



2025

EMPLOYMENT LAW UPDATE



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2025 Employment Law Update
November 5, 2025
PROGRAM AGENDA

8:30 – 9:00 a.m.	<u>Registration / Breakfast</u>
9:00 – 9:05 a.m.	<u>Welcome</u> <i>J. Travis Hockaday</i>
9:05 – 9:50 a.m.	<u>AI Unpacked (2025): Essentials for Busy Professionals</u> <i>Darrell A. Fruth</i> Artificial intelligence is everywhere. This session will cut through the jargon and hype to give business leaders a practical lens for thinking about AI in this fast-evolving space.
9:50 – 10:40 a.m.	<u>HR Meets AI: Friend, Foe or Lawsuit?</u> <i>Kimberly J. Korando</i> AI is transforming HR practices...but there are compliance pitfalls, bias concerns, and emerging state and local regulations. We will discuss tips and best practices for spotting them, managing them and keeping up with them, so that AI in your workplace remains friend, not foe or lawsuit.
10:40 – 10:55 a.m.	<u>Morning Break</u>
10:55 – 11:45 a.m.	<u>Everything Everywhere All at Once: DEI, Executive Orders & Legal Uncertainty</u> <i>Taylor M. Dewberry</i> <i>James C. King</i> With overlapping federal directives, lawsuits, and the changing political and social climate, DEI policy is being pulled in every direction. This session offers clarity on the current legal frameworks guiding diversity and inclusion in the workplace—and how to stay compliant amid the chaos.
11:45 – 12:25 p.m.	<u>Balancing Health and Compliance: Practical Guidance for Navigating the ADA and FMLA in the Workplace</u> <i>Kevin M. Ceglowski</i> <i>Lauren E. Davis</i> Employers can effectively balance workplace health concerns with their legal obligations and rights under the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA). This session highlights common compliance challenges—including accommodation requests, engaging in the interactive process, overlapping obligations, and employee medical leave—while offering practical strategies for HR and in-house counsel. Attendees will gain actionable guidance to reduce legal risk, maintain compliance, and support employee well-being.
12:25 – 1:25 p.m.	<u>Lunch and Panel Discussion</u> <u>Avoiding a Hot Mess: Lessons Learned from Cases Gone Wrong</u> <i>Rosemary Gill Kenyon, Kerry A. Shad,</i> <i>J. Travis Hockaday and Dani B. Dobosz</i> During this session, we will highlight a number of recent cases that did not turn out well for employers (and their managers and HR professionals) and we will discuss how it happened and what could have been done differently along the way to better position the employer for success in litigation.

1:25 – 2:05 p.m.	<u>HR Island – Outsmart, Outwork, Outlast an I-9 Audit</u> <i>J. Travis Hockaday</i> <i>Lauren E. Davis</i> With the increased focus on immigration-related matters, it is important for employers to make sure they are in compliance with all things I-9 and E-Verify. During this session, we will provide an overview of Form I-9 and E-Verify requirements and best practices, and will highlight the importance of accuracy, timing, and proper documentation. We also will discuss common errors that employers make and offer practical guidance on how to avoid them to reduce audit risk and ensure workforce eligibility.
2:05 – 2:15 p.m.	<u>Transition to Breakouts</u>
2:15 – 3:00 p.m.	<u>Breakout Sessions:</u>
Session A	<u>Workforce Transitions and Legal Traps: Navigating RIFs, OWBPA and WARN</u> <i>Kevin M. Ceglowski</i> Workforce reductions carry significant legal risk, and employers must navigate complex requirements under the Worker Adjustment and Retraining Notification (WARN) Act and the Older Workers Benefit Protection Act (OWBPA). This program highlights critical compliance considerations—including notice obligations and release requirements—while addressing common pitfalls that can create liability. Attendees will gain practical strategies to reduce risk, ensure compliance, and manage workforce transitions effectively.
Session B	<u>Benefit Plan Governance: From Fiduciary Fundamentals to Best Practices</u> <i>Kara Brunk</i> Join us for a master class on benefit plan fundamentals and best practices for plan administration. We'll cover recent trends that have been frustrating plan sponsors and administrators, including the SECURE 2.0 Roth catch-up requirement and the use of AI in benefits administration. Because, what's good plan governance without compliant administration?!
3:00 – 3:10 p.m.	<u>Afternoon Break</u>
3:10 – 3:50 p.m.	<u>Concerted Activities: What Employee Conduct is Legally Protected?</u> <i>Nelson A. McKown</i> Concerted activity is a protected class of actions when two or more workers act in concert for purposes of mutual aid and protection. But what does this actually mean? This presentation will review the ever-changing legal landscape of what is and what is not considered protected activity under Section 7 of the National Labor Relations Act and what HR professionals and corporate counsel need to know to ensure their policies and practices are lawful.
3:50 – 4:30 p.m.	<u>EEO Update</u> <i>Zebulon D. Anderson</i> A discussion of EEOC enforcement trends and plans, as well as select cases representative of recent trends in EEO litigation.

