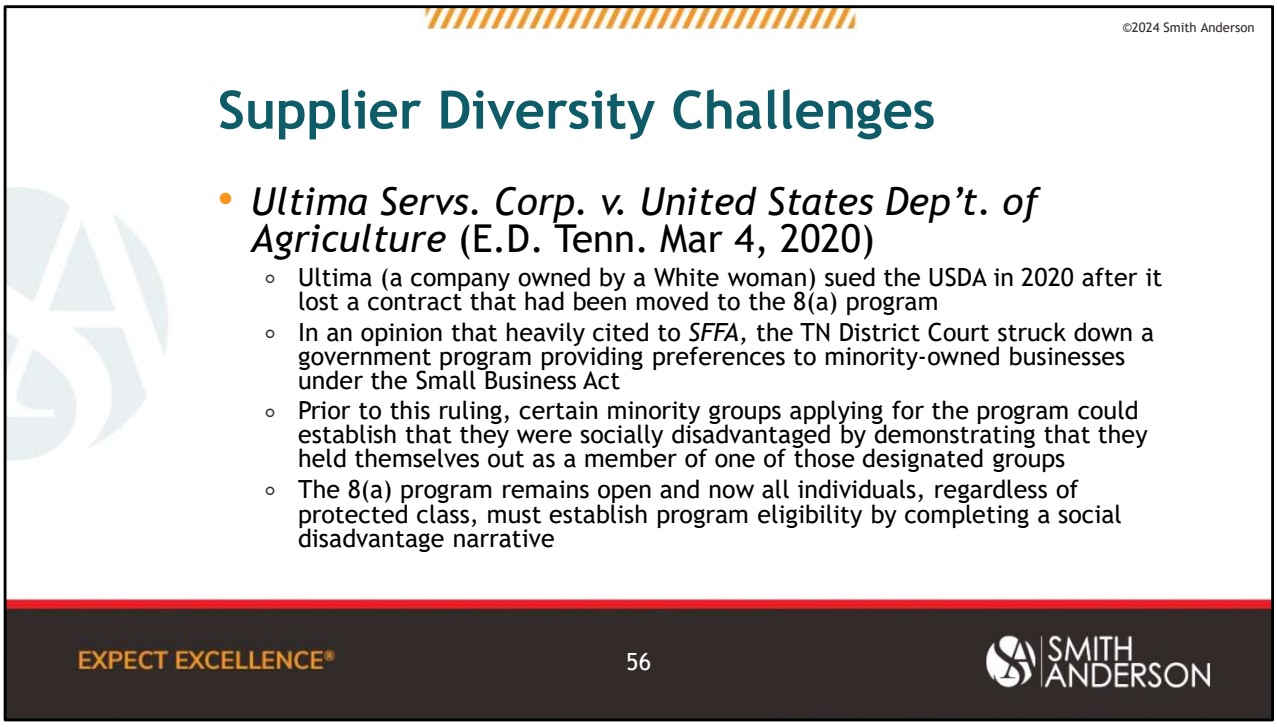
Lower Court Decision – *Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC*, 2023 WL 6295121 (N.D. Ga. Sept. 27, 2023), *aff'd in part, rev'd in part and remanded,* 103 F.4th 765 (11th Cir. 2024).

Emergency Appeal – *Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC*, No. 23-13138, 2023 WL 6520763 (11th Cir. Sept. 30, 2023).

Supplier Diversity Challenges

- *AAER v. Fearless Fund Management LLC (con.)*
  - After oral arguments and extensive briefing, the 11th Circuit held AAER had standing and the preliminary injunction was appropriate because the Fund likely violates Section 1981
  - Many expected that this matter would continue to the Supreme Court
  - However, in Sept. 2024, the parties settled and both parties agreed that the Fund would permanently close the contest

Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC, 103 F.4th 765 (11th Cir. 2024).



Decision striking down the program - *Ultima Servs. Corp. v. U.S. Dep't of Agric.*, 683 F. Supp. 3d 745 (E.D. Tenn. 2023)

Information about changes to the program - https://www.sba.gov/federal-contracting/contracting-assistance-programs/8a-business-development-program/updates-8a-business-development-program

Legal Challenges

- *Bolduc v. Amazon.com Inc.* (E.D. Tex. Jul 20, 2022)
  - Amazon faces a lawsuit alleging that the company's $10,000 startup bonus offered to "Black, Latinx, and Native American" delivery service partners (independent businesses contracted to deliver Amazon packages to customers' homes) violates "§ 1981 by excluding Whites and Asian-Americans"
  - On Apr. 24, 2024, the court dismissed the matter because the plaintiff lacked standing (a common issue in many of these cases)

Bolduc v. Amazon.com Inc., 2024 WL 1808616 (E.D. Tex. Apr. 25, 2024).

FINAL Fix it Moment!

- Ensure corporate commitments to use diverse vendors are goals not quotas
- A vendor's protected class should not be a factor in the selection process
- It remains appropriate to conduct outreach to diverse vendors to apply for supplier opportunities
- Review your corporate commitments to diverse suppliers for risk of Section 1981 challenges
- This area of law is developing

Summary of Mitigation Tactics

Ideal DEI Programs/Initiatives

- Ideal DEI programs in the employment context are policies and practices aimed at ensuring equal opportunities and outreach to certain underrepresented groups in the workforce, such as women, people of color, LGBTQ+ individuals, and people with disabilities
  - It is NOT "affirmative action"
  - It is NOT making decisions based on protected class status
- **Can still have diversity, equity, inclusion, belonging, and accessibility policies and a culture grounded in these values**

Ideal DEI Programs/Initiatives

- DEI programs might include:
  - outreach to diversity-focused recruitment sources to identify a strong pipeline of diverse talent
  - non-exclusive mentoring programs aimed at supporting diverse talent within a company (beware of exclusive accelerated development programs)
  - unconscious bias training, bystander intervention training, and ally training (carefully vetted by legal and HR)
  - skills based training to develop employee skills to be better qualified to move into other roles
  - having other policies and practices to champion and promote diversity within the workforce, such as affinity groups and awareness events (open to all)

Ideal DEI Programs/Initiatives

- DEI programs cannot include:
  - using protected categories, such as race, to decide who to hire or promote, or
  - setting aside positions to be filled by a woman or racial/ethnic minority, or
  - setting a quota for a specific number of individuals to be hired based on a protected class

Ideal DEI Programs/Initiatives

Consider Race-Neutral Diversity Factors

- Criteria that, while race neutral, nonetheless tend to increase racial diversity in the workplace
- Such factors may include socioeconomic status, first generation professionals, unique personal circumstances or geographic diversity
- Continue to always hire the best qualified person for the role

Examples of Activities in Each Category

Permissible	Uncertain/Caution	High Risk	Impermissible
• Recruiting using affinity-based job fairs, diverse media, HBCUs, and similar organizations • Equal employment opportunity to all employees and applicants • Defining "diversity" broadly (not limited to protected classes only) • Providing disability accommodations for applicants and reviewing job descriptions for accessibility • Trainings on anti-harassment, implicit bias, and anti-discrimination • Maintaining demographic data for EEO-1 forms and assessment of selection processes (with proper storage and appropriate access) • Mandatory (under EO 11246 and OFFCP regulations) and Voluntary Affirmative Action programs (compliant with Title VII and EEOC guidance) • Factoring in compliance with the EEO policy and Affirmative Action policies with compensation • For suppliers - fostering relationships with organizations that provide diverse business accreditation; asking vendors to describe their DEI programs/commitments	• Pipeline, mentorship, training, and sponsorship programs for individuals based on protected classes (consider opening to all employees to opt-in) • Statements discussing DEI goals (should be vetted by counsel to ensure not to inadvertently say anything impermissible or something that could be used as evidence of reverse discrimination) • Employee Resource Groups (should be open to all employees in and outside of the unifying protected class) • Aspirational goals for diversity of a workplace (allowed but careful not to be a quota; how goals are achieved matters) • Consideration of a diverse slate of qualified applicants • Practices that may be interpreted as employment decisions based on the employee's or applicant's protected class; Facially neutral policies/practices that may have adverse impact • Engaging suppliers based on diverse ownership • The use of self-identification surveys requesting more demographic information than required (permissible with proper procedures in place)	• Allowing those with hiring decision-making power to have access to demographic information creates a presumption that information was used in the decision-making process • Commitment to a certain dollar number to racially diverse suppliers (challenged under Section 1981 and various state law); a points-based system awarded to diverse vendors • Tying in compensation with certain diversity hiring targets	• Protected class quotas • Job openings, scholarships, and internships limited only to those of a certain protected class • Employment decisions based on the individual's protected class

Questions?


SMITH ANDERSON
Successfully Navigating Change: Legal Updates on Diversity, Equity and Inclusion
Taylor M. Dewberry
October 29, 2024
EXPECT EXCELLENCE®

Today's Employee Organizing: What HR Professionals and Corporate Counsel Need to Know, and Do, Now!


SMITH ANDERSON
Today's Employee Organizing
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Kimberly J. Korando
Nelson A. McKown
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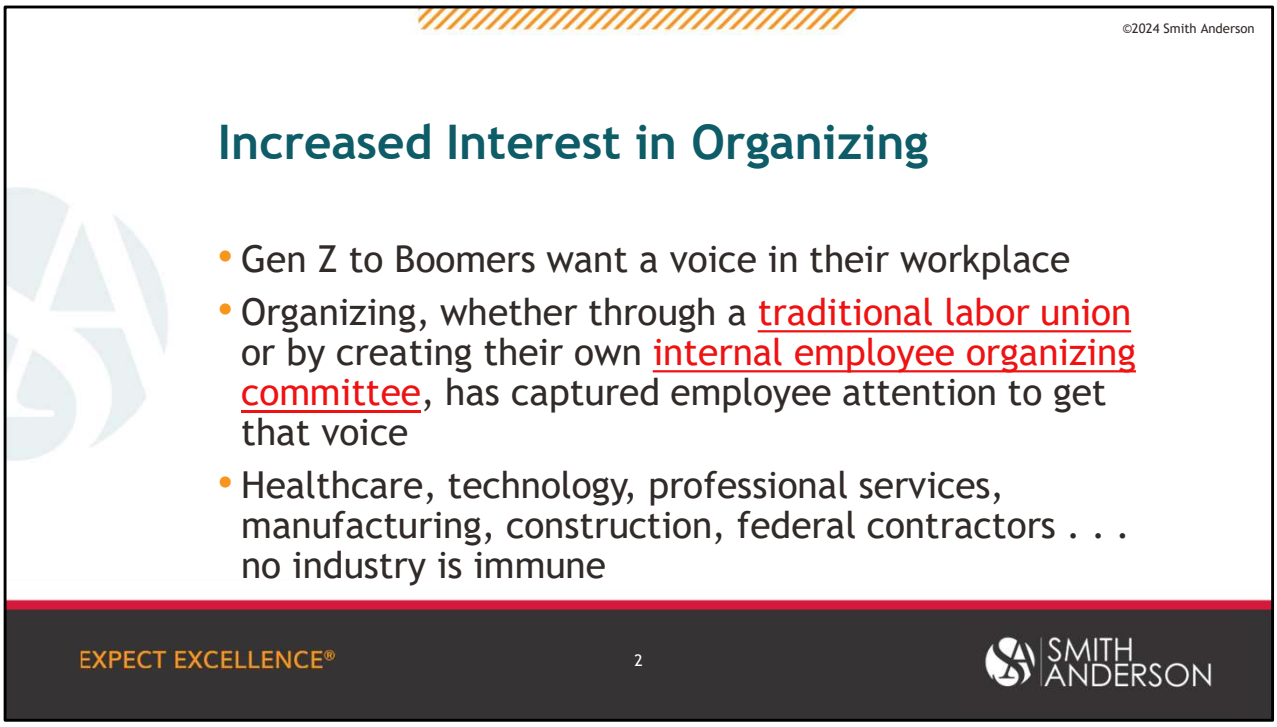


REMEMBER:

- Union organizing does not require affiliation with a traditional labor union. Company employees can form their own internal employee organizing committee and "independent union" to be certified as the bargaining representative. Whether it is a traditional labor union or their own independent "union," it qualifies as a "union" and is referred to as such in this presentation.
- The National Labor Relations Act (NLRA) does not apply to government employees.
- The NLRA allows ***non-supervisory*** employees to organize and be represented by an exclusive bargaining representative. ***It does NOT apply to supervisors and managers, HR employees or other "confidential" personnel.***

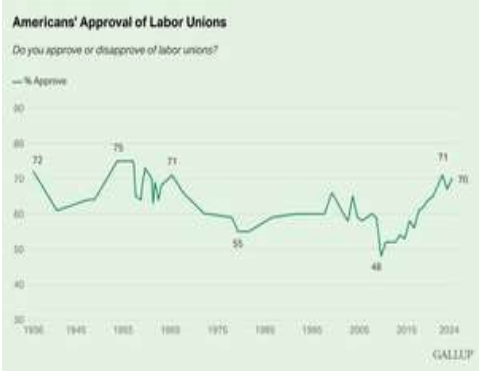
Additional Information: Workers want unions, but the latest data point to obstacles in their path: Private-sector unionization rose by more than a quarter million in 2023, while unionization in state and local governments fell | Economic Policy Institute (epi.org)

- In 2023, workers organized across a variety of work settings, including higher education, museums, nonprofits, entertainment, retail, and manufacturing (Greenhouse 2023; Shepardson 2023).
    - Greenhouse, Steven. 2023. "Focus Organizing Drives on Workers Without College Degrees, US Unions Told." *Guardian*, May 5, 2023.
    - Shepardson, David. 2023. "UAW Launches Bid to Organize Tesla and 'Entire Non-Union Auto Sector' in US." Reuters, November 29, 2023.

Favorable View of Unions *Increasing*

Public approval of labor unions increased to 70% in August

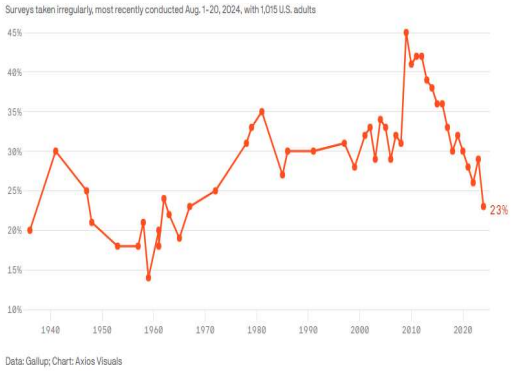
-- the second highest level in 57 years

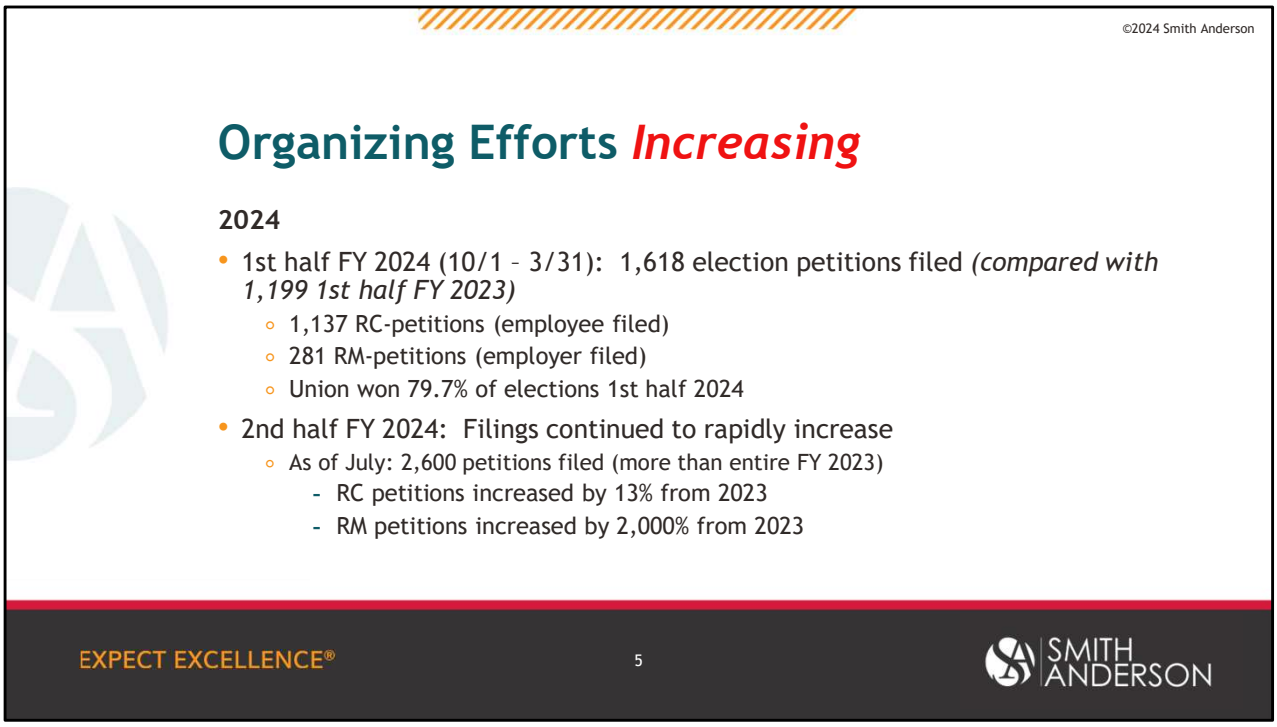


Unfavorable View of Unions *Decreasing*

Only 23% of Americans disapprove of labor unions

--a number that has not been this low since September 1967





Unions' increase in popularity follows the NLRB's reporting of significant increases in union activity, including a 32% increase in union election petitions. This spike in petitions is driven by **employer** filed RM-petitions after the NLRB's controversial *Cemex* decision, which will be discussed in the following slides 13 - 22.

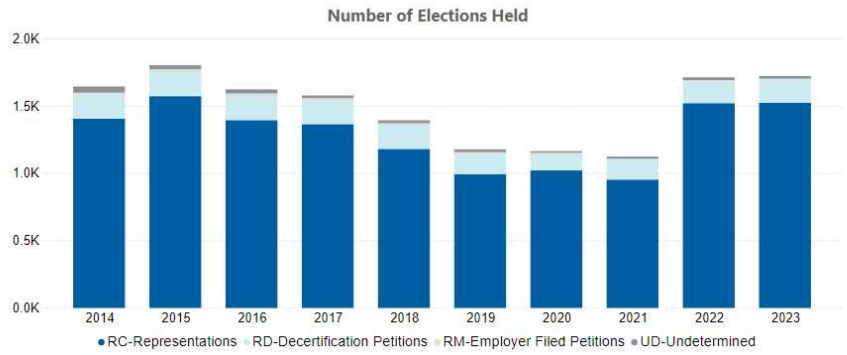
https://www.nlrb.gov/news-outreach/news-story/union-petitions-up-35-unfair-labor-practices-charge-filings-up-7-in-the

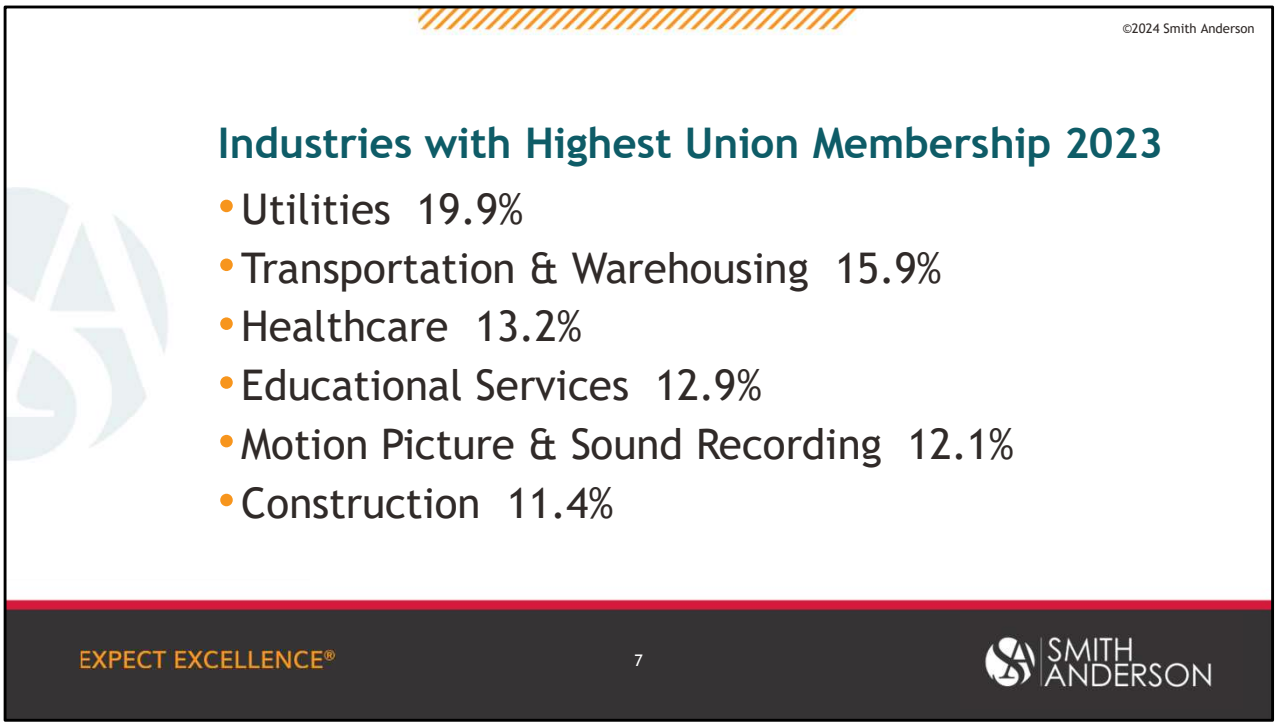
Definitions:

RC petition: This is the name for the petition filed by EMPLOYEES who are seeking an election to certify a "union" as their bargaining representative (remember, this can be a traditional labor union or the employees' created independent union)

RM petition: This is the name for the petition filed by EMPLOYERS who are seeking an election to verify a claim that a majority of employees support a "union" as their bargaining representative (remember, this can be a traditional labor union or the employees' created independent union)

Number of Elections Held Per FY





Union Members 2023, U.S. Bureau of Labor Statistics www.bls.gov/news.release/pdf/union2.pdf

REMEMBER: Union membership rate is the percent of wage and salary workers who were ***members*** of unions. In right to work states, employees in unionized workplaces do NOT have to be union members to get the benefit of the collective bargaining agreement.