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

- o procurement fraud in government contract bid by former employee whistleblower and assistance with self-reporting to government
- Retained in connection with allegations against high-ranking corporate officers and to identify root causes of management failures

Protecting Employers: Relationships and Confidential Information

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

Government Investigations, Audits and Administrative Proceedings

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

Zebulon D. Anderson

ATTORNEY

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919.821.6735



"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*, Labor & Employment (2015-2025)
- *Benchmark Litigation*, North Carolina Labor and Employment Star (2018-2021, 2023-2024)
- *The Best Lawyers in America*®
 - Litigation - Labor and Employment (2016-2026)
 - Employment Law-Management (2018-2026)
 - Trade Secrets Law (2026)
 - "Lawyer of the Year," Raleigh, Litigation - Labor and Employment (2023)
- Super Lawyers
 - North Carolina Super Lawyers (2012-2025)
 - 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
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David W. Berry

ATTORNEY

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"I really enjoy working with David; he provides good client service." – **Client quote in Chambers USA**

OVERVIEW

David Berry has over twenty years of transactional, regulatory and litigation experience in environmental, land use/commercial real estate, renewable/alternative energy and occupational safety matters. Prior to joining Smith Anderson in 1998, he worked over five years as an Assistant Attorney General in the North Carolina Department of Justice's Environmental Division, representing the Divisions of Air Quality, Water Quality, Land Resources, Marine Fisheries, and Parks and Recreation in enforcement, permitting and rulemaking cases. He developed significant environmental litigation experience representing these State environmental agencies in civil penalty and injunctive relief actions, both at the administrative level before the Office of Administrative Hearings and State environmental regulatory boards and in the State's superior and appellate courts.

David's current practice involves many substantive areas of environmental and land use law, including underground storage tanks, site remediation and redevelopment, water quality, storm water, wetlands, riparian buffers, submerged lands and lakefront development, air quality, and mining, as well as OSHA regulation and enforcement. He regularly counsels clients on regulatory compliance and permitting, evaluating and managing environmental risks, sale and acquisition of contaminated properties, due diligence and contract issues, environmental and OSHA investigations and audits, and public company environmental disclosures. He has extensive experience representing clients before regulatory agencies, in administrative appeals, and judicial proceedings. He has handled a broad range of complex transactions for the purchase, sale, leasing, construction and development of commercial, industrial and public utility properties. His public utility practice experience includes the development of renewable/alternative energy facilities, negotiation of renewable energy power purchase agreements, and renewable energy credit (or "green tag") contracts, smart grid implementation, coal fly ash beneficiation and re-use projects, major line relocations, easements and encroachments.

EXPERIENCE

- Served as local environmental counsel for Fortune 1000 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 an insurance carrier and its insured, a private water company, in defense of a drinking water contamination lawsuit brought by approximately 30 homeowners in Wake County Superior Court. Many of the lawsuit's allegations involved exceedences of the State's groundwater standards and EPA's secondary drinking water standards.
- Assisted a public electric utility in multiple contracts for connecting and permitting of wastewater discharges to local publicly-owned treatment works (POTW).
- 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 North Carolina Department of Labor.
- Represented a national food products manufacturer before the North Carolina Environmental Management Commission in its successful renewal of a variance from the State's water quality action level for chloride and National Pollutant Discharge Elimination System (NPDES) permit for its North Carolina facility.
- Served as counsel for the largest electric utility in the United States, providing regulatory counseling and legal assistance with implementing and complying with the North Carolina Renewable Energy and Energy Efficiency Portfolio Standard
- 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.
- Assisted the largest electric utility in the United States for nearly 20 years with acquisitions, dispositions, and regulatory compliance involving the utility's power plant properties, lakes, substations, transmission and distribution projects across North and South Carolina.
- Represented of a national paper product company in connection with its environmental permitting and OSHA compliance at several North Carolina facilities.
- Represented a real estate investment company in its successful opposition to a declaratory ruling request before the North Carolina Environmental Management Commission involving Jordan Lake's watershed boundaries.

CREDENTIALS

Recognition

- *Chambers USA*, Environmental (2014-2025)
- *The Best Lawyers in America®*
 - Environmental Law (2011-2026)
 - Energy Law (2024-2026)

- "Lawyer of the Year," Raleigh, Environmental Law (2021)
 - *Business North Carolina's Legal Elite*, Environmental
 - Martindale-Hubbell AV Preeminent Rated
-

Education

- Tulane University, J.D., with Certificate in Environmental Law, 1992
 - University of North Carolina, B.A., 1985
-

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

OVERVIEW

Kara is a trusted advisor to public, private, governmental and non-profit employers on all aspects of employee benefits.

With over a decade of experience and a deep understanding of ERISA, the Internal Revenue Code, and related federal regulations, Kara counsels clients on design, compliance, and administration of qualified retirement plans, health and welfare benefits and deferred compensation arrangements. Recognized for her extensive knowledge and skills, Kara has earned accolades from publications such as *Business North Carolina*, *Chambers USA* and more.

Whether helping employers to achieve day-to-day compliance within complex regulatory frameworks or navigate benefits issues in corporate transactions, Kara provides clear, strategic counsel tailored to each client's business objectives.

Kara regularly advises on:

- 401(k), 403(b), and defined benefit pension plans
- 457 deferred compensation plans
- Health and welfare plans, including Affordable Care Act, COBRA, and HIPAA compliance
- ERISA fiduciary governance and plan corrections (EPCRS, VFCP, and DFVCP)
- Benefits due diligence and integration in mergers and acquisitions
- IRS and DOL audits and investigations

Kara also enjoys being an extension of a client's internal team by partnering with HR professionals and in-house counsel to ensure legal compliance while managing risk and promoting competitive, compliant benefit programs.

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

- *Chambers USA*, Employee Benefits & Executive Compensation (2021-2025)
- *Business North Carolina* Legal Elite, Young Guns (2024-2025)
- *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



Kevin M. Ceglowski

ATTORNEY

kceglowski@smithlaw.com
919.821.6698



"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.

Outside of his practice, Kevin enjoys time with his family and is an avid reader - though he admits to buying more books than he finishes.