New Trends in Industries

Allina Health Systems

In 2023, nearly 600 physicians, nurse practitioners, and physician assistants in MN and WI created the largest private-sector doctors union in the country, Doctors Council SEIU Local 10-MD

Chronic understaffing, high levels of burnout and compromised patient safety in pursuit of profits was their reasoning to seek union representation

"It sounds cliché, but I think the most important thing that we are asking for is a seat at this table." Allina Health Maplewood Clinic pediatrician Dr. Kristin Sanders-Gendreau

[600 Allina Health clinicians officially recognized as largest private-sector doctors union in the US - KSTP.com 5 Eyewitness News]

New Trends in Historically Low Unionized States

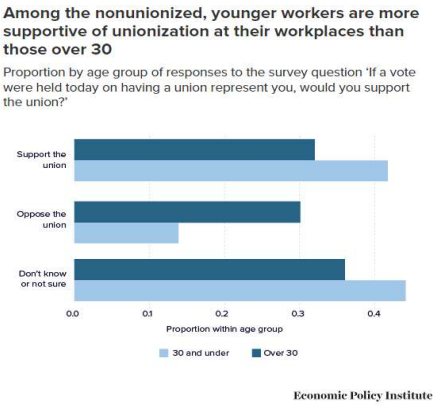
Mississippi union membership experienced a 97.4% growth rate between 2013 and 2023 (largest growth in the country)

Arkansas experienced a 63.2% growth rate (2nd largest)

North Carolina remains one of the least unionized states, but union membership has increased the last 4 years

https://www.achrnews.com/articles/155049-10-states-with-the-largest-declines-in-union-membership

Shifts in Culture & Organizing Approaches



- Recent polling from the Economic Policy Institute shows US workers today *are much less likely to oppose* union representation in their workplaces
  - Employees 30 and under *are far more likely to support unionization*
- Strikes, threats of strikes, and several recent high-profile collective bargaining agreements have secured large wage increases in a variety of industries, which has garnered support and interest from non-union employees

Younger workers are both more supportive *and* more uncertain about unions compared with older workers. This is an especially important finding given the fact that young workers have been the main push in recent organizing efforts at Amazon and Starbucks. Members of these generations appear to be more active in social movements and are turning out to vote at higher rates than earlier generations did in their 20s and 30s.

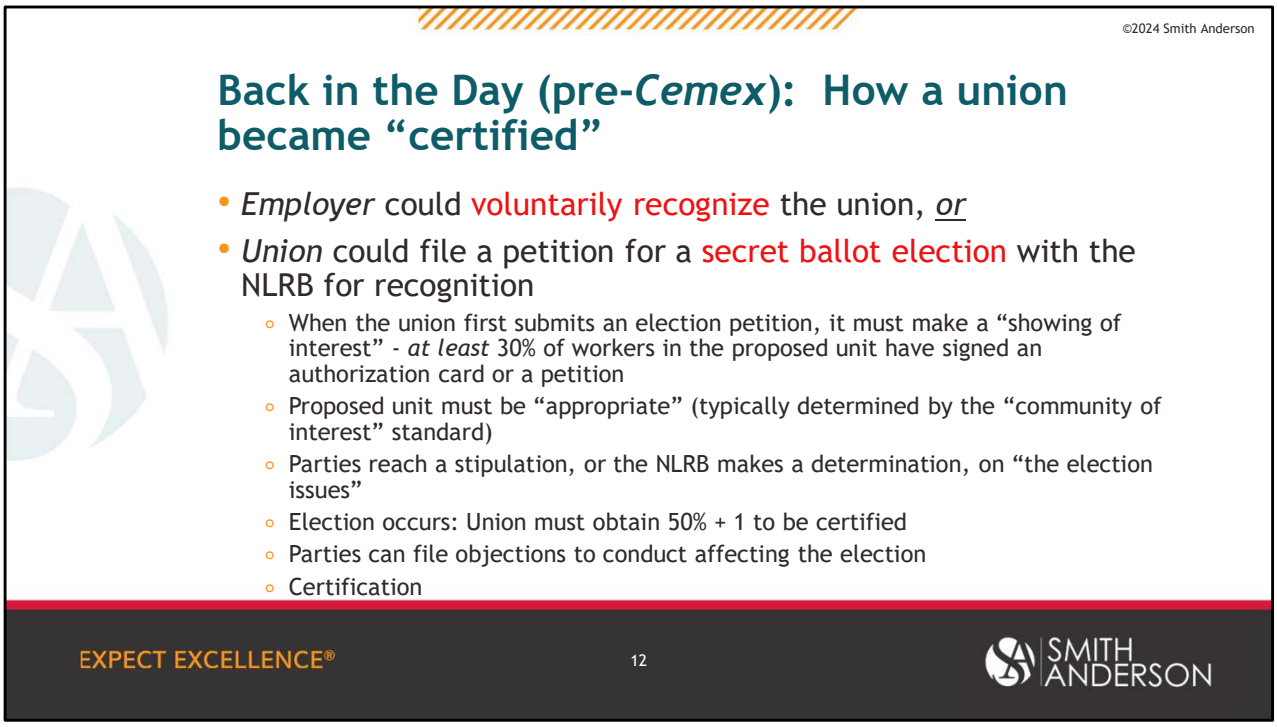
https://www.epi.org/publication/rise-of-the-union-curious/

Unions are also becoming better "marketers" of their successes with collective bargaining and strikes. Last year more than half a million American workers went on strikes. In October 2023, companies lost more workdays to strikes than any month during the past 40 years. Some of these high-profile strikes included the (1) Writers Guild of America and Screen Actors Guild's strikes, which each lasted several months; (2) the United Auto Workers strikes against Ford, GM, and Stellantis; and (3) the Teamster's threatened strike against UPS last summer primarily over part-time worker pay and air conditioning in trucks.

https://nhjournal.com/point-the-year-of-the-strike-could-be-a-turning-point-for-the-labor-movement/

Also, several recent high profile collective bargaining agreements secured large wage increases in industries ranging from parcel delivery to auto manufacturing, health care, and education.

https://www.epi.org/publication/major-strike-activity-in-2023/
https://www.cnbc.com/2024/01/28/unions-with-power-popularity-rising-are-still-losing-a-big-battle.html



Background Information On How Employees Become Represented By Unions
Generally, there are two paths employees can follow to certify a union as their exclusive bargaining representative: (1) the employer can voluntarily recognize the union (if there is evidence that a majority of workers have indicated interest in unionizing) or (2) the union can file a petition for a secret ballot union election with the NLRB.

Secret Ballot Elections
Traditionally, the secret ballot election has been the preferred method to determine union support because of the anonymity. Obviously, there can be potential peer pressure with authorization cards or signing a petition.

1-First, the union must make what is called a "showing of interest" to the NLRB. This means at least 30% of the proposed unit has signed authorization cards or signed a petition that they want union representation. Most unions will not file the petition until they have at least 70% of the relevant workers have signed an authorization card. This is because once the petition is filed the employer can campaign against the union. Typically, the union wants to keep the fact that they are soliciting signatures quiet so the employer cannot get out in front of it by adjusting the main source of the grievance, whether it be pay, benefits, or some other issue on the job.

2-Once the petition is filed:
- The employer cannot make ANY changes to wages, hours, or working conditions of the

employees. The status quo must remain the same until the election is complete. If there are changes or promises of changes during the election period, the union can file objections to conduct affecting the election, and the employer will face unfair labor practice charges. Specific remedies for these charges and objections are discussed in slides 13 - 22.

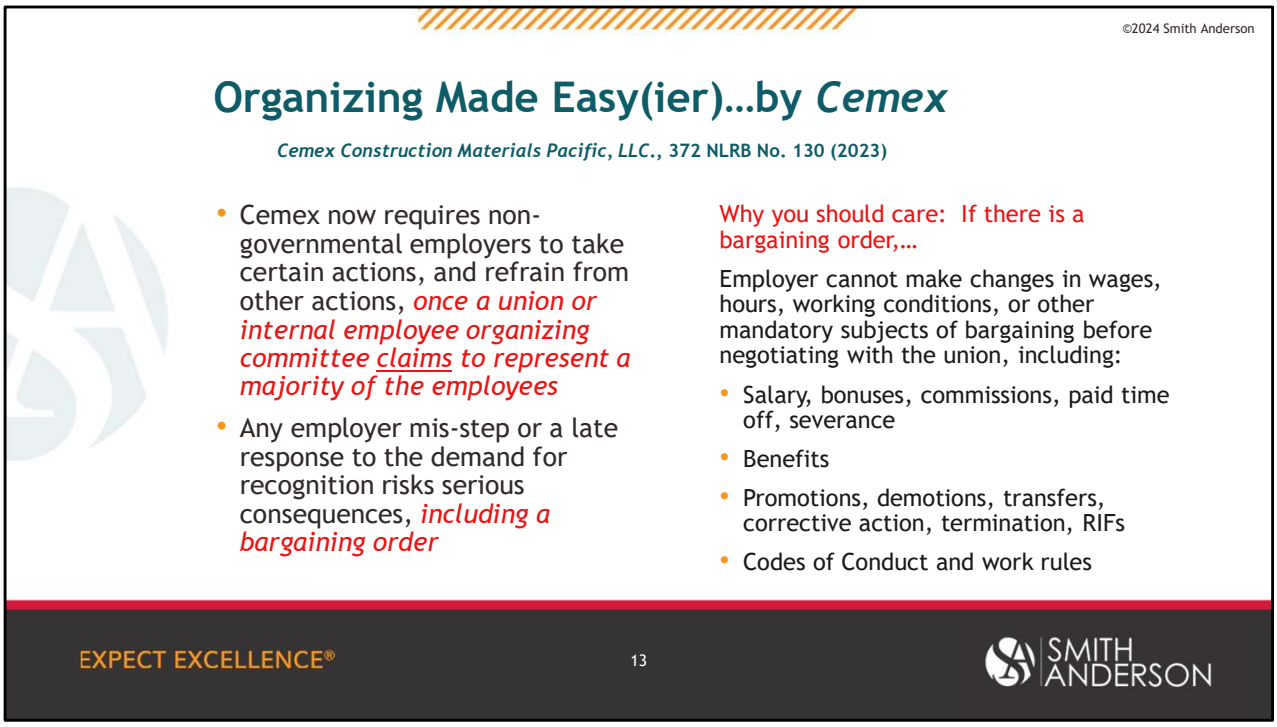
- The NLRB will then quickly investigate to make sure they have jurisdiction, the union is qualified, and there are no existing labor contracts or recent elections that would bar an election.
- Once this is completed, the NLRB will seek an election agreement (called a stipulation) between the employer and the union setting the date, time, and place for voting, the appropriate unit, and a method to determine who is eligible to vote. To ensure the unit of employees is "appropriate", NLRB typically uses the "community of interest" test. This test looks at a number of factors like hours worked, location, job duties, supervision, and a number of others to ensure the employees have enough in common where it would be appropriate for one union to represent them all. There are a number of exceptions to the community of interest test.

3-Once an election agreement is reached, the parties authorize the NLRB's Regional Director to conduct the election at the specific time and place. If no agreement is reached, the Regional Director will hold a hearing and rule on those issues not agreed to. Following new rules, elections are now held on the earliest practicable date after a Regional Director's order. This can be an extremely quick turnaround.

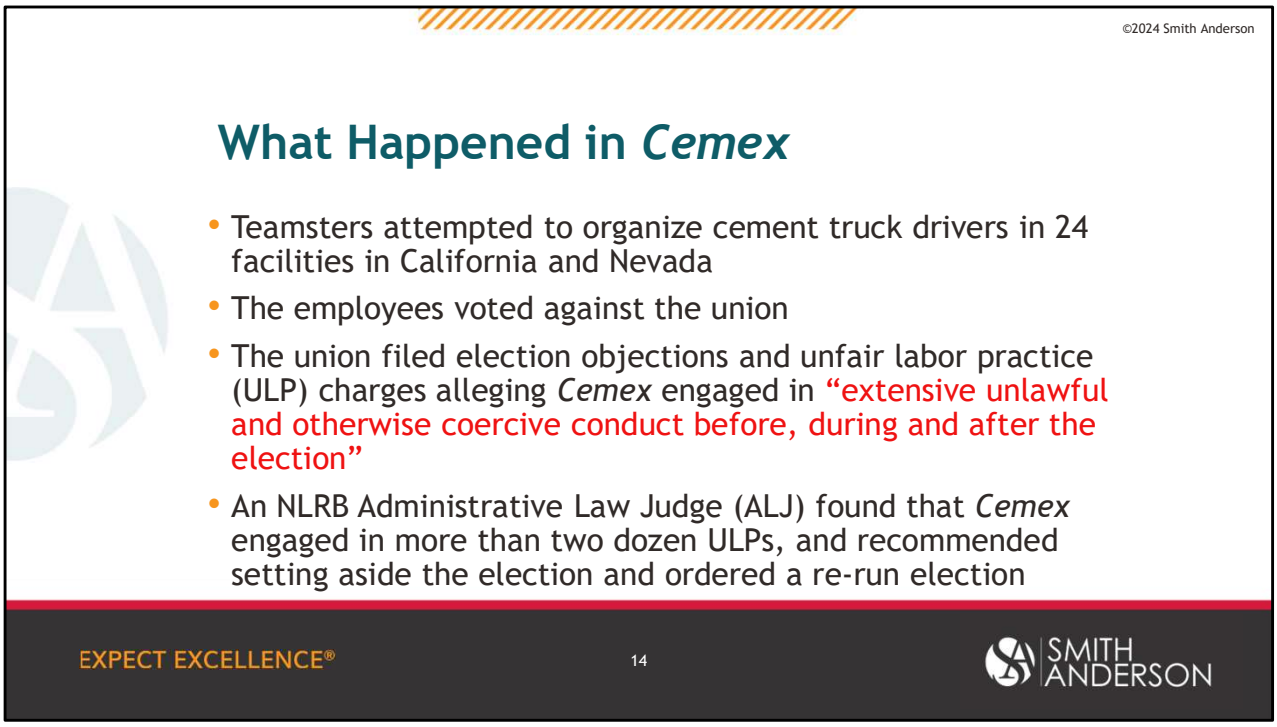
4-Then an election is held. For a union to be certified they must receive a majority of the ballots cast. (So, 50% plus 1). A tie means the employer wins because a majority of the employees did not want union representation.

5-After the election, both parties have 7 days to file objections to conduct affecting the election.

- So, if any unlawful conduct occurred after the petition was filed and before the election, the parties can point this out to the NLRB and provide evidence. This can be from a number of things including the employer threatening union-supporting employees, the union threatening employees, changing wages or benefits during the election period. It can be a lot things.
- If no objections are filed and the union wins, the union becomes certified and the exclusive representative of the employees, and the employer must begin to bargain with the union.
- If the union losses, they cannot attempt to unionize the same employees for 1 year. This is called an election bar.



On August 25, 2023, the NLRB issued a far-reaching decision in *Cemex Construction Materials Pacific, LLC*. The *Cemex* decision effected a drastic overhaul to how American workers may become represented by labor unions.

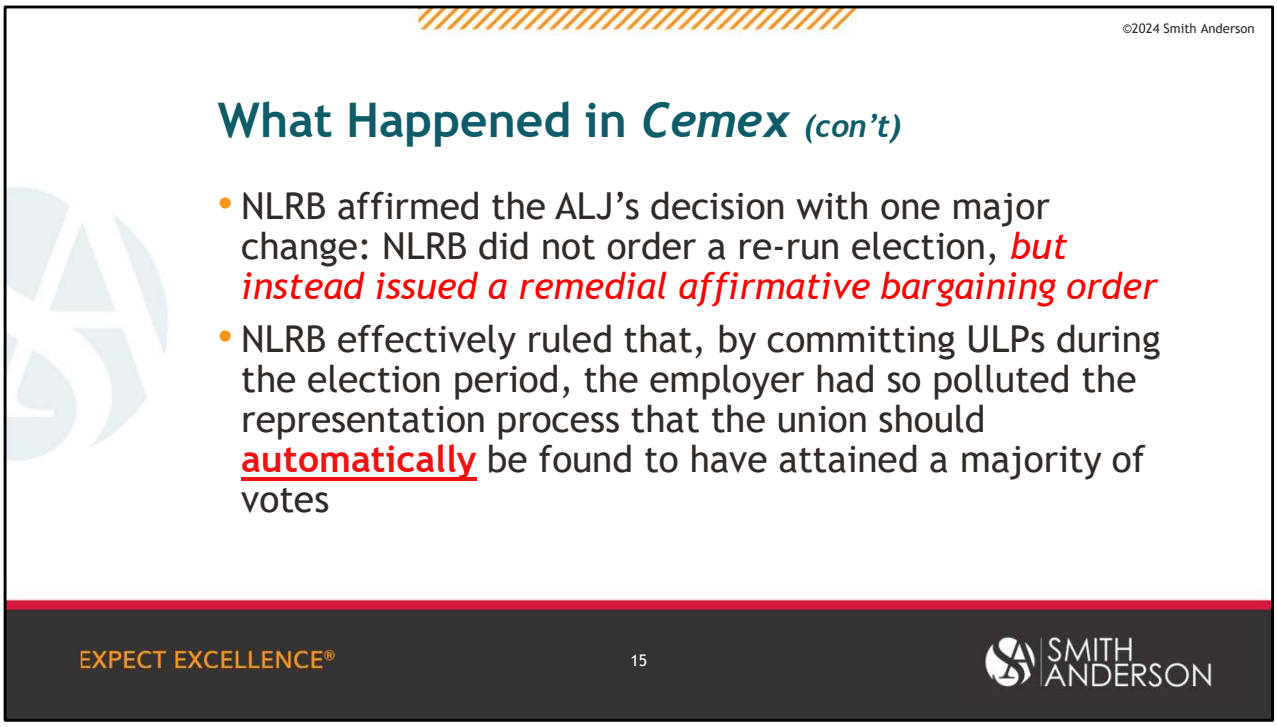


The main case that has affected the most change with elections and certifying unions over the past two years is the *Cemex* case. This case arose as a result of a campaign to organize a bargaining unit of cement truck drivers and driver trainers led by the Teamsters Union. The Cemex employees were located across 24 facilities throughout Southern California and Nevada. An election was held, and the employees voted against representation by a thin margin.

The union filed several charges and election objections alleging that the company had engaged in "extensive unlawful and otherwise coercive conduct before, during and after the election" that included:

- threatening employees who appeared to favor the union,
- engaging in surveillance of employees,
- restricting employees from communicating with union representatives,
- hiring security guards to intimidate employees, and more. *Cemex*, 372 NLRB No. 130 at *2.

An NLRB ALJ found that the company violated Section 8(a)(1) of the Act more than two dozen times. The ALJ recommended setting aside the election and ordered a rerun election.

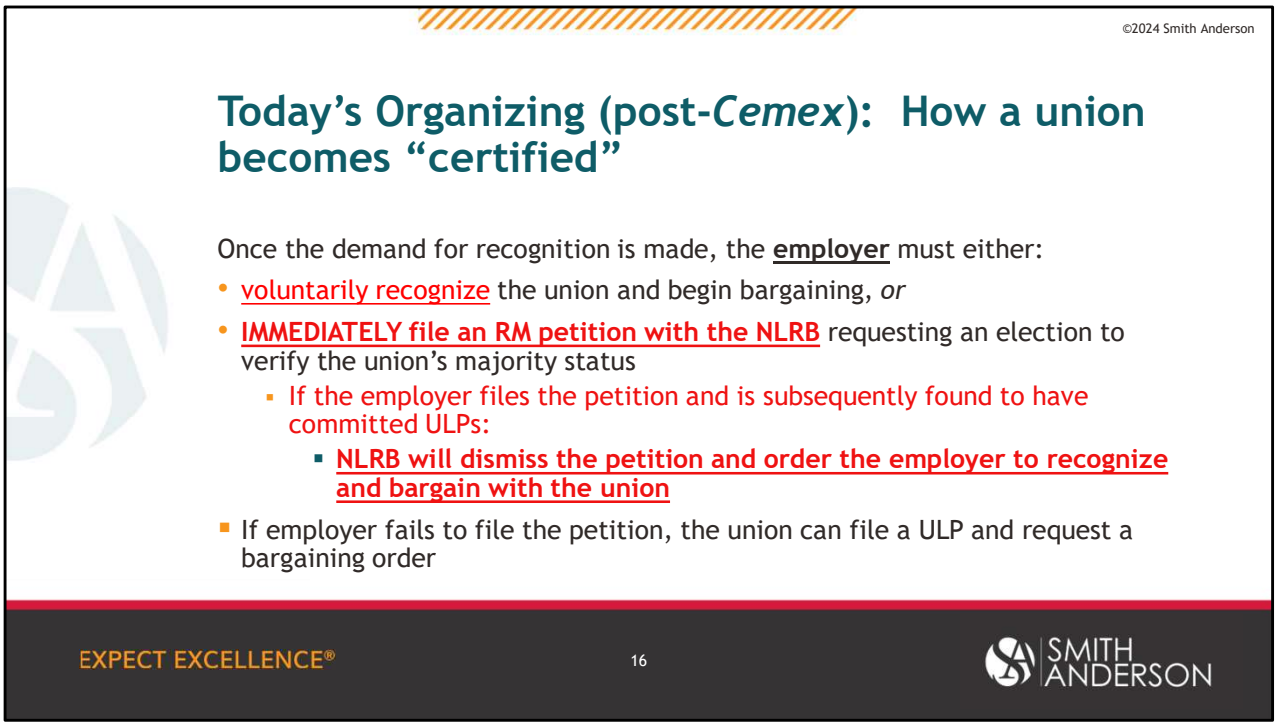


The ALJ's decision was affirmed by the NLRB, but with one major change: the NLRB did not order a re-run election, but instead issued a remedial affirmative bargaining order.

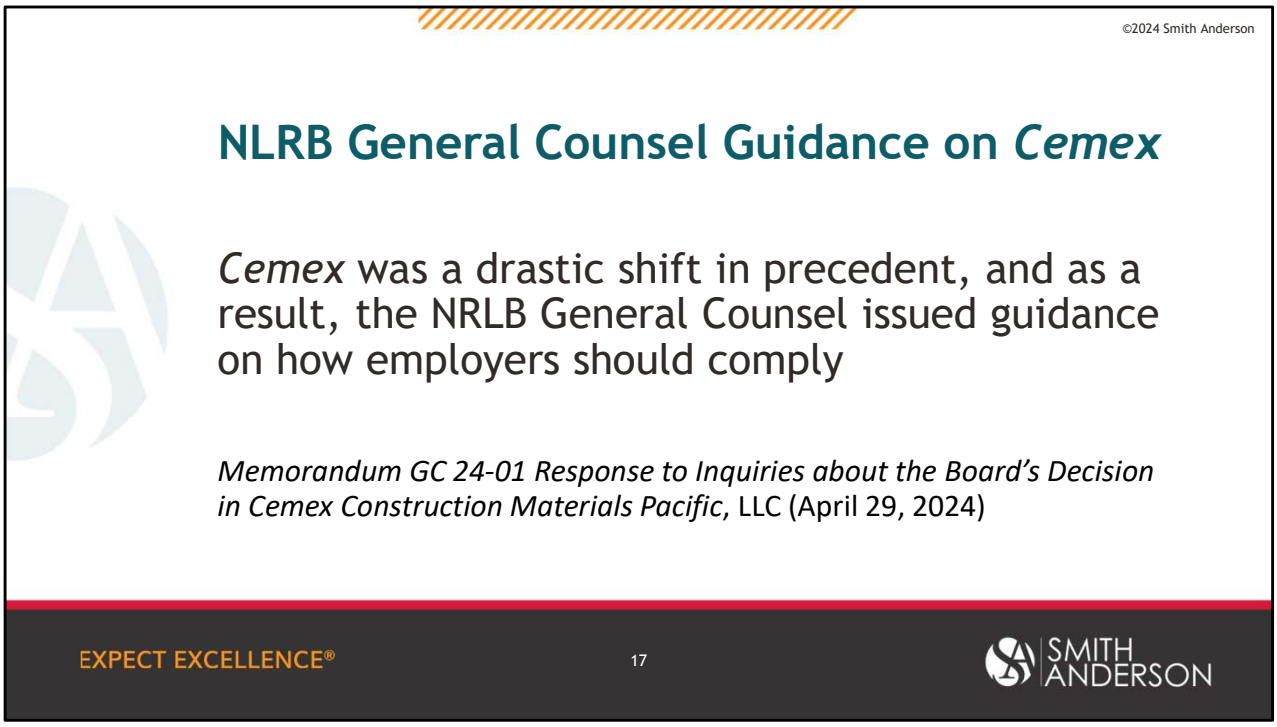
In so doing, the NLRB effectively ruled that, by committing unfair labor practices during the election period, the employer had so polluted the representation process that the union should **automatically** be found to have attained a majority of votes.

The NLRB's previous standard in these type of circumstances was to **set aside** the results of the election where the unlawful conduct occurred during the critical election period ("critical period") unless the election results could not have been affected by the violation. NLRB would issue re-run elections because the preferred and default method for union certification was a secret ballot election, so employees can freely make their decision without the threat of reprisal or intimidation from either the company, union, or their co-workers.

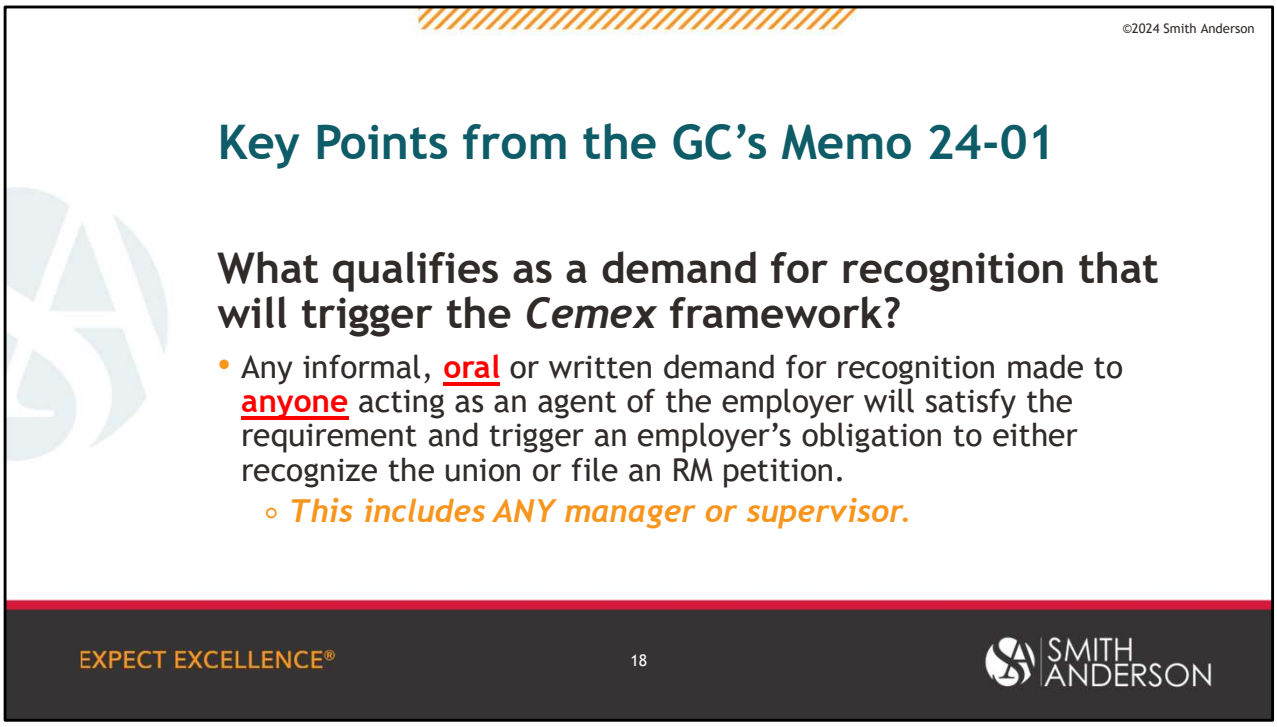
The NLRB deviated from that norm and set out a new framework in *Cemex*, where regardless of the results of the secret ballot election, the Board can certify the union as the employees' exclusive bargaining representative because of the unfair labor practices committed during the election period. **Just for reference it is very common for ULPs to occur during an election, because there are very specific, non-common sense rules that apply.**



Cemex drastically changed how elections work and placed additional requirements on employers when faced with a union's demand for recognition.

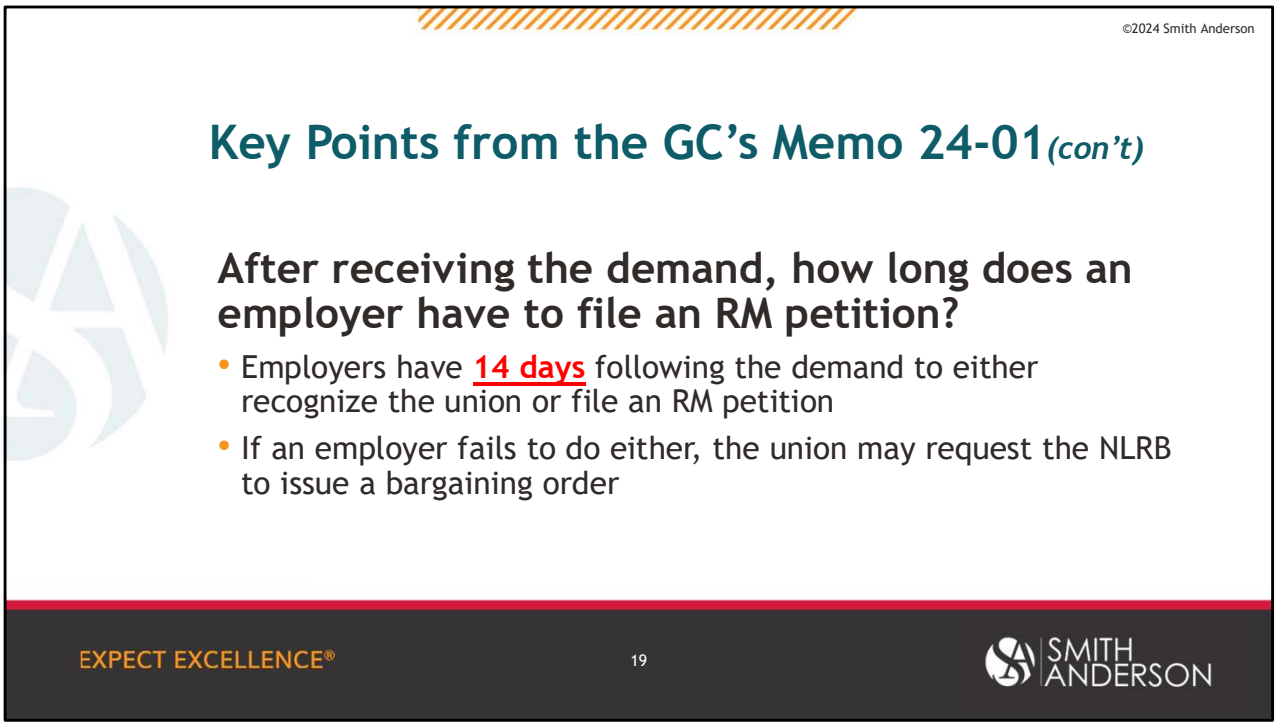


The decision in *Cemex* left many questions. After the ruling, the NLRB General Counsel issued guidance in *Memorandum 24-01 Response to Inquiries about the Board's Decision in Cemex Construction Materials Pacific, LLC* (April 29, 2024) to explain her interpretation of the decision. Although the General Counsel's guidance does not carry the weight of law, it is meaningful insofar as it helps employers understand how the NLRB will attempt to enforce the precedent.



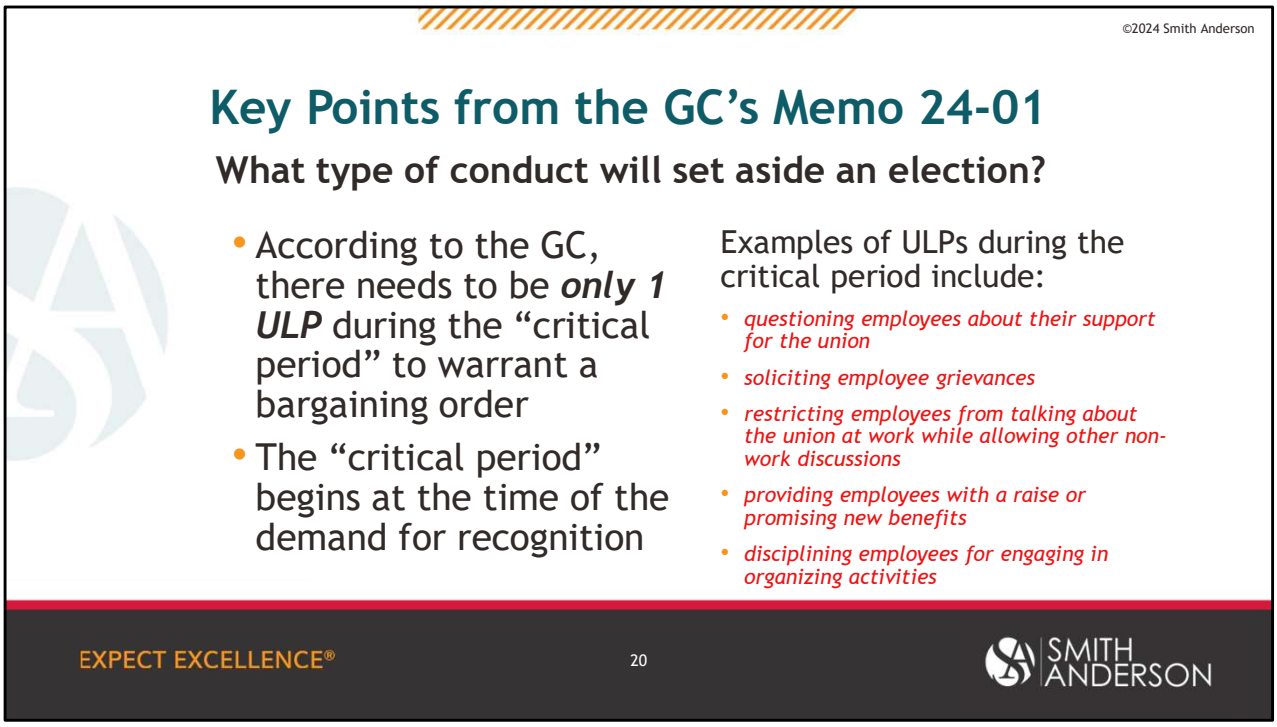
In the General Counsel's Memo, any informal, oral or written demand for recognition **made to anyone** acting as an agent of the employer will satisfy the requirement and trigger an employer's obligation to either recognize the union or file an RM petition. Although the recognition demand must specify the unit of employees the union seeks to represent, there is no requirement that the demand be in writing.

This means if a demand is made to a manager or **any supervisor**, regardless of the supervisor's involvement in or understanding of labor relations, then it will effectively trigger *Cemex* under the General Counsel's interpretation. The General Counsel has made clear that the employer is "on the clock" as soon as any agent, including low-level supervisors, receive a demand for recognition. **This underscores the need to train ALL supervisors about immediately reporting anything that could be interpreted as a demand for recognition from an employee up the chain of command.**



How long does an employer have after receiving the demand to file an RM petition?

According to the General Counsel's memorandum, employers will have two weeks following a demand to either recognize the union or file an RM petition. If an employer fails to do so timely, then a union's request to the NLRB for a bargaining order will likely be granted. **This is an extremely short period of time. This is why it is imperative for employers to train all supervisors on what to do when presented with a demand for recognition.**

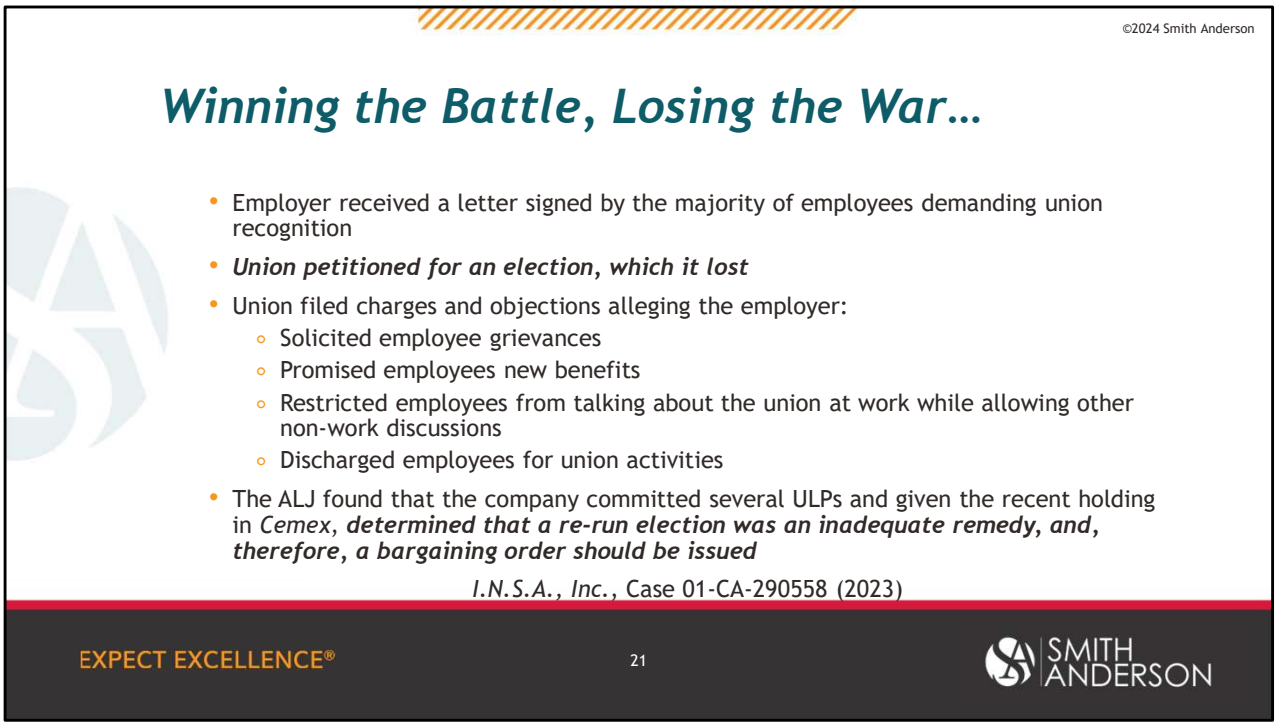


What types of unfair labor practices require setting aside an election?

According to the General Counsel's memorandum, there needs only be one ULP to warrant a bargaining order. **The Board may also consider conduct that occurred before the employer files an RM petition when determining "whether the election was invalidated." This could be critical for employers given the recent wave of precedent shifting standards that require a case-by-case analysis to determine the lawfulness of the employer's actions.**

Even "less serious" violations during the "critical election period" like questioning employees about their support for the union, or asking if they have ever attended a union meeting, or giving all employees a raise, can result in a bargaining order.

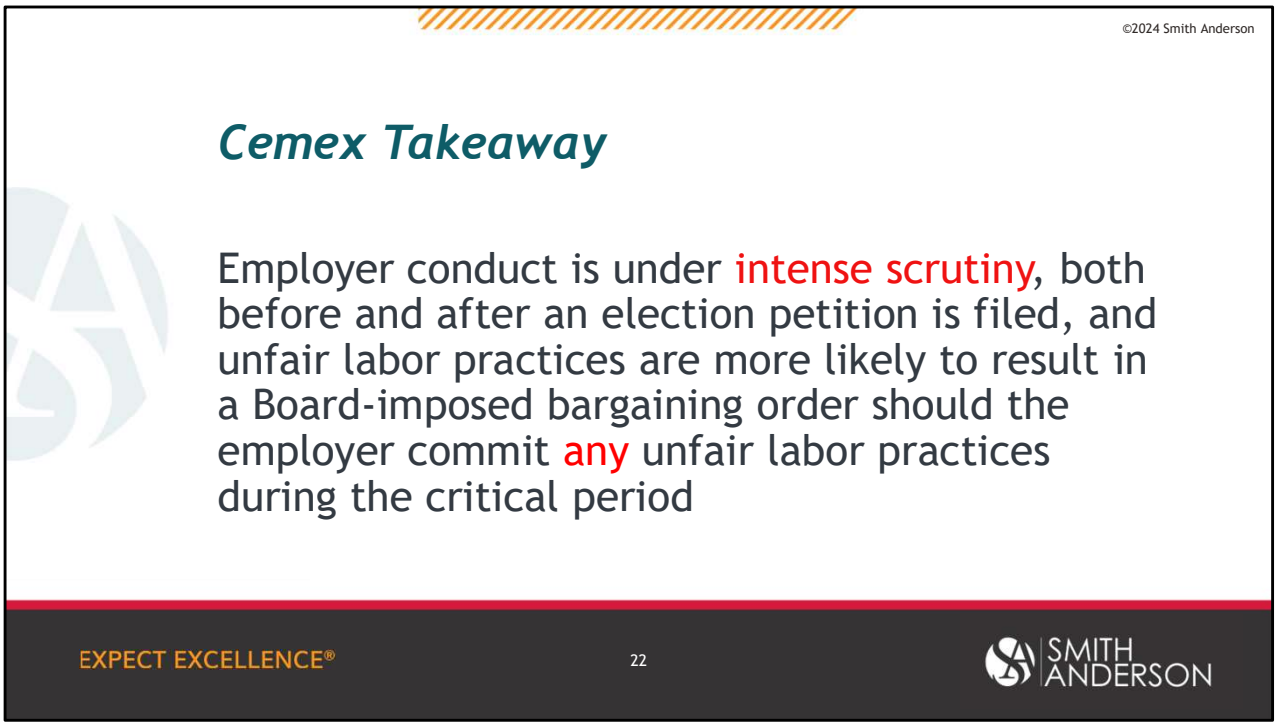
- But the General Counsel has stated the NLRB will continue to assess "the number of violations, their severity, the number of unit employees subject to the violation, the proximity of the misconduct to the election date, and the size of the proposed unit" before making a ruling.
- Thus, it is clear that the determination of whether or not a bargaining order will be issued is heavily dependent on the specific facts of a single case, and decisions will be made on a case-by-case basis.



I.N.S.A., Inc. is another example of a Board ALJ finding numerous ULPs during the critical period of an election and issuing a *Cemex* bargaining order. In *I.N.S.A., Inc.*, a cannabis company, received a letter signed by the majority of employees demanding union recognition and bargaining. The union then petitioned for an election. The employees voted against the union by a 17-11 margin.

Following the election, the union filed a number of objections and charges against the company alleging (1) the company solicited employee grievances and made promises of better benefits if they refrained from supporting the union; (2) the company restricted employees from discussing the union, while allowing discussions on other non-work related topics; and (3) the company discriminatorily enforced work rules and policies by disciplining and discharging known union supporters.

The ALJ found that the company violated the NLRA and given the recent holding in *Cemex*, determined that a re-run election was an inadequate remedy, and therefore, a bargaining order should be issued.



In June, the NLRB issued its first mandatory bargaining order to an employer post-*Cemex: Red Rock Casino Resort Spa*, 373 NLRB No. 67 (2024)

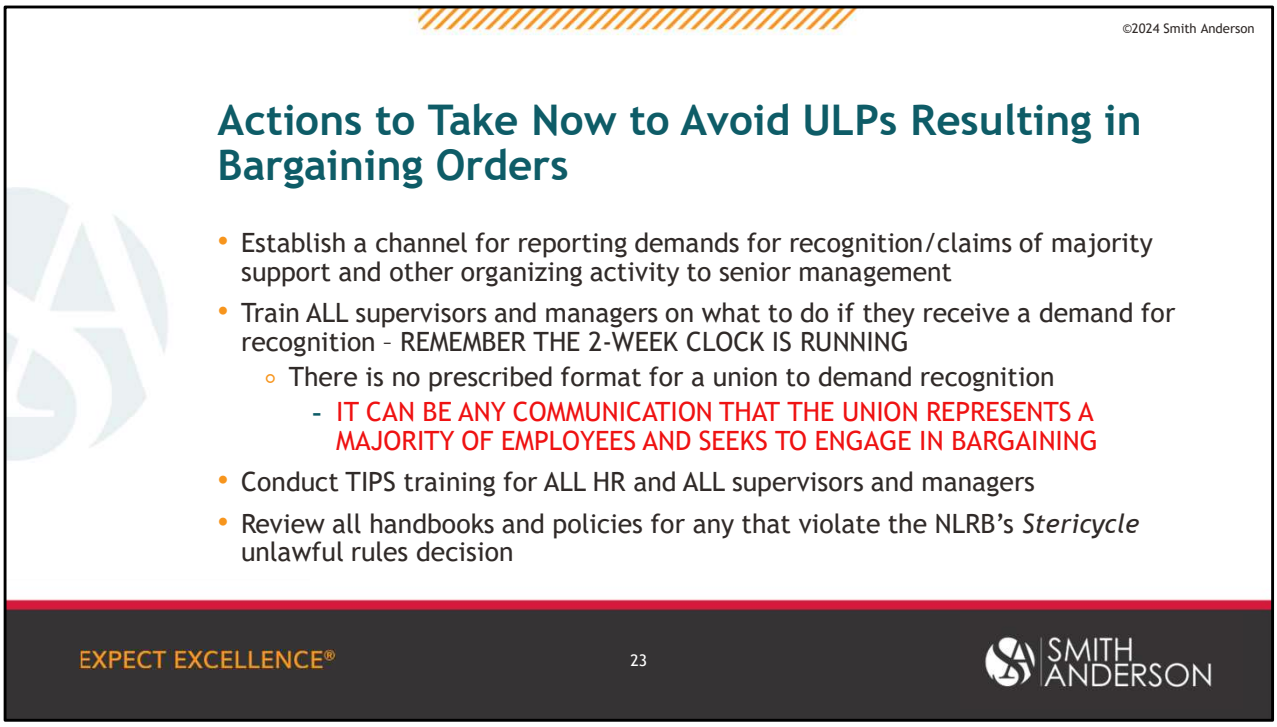
In *Red Rock*, the Board found that the casino's extensive anti-union campaign involved both threats and the promise of new benefits—both of which violated the NLRA. Not only was the bargaining order warranted under the longstanding *Gissel* standard (the pre-Cemex standard), but the NLRB also applied a *Cemex* bargaining order, the first under the new standard.