EXPERIENCE

- Advised an international private equity investor and its portfolio Contract Research Organization on employment matters related to the acquisition of a U.S.-based CRO, enhancing the platform's global presence and supporting its strategy to build a leading independent specialist CRO.
- 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*, Labor & Employment (2017-2025)
- *The Best Lawyers in America®*
 - Employment Law - Management (2023-2026)
 - Litigation - Labor and Employment (2025-2026)
- *Benchmark Litigation*, North Carolina Litigation Star (2023)
- *Business North Carolina* Legal Elite, Employment (2015-2017, 2019-2022, 2025)
- 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
- South Carolina
- U.S. Court of Appeals for the Fourth Circuit
- U.S. District Courts for the Eastern, Middle and Western Districts of North Carolina

Lauren E. Davis

ATTORNEY

ldavis@smithlaw.com
919.821.6648



OVERVIEW

Lauren Davis is a member of Smith Anderson's Employment, Labor and Human Resources practice group. Since joining the firm in 2021, Lauren has worked closely with employers across a broad spectrum of workplace law matters. Her practice includes advising clients on employment issues in the context of corporate transactions, preparing and negotiating employment-related agreements and developing comprehensive multi-state employee handbooks and workplace policies.

Lauren's approach to her work is rooted in her understanding of the dynamic nature of employment law and a commitment to helping employers navigate the legal landscape with confidence and clarity. Whether supporting day-to-day compliance needs or offering counsel during pivotal business changes, she brings a thoughtful perspective and meticulous attention to detail to each matter she handles.

Outside of her legal practice, Lauren is an avid fan of Michigan State University basketball and football. She also enjoys dancing, traveling to new destinations and attending musicals.

EXPERIENCE

- Advised an international private equity investor and its portfolio Contract Research Organization on the acquisition of a U.S.-based CRO, enhancing the platform's global presence and supporting its strategy to build a leading independent specialist CRO.

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





Taylor M. Dewberry

CHIEF DIVERSITY OFFICER & ATTORNEY

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919.821.6729



OVERVIEW

Taylor Dewberry is Smith Anderson's Chief Diversity Officer and an attorney in the firm's Employment, Labor and Human Resources practice group. Her law 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. As Chief Diversity Officer, Taylor works closely with the firm's Management and D&I Committee in creating and implementing D&I programs and policies to recruit and retain diverse talent, support professional development and foster an inclusive workplace culture.

Taylor continuously seeks innovative ways to advance Smith Anderson's D&I mission, with her vision rooted in the belief that every individual should feel included and free to be their authentic selves. Her strategic approach to advancing D&I is not only about promoting a culture of belonging within Smith Anderson, but also about influencing the broader legal profession and the overall community. *Triangle Business Journal* named Taylor a **2024 Leader in Diversity** and *North Carolina Lawyers Weekly* and the *Mecklenburg Times* recognized Taylor as one of **North Carolina's 50 Most Influential Women** in 2024 for her leadership, business acumen, mentoring and community involvement.

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 (2022-2026)
- North Carolina Bar Association's Robinson O. Everett Professionalism Award (2025)
- *Triangle Business Journal*, Leaders in Diversity Award (2024)
- *Mecklenburg Times* and *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



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

- All North Carolina State Courts
- 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

Darrell A. Fruth

ATTORNEY

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919.821.6741



OVERVIEW

Darrell A. Fruth combines his engineering background with over two decades of legal experience across a range of technologies to help innovative companies achieve their business goals. As the leader of Smith Anderson's **Technology and Software** Transactions group, he delivers strategic legal counsel tailored to the unique needs of companies developing and commercializing cutting-edge technologies, with a particular emphasis on software and the artificial intelligence, life sciences and cleantech sectors.

Darrell's experience ranges from negotiating initial research and development agreements to structuring commercialization and licensing deals that result in successful product launches and generate millions in licensing revenue. Darrell leads Smith Anderson's AI task force on the ethical and effective use of AI, demonstrating his knowledge and leadership in this rapidly evolving field. He has been invited to speak on the subject to multiple clients and at North Carolina Bar Association events, underscoring his reputation as a thought leader in the responsible implementation of AI technologies.

Outside of work, Darrell is an avid mountain biker and skier.

Please reach out to discuss how he and his team can support your organization's legal needs.