- *Gissel* is a 1969 US Supreme Court case, which upheld a narrow exception carved out by the NLRB in cases involving severe unfair labor practices during an organizing campaign. *Gissel* bargaining orders are rare have been reserved for only the most egregious misconduct from employers. The reason the *Gissel* standard is so high is because when a bargaining order is issued, it deprives the workers of their free choice on whether or not to unionize. ***Cemex* greatly reduces this standard.**

In Red Rock, the NLRB concluded that (1) Red Rock refused the union's request to bargain; (2) at a time when the union had been designated representative by a majority of employees; (3) in an appropriate unit; and then (4) committed unfair labor practices requiring the election to be set aside. As such, a bargaining order was warranted.

Cemex is currently on appeal and awaiting oral argument in the U.S. Court of Appeals for the Ninth Circuit. But, although the Circuit Court—and potentially even the U.S. Supreme Court—may vacate

the *Cemex* decision, *Red Rock* makes clear that the force of the new standard is fully in play.



Recommendation: Appoint a senior official in Human Resources or in the company's legal department to whom any such demands should **immediately** (hours, not days) be reported to.

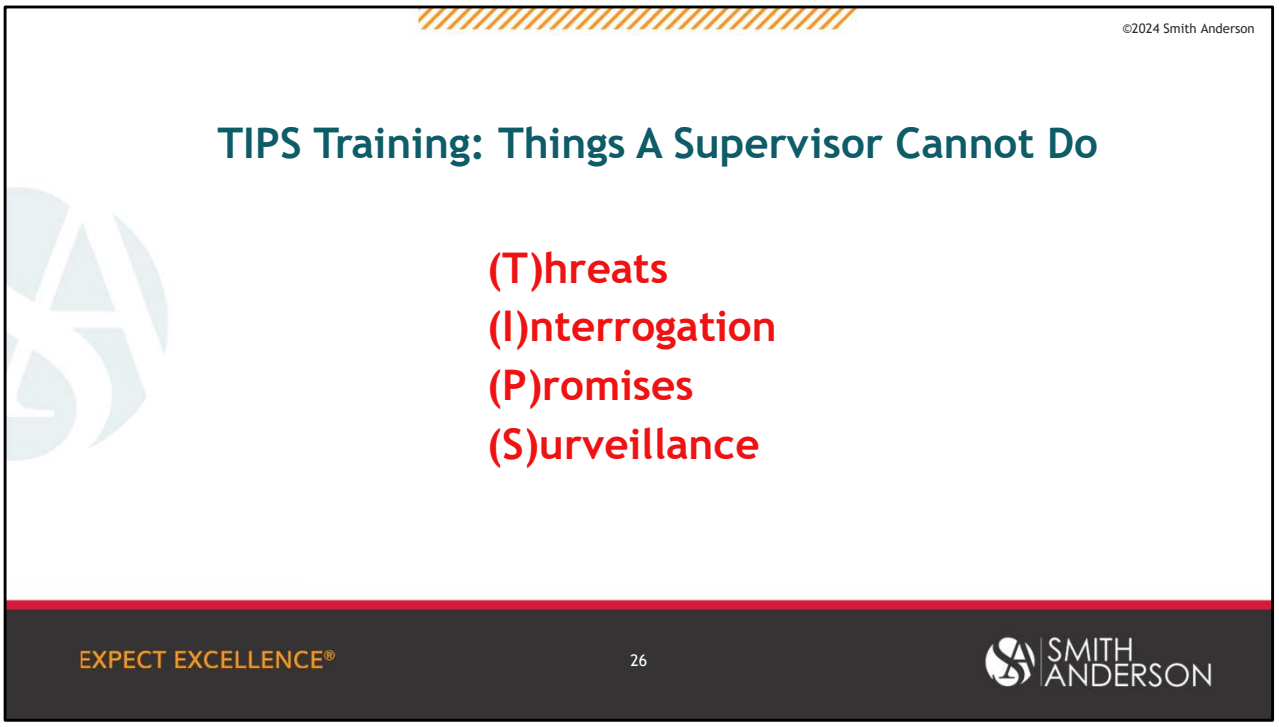
What To Do If An Organizer Makes A Demand For Recognition?

- If the organizer attempts to show the supervisor authorization cards or a petition, **DO NOT LOOK AT OR TAKE THE DOCUMENTS**
- Do NOT engage in discussion or agree to anything
- End the conversation and IMMEDIATELY report the demand to senior management
  - Just sending an email or leaving a voicemail is NOT sufficient – time is critical

TRAIN ALL SUPERVISORS AND MANAGERS ON THE ABOVE

Conduct TIPS Training for All Supervisors

- Many things that a supervisor would naturally do in response to union organizing are unfair labor practices
  - After *Cemex*, these natural responses can lead to a union certification, even if the union loses the election
  - Supervisors and management MUST be trained on what is lawful and unlawful when dealing with organizing activity
- Once the demand is made, the "critical period" starts
  - Delaying training until a demand is made may be too little, too late to avoid ULPs
- Require TIPS training for all newly-hired supervisors AND newly promoted supervisors as part of orientation



TIPS is a helpful acronym used to remind supervisors on what not to do. It stands for Threats, Interrogation, Promises, and Surveillance (spying).

Threats

(T)hreats—Cannot "threaten" employees with loss of overtime, closure, decreased pay, discharge, etc., if the union wins the election

Examples:

- "The Company will never sign a contract with this union."
- "The Company will get those employees that are for the union."
- "You will never get another promotion or wage increase here."
- "Say goodbye to your bonuses if the union wins."
- "The company will just shutdown and move to South Carolina."

Interrogations

(I)nterrogation—Cannot question employees about union activity.

- There is nothing wrong with listening and if you listen long enough you may learn what the employees know. Just avoid any hint of "Who," "What," "Why," or "Where"

Examples

- "Who is going to the union meeting tonight?"
- "How do you feel about the union?"
- "Why do employees want the union?"
- "What have other employees been saying about the union?"

Promises

(P)romises—Cannot promise employees anything after a petition has been filed, such as a raise or better benefits

Examples

- "If you vote against the union, I'll see to it that:
  - You get a raise;
  - You get that extra week of vacation;
  - You are promoted."
- "The Company will take care of its friends after the election."

Surveillance

(S)urveillance—Cannot spy on organizing meetings or activities, or follow the organizer/leader around

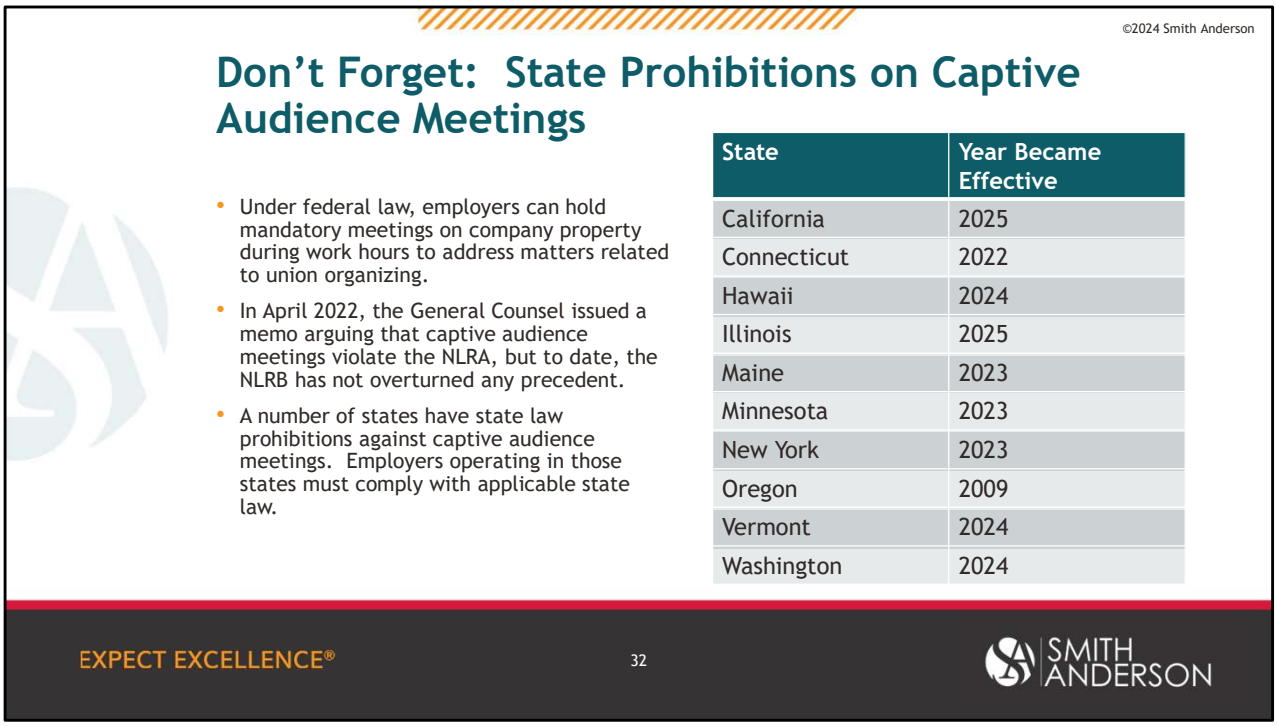
- Even the "impression of surveillance" is unlawful

Examples

- "The Company knows who is for the union."
- "I heard you had a lot to say at the union meeting last night."

No Retaliation

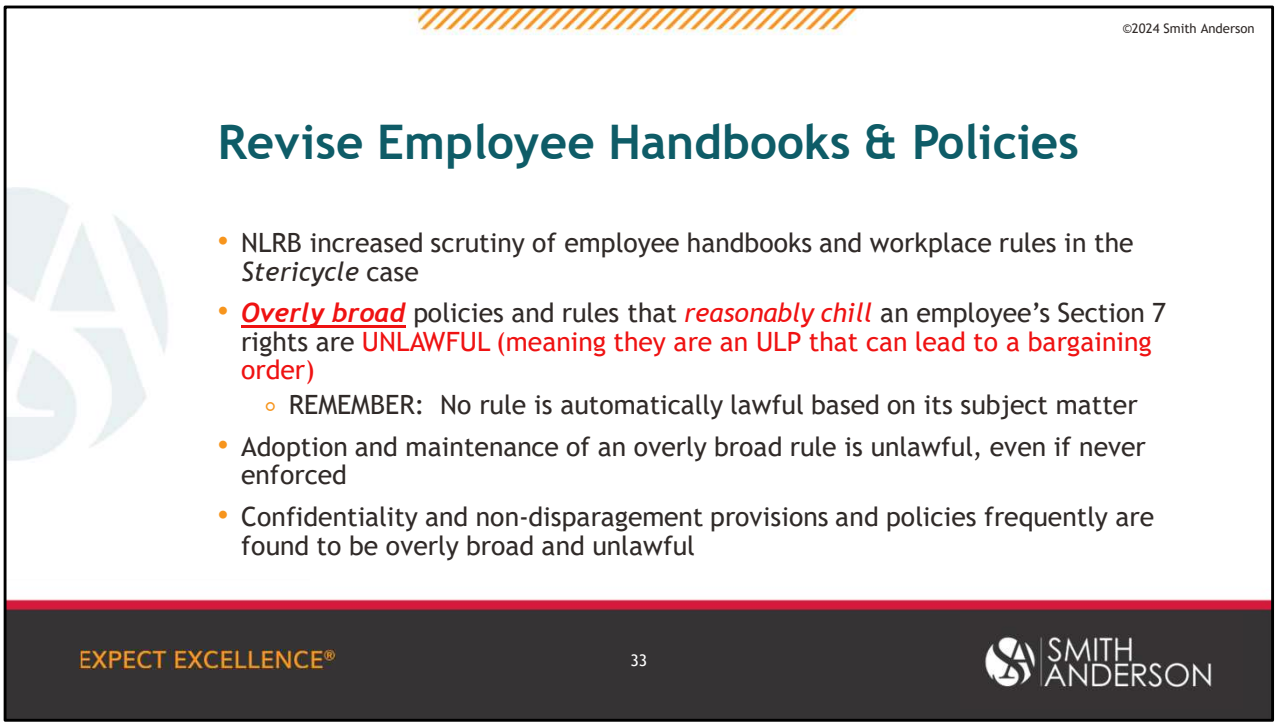
- Employees cannot be terminated or laid off in retaliation for organizing or union activity
- Loud union supporters often are problem employees, but disciplinary action against them for performance reasons requires careful consideration and legal review in advance
- Any discipline against vocal union supporters will be thoroughly investigated by the NLRB



Another relevant change in election law has occurred at the state level. In 1948, NLRB ruled that employers could hold mandatory meetings on company property during work hours to address matters related to union organizing. Since then, these meetings, which are called "captive audience" meetings, have become a good way for employers to express their views about union organizing and its impact on companies, and to discourage employees from voting to unionize. These meetings MUST be on paid working time, and employees can be required to attend or face disciplinary action.

In April 2022, the NLRB General Counsel issued a memo arguing that captive audience meetings violate the law, but the NLRB has yet to overturn the 1948 decision. Memorandum GC 22-04, *The Right to Refrain from Captive Audience and other Mandatory Meetings* (April 7, 2022). Following the General Counsel's memo several states passed their own legislation banning or restricting captive audience meetings. These states include California, Hawaii, Connecticut, Illinois, Maine, Minnesota, New York, Washington, Oregon, and Vermont. All of these states except Oregon have passed these laws since the General Counsel's memo in April 2022.

Although each states' statutes are slightly different, they all prohibit employers from disciplining or threatening to discipline employees for refusing to attend an employer-sponsored meeting if the purpose of those meetings is to share the employer's opinion on religious, political, or union matters. Most of these statutes are being challenged in federal courts due to the 1st Amendment implications.

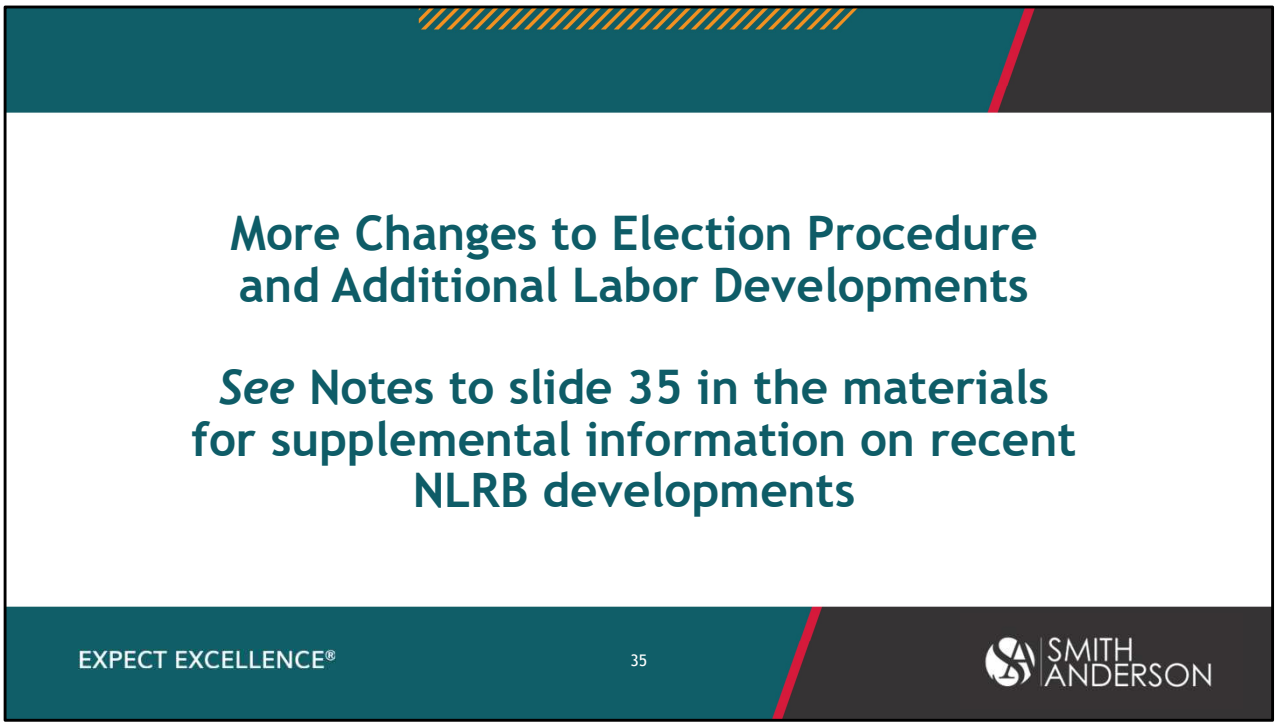


Stericycle – A New Standard for Legality

- Does the rule have a reasonable tendency to chill employees from exercising their Section 7 rights when viewed from the perspective of an employee who is economically dependent on the employer and who contemplates engaging in protected concerted activity?
- "Where the language is ambiguous and ***may be*** misinterpreted by the employees in such a way as to cause them to refrain from exercising their statutory rights, then the rule is invalid ***even if interpreted lawfully by the employer in practice.***"
- Employer can rebut the presumption that a rule is unlawful by proving that it advances legitimate and substantial business interests that cannot be achieved by a more narrowly tailored rule.

Other Policies Warranting Close Review

- Civility, disruptive behavior and related conduct
- Use of company logos, IP
- Conduct harming business reputation, conflicts of interest
- Requiring complaints and investigations to be kept confidential
- No recording, use of personal devices
- Use of company communications systems
- Social media, media contact policies
- Dress code



NLRB Reverts to "Ambush Election" Rules

- On August 24, 2023, the NLRB announced a new final rule for union elections that revives the prior "quickie" or "ambush" election rules. *See* 29 CFR Part 102 *et seq.*
- This rule greatly reduces the time period between the time a petition is filed and the actual election.
- This makes it more difficult for employers to educate employees about unions and unionization prior to a vote.
- According to the NLRB, the new rule seeks to: (1) commence pre-election hearings sooner; (2) speed up the dissemination of election information to employees; (3) make pre- and post-election hearings more efficient; and (4) hold union representation elections more quickly.
- The changes include, pre-election hearings will now generally be scheduled for eight calendar days from the service of the notice of hearing, which is ten days sooner than under the 2019 rule. § 102.63. This means that employers will now be required to present documents and witness testimony at the hearing with significantly less time to prepare.
- Regional directors will only have the discretion to postpone a pre-election hearing for up to two business days "upon request of a party showing special circumstances" or for more than two days if a party shows "extraordinary circumstances." § 102.63(a). Under the 2019 rule, regional directors could postpone for an unlimited time upon a showing of good cause.
- Union petitioners can respond orally at the pre-election hearing as opposed to being required to submit a statement of position 3 business days prior. This change relieves unions of the requirement to file and serve their responsive statement, leaving employers in the dark on the

relevant issues until the day of the hearing.

- An employer will have 2 business days after the service of a notice of hearing to post and distribute a notice of petition for election to its employees, which is 3 days sooner than under the 2019 rule. § 102.63(a)(2).
- The new rule clarifies that "the purpose of the pre-election hearing is to determine whether a question of representation exists" and that disputes over the eligibility or inclusion of certain individuals "ordinarily do not need to be litigated or resolved prior to an election." § 102.64. This new rule eliminates the 2019 rule to the extent that the 2019 rule requires individual eligibility and inclusion issues to be resolved by the regional director prior to the election.
- Parties will only be allowed to file post-hearing briefs with special permission of the regional director following a pre-election hearing. § 102.66(h). The 2019 rule had allowed parties up to 5 days to file briefs.
- Finally, under the 2019 rule, elections were not scheduled before the 20th day after a direction of election was issued. Now, Regional directors will have to schedule elections for "the earliest date practicable" after a decision and direction of election. § 102.67(b).
- **Under the new rule, if an employer waits for there to be union activity before they decide what their labor strategy is, it will likely be too late. Employers need to proactively prepare their labor strategy now.**

Fair Choice-Employee Voice Final Rule

On July 26, 2024, NLRB issued its Fair Choice – Employee Voice Final Rule, which rescinds a trio of April 2020 amendments to the NLRB's Rules and Regulations affecting the NLRB's processing of petitions that ultimately make it easier for unions to maintain recognition and stifles employee choice in whether or not to be represented by a union. *See* 29 CFR Part 103. The Final Rule touches on three areas of the NLRB's processing of petitions for elections:

- It revives the blocking charge to delay elections – the Rule allows regional directors to delay representation and, importantly, decertification elections upon a filing and resolution of an unfair labor practice charge upon the request of the party who filed the charge. § 103.20. Delaying, or blocking the election benefits unions, who are able to file meritless charges in order to block an election and allows them to continue their organizing campaigns during the delay. During this pause, which could take *up to a year* to rule on, employers must continue to refrain from making changes to the terms and conditions of its employees' employment, including wage increases or performance-based bonus payouts, because these changes will draw additional ULP charges.

- Next the rule, returns to an immediate voluntary recognition bar – the Final Rule removes the 45-day window so employees will no longer be able to request an election to challenge an employer's recent voluntary recognition of a union. *See* § 103.21.
    - Under the NLRA, an employer may voluntarily recognize a union, based on the union's claim of majority support among its employees without an election. Over the years, the Board has shifted its position on how long employees must wait before they are allowed to challenge (or decertify) the status of the voluntarily recognized union. When Democrat-appointees control the NLRB, an employer's voluntary recognition of a union immediately prevents the employees from challenging the union's status for "a reasonable period of time." § 103.21(a). A reasonable period of time was typically defined as between 6 months to a year. When Republican-appointees control the NLRB, there cannot be a voluntary recognition bar, unless and until affected employes were first provided notice of the employer's voluntary recognition and were afforded 45 days from

the notice to file an election petition to question the union's majority status in an NLRB-conducted secret ballot election. This rule again removes the 45-day widow for the employees to seek an election to challenge the representation.

- Finally, the rule impacts employer/union relationships in the construction industry – by easing the standard required for a union in the construction industry to demonstrate majority support for what is called a 9(a) collective bargaining relationship. Under Section 9(a) of the NLRA, a union must have majority support among the employees in an appropriate bargaining unit to be recognized as the exclusive bargaining representative. As a general rule, employers may not bargain with a union that does not have majority support of the employees.
    - Section 8(f) of the NLRA provides for a limited exception in the construction industry – a construction employer and a union may enter into a pre-hire agreement providing the union as the exclusive bargaining representative, even in the absence of majority support. An employer can leave an 8(f) relationship at any time.
    - For a Section 8(f) relationship to become a Section 9(a) relationship, the union must demonstrate a clear showing of majority support from the unit employees, much like unions representing employees in non-construction industries. This rule lowers the standard of proof a construction union must demonstrate to obtain 9(a) status by allowing contract language alone between an employer and union that (1) the union requested recognition as the majority representative of unit employees; (2) the employer recognized the union; and (3) the employer's recognition was based on the union showing or offering to show evidence of its majority support.

Project Labor Agreements Required For Large Federal Construction Projects

On January 22, 2024, the Federal Acquisition Regulatory Council issued its final rule requiring project labor agreements ("PLAs") for most large-scale federal construction projects. 88 Fed. Reg. 88708

The rule implements an executive order (E.O. 14063) issued in 2022, which required PLAs on projects where the estimated cost to the federal government totals at least $35 million, unless an exception applies. 48 CFR § 22.503(d). The final rule provides, with certain exceptions, government contractors and subcontractors working on federal construction projects that meet the threshold of $35 million must "become a party to a project labor agreement with one or more appropriate labor organizations." 48 CFR § 22.503(c)(1).

The Administration has stated that the rule will increase efficiency on construction projects because all parties – including contractors, subcontractors, and unions – are required to negotiate the set terms, and the rule will further "avoid labor-related disruptions on projects by using dispute-resolution processes to resolve worksite disputes and by prohibiting work stoppages, including strikes and lockouts."

The final rule does provide exceptions to be made case-by-case, so that some larger projects may end up not requiring PLAs. Nevertheless, construction employers should assume that large-scale federal projects that require coordination among various contractors and subcontractors across several trades will require a PLA that, at a minimum, complies with the rule's requirements.

ADDITIONAL INFORMATION ABOUT PLAs:
Project Labor Agreements – What Was Optional is Now Mandatory (smithlaw.com) June 25, 2024

Labor or Bust? President Biden Orders Project Labor Agreements for Large Federal Construction Projects (smithlaw.com) February 23, 2022

Tips & Final Thoughts

- Be *vigilant* of employee organizing activity – STOP IT BEFORE IT HAPPENS
- Have a reporting plan in place before a demand for recognition is made
- Train ALL supervisors and managers on:
  - how to respond to a union's demand for recognition
  - no TIPS
- Update overly broad workplace policies


SMITH ANDERSON
Today's Employee Organizing
What HR Professionals and Corporate Counsel Need to Know, and Do, Now!
Kimberly J. Korando
Nelson A. McKown
October 29, 2024
EXPECT EXCELLENCE®

The Latest from EEOC on Unlawful Harassment and Health Issues in the Workplace

SMITH ANDERSON

The Latest from EEOC on Unlawful Harassment and Health Issues in the Workplace

J. Travis Hockaday
Kevin M. Ceglowski
October 29, 2024

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EEOC's (new) Enforcement Guidance on Harassment in the Workplace

Background

- 25 years in the making . . .
- Consolidates all earlier guidance from EEOC on harassment in the workplace (1987, 1990, 1994 and 1999)
- Addresses harassment against LGBTQ+ individuals and on basis of pregnancy, childbirth and related medical conditions
- Not legally binding precedent, but EEOC will follow it, and many courts may give it deference

Something old, something new . . .

Unlawful harassment – what is it?

- Unwanted/unwelcome conduct,
- Connected with work,
- Severe or pervasive, and
- Based on a protected characteristic

Protected characteristics

- Under laws covered by EEOC:
  - Race/color
  - Religion
  - Sex
    - Sexual orientation
    - Gender identity
    - Pregnancy, childbirth, related medical conditions (for example: lactation, using/not using contraception, decisions on abortion, morning sickness)

Protected characteristics (cont'd)

- National origin
- Disability
- Age (40 and over)
- Genetic information (including family medical history)

Protected characteristics (cont'd)

- And many others…
  - List varies widely based on other federal laws, executive orders, state laws and local ordinances

What is NOT harassment?

- Being a jerk (rudeness, incivility)
- Teasing
- Mistreatment because of personality conflict

  (so long as those things are not happening because of a protected characteristic)

Problematic conduct hasn't changed

- **Verbal**: Offensive comments; humor, jokes, and teasing about protected traits; rumors about other employees; verbal abuse, insults, threats; propositions or innuendo; flirtation; suggestive or sexist comments
- **Non-verbal:** Gestures, signs, cartoons, pictures, graffiti; paraphernalia; whistling; vandalism; text, email and internet usage; exclusion
- **Physical**: Touching, patting, pinching, brushing the body, assault, rape

What's (sort of) new?

Harassment in today's workplace

- Race/color
  - Traits/characteristics linked to race:
    - Name
    - Cultural dress
    - Accent/manner of speech
    - Physical characteristics (including appearance standards, hair textures/styles commonly associated with racial groups)

Harassment in today's workplace

- National origin
  - Physical characteristics
  - Ancestry
  - Ethnic/cultural characteristics (attire, diet)
  - Linguistic characteristics (accent, lack of fluency in English)

Harassment in today's workplace

- Religion
  - Stereotypes
  - Receipt of accommodations
  - Lack of religious belief
  - Explicit/implicit coercion by employer or other employees to engage in religious practices at work or elsewhere

Harassment in today's workplace

- Sex
  - Pregnancy, childbirth, related medical conditions
    - Lactation
    - Using/not using contraception
    - Deciding to have, or not having, abortion
    - Morning sickness

Harassment in today's workplace

- Sex
  - Sexual orientation/gender identity
    - "Outing"
    - Harassment for not presenting in manner typically associated with person's sex
    - Repeated/intentional use of wrong noun/pronoun ("misgendering"), using pre-transition name ("dead naming")
    - Denial of access to bathroom or sex-segregated facility consistent with gender identity

Harassment in today's workplace

- Age
  - Encouraging/pressuring to retire
  - Pressuring transfer to a position that uses less technology

Harassment in today's workplace

- "Cross-Bases" issues – harassment based on:
  - Perception that someone has particular characteristic (even if they do not)
  - Individual's association with someone in a different or the same protected class (biracial child, spouse of different race)
  - "Intraclass" conduct - individual's characteristic even if harasser is member of same protected class

"Hostile Work Environment"

- Harassment so severe or pervasive that a reasonable person in employee's shoes would find it to be abusive
  - Victim does not need to show severe *and* pervasive; it's "or"
  - One instance can be enough (touching, certain words)
  - Harasser's status matters
  - Victim need not show harassment led to change in position, pay, hours or opportunities, or that it made them perform worse

The Causation Spectrum

- Explicitly based on protected characteristic(s)
  - Intent irrelevant
  - Conduct need not be directed to complainant or anyone in particular
- Based on stereotypes (positive, negative, neutral)
  - Family responsibilities, suitability for leadership, gender roles, weight/body type, expression of orientation/identity, survivor of gender-based violence

The Causation Spectrum

- Arising from context in which it occurs
  - Context, inflection, tone, local custom, historical usage
  - Code words
- Facially neutral but linked to other conduct that is facially discriminatory
  - Cannot necessarily discount neutral conduct when mixed with facially discriminatory conduct
- Timing
  - The closer to learning of protected status, the more likely harassment

Why does this matter? (liability standards)

Executives	Automatic liability; no affirmative defense
Supervisors	Tangible act – liable; no affirmative defense No tangible act – no liability if reasonable prevention and prompt effective remedial action plus employee unreasonably failed to take advantage of employer's corrective opportunities
Coworkers	Liable if negligent because it unreasonably failed to prevent, or failed to take reasonable corrective action in response to harassment about which it knew or should have known

What to do now?

- Read the guidance and pay attention to the nearly 80 examples
- Consider different and more expansive state/local laws
- Review policies to ensure they are in line with new guidance
- Train, train, train – early and often

Open questions . . .

- Intersection with Constitutional rights (such as free speech protections), other federal laws (such as the Religious Freedom Restoration Act)
- Legal challenges

Highly recommended reading

- Full enforcement guidance:
  - https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace
- Summary of key provisions:
  - https://www.eeoc.gov/summary-key-provisions-eeoc-enforcement-guidance-harassment-workplace

The Latest from EEOC on Health Issues in the Workplace

Work health considerations – EEOC strategic enforcement plan (SEP) and technical guidance

- SEP regarding mental health issues in the workplace
- Visual Impairments
- Intellectual disabilities

EEOC SEP September 21, 2023

- Expands the vulnerable and underserved worker priority to include additional categories of workers who may be unaware of their rights under equal employment opportunity laws, may be reluctant or unable to exercise their legally protected rights, or have historically been underserved by federal employment discrimination protections—such as people with intellectual and developmental disabilities . . .”

Protecting Vulnerable Workers and Persons from Underserved Communities from Employment Discrimination

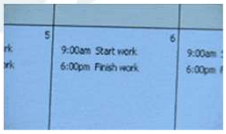
- With respect to employment discrimination, the Commission views the category of vulnerable workers as including:
  - people with developmental or intellectual disabilities
  - workers with mental health related disabilities

Protecting Vulnerable Workers and Persons from Underserved Communities from Employment Discrimination

- Focus on recruitment and hiring practices and policies that discriminate under the statutes EEOC enforces, including . . . Disability, including:
  - reliance on restrictive application processes or systems, including online systems that are difficult for individuals with disabilities or other protected groups to access

Example Accommodations

- Examples of accommodations that have helped employees with mental health conditions to more effectively perform their jobs . . .provides some of the most effective and frequently used workplace accommodations.
  - **Flexible Workplace** - telecommuting and/or working from home
  - **Scheduling** - Part-time work hours, job sharing, adjustments in the start or end of work hours, comp time, or "make up" of missed time

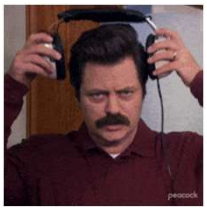


Example Accommodations

- **Leave** - Sick leave, flexible use of vacation time, additional unpaid or administrative leave for treatment or recovery, leaves of absence, or occasional leave for a few hours for appointments
- **Breaks** - Breaks for individual needs rather than fixed schedules, more frequent breaks or flexibility in scheduling breaks, backup coverage during breaks, telephone breaks during work hours to call for support
- **Other** - Food and drink at workstations to mitigate side effects of medications, on-site job coaches

Example Accommodations

- **Modifications**
  - Reduction and/or removal of distractions in the work area
  - Room dividers, partitions, soundproofing or visual barriers
  - Private offices or enclosures
  - Location away from noisy machinery
  - Reduced noise
  - Increased light
  - Music or headsets to block out distractions



Example Accommodations

- **Equipment/Technology:**
  - Recording meetings and training sessions
  - "White noise" or sound machines
  - Electronic organizers, software calendars, organizer programs
  - Remote job coaching, laptop computers, personal digital assistants and office computer access via remote locations
  - Software that minimizes computerized distractions such as pop-up screens

Example Accommodations

- **Job Duties**
  - Modification or removal of non-essential job duties or restructuring of the job to include only the essential job functions
  - Dividing large assignments into smaller tasks and goals
  - Additional assistance or time for orientation activities, training, and learning job tasks responsibilities
  - Additional training or modified training materials

Example Accommodations

- **Management/Supervision**
  - Implementation of flexible and supportive supervision style; positive reinforcement and feedback; adjustments in level of supervision or structure, such as more frequent meetings to help prioritize tasks; and open communication with supervisors regarding performance and work expectations
  - Additional forms of communication or written and visual tools, including communication of assignments and instructions in the employee's preferred learning style (written, verbal, e-mail, demonstration); creation and implementation of written tools such as daily "to-do" lists, step-by-step checklists, written (in addition to verbal) instructions and typed minutes of meetings

Example Accommodations

- **Management/Supervision**
  - Regularly scheduled meetings (weekly or monthly) with employees to discuss workplace issues and productivity, including annual discussions as part of performance appraisals to assess abilities and discuss promotional opportunities
  - Development of strategies to deal with problems before they arise
  - Written work agreements that include any agreed upon accommodations, long-term and short-term goals, expectations of responsibilities and consequences of not meeting performance standards

Visual Disabilities

- July 25, 2023: EEOC issued technical assistance regarding ADA and visual disabilities.
  - How to handle voluntary disclosures regarding an applicant's or an employee's vision
  - Safety considerations
  - Example accommodations

Before an employment offer is made

- May an employer ask whether a job applicant has or had a vision impairment, or treatment related to any vision impairment, before making a job offer?
- Does the ADA require applicants to disclose a current or past visual disability before accepting a job offer?

After an employment offer is made

- **Are there any other instances when an employer may ask an employee about the employee's vision?**
  - Yes:
    - to support the employee's request for a reasonable accommodation needed because of a vision impairment;
    - to enable the employee to participate in a voluntary wellness program;
    - to comply with federal safety statutes or regulations; or
    - to verify the employee's use of sick leave related to a vision impairment, if the employer requires all employees to provide such information (for instance, doctors' notes) to justify their use of sick leave

Safety Concerns

- **Direct threat only, except . . .**
- **What should an employer do when another federal law prohibits it from hiring individuals with vision impairments for particular positions?**
  - If a federal law prohibits an employer from hiring or retaining an individual with a vision impairment for a particular position, no liability under the ADA
  - Ensure prohibition actually applies
  - Ensure the law does not contain any exceptions or waivers that apply to the individual with the vision impairment

Example Accommodations

- Screen readers (or text-to-speech software)
  - Software applications that can convert written text on a computer screen into spoken words or a braille display. Allow individuals to quickly review written text
- Optical character recognition (OCR) technology
  - Creates documents in screen-readable electronic form from printed ones,
- Systems with audible, tactile, or vibrating feedback
  - Proximity detectors

Example Accommodations

- Website modifications for accessibility
  - Taking steps to ensure that job applicants and employees can access and timely complete job applications, online tests, or other screening tools
- Written materials in more accessible or alternate formats
  - Large print, sans serif fonts, braille, a recorded format, or an accessible shared document format, including those provided via QR code

EEOC v. All Day Medical Care Clinic, LLC

- All Day Medical Care Clinic, LLC operated five medical clinics in Maryland
- After the scheduling assistant informed employer about her vision impairments and need for accommodation, the employer questioned why she did not raise these issues in her interview, and immediately terminated her
- The employer ignored her later communications asking to remain employed, as well as subsequent overtures from her vocational representative to install and fund the accommodations
- Result?

Intellectual Disabilities

- **Salvation Army, Ann Arbor, MI, 2023:** According to the lawsuit, the organization allowed the individual, who worked successfully as a cashier for five months, to use a job coach during his probationary period. A new manager refused to allow the cashier to have additional job coaching, criticized him for his disability, punished him for minor mistakes, and then fired him shortly after new cashiers were hired.

Intellectual Disabilities

- JDKD Enterprises, Deptford, NJ, 2022: Company that owns and operates numerous McDonald's restaurants; worker who is on the autism spectrum. The company fired the long-time worker because of his autism spectrum disorder only two months after the company purchased the restaurants. The employee had worked at several McDonald's restaurants for 37 years and received several awards and praise for his excellent job performance.
- Result?


SMITH ANDERSON
The Latest from EEOC on Unlawful Harassment and Health Issues in the Workplace
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October 29, 2024
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Pregnant Worker Protections: A Developing Landscape

SMITH ANDERSON

Pregnant Worker Protections: A Developing Landscape

PWFA, PUMP Act, and State Laws

Kevin M. Ceglowski
Lauren E. Davis
October 29, 2024

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Before the PWFA - *Young v. UPS*

- SCOTUS case decided in 2015
- Young worked for UPS as a driver and became pregnant. Her doctor restricted her from lifting certain amounts of weight.
- UPS informed Young that she could not work because the company required drivers to be able to lift parcels weighing up to 70 pounds - Young was placed on leave without pay.
- UPS at the time accommodated: (1) drivers injured on the job, (2) drivers who lost DOT certifications, and (3) drivers suffering from disabilities under the ADA.
- Young sued UPS claiming gender & disability discrimination under the ADA and Pregnancy Discrimination Act.
- SCOTUS held that courts must evaluate the extent to which an employer's policy treats pregnant workers less favorably than non-pregnant workers with similar inabilities to work.

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The Pregnant Workers Fairness Act (PWFA)

- Effective June 27, 2023
- **Covered employers** must grant reasonable accommodations to **qualified applications and employees** with **known limitations** related to:
  - Pregnancy
  - Childbirth
  - Related medical conditions

What does that mean?

- **Covered Employer**: private & public employers that have 15 or more employees
- **Qualified Employee or Applicant**: can perform the **essential functions** of the job with or without a reasonable accommodation, OR if they cannot perform the essential functions of the job with or without a reasonable accommodation, they can still be qualified as long as:
  - The inability is **temporary**
  - They could perform the functions **in the near future**, and
  - The inability to perform the essential functions can be reasonably accommodated

What does that mean?

- **Known Limitation:** the employee has communicated the physical or mental limitation related to pregnancy, childbirth, or related medical condition to the employer. The limitation does not have to be major or ongoing – some examples include:
  - pelvic pain,
  - fatigue,
  - occasional morning sickness,
  - need to attend appointments,
  - miscarriages,
  - postpartum depression,
  - lactation

Reasonable Accommodations

- Reasonable accommodations are changes in the work environment
- Examples:
  - Flexible breaks
  - Changing food or drink policies
  - Providing a stool to sit on
  - Changing the dress code
  - Telework
  - Leave for medical appointments
  - Assistance with manual labor
  - Temporary reassignment

Requesting a Reasonable Accommodation

- Employees do not need to use specific words to make the request
- The following would be sufficient:
  - "I'm having trouble getting to work on time because of morning sickness"
  - "I'm worried about hurting myself or the baby if I lift these boxes"
  - "I need time off to attend a medical appointment for my pregnancy"
- Employers should train supervisors how to respond to such requests and engage in the **interactive process**

Medical Documentation

- Employers may request medical documentation if **reasonable.** It is <u>not</u> reasonable if:
  - The limitation is obvious (ex: pregnant employee seeks a larger sized uniform)
  - Employer is already aware of the limitation
  - Worker is pregnant and needs breaks for the bathroom or to eat/drink, or needs to carry water around with them, or needs to be able to sit or stand
  - Employee is lactating and needs modifications to pump at work
  - Employer would not ask a worker for documentation in that situation normally (ex: company policy to only require a doctor's note for absences if worker is missing 3 or more days in a row)
- Employers may <u>not</u> require the worker seeking an accommodation be examined by a health care provider selected by the employer

To comply with the PWFA, do not do the following:

- Fail to reasonably accommodate a known limitation (unless it would cause an undue hardship)
  - Undue Hardship: significant difficulty or expense to the employer
- Require the employee to accept an accommodation that was not arrived at through the interactive process
- Deny employment opportunities based on the need for reasonable accommodation
- Require the employee take leave if another option is available
- Retaliate against the employee for engaging in activity protected under the PWFA

EEOC Charges

- Accepting charges alleging violation of the PWFA since the effective date - June 27, 2023
- The EEOC recently filed lawsuits against 2 companies to enforce the PWFA:
  - **EEOC v. Polaris Industries, Inc.** - the company refused to excuse an employee's absences related to her pregnancy & required her to work overtime even when her doctor restricted her from working over 40 hours a week while pregnant
  - **EEOC v. Urologic Specialists of Oklahoma, Inc.** - the company did not allow the employee to sit, take breaks, or work part-time as her doctor said was needed to protect her health during her final trimester of her high-risk pregnancy (company forced her to take unpaid leave)
- EEOC General Counsel, Karla Gilbride stated:
  - "When employers apply inflexible policies that drive pregnant workers out of the workplace rather than engaging in this interactive process, the EEOC will step in to defend workers' rights under this new law."

Other federal laws providing protections for pregnant workers

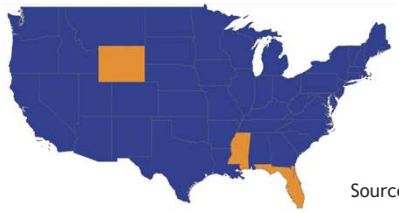
- **Title VII** - Protects workers from discrimination based on pregnancy, childbirth, or related medical conditions
- **ADA** – Protects workers from discrimination based on disability and requires reasonable accommodations (where some pregnancy-related conditions qualify as a disability)
- **FMLA** – Provides workers with unpaid, job-protected leave for certain family and medical reasons
- **PUMP Act** - Broadens workplace protections for employees to express breast milk at work

Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act)

- Effective April 28, 2023
- Employers shall provide:
  - Reasonable **break time** for an employee to express breast milk for 1 year after the child's birth, each time the employee has a need to express milk
    - The break time provided is considered hours worked if the employee is not completely relieved from duty
  - A **place**, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public

State laws requiring accommodations for pregnant workers

- PWFA does not replace state or local laws that are more protective of workers
- Most states have laws that require employers to provide accommodations for pregnant workers (all of the blue states below have some sort of state-level protection related to pregnancy accommodations):



Source: U.S. DOL

California

- **Reasonable Accommodation**: Employers with 5 or more employees must provide employees with reasonable accommodations for conditions related to pregnancy, childbirth, or related medical conditions at their request, if these requests are reasonable and based on their health-care provider's advice that reasonable accommodations are medically advisable.
- **Pregnancy Disability Leave**: Provides up to 4 months of unpaid, job-protected leave to employees with a pregnancy-related disability
- **CFRA:** Requires covered employers to provide eligible employees with unpaid, job-protected leave of up to 12 work weeks in any 12-month period

Illinois

- **Reasonable Accommodation**: Employers with 1 or more employee, must provide reasonable accommodations for employees' and applicants' medical or common conditions related to pregnancy or childbirth, upon their request, unless employers can show that these accommodations would impose undue hardship.
  - Failing to provide timely responses to reasonable accommodation requests can be considered a failure to provide reasonable accommodations.

Hypothetical #1

- Emma is a customer service representative at a busy call center. She is in her second trimester of pregnancy and has begun experiencing fatigue and nausea, which makes it challenging for her to meet the demands of her role, particularly with the long hours of sitting and the need for frequent bathroom breaks. During a routine check-in with her supervisor, Emma mentions her pregnancy and expresses difficulty managing her workload due to her symptoms.
- **What must the supervisor do?**

Answer #1

- The Supervisor should start the interactive process with Emma:
  - Acknowledge her request and assure her that the company is committed to supporting employees during pregnancy
  - Gather more information from her related to her specific needs
    - Gathering medical documentation only if necessary
  - Explore reasonable accommodation options with her: flexible break schedule, modified workstation, remote work
  - Implement the accommodation decided on
  - Follow up with her and make adjustments if necessary

Hypothetical #2

- Sophia is a graphic designer who recently applied for a position at a marketing firm. She is in her first trimester of pregnancy and is experiencing significant morning sickness. During her second interview, Sophia mentions to the hiring manager that she is having morning sickness and may need accommodations going forward in the interview process, and potential work-from-home days, especially during her first trimester, if she were to get the job.
- **What must the company do?**

Answer #2

- The hiring manager should start the interactive process with Sophia:
  - Acknowledge her request and assure her that the company is committed to supporting applicants during pregnancy
  - Gather more information from her related to her specific needs
    - Gathering medical documentation only if necessary
  - Explore reasonable accommodation options with her: flexible interview schedule, an adjustable start date, remote work
  - Implement the accommodation decided on
  - Follow up with her and make adjustments if necessary

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Pregnant Worker Protections:
A Developing Landscape
PWFA, PUMP Act, and State Laws
Kevin M. Ceglowski
Lauren E. Davis
October 29, 2024
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Advice for DIYers: EEOC Charges and Internal Investigations

SMITH ANDERSON

Advice for DIYers: EEOC Charges and Internal Investigations

Kerry A. Shad
Shameka C. Rolla
October 29, 2024

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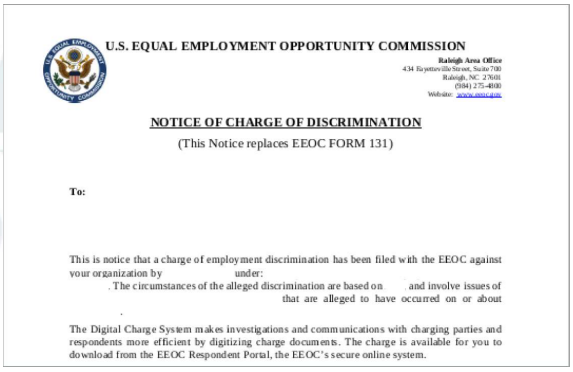
Effectively Interacting with EEOC Investigators and Responding to Charges of Discrimination

EEOC Process – What to Expect

Notice of Charge → Option to Mediate → Investigation → Conclusion

Notice of Charge of Discrimination



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Raleigh Area Office
434 Fayetteville Street, Suite 700
Raleigh, NC 27601
(984) 275-4800
Website: www.eeoc.gov

NOTICE OF CHARGE OF DISCRIMINATION

(This Notice replaces EEOC FORM 131)

To:

This is notice that a charge of employment discrimination has been filed with the EEOC against your organization by under: . The circumstances of the alleged discrimination are based on and involve issues of that are alleged to have occurred on or about .

The Digital Charge System makes investigations and communications with charging parties and respondents more efficient by digitizing charge documents. The charge is available for you to download from the EEOC Respondent Portal, the EEOC's secure online system.

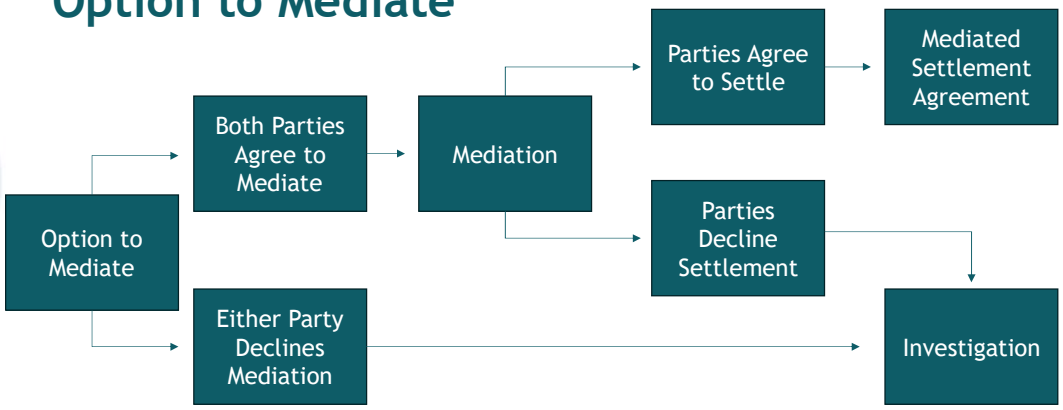
Review the Charge Carefully

- In North Carolina, in most situations, the Charge must be filed within 180 days of the alleged discriminatory act (in some states it's 300 days)
- If Charge is not timely, raise that issue with the EEOC in a letter
- Take steps to preserve the relevant information
- Collect the documents you need
- Make a list of the people you will need to talk with

EEOC Process - What to Expect

Notice of Charge → Option to Mediate → Investigation → Conclusion

Option to Mediate



Key Terms in a Mediated Settlement Agreement

- EEOC's agreement will only cover what's in the charge
- Standard terms include:
  - Charging Party agrees not to institute a lawsuit under the statutes underlying the Charge allegations
  - Payment to Charging Party
  - EEOC agrees to terminate investigation of Charge

Additional Terms to Consider

- May want to have a side settlement agreement to include:
  - full general release of all claims
  - no rehire
  - confidentiality
- EEOC will not be a party but will allow

EEOC Process - What to Expect

Notice of Charge → Option to Mediate → Investigation → Conclusion

Investigation

- Position Statement
- Request for Information (RFI)
- On-site Visit or Interviews
- Negotiated Settlement Agreement (NSA)

The Position Statement

- What is it? Your chance to respond to the Charge allegations
- Take it very seriously, always
- Ask for more time if you need it
- Opportunity to "nip the Charge in the bud"
  - Write simply – tell the story
  - Provide background on your business/industry
  - Do not "trash" the Charging Party -
    - "they were the worst employee ever"
    - "they were toxic"
    - "they lied about everything including the hours they worked"

The Position Statement

- Provide the facts and documents that support those facts
  - "The performance issues were well-documented and the subject of several discussions with Charging Party." (*See* copies of Performance Reviews and Performance Improvement Plan)
  - "The time-keeping policy was shared with Charging Party, and they had been counseled about the importance of compliance on several occasions before the termination." (*See* copies of the Timekeeping Policy and Supervisor's Notes from Discussions with Charging Party)

The Position Statement

- It is the story you will live with AND key "evidence" in the investigation and in any litigation
  - Tell the truth – shifting stories are fatal
    - Example: don't say it was a "reduction in force" if it was not
  - Have the key people review it and ensure it is 100% true
  - Don't inadvertently admit a violation of another law
    - Example: "We didn't fire because of gender, but because their STD expired and they couldn't come back to work yet."

The Position Statement

- Don't "information dump" – be precise
  - Example: Health information –
    - be careful how you provide and describe
    - cannot be kept in the "personnel file" – must be segregated
  - Example: Info on other employees –
    - Submit confidentially
    - Could expand the scope of investigation inadvertently
- Don't share what your lawyers told you – don't waive attorney client privilege

The Request for Information (RFI)

- Sometimes issued with the Notice of Charge, sometimes after, and sometimes after position statement turned in
- Might just be box checking so respond timely
- If too broad/unreasonable it's okay to push back/negotiate

"On Sites"

- Typically virtual
- Prepare the people EEOC asks to speak with
- Be present if they are managers/supervisors

Negotiated Settlement Agreement (NSA)

- Sometimes offered by the investigator before he/she concludes his/her investigation
- Can indicate the investigator is going to find cause – but not always
- Will usually require some amount of training by the Respondent
- Attempt to negotiate important terms
  - Limit group that has to be trained as much as possible
  - Limit number of years training has to be reported to EEOC

EEOC Process – What to Expect

Conclusion

- Dismissal and Notice of Right to Sue; or
- Letter of Determination – "Cause Finding"
  - Conciliation
  - EEOC Files Lawsuit
  - Notice of Right to Sue

Conclusion

- Conciliation –voluntary and confidential
  - Only when EEOC finds "cause"
  - No opportunity to reargue your position
  - EEOC provides a "demand" – has to provide basis for findings and for damages requested
  - Training (can negotiate scope of group to be trained)
  - Policy revisions
  - Post a notice of the agreement
  - Report on compliance (can be for years – negotiable)
  - Failure to comply is an additional violation of the law

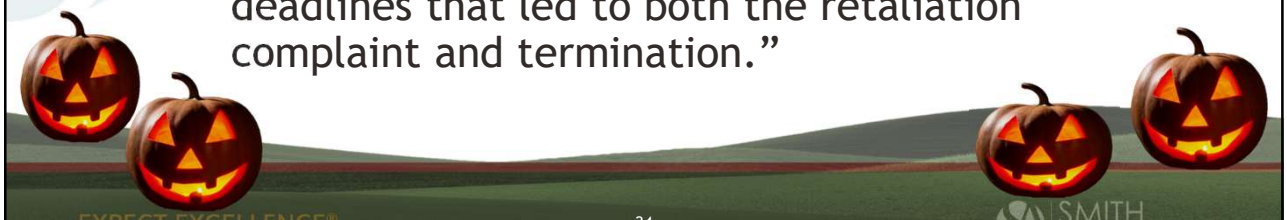
Conducting Thorough and Effective Internal Investigations into Workplace Issues

Spooky Stories from Case Law:
Mohamed v. Society for Human Resource Management (D. Colo. Oct. 8, 2024)

- Plaintiff complained that her manager treated White employees differently from non-White employees
- An HR employee was assigned to investigate the complaint *and* ghostwrote emails to Plaintiff for her manager about deadlines
- Plaintiff complained of retaliation but there was no evidence indicating that complaint was investigated

Mohamed v. Society for Human Resource Management (D. Colo. Oct. 8, 2024)

- "[J]ury could reasonably conclude that the investigation was a sham in view of, for example, [the HR employee's] failure to discuss [Plaintiff's] retaliation complaint with her and his involvement in drafting the email setting deadlines that led to both the retaliation complaint and termination."



Spooky Stories from Case Law: Your Investigator Matters

- In *Jameson v. Pacific Gas & Electric Co.*, the employer hired an experienced lawyer to investigate a complaint regarding retaliation by the Plaintiff against an employee who reported safety violations
- The lawyer's report led to termination of Plaintiff's employment, and the Plaintiff argued that the lawyer was biased and did not conduct a thorough investigation. The Court disagreed, noting the investigator's experience.

16 Cal. App. 5th 901, 225 Cal. Rptr. 3d 171 (2017)

Spooky Stories from Case Law: Your Investigator Matters

- In *Kramer v. Wasatch County Sheriff's Office*, the plaintiff, a bailiff in a county jail, was sexually assaulted multiple times by her direct supervisor
- The Sheriff asked a detective to investigate potential sexual misconduct between plaintiff and the supervisor
- The detective was not:
  - an HR specialist
  - trained in conducting sexual harassment investigations
  - given any policies or procedures on how to conduct the investigation
- The detective was friends with the accused and considered him a mentor

743 F.3d 726, 730 (10th Cir. 2014)

Trick-or-Treat

Traps to avoid and practical tips

Traps to Avoid and Practical Tips

- Choose the right investigator
  - unbiased, experienced
  - HR person involved in employee discipline should not investigate complaints by employee
- Define the scope of the investigation
- Preserve relevant information
- Identify potential witnesses
- Prepare for investigation
  - Review policies at issue
  - Review documents before interview
  - Prepare an outline for each witness interview

Traps to Avoid and Practical Tips

- Confidentiality
  - NLRB - instruction not to discuss ongoing investigation may violate rights to engage in protected concerted activity under NLRA
    - If instruction is limited to duration of a workplace investigation, it is presumptively lawful
    - If instruction is not limited to the duration of the investigation, case-by-case business justification required
      - Witness needs protection (from violence or manipulation)
      - Evidence may be destroyed
      - Testimony may be fabricated
      - Need to prevent a cover-up
  - Don't guarantee confidentiality to anyone

Traps to Avoid and Practical Tips

- Do not prejudge – keep an open mind
- Do not share your interpretation, assumptions, or subjective comments with witnesses
  - Ask questions, record answers

Traps to Avoid and Practical Tips

- Do not fail to ask witnesses difficult questions
  - Save hostile or embarrassing questions for the end – but be sure to ask them
  - Ask about past practices/similarly situated employes
- Be thorough
  - Resist pressure to "wrap it up"
  - Follow up on info learned
  - Reinterview if necessary to resolve conflicting info

Traps to Avoid and Practical Tips

- Assess witness credibility
  - Pay attention to inconsistencies, evasiveness, and non-verbal cues
- Do not waive attorney-client privilege inadvertently
  - Do not disclose discussions with counsel (internal or external) – to witnesses or in the report

Traps to Avoid and Practical Tips

- Produce an airtight report –
  - Objective, thorough, well-written (no typos/poor grammar)
  - Do not draw legal conclusions
    - Don't say: "Employee X was sexually harassed by Employee Y."
    - Do say: "Employee X stated that Employee Y made sexual gestures to her. Specifically, she reported that Employee Y rubbed up against her from behind and brushed his hand across her buttocks.
- Communicate the results of the investigation
  - Memo to complaining party advising of result, action, and request that he/she report any reoccurrence or retaliation
  - Close Out Memo to accused employee

SMITH ANDERSON

Advice for DIYers: EEOC Charges and Internal Investigations

Kerry A. Shad
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October 29, 2024

EXPECT EXCELLENCE®

Making Sense of the Non-Compete Landscape: FTC Fallout and What Comes Next

SMITH ANDERSON

Making Sense of the Non-Compete Landscape: FTC Fallout and What Comes Next

Isaac A. Linnartz
Dani B. Dobosz
October 29, 2024

EXPECT EXCELLENCE®

The FTC's Rule

FTC Non-Compete Rulemaking

For Release

FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition

Agency estimates new rule could increase workers' earnings by nearly $300 billion per year

January 5, 2023

FTC Approved Final Rule

On April 23, 2024, the FTC voted 3-2 to publish a proposed final rule that would:

- Ban almost all worker non-competes as "unfair methods of competition"
- Extend to other agreements that were *de facto* non-competes
- Be both prospective and retroactive
- Require written notice that most existing non-competes would no longer be enforced

Uncertainty in the Rule

The FTC's proposed final rule left much uncertainty.

- Exception for then-existing non-competes with "senior executives"
- Limited sale-of-business exception
- *De facto* non-competes
- Certain non-profits?

Litigation Challenging the Rule

- The same day the rule was announced, Ryan, LLC filed suit challenging the Rule in the Northern District of Texas
- Shortly after, the U.S. Chamber of Commerce joined the suit
- On April 25, 2024, ATS Tree Services, LLC filed suit in the Eastern District of Pennsylvania challenging the rule
- Other cases followed

Initial Litigation Uncertainty

- On July 3, 2024, a federal judge in the N.D. Tex. issued a preliminary injunction prohibiting the FTC from implementing or enforcing the rue against Ryan, LLC and the other parties in the litigation
- On July 23, 2024, a federal judge in Pennsylvania denied the plaintiff's motion for preliminary injunction, in a decision that was directly contrary to the decision of the Texas court
- On August 14, 2024, a federal judge in Florida entered a limited preliminary junction similar to that entered by the federal judge in Texas

FTC Rule Struck Down

- On August 20, 2024 the Texas federal court ruled that the FTC exceeded its statutory authority in implementing the rule and found that the rule was arbitrary and capricious
- The rule was set aside nationwide

What Comes Next for Non-Competes?

FTC Likely to Appeal

- On September 24, 2024, the FTC filed a notice of appeal challenging the preliminary injunction entered by the federal judge in Florida.
- The FTC's appellate brief is due November 4, 2024.
- On October 18, 2024, the FTC filed a notice of appeal challenging the decision to set aside the rule by the federal judge in Texas.
- While the FTC's decision to appeal is unsurprising, the FTC is unlikely to succeed before the Fifth Circuit or the Supreme Court.

FTC Enforcement

- FTC still may pursue individual employers arguing their non-competes are "unfair methods of competition"
- FTC previously signaled intent to pursue non-competes involving:
  - Large numbers of workers who are paid low wages,
  - Hold low-skill positions, or
  - Lack access to significant confidential information/customer relationships
- FTC enforcement actions likely to resume against individual employers

NLRB Enforcement

- On May 30, 2023, NLRB GC opines that non-competes *generally* constitute an "unfair labor practice"
- Argument is that non-competes prevent employees from leaving employment or threatening to leave, either individually or collectively, infringing on their NLRA rights
- Applies to employees with unionized and non-unionized workforces
- Does not apply to employees in supervisory roles (assign/reward/discipline)

NLRB Enforcement

- On October 7, 2024, NLRB GC issued a follow-up memorandum addressing non-competes and "stay-or-pay" agreements
- Further suggests NLRB interest in pursuing enforcement action
- Suggests NLRB seeking not only to void non-competes, but also seeking "make-whole remedies" for affected workers

NLRB Enforcement

- NLRB GC proposed employees be compensated (difference in pay and/or benefits) if the employee can show:
  - There was a vacancy available for a job with a better compensation package;
  - They were qualified for the job; and
  - They were discouraged from applying because of a non-compete

NLRB Enforcement

- NLRB GC also posited that former employees may be entitled to "make-whole relief" for time spent complying with a non-compete after exiting employment.
- NLRB GC suggests that former employees be made whole if:
  - The former employee shows (through the same criteria mentioned previously) they were out of work for longer than they otherwise would have been because of the non-compete
  - The former employees shows they accepted a job outside their industry for lesser compensation because of the non-compete
  - The former employee shows they needed to move outside of the geographic region covered by the non-compete
  - The former employees shows they needed to undertake new job training to be eligible for a position not restricted by the scope of the non-compete

New State-Level Action

- Minnesota
  - In May 2023, Minnesota Legislature passed a new statute banning non-competes
  - The ban was signed into law by Gov. Tim Walz.
  - The law took effect on July 1, 2023
  - The law is prospective only
  - The law still permits non-solicits, confidentiality agreements/NDAs, and non-competes in sale-of-business context

New State-Level Action

- New York
  - In June 2023, the New York State Legislature passed a bill banning non-competes
  - In December 2023, New York Governor Kathy Hochul vetoed the bill
  - Governor Hochul has signaled that she would support a future non-compete ban that was tailored to protect low-wage and middle-class earners while preserving the ability to protect interests related to highly-compensated workers

Best Practices

Overall Principles

- Who to worry about
  - State law – high concern
  - FTC / Congress / other agencies – lower concern, but monitor
- What to worry about
  - Non-competes – high concern
  - Non-solicits – medium/low concern
  - Confidentiality agreements/non-disclosure agreements – low concern

Non-Competes

- Use sparingly
- Tailor appropriately – geography, time, activities prohibited
- Provide notice with offer/remind at termination
- Goals
  - Protect legitimate interests – confidential information, trade secrets, and customer relationships/goodwill
  - Have enforceable agreements
  - Avoid FTC, NLRB, or other regulatory scrutiny
- Not a panacea—feed and care for your workers!

Non-Solicits

- Use where worthwhile
  - External-facing executives and management
  - Business development and sales roles
- Tailor appropriately
  - Not “all customers”
  - Based on business-related contact
  - Reasonable post-employment period (<=2 years)
  - Reasonable lookback period (<=2 years)

Confidentiality and Trade Secrets

- The lowest-hanging fruit
  - Have a defensible confidentiality agreement
    - Signed by anyone with access to confidential information/trade secrets
    - Limited to confidential information
    - Contains DTSA safe harbor language
  - Address confidentiality and return of information in onboarding and offboarding
  - Limit access to confidential information based on need to know

Confidentiality and Trade Secrets

- Advanced Options
  - Identify trade secret information
  - Trade secret policy
  - IT policies regarding access to and monitoring of trade secret information
  - Other advanced measures based on the information at issue

Disclaimer 1: State Law Varies and Changes

- State laws continue to be divergent and complicated—no one-size-fits-all
- There was a lull while the FTC rule was in process
- Expect more state legislation, particularly in blue-leaning states
- Expect more state-specific statutory bans, wage thresholds and highly technical requirements (notice, required disclosures, etc.)

Disclaimer 2: Who Knows What's Coming

- Federal changes
  - Harris or Trump administration?
  - Agency action?
  - Congressional action?
- Court scrutiny

Q&A

SMITH ANDERSON

Making Sense of Non-Compete Landscape: FTC Fallout and What Comes Next

Isaac A. Linnartz
Dani B. Dobosz
October 29, 2024

EXPECT EXCELLENCE®

When the Dealin's Done: Benefits Integration Following M&A Transactions

SMITH ANDERSON

When the Dealin's Done: Benefits Integration Following M&A Transactions

Caryn Coppedge McNeill
Kara Brunk
October 29, 2024

EXPECT EXCELLENCE®

What We'll Cover

1. What this presentation is not about
2. "When the dealin's done"
3. Communicating with employees
4. Cuing and coordinating vendors
5. A plan termination to-do list
6. A plan assumption to-do list
7. The power of a T&R schedule

What this presentation is not about

What this presentation is not about

- Things you can't control for that do matter
  - How the deal is structured
  - Nature of the seller (e.g., whole company vs. sub)
  - Nature of the buyer (e.g., strategic vs. financial)

What this presentation is not about

- Conducting due diligence
  - Requests/responses yield diligence reports and disclosure schedules

What this presentation is not about

- Negotiating deal terms
  - Covenants
    - Salary and benefits post-closing
    - Crediting prior service with seller
    - Crediting deductibles
    - Honoring seller's severance arrangement for a period of time
    - Terminating plans (401(k) and/or H&W)

“When the dealin’s done”

“When the dealin’s done”

- As a matter of law or contract, the plan for seller’s plans is set, and it is time for buyer’s HR/benefits team to get to work on integration
- Initial steps:
  - Determine what’s happened already
  - Request copies of documents (diligence report(s), deal document, disclosure schedules)
  - Talk to your benefits counsel for the deal

"When the dealin's done"

- It may be that seller's plans will be:
  - Continued
  - Terminated and/or
  - Assumed

Communicating with employees

Communicating with employees

- Coordination and timing
  - Parties should discuss how communications to seller's employees will be handled – who will speak on behalf of each party and when communications will be made
  - Parties will want to review and agree beforehand to any communications that are made, if not joint

Communicating with employees

- Representations
  - Parties should expressly agree that neither will make representations to employees about how the deal will affect benefits until that's been fully negotiated

Communicating with employees

- A fulsome set of Q&As might typically cover:
  - **General**
    - Whether seller's benefit plans will continue or terminate (come with, or stay behind)
    - Whether employees will be eligible to participate in buyer's benefit plans, and when coverage will be effective
    - When employees can make elections to participate in buyer's benefit plans
  - **401(k) Plan**
    - Whether contributions to seller's 401(k) plan will continue or cease
    - Whether employees can continue to direct the investment of their 401(k) account
    - What will happen to 401(k) loans
    - Whether/when employees can take distributions
  - **Health and Welfare Plans**
    - Whether co-payments and deductibles paid year-to-date will be applied to buyer's plans

Cuing and coordinating vendors

Cuing and coordinating vendors

- Timing
  - The earlier notice can be given, the better
  - But it may not always be possible to give advance notice to vendors (e.g., due to confidentiality issues, simultaneous sign and close)
  - Service agreements include notice deadlines but, in the end, sometimes all you can do is your best.

Cuing and coordinating vendors

- Parties should expressly agree about who will be responsible for notifying vendors.
- (If pre-closing, this would likely be the seller's responsibility.)

A plan termination to-do list

A plan termination to-do list

- Step 1: Determine the (anticipated) termination date
- Step 2: Contact the TPA for any necessary plan amendment
- Step 3: Prepare written consent terminating the plan
  - Step 3A: Decide whether to file for an IRS Determination Letter on the terminated plan

A plan termination to-do list

- Step 4: Coordinate with payroll to stop deferrals as of the termination date
- Step 5: Communicate with employees
- Step 6: Notify other vendors (e.g., investment advisor) of the plan termination

A plan termination to-do list

- Step 7: Distribute the plan assets
- Step 8: File the final form 5500

A plan assumption to-do list

A plan assumption to-do-list

- Step 1: Check 401(k) plan eligibility provisions, and coordinate coverage **[Pre-closing!]**
- Step 2: Before the end of 410(b)(6)(C) Transition Period, decide whether to (A) keep the 401(k) plans separate (Option 1) or (B) merge the 401(k) plans (Option 2)

A plan assumption to-do-list

- *If Option 1 . . .*
  - Step 3: Notify both TPAs that there are now two 401(k) plans in the controlled group
  - Step 4: Ask TPA to mock-up testing
  - Step 5: Amend seller 401(k) plan to reflect new plan sponsor and changes to governance

A plan assumption to-do-list

- *If Option 2 . . .*
  - Step 3: Put the two 401(k) plans side-by-side to analyze the similarities and differences
  - Step 4: Select surviving plan
  - Step 5: Select service providers for surviving plan

A plan assumption to-do-list

- Step 6: Hold regularly scheduled calls with service providers to coordinate conversion
- Step 7: Ask TPA to prepare plan document for surviving plan

The power of a T&R schedule

The power of a T&R schedule

Confidential

TERMINATION OF [PLAN NAME][1]

Target Acquisition Date: January 31, 2025

Plan Termination Date: January 30, 2025

Updated: October 29, 2024

LEGEND:

Acquirer	[Name of Acquirer]
Target	[Name of Target]
Target Counsel	[Name of counsel for target]
SA	Smith Anderson, Benefits Counsel to Acquirer Caryn McNeill and Kara Brunk
RK	[Name of plan recordkeeper/custodian]
TPA	[Name of third party administrator responsible for testing, plan document and 5500s]
Trustee	[Name(s) of trustee, if individual]

Completed

In Process

	ACTION	STATUS/PROJECTED COMPLETION DATE	RESPONSIBLE PARTY(IES)
Pre-Closing Actions			
1	Preparation of 401(k) plan determination letter request	[X days before closing]	SA

[1] Pending receipt of the IRS determination letter, distributions of 401(k) assets will NOT be permitted. 401(k) assets will continue to be invested as directed by participants in the 401(k) investment options.

Actions And Timeline For Termination Of 401k P__.Docx

The power of a T&R schedule

Confidential

	ACTION	STATUS/PROJECTED COMPLETION DATE	RESPONSIBLE PARTY(IES)
2	Identify the new 401(k) plan trustee	[X days before closing]	Seller/Buyer
3	Discuss proposed resignations with current trustees	[X days before closing]	Seller, [Counsel for Seller], RK, TPA and Trustees
4	Prepare proposed draft of written resignation letter for current 401(k) plan trustees	[X days before closing]	[Counsel for Seller], SA
5	Prepare plan termination amendment shutting off the right to take distributions and naming new trustee	[X days before closing]	TPA (SA to advise on content as needed)
6	Prepare and adopt Board resolutions terminating the 401(k) plan effective as of the day immediately prior to closing. Such resolutions shall freeze contributions and distributions (other than RMDs) and fully vest participant accounts as of the Plan Termination Date.	[X days before closing]	Seller, [Counsel for Seller]
7	Share and discuss pre-closing participant Q&A and T&R Schedule with working group, including [Counsel for Seller], Seller, and TPA	[X days before closing]	SA with input from Buyer
8	Route pre-closing participant Q&A to participants	[X days before closing]	Buyer
9	Prepare and adopt Board resolutions: (1) accepting resignation of current trustees effective as of the Plan Termination Date, (2) confirming appointment of Trustee, and (3) approving related amendments to Plan Document and Trust Agreement (and/or ASA)	[X days before closing]	Seller, [Counsel for Seller]

Actions And Timeline For Termination Of 401k P__.Docx

Questions?

SMITH ANDERSON

When the Dealin's Done: Benefits Integration Following M&A Transactions

Caryn Coppedge McNeill
Kara Brunk
October 29, 2024

EXPECT EXCELLENCE®

Safeguarding Data Privacy in HR: The Critical Role of Data Privacy in Human Resources

SMITH ANDERSON

Safeguarding Data Privacy

The Critical Role of Data Privacy in Human Resources

David A. Senter, Jr.

October 29, 2024

EXPECT EXCELLENCE®

An Era of Compromise

- Record high in *publicly reported* data compromises
- 78% increase in compromises
  - 16% decrease in victims
- Estimated $188 billion spent on Cybersecurity in 2023

Figure 2 | *Total Compromises, Year-Over-Year*

	Compromises	Victims
2023	3,205	353,027,892
2022	1,801	425,212,090
2021	1,860	300,607,163
2020	1,108	310,235,204
2019	1,279	883,558,186
2018	1,175	2,227,849,622

2023 Data Breaches - By Industry

Top Compromises by Industry

HEALTHCARE	*809 Compromises*
FINANCIAL SERVICES	*744 Compromises*
PROFESSIONAL SERVICES	*308 Compromises*
MANUFACTURING	*259 Compromises*
EDUCATION	*173 Compromises*

Cost of Data Breaches

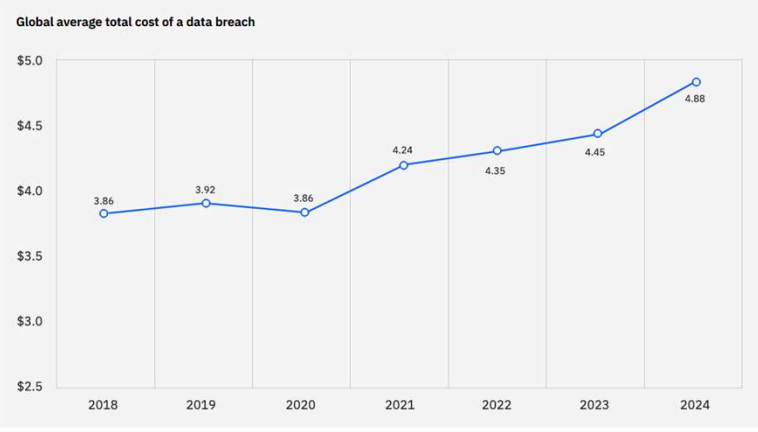

Figure 1. Measured in USD millions

Cost by Industry

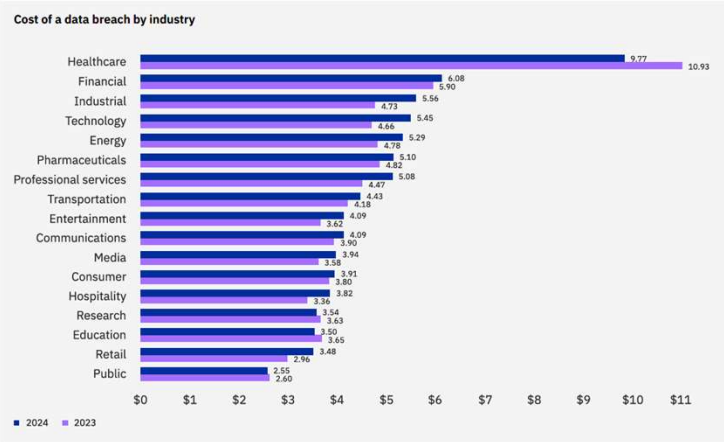

Figure 3. Measured in USD millions

Why Should Companies be Concerned?

- State Laws
- Federal Laws
- Contractual Obligations
- "Potential" Third-Party Claims
- Publicity
- Reputation
- Consumer and Employee Trust

Impact to HR Professionals

- Employees (current, former, contract, applicants)
- Deluge of Data and Personal Information
  - Social security numbers
  - Bank and financial information
  - Health information
  - Biometric information

Impact to HR Professionals

- New Technologies
- Record Retention and Destruction
- Reliance on Others
  - Other departments (IT, Security, Legal, C-suite, etc)
  - Vendors (payroll, benefits, etc)

FTC - 5 Key Principles - Take Stock

- Know what personal information you have in hard copy and electronic form
  - Inventory system and equipment
  - Track life cycle of data
- Question: What laws require my company to keep data private and secure?

Laws Impacting Employment Data

- State data breach notification laws
  - NC Gen Stat § 75-65
  - CCPA/CPRA
- HIPAA
- ADA
- GDPR
- Vendor Contracts*

5 Key Principles – Scale Down

- Only keep data that for which you have a legitimate business need
  - Principle of least privilege
  - Written records retention policy
- Question: We create a permanent file for all of our current and former employees. As long as it's secure, what's the risk?

5 Key Principles – Lock It (Physical)

- Implement physical, administrative and technical controls to safeguard data
  - Physical
    - Locked rooms and file cabinets
    - Clean workstations
    - Building access controls
- Question: We keep personnel files in a file cabinet in the HR manager's office. The building is controlled by keycard access. Any concerns?

5 Key Principles - Lock It (Administrative)

- Administrative Controls
  - Policies, Procedures, Training
  - Background checks
  - Create “culture” of privacy and security
- Question: Our employees sign a confidentiality agreement and read our employee manual during onboarding. Don’t they have a responsibility to stay up to date on privacy and security matters?

5 Key Principles - Lock It (Technical)

- Technical Controls
  - Secure internet connection
  - Encryption
  - Restrict downloads
  - Strong passwords
- Question: We encrypt employment applications submitted on our website, but de-crypt it once received and email them to branch sites.

5 Key Principles – Pitch It

- Properly destroy what you no longer* need
  - Proportional disposal practices
  - Shred, burn, wipe
  - Work from home policies
- Question: My company throws away information from the personnel file once it is no longer needed. Is that sufficient?

5 Key Principles – Plan Ahead

- Create a plan for responding to privacy and security incidents
  - Investigate immediately
  - Escalate and document internally
  - Is HR at the table?
- Question: I own a small company. Aren't these steps cost-prohibitive?

Questions/Comments

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SMITH ANDERSON

SMITH ANDERSON

Safeguarding Data Privacy

The Critical Role of Data Privacy in Human Resources

David A. Senter, Jr.
October 29, 2024

EXPECT EXCELLENCE®

Raising the Bar and the Threshold: USDOL's New Final Rules on Independent Contractors and the Salary Threshold for Overtime Exemptions

SMITH ANDERSON

Raising the Bar and the Threshold: USDOL's Final Rules on Independent Contractors and the Salary Threshold for Overtime Exemptions

J. Travis Hockaday
James C. King
October 29, 2024

EXPECT EXCELLENCE®

USDOL's Final Rule on Independent Contractors

So true . . .

"Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing."

N.L.R.B. v. Hearst Publications, 322 U.S. 111 (1944)

Who cares?

- Workers (minimum wage, OT, unemployment, benefits)
- Employers (same as above, flexibility in staffing, reduces recruiting/retention costs)
- Federal and state governments
  - IRS/departments of revenue
  - Departments of labor
  - EEOC/NLRB
  - USCIS
  - Workers' comp/unemployment regulators

Who cares?

- Labor unions
  - ICs excluded from NLRA coverage and cannot organize
  - Misclassified workers are potential dues-paying members
- The lawyers (especially plaintiffs' bar)
  - Misclassification cases are ripe for class actions
  - Big money potential

Why YOU should care . . .

- All it takes to spark a full-blown, multi-agency investigation:
  - One unemployment claim by contractor
  - One random, drive-by OSHA inspection
  - One complaint to state/federal DOL
- Liabilities can be significant

Why YOU should care . . .

- It can "kill the deal" (or heavily impact it)
  - Always a top due diligence issue in transactions
  - Can affect marketability/value of the company
  - Can lead to special indemnities/escrows that may not otherwise be necessary

What's the worst that can happen?

- Liability for:
  - Penalties for failure to withhold income taxes and to pay FICA, FUTA, SUTA; interest; penalties; possible individual liability for execs
  - Employee benefits (unless plan has "Microsoft clause" and properly excludes misclassified workers)
  - Back wages for 2-3 years for MW and OT (longer in some states); liquidated damages; attorneys' fees

What's the worst that can happen?

- Liability for:
  - Violations of federal employment laws (Title VII, ADA, FMLA, NLRA, etc.)
  - Immigration/I-9 issues (civil/criminal penalties)
  - OSHA violations (injunctive relief, civil/criminal penalties)
  - Workers' comp liability and penalties
  - Potential criminal penalties in some states

How can we tell?

- Tests, tests, and more tests . . .
- IRS has a test ("old" 20 factor test; "new" three-prong test - behavioral control, financial control, type of relationship)
- Federal and state courts have developed tests
- Federal and state agencies have tests for the laws they enforce

Recent evolution of USDOL test

- Trump DOL's 2021 rule
  - 5 factors with focus on two "core" factors:
    - Control (minimalized relevance of reserved/unexercised control)
    - opportunity for profit/loss
  - If those pointed to IC status, very likely IC - without consideration of the other factors:
    - amount of skill required
    - degree and permanence of relationship
    - whether work part of integrated unit of production

Recent evolution of USDOL test

- Biden DOL's new rule
  - Effective March 11, 2024
  - Return to "economic reality" test

Factor 1: Opportunity for profit/loss depending on managerial skill

- Can worker determine or negotiate pay for work?
- Does worker accept/decline jobs or choose order/time in which performed?
- Does worker engage in marketing, advertising, other effort to expand/secure work?
- Does worker make decisions to hire others, purchase materials/equipment, or rent space?

Factor 1: Opportunity for profit/loss depending on managerial skill (cont.)

- Note that decision to work more hours or take more jobs when paid a fixed rate per hour or job does not reflect type of managerial skill contemplated by rule

Factor 2: Investments by the worker and the employer

- Are the worker's investments entrepreneurial in nature?
- No:
  - Costs of tools/equipment to do specific job
  - Costs of worker's labor
  - Costs that company imposes on worker
- Yes:
  - Expenditures that increase ability to do different or more types of work, reduce costs, expand market reach

Factor 2: Investments by the worker and the employer (cont.)

- Worker's investments need not be equal to company's investments
- Focus should be on comparison to determine whether the worker is making *similar types* of investments (even on smaller scale) to suggest that worker is operating independently

Factor 3: Degree of permanence of the work relationship

- Suggestive of employee status:
  - Indefinite
  - Continuous
  - Exclusive of work for others
- Suggestive of contractor status:
  - Definite
  - Non-exclusive
  - Project-based
  - Sporadic

Factor 4: Nature and degree of control

- Must consider exercised *and reserved* control over performance of work and economics of relationship
- Relevant factors include whether company:
  - Sets schedule, supervises performance of work, limits worker's ability to work for others
  - Uses technological means to supervise performance of work (via devices or electronically)
  - Reserves right to supervise or discipline worker, or places demands/restrictions that do not allow worker to work for others or to work when they choose
  - Exercises control over prices, rates for services, marketing of services provided by worker

Factor 4: Nature and degree of control (cont.)

- Actions taken for sole purpose of complying with specific, applicable federal, state or local law are NOT indicative of control
- But, acts of company that go beyond such compliance with law and instead serve the company's own compliance methods, standards, QC, or contractual or customer standards may suggest control
- More control suggests employee status; less control suggests IC status

Factor 5: Extent to which work performed is integral part of employer's business

- Is the function the worker performs an integral part of the business? Is it critical, necessary or central to the business?
  - If yes, suggests employee status
  - If no, suggests IC status

Factor 6: Specialized skills and whether they contribute to business-like initiative

- Worker does not use specialized skills or is dependent on training from potential employer = employee
- Worker brings specialized skills to the relationship (but does not use in connection with a "business-like initiative") = not itself indicative of IC status
- Worker brings specialized skills to the relationship + uses in connection with a "business-like initiative" = suggests IC status

Application of factors

- No single factor or set of factors determinative
- Worker need not satisfy all of the factors to qualify as IC
- All factors are weighed to assess whether worker is economically dependent on company for work, according to totality of circumstances

It's not the ABC test . . .

- . . . of California/New Jersey/etc. fame
- Very difficult to satisfy
- IC status only proper where all three factors are present:
  - Worker free from control in performance of work
  - Work is outside usual course of company's business
  - Worker is customarily engaged in independent business of the same nature as involved in the work being performed

Remember, there are lots of tests, and multi-state employers must consider state-specific standards

Structuring to minimize risk

- Engage through third-party/staffing firm or worker's business entity if possible
- Do not use for routine work/integral business functions
- Avoid routine supervision, tracking, reporting requirements
- Focus on end results, not details of how work gets done

Structuring to minimize risk (cont.)

- Base pay on project/performance vs. time
- Require worker to supply own equipment and materials if feasible and consistent with security standards
- Avoid "look and smell" of employees (email addresses, attire, logos, ID badges, etc.)
- Do not include in employee meetings/functions

Structuring to minimize risk (cont.)

- Do not prohibit worker from working for others
- Require worker to have insurance and workers' comp coverage
- Use carefully drafted/legally reviewed agreement

Resources

- https://www.dol.gov/agencies/whd/flsa/misclassification/rulemaking

"Everything old is new again."

- lots of people

FLSA Refresher

- Requires minimum wage and overtime, unless an exemption applies
- Exemptions:
  - Executive
  - Administrative
  - Professional
  - Highly-compensated employees
  - Computer employees
  - Outside sales

Requirements for EAP exemptions

- **Salary level test** - paid at a rate of not less than $[x] per week (the "salary threshold")
- **Salary basis test**
  - Regularly receives predetermined amount of compensation each pay period on a weekly, or less frequent, basis
  - Subject to specific exceptions, cannot be reduced because of variations in quality or quantity of work
- **Duties test**

Increase in salary threshold

- Effective July 1, 2024
- Additional salary threshold increases are scheduled for:
  - **January 1, 2025**
  - **July 1, 2027**
  - **Every 3 years thereafter**

Increases in salary threshold

DATE	STANDARD SALARY LEVEL	HCE ANNUAL COMPENSATION
Before July 1, 2024	$684/week ($35,568/year)	$107,432 (including at least $684/week on salary basis)
July 1, 2024	$844/week ($43,888/year)	$132,964 (including at least $844/week on salary basis)
January 1, 2025	$1,128/week ($58,656/year)	$151,164 (including at least $1,128/week on salary basis)
July 1, 2027 (and every 3 years thereafter)	To be determined	To be determined

Bonuses, commissions, incentives

- Can count for up to 10% of salary level
  - Must be non-discretionary
  - May be paid annually "or more frequently"
  - "Catch-up" payment allowed
  - Can include all bonuses and other incentive compensation to meet HCE total annual compensation level

Increases do not apply to all exemptions

- Not to outside sales
- Not to learned professionals (lawyers, teachers, doctors)
- Not to computer professionals earning more than $27.63 an hour

Options for compliance

- Raise salary to meet new threshold
  - Ensure duties tests met
- Reclassify as non-exempt

Options for compliance (reclassification)

- Remember - “non-exempt” ≠ “hourly”
  - Can still pay a non-exempt employee a fixed salary for the week
  - Must satisfy minimum wage requirement
  - Must pay overtime for hours > 40 in workweek

Options for compliance (reclassification)

- Convert to hourly
  - Reduce hourly rate to neutralize effect of OT
    - Formula: Weekly salary/(40+ (OT Hours x 1.5))
    - COMPLIANT NATIONALLY
- Convert to salaried non-exempt and pay overtime for hours over 40
  - OT rate is 1.5 times salary ÷ 40
    - Most expensive
    - Can reduce salary to neutralize the effect of OT
    - COMPLIANT NATIONALLY

Options for compliance (reclassification)

- Fixed salary for fixed hours
  - Must have agreement
  - OT rate can change each week
  - NOT LEGAL IN ALL STATES
- Fluctuating workweek
  - Must have agreement
  - Straight time for all hours in workweek (at least Min. Wage)
  - Hours must fluctuate
  - NOT LEGAL IN ALL STATES

Remember…..

- Give prior written notice of reduction/change in pay
- Specific requirements vary by state
  - NC: one full pay period in advance

Tips for newly non-exempt employees

- Policy should address if and when OT allowed
  - Advance authorization required?
  - Still have to pay OT if employee does not get approval
  - But may discipline employee if they violate the policy

Tips for newly non-exempt employees

- Major concern - “hidden” overtime
  - May be hard to predict overtime for formerly exempt employees
  - Employers need to look out for:
    - Accurate recordkeeping
    - Working through lunch
    - Working outside regular hours
    - Job-related “volunteer” work

Tips for newly non-exempt employees

- Bonuses/incentive compensation/commissions
  - Decide whether to continue to pay to non-exempts
  - If paid, OT calculation must include these payments
  - Pay OT in same check as bonus, etc. is paid

Tips for newly non-exempt employees

Discretionary Bonuses

- Employer must retain discretion over the fact that payment will be made AND the amount of the payment
- Not included in the regular rate of pay (no effect on employee's overtime compensation)

Nondiscretionary Bonuses

- Are typically made based on a prior contract, agreement, or promise to the employee
- Are included in regular rate of pay (increases employer's potential overtime liability)

Refresher on EAP duties tests – administrative

- Most common
- Primary duty:
  - Must be performance of office or non-manual work directly related to management or general business operations of employer or employer's customers, and
  - Must include exercise of discretion and independent judgment with respect to matters of significance

Functional areas for administrative exemption

- Tax
- Finance
- Accounting
- Budgeting
- Auditing
- Insurance
- Quality control
- Purchasing
- Procurement
- Advertising
- Marketing
- Research
- Safety and health
- Personnel management
- Human resources
- Employee benefits
- Labor relations
- Public relations
- Government relations
- Computer network
- Internet and database admin
- Legal and regulatory compliance
- "Similar activities"

Refresher on EAP duties tests – executive

- Primary duty must be managing the enterprise or customarily recognized department or subdivision
- Must customarily and regularly direct work of two or more other full-time employees (or equivalent)
- Must have authority to hire/fire or have recommendations as to hiring/firing/advancement be given particular weight

Refresher on EAP duties tests – professional

- Learned professional
  - Primary duty must be performance of work requiring advanced knowledge (predominantly intellectual in character and requiring consistent use of discretion and judgment)
  - Advanced knowledge must be in field of science or learning, and acquired by prolonged course of specialized intellectual instruction

Refresher on EAP duties tests – professional

- Creative professional
  - Primary duty must be performance of work requiring invention, imagination, originality or talent
  - In a recognized field of artistic or creative endeavor

Refresher on HCE exemption

- Highly compensated employees
- Must perform office/non-manual work
- Must meet enhanced salary level
- Must customarily and regularly perform at least one of the duties of an exempt EAP employee
- Not recognized in all states

Resources

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

SMITH ANDERSON

Raising the Bar and the Threshold: USDOL's Final Rules on Independent Contractors and the Salary Threshold for Overtime Exemptions

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October 29, 2024

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EEO Update

SMITH ANDERSON

EEO UPDATE

Zebulon D. Anderson
October 29, 2024

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EEOC DEVELOPMENTS

Administrative Statistics

- Volume
  - FY 2022 = 81,055 charges
  - 11% ↑ and largest volume since FY 2017
  - Substantial decrease in religion discrimination claims
    - Most likely the result of fewer vaccine-related claims
  - Over last 10 years, retaliation and disability claims have increased the most
  - Retaliation has remained most common claim for over a decade – now 57% of all charges include this claim
  - 188 Charges involved the new Pregnant Workers Fairness Act
  - Cause finding in only 2.3% - essentially unchanged
  - Employees recovered $440M – by far the most ever

Administrative Statistics (cont.)

- Location
  - FY 2023: NC – remains about 5% of all charges nationwide
  - 8 States (Texas, Florida, California, Georgia, Illinois, Pennsylvania, New York, and North Carolina) account for over 50% of all charges nationwide

Litigation Statistics

- In FY 2023 – 143 new merits lawsuits filed by EEOC
  - 57% increase from FY 2022
  - Most since 2019
  - About 40% of the lawsuits sought relief for multiple people
  - 69% of the lawsuits involved termination claims; 39% involved harassment claims; and 25% involved disability accommodation claims
  - Much less EEOC litigation than 10-15 years ago
  - When EEOC pursues litigation, its results are successful
    - 91% success rate (settlements and jury verdicts)
  - Litigation resolutions: 98 cases (85% ended with settlement) for $22.6M benefitting 971 people – significant decrease in monetary relief and 2nd lowest year ever

NC EEOC Litigation in 2024

EEOC v. Aurora Pro Services, No. 1:22-cv-00490 (M.D.N.C. Aug. 2, 2023):

- Defendant was a residential home service and repair company;
- Defendant's owner held daily prayer meetings where employees were required to stand in a circle as the owner read Bible scripture and Christian devotionals, led employees in Christian prayers, and solicited prayer requests from employees;
- One CP was an Atheist and asked to be excused from the meetings;
- The owner responded that employees were required to participate, and the employee's pay was cut in half;
- The second CP worked as a customer service representative and is Agnostic;
- She stopped attending the meetings as they increased in length;
- Both CPs were terminated after objecting to the meetings; and
- The 3-year consent decree provides for $50,000 to the two employees and equitable relief.

Systemic Statistics

- Systemic cases are EEOC priority
- Systemic cases involve 20+ employees and are focused on matters in which the alleged discrimination is the result of a "pattern or practice" or "policy" that has a broad impact
- FY 2023
  - 370 systemic investigation resolutions = $29M
  - Systemic charges: far more likely to result in "cause" determination
  - New lawsuits: 40% are systemic or multi-party
  - Active lawsuits: 42% systemic or multi-party
  - 100% litigation success rate (settlement and verdict) = $11M for 806 people
  - EEOC litigation is *heavily* focused on systemic and multi-party cases

Systemic Examples in 2024

EEOC v. The Whiting-Turner Contracting Company, No. 3:21-cv-00753 (M.D. Tenn. May 3, 2023):

- At a construction site, a White crew leader referred to Black employees as "boy," "m___ f___," and "you";
- Porta potties and buildings were riddled with racially offensive graffiti, such as the n-word and KKK references;
- Black employees were assigned the most physically difficult work;
- Black employees reported the harassment, but the employer did not investigate;
- Instead, a White assistant superintendent told one of the Black employees to "let it go" and that the crew leader was "old-fashioned;"
- The charging parties complained about the racially offensive conduct multiple times and were discharged the same day they complained to a manager in a team meeting; and
- The 2-year consent decree provides for $1.2 million to 31 claimants, along with equitable relief.

Systemic Examples in 2024 (cont.)

EEOC v. AMTCR, Inc., AMTCR Nevada, Inc., AMTCR California, LLC, No. 2:21-cv-01808 (D. Nev. Jan 5, 2023):

- Defendant owned and operated 21 McDonald's franchises;
- CP, a teen, was subjected to sexual comments and advances and unwanted touching;
- After CP and his mother complained to management, no corrective action was taken;
- Instead, a manager said CP should take the conduct as a compliment;
- Other male and female employees, some teens, were subjected to groping, sexually explicit comments, and sexual requests from coworkers and managers;
- One male general manager conditioned hire on the acquiescence of male applicants to dates and sexual activity; and
- The 3-year consent decree provides for $1,997,500 to 41 individuals, along with equitable relief.

Systemic Examples in 2024 (cont.)

EEOC v. R&L Carriers, Inc., and R&L Carriers Shared Services, LLC No. 1:17-cv-00515 (S.D. Ohio April 24, 2023):

- CP was a female dockworker who brought claims against a national freight trucking carrier;
- Data showing a statistically significant underrepresentation of female dockworkers/loaders;
- Statements attributable to the employer indicated the employer believed women should not be employed as loaders;
- Comparisons of contemporaneous male and female applicants showed that men were hired for loader positions over more qualified women; and
- The 3-year consent decree provides for $1.25 million to about 200 women who unsuccessfully applied for loader positions between 2010 and 2017 (about 200 individuals) and enjoins failing to hire women as loaders because of their sex.

EEOC Composition

- General Counsel
  - Karla Gillbride – D – Confirmed October 2023 and term ends October 2027
- Five Commissioners
  - Kalpana Katagul – D – Confirmed August 2023 and term ends July 2027
  - Keith Sonderling – R - Confirmed September 2020 and term ended July 2024
    - This seat now is vacant and will be filled by next president
  - Andrea Lucas – R – Confirmed September 2020 and term ends July 2025
  - Charlotte Burrows (Chair) – D - Confirmed August 2019 and term ends July 2028
  - Jocelyn Samuels (Vice-chair) – D – Confirmed September 2020 and term ends July 2026
- What it Means
  - Effective August 2023, control returned to Democrats
  - With Democrat GC in place, we anticipated, and saw, more robust litigation efforts by EEOC
  - Democrat objectives had been stalled, but we anticipate more robust admin activity

Strategic Enforcement Plan: FY 2024 - 28

1. Eliminating barriers in recruitment and hiring
   - Improper use of AI
   - Continued underrepresentation of women and minorities in industries and sectors (such as construction, finance and STEM) is a concern
2. Protecting vulnerable workers
3. Selected emerging and developing issues
   - Qualification standards and inflexible policies or practices that discriminate against individuals with disabilities
   - Protecting workers affected by pregnancy, childbirth or related medical conditions
   - Addressing discrimination influenced by or arising as backlash in response to local, national or global events
   - Discrimination associated with the long-term effects of the COVID-19 pandemic
   - Technology-related employment discrimination

Strategic Enforcement Plan: FY 2024 - 28 (cont.)

4. Advancing Equal Pay for all workers
5. Preserving access to the legal system
   - EEOC will challenge policies and practices that limit substantive rights or discourage or prohibit individuals from exercising their rights
6. Preventing and remedying systemic harassment
   - Since 2018, over 34% of all charges include allegations of harassment

EEOC Priorities for 2025

- In connection with its budget request for 2025, EEOC identified its six target priorities

1. Racial Justice and Systemic Discrimination
   - Systemic Race Discrimination – over 33% of all charges in last 5 years allege race discrimination
2. Pay Equity
   - Women working FT earn 82 cents to a dollar when compared to White men
3. Promote DEI&A
   - Mostly focused on the federal sector

EEOC Priorities for 2025 (cont.)

4. Artificial Intelligence and Algorithmic Fairness
   - AI has potential to discriminate
5. Retaliation
   - Volume of charges containing allegations of retaliation have increased every year for 20 years
   - EEOC will collaborate with DOL and NLRB
6. Strengthening the EEOC
   - By 2020, EEOC staffing was at lowest level in 4 decades
   - Workload was highest ever with population increase and new laws

EEOC Activities in 2025

- Enforcement Guidance on Harassment in the Workplace
  - April 29, 2024
  - https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace
  - Important description of EEOC policy – already covered

EEOC Activities in 2025 (cont.)

- Promising Practices for Preventing Harassment in the Construction Industry
  - June 18, 2024
  - https://www.eeoc.gov/promising-practices-preventing-harassment-construction-industry
  - For the last few years, EEOC has made clear that it is focused on the Construction Industry
  - "The EEOC intends to address systemic harassment in construction using a variety of tools, such as encouraging commitment and coordination from every entity with a presence on a construction worksite, including all employers (contractors and subcontractors), unions, apprenticeship programs, and staffing agencies."
  - "*The contents of this document do not have the force and effect of law, do not create any new obligations or duties under federal law, and are not meant to bind the public in any way.* "
  - "Five core principles that have generally proven effective in preventing and addressing harassment: (i) committed and engaged leadership; (ii) consistent and demonstrated accountability; (iii) strong and comprehensive harassment policies; (iv) trusted and accessible complaint procedures; and (v) regular, interactive training tailored to the audience and the organization."

EEOC Activities in 2025 (cont.)

- Final Regulation on Pregnant Workers Fairness Act
  - Issued April 15, 2024
  - Effective starting June 18, 2024
  - https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1636
    - Full text of regulation
    - Includes as Appendix A the EEOC's Interpretive Guidance
    - Super long with many practical examples

EEOC Activities in 2025 (cont.)

- PWFA requires accommodations for pregnancy, childbirth, or related medical conditions
- Regulations make clear this is VERY broadly interpreted by EEOC:

"Pregnancy" and "childbirth" refer to the pregnancy or childbirth of the specific employee in question and include, but are not limited to, current pregnancy; past pregnancy; potential or intended pregnancy (which can include infertility, fertility treatment, and the use of contraception); labor; and childbirth (including vaginal and cesarean delivery). "Related medical conditions" are medical conditions relating to the pregnancy or childbirth of the specific employee in question. The following are examples of conditions that are, or may be, "related medical conditions": termination of pregnancy, including via miscarriage, stillbirth, or abortion; ectopic pregnancy; preterm labor; pelvic prolapse; nerve injuries; cesarean or perineal wound infection; maternal cardiometabolic disease; gestational diabetes; preeclampsia; HELLP (hemolysis, elevated liver enzymes and low platelets) syndrome; hyperemesis gravidarum; anemia; endometriosis; sciatica; lumbar lordosis; carpal tunnel syndrome; chronic migraines; dehydration; hemorrhoids; nausea or vomiting; edema of the legs, ankles, feet, or fingers; high blood pressure; infection; antenatal (during pregnancy) anxiety, depression, or psychosis; postpartum depression, anxiety, or psychosis; frequent urination; incontinence; loss of balance; vision changes; varicose veins; changes in hormone levels; vaginal bleeding; menstruation; and lactation and conditions related to lactation, such as low milk supply, engorgement, plugged ducts, mastitis, or fungal infections. This list is non-exhaustive.

EEOC Activities in 2025 (cont.)

- As with ADA, "qualified" employees entitle to accommodation include those who can perform essential functions, but unlike ADA they include some who cannot:
  - "One month into pregnancy, Akira, an employee in a paint manufacturing plant, is told by her health care provider that she should avoid certain chemicals for the remainder of the pregnancy. One of several essential functions of the job involves regular exposure to these chemicals. Akira talks to her supervisor, explains her limitation, and asks that she be allowed to continue to perform her other tasks that do not require exposure to the chemicals."
  - One of the essential functions of Elena's position as a park ranger involves patrolling the park. Park rangers also answer questions for guests, sell merchandise, and explain artifacts and maps. Due to her postpartum depression, Elena is experiencing an inability to sleep, severe anxiety, and fatigue. Her anti-depressant medication also is causing dizziness and blurred vision, which make it difficult to drive. Elena seeks the temporary suspension of the essential function of patrolling the park for 12 weeks.
  - EEOC – Akira and Elena are qualified because her inability is temporary, they can perform the essential function in near future (less than 40 weeks), and they can do other things until then

EEOC Activities in 2025 (cont.)

- Other examples from EEOC:
  - "Tallah, a newly hired cashier at a small bookstore, has a miscarriage in the third month of pregnancy and asks a supervisor for 10 days of leave to recover. As a new employee, Tallah has only earned 2 days of paid leave, she is not covered by the FMLA, and the employer does not have a company policy regarding the provision of unpaid leave. Nevertheless, Tallah is covered by the PWFA."
  - "Sofia, a custodian, is pregnant and will need 6 to 8 weeks of leave to recover from childbirth. Sofia is nervous about asking for leave, so Sofia asks her mother, who knows the owner, to do it for her. The employer has a sick leave policy, but no policy for longer periods of leave. Sofia is not eligible for FMLA leave because her employer is not covered by the FMLA."
    - EEOC: Unpaid leave must be granted as a reasonable accommodation

SCOTUS

SCOTUS

- Court continues to focus on employment-related issues with nearly 25% of its docket this term touching on employment law, though not all those decisions addressed EEO issues
- In the employment context, courts for years have relied heavily on federal administrative agencies, such as the EEOC, to define the scope of statutory protection; but such reliance now has been limited by the Court

SCOTUS (Muldrow)

- *Muldrow v. City of St. Louis, 601 US 346 (2024)*
  - Ms. Muldrow worked for St. Louis P.D. for nine years in the Intelligence Division (public corruption, human trafficking, gang activity)
  - A new leader assumed command and transferred her to a new position against her wishes
  - She maintained the same rank and pay, but her duties were more administrative and less prestigious, she lost the use of a car, and her schedule was less regular
  - She sued, alleging sex discrimination
  - Summary Judgment for employer based on: (i) precedent that held that transfer was actionable only if it results in a "significant" change in work conditions causing "material employment disadvantage," and (ii) conclusion that that changes in her new job did not reach that level
  - Affirmed by 8th Cir Panel, which agreed she had failed to show that she suffered a "materially significant disadvantage"

SCOTUS (Muldrow cont.)

- SCOTUS accepted the case because courts in at least eight different circuits had articulated different governing standards
- The issue before the Court was whether an employee challenging a transfer must establish some sort of heightened threshold of harm

SCOTUS (Muldrow cont.)

- Justice Kagan issued the opinion of the Court
  - Title VII prohibits discrimination concerning the "terms" and "conditions" of employment
  - "Discriminate against" refers to "differences in treatment that injure" and means "treat worse"
  - So, to be actionable, a transfer must be "disadvantageous" and cause "some harm"
  - But the statute does not require that the employee show that the harm was "significant," "material," or "serious"
  - In response to the employer's argument that this would flood the courts with claims based on minor harms, the Court explained that less harmful acts may be less suggestive of discrimination
  - So, the decision of the 8th Circuit was vacated

SCOTUS (Muldrow cont.)

- Justice Thomas
  - He agreed with the outcome, but . . .
  - He believes that an employee must show a harm that is "more than trifling"
  - And he wasn't sure Muldrow met that standard
- Justice Alito
  - He also agreed with the outcome, but . . .
  - He doesn't think that a change from "substantial" harm to "some" harm is a useful distinction, observing that he has "no idea what that means"

SCOTUS (Muldrow cont.)

- Justice Kavanaugh
  - He also agreed with the outcome, but . . .
  - Any transfer affects the "terms" and "conditions" of employment
  - So, any transfer that is implemented because of sex (or race, etc.) violates Title VII
  - This is a simple straightforward statutory interpretation
  - If an employer told an employee that it was transferring him from Columbus to Cincinnati because he is Black, would that violate Title VII? Of course, and you don't need to ask whether there was "some" harm or "substantial" harm

SCOTUS (Muldrow cont.)

- What is the significance?
  - Taking any employment action because of protected class status is risky, even if there is no monetary harm
  - The decision lowers the bar for employees
  - More claims are likely
  - The Court, other than perhaps Justice Kavanaugh, seems to have drifted away from its developing strict statutory construction approach

SCOTUS (UBS)

- *Murray v UBS Securities*, 601 U.S. 23 (2024)
  - Murray worked as a securities strategist for UBS
  - He received a positive performance review
  - Soon after, two leaders pressured him to skew his reports
  - Murray reported the conduct to his supervisor
  - His supervisor told him that it was "very important" that Murray not alienate those leaders
  - The pressure continued and Murray reported that it was getting worse
  - His supervisor told Murray to do what the internal clients wanted
  - His supervisor then also recommended that Murray be fired
  - His recommendation was approved

SCOTUS (UBS cont.)

- Murray filed a lawsuit, alleging that his termination violated the whistleblower protection provision of Sarbanes-Oxley Act
- The case went to trial and the court instructed the jury that they had to decide whether Murray's protected activity was a contributing factor in the termination decision
- The court did not instruct the jury that Murray had to prove retaliatory intent
- The jury awarded Murray $1M in damages, and the court awarded another $1.769M for fees and costs
- On appeal, the Second Circuit vacated the decision, concluding that the jury should have been instructed that Murray was required to prove that UBS acted with "retaliatory intent"
- SCOTUS accepted the case to resolve a circuit split

SCOTUS (UBS cont.)

- Justice Sotomayor issued the opinion of the Court
  - SOX prohibits discharging or "discriminat[ing]" against an employee "because of" protected whistleblowing activity
  - The employee bears the initial burden of providing that protected activity was a "contributing factor"
  - The employer then bears the burden of showing that it would have taken the same action in the absence of protected activity
  - The term "retaliatory intent" means "animus" (*e.g.*, hostile feelings toward the protected act)
  - The term "discriminate" does not include an "animus" concept so it does not require "retaliatory intent"
  - So, an employee need not prove retaliatory intent, and the Second Circuit decision was reversed

SCOTUS (UBS cont.)

- Justices Alito and Barrett
  - They agree that an employee need not prove anti-whistleblowing "animus," but . . .
  - Based on the plain language of the text, it is clear that there is no "animus" requirement
  - That said, the statute does say that an employee must prove that the adverse action was "because of" the protected activity
  - That means that the statute does require that an employee prove an "intent to discriminate"

SCOTUS (UBS cont.)

- What does that mean?
  - As Alito/Barrett recognize, the Court starts with an assumption that the term "retaliatory intent" means "animus"
  - Based on that assumption, everyone agrees that an employee need not prove that the employer hates whistleblowers
  - But if the statute prohibits adverse action taken "because of" protected activity, aren't Alito/Barrett right when they state that those words require an intent to discriminate?
  - How could an employer fire someone *because* they blew the whistle without retaliatory intent?

SCOTUS (UBS cont.)

- This is simply the latest case in a long lines of cases that attempt to define what "because" means, and none of them make much sense
- Bottom line:
  - In the SOX retaliation context, it is now easier for employees to prevail
  - While SOX retaliation claims arise in the securities law context, the method of proof applies in other settings such as under air carrier and other transportation safety statutes
  - It is simply another example of the Court making retaliation claims easier to pursue, which has directly resulted in the dramatic expansion of retaliation litigation, which is more difficult to defend

SCOTUS (Loper)

- *Loper Bright Enters. v Raimondo*, 144 S. Ct. 2244 (2024)
  - Not an employment case, so won't address the facts
  - But the case will have a significant impact on the development of employment law

SCOTUS (Loper cont.)

- 6-3 decision, with CJ Roberts writing the opinion of the Court
  - In 1984, SCOTUS decided *Chevron*, explaining when a court should defer to an agency interpretation of a statute
    - Step 1: Did Congress directly address the statutory issue?
    - Step 2: If not (*e.g.*, the statute is silent or ambiguous), then a court should defer to an agency interpretation of the statute that is based on a permissible construction of the statute
  - *Chevron* is overruled

SCOTUS (Loper cont.)

- In *Marbury v Madison* (1803!), the Court said it is "the duty of the judicial department to say what the law is"
- In 1946, Congress enacted the APA, which states that when reviewing agency action, courts shall interpret statutory provisions
- When *Chevron* was decided in 1984, the Court improperly ignored the requirements of the APA
- The *Chevron* presumption that Congress implicitly delegated to agencies the power to interpret ambiguous statutory provisions lacks any foundation
- And, while agencies may have expertise in their substantive areas, they have no special expertise in statutory interpretation – that is an area in which courts have expertise
- Perhaps the best argument for keeping *Chevron* is *stare decisis* (*e.g.*, don't change legal precedent) – but *Chevron* (I paraphrase) is really really wrong.

SCOTUS (Loper cont.)

- What does it mean?
  - The legal analysis of the Court is compelling
  - But the Court's current willingness to jettison decades-old precedent is jarring and unsettling
  - As a result of *Loper*, there will be more legal challenges to agency interpretations of the law
  - So, for example, there will be less deference to the EEOC

SCOTUS (Loper cont.)

- Is that a bad thing?
  - It is mostly a shift in power from the administrative (Executive) branch to the Judicial branch
  - Whether that is bad probably depends on your relative trust in those branches of government, and there is a lot of distrust for both these days
  - Personally, I think we have seen a lot of jarring administrative overreach (*e.g.*, the FTC proposed non-compete ban), and when agency interpretations change dramatically from administration to administration it isn't very helpful for business
  - And generally, I tend to believe that federal judges are smart and thoughtful (though we surely see partisanship there as well)
  - For employers, I tend to think it is a positive development that provides additional grounds for challenging agency overreach

FOURTH CIRCUIT
(TIME PERMITTING)

4th Circuit (Billard)

- *Billard v Charlotte Catholic High School* (4th Cir. 2024)
  - CCHS is an "educational community centered in the Roman Catholic faith"
  - CCHS evaluates teachers on "their ability to teach their subjects in a manner "agreeable with Catholic thought"
  - CCHS prohibits teachers from "advocating for conduct contrary to the moral tenets of the Catholic faith, including the Catholic Church's rejection of same-sex marriage"
  - Billard was an English and Drama teacher who did not provide religious instruction and who worked for CCHS
  - Billard is gay, and when CCHS found out he planned to marry a same-sex partner, it fired him

4th Circuit (Billard cont.)

- Billard sued, alleging sex discrimination under Title VII
- CCHS asserted several defenses, including denying that Billard was fired because of his sex and relying on various affirmative defenses and alleged Constitutional rights related to religion
- Notably, it "waived" any First Amendment "ministerial" exemption, presumably because it believed the exemption did not apply
- The District Court rejected all of CCHS's arguments, but considered the ministerial exemption, despite the waiver, concluding it was non-waivable
  - Nonetheless, it found that the ministerial exemption was inapplicable to Billard
- CCHS appealed

4th Circuit (Billard cont.)

- Majority Opinion by Judge Harris
  - The ministerial exemption is outcome determinative and the court could consider it despite its "waiver"
  - SCOTUS precedent identifies four factors to consider—(i) did the employee have the title of minister, (ii) did the employee hold himself out as minister, (iii) did the employee receive religious training, and (iv) did the employee's job duties have a religious component
  - Here, the fourth factor was key
  - Billard was a lay teacher with no religious instruction duties, but his duties did require conforming his instruction with Catholic thought
  - Accordingly, the ministerial exception to Title VII applied, and the decision of the District Court was reversed

4th Circuit (Billard cont.)

- How is this important?
  - In the Fourth Circuit, it is hard to imagine when any lay teacher at a religious institution would not be subject to the ministerial exception
  - So, those teachers in those positions are not protected by Title VII from discrimination
  - More broadly, SCOTUS has for years been strengthening religious rights, including in the employment context, and this case is a natural progression
  - So, think carefully when any employment action impacts religion in any way

SMITH ANDERSON

EEO UPDATE

Zebulon D. Anderson

October 29, 2024

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