EXPERIENCE

Software

- Developed and implemented comprehensive contracting strategies for clients offering on-prem software and software-as-a-service solutions, including customer-facing form agreements, playbooks and advice for reducing friction and optimizing contract velocity to balance speed of closure with risk mitigation. Also supported clients receiving digital services by developing triaged procurement systems and strategies.
- Served as lead outside counsel on over one thousand software deals, ranging in size from several thousand dollars to several hundred million dollars in recognized revenue for clients. Counterparties included major video game distributors, platform providers, movie studios and other Fortune 500 companies, as well as companies located in Europe and Asia.

- Advised clients on issues related to open source and source-available distribution models, including developing policies for large organizations governing the use of such technology, as well as developing dual-licensing strategies for providers.
- Provided strategic advice and counsel on complex monetization strategies for technologies designed for the metaverse, including digital humans, user generated content, and tokens and related assets distributed in connection with blockchain technologies.

Artificial Intelligence

- Helped protect client intellectual property rights in artificial intelligence (AI) solutions deployed by a range of clients for drug discovery, medical imaging, supply chain optimization, real estate, fraud detection and other novel applications.
- Counseled clients in finance, human resource management, travel and other consumer-facing fields on the legal implications of using artificial intelligence to deliver services.

Life Sciences & AgTech

- Represented clients offering software solutions to the life science and ag-tech sectors, including software tools for managing decentralized clinical trials, laboratory instrument management systems, equipment automation technology and gene editing analysis.
- Advised clients on their acquisition and global distribution of FDA-approved drugs.
- Represented multiple medical device companies in developing and commercializing their technologies, including negotiation of clinical trial agreements, supply-chain agreements and distribution agreements.
- Counseled university spin-offs in out-licensing of core technology from universities, including a biotechnology company focused on discovery of traits for improving plant yields.

Cleantech

- Helped start-up company making zero-emission electricity from natural gas scale from demonstration to commercial scale, leading to a successful exit. Darrell's work focused on preparation of complex supply agreements with strategic technology partners.
- Advised a global materials manufacturer on collaborations with industry partners to research and develop innovative rechargeable battery technologies.
- Represented a regional power company on an agreement for pilot testing clean energy technologies and served as a founding member of a regional cleantech innovation hub.

CREDENTIALS

Recognition

- *Business North Carolina* Legal Elite, Intellectual Property (2017-2018, 2024-2025)
- *The Best Lawyers in America®*
 - Trademark Law (2018-2026)
 - Litigation - Intellectual Property (2020-2026)
 - Trade Secrets Law (2020-2026)
 - "Lawyer of the Year," Raleigh, Trademark Law (2021, 2023)
- Super Lawyers
 - North Carolina Super Lawyers (2025)
 - North Carolina Super Lawyers Rising Star (2012)
- *University of California* Regents Fellow
- President, Chi Epsilon Honor Society, MIT

Pro Bono:

As an associate in San Francisco, Darrell argued a successful pro bono civil rights case to the federal court of appeals for the Ninth Circuit. The resulting opinion has been cited in decisions by judges more than 4,000 times.

Clerkships

Law Clerk to the Honorable Howard D. McKibben, U.S. District Court for Nevada

Education

- Yale Law School, J.D., 2000
- University of California at Berkeley, M.S., Environmental Engineering, 1995
- Massachusetts Institute of Technology, B.S., Environmental Engineering Science, 1994

Bar & Court Admissions

- North Carolina



Hope C. Garber

ATTORNEY

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919.821.6724



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 (2025-2026)

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
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Bar & Court Admissions

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





Jamison H. Hinkle

ATTORNEY

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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 to \$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*, Employee Benefits & Executive Compensation (2023-2025)
 - *The Best Lawyers in America®*, Employee Benefits (ERISA) Law (2013-2026)
 - 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
-



J. Travis Hockaday

ATTORNEY

Chair, Workplace Law

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"He is an exceptional lawyer who is savvy and responsive to our needs. 'We need to ask Travis' is our first response in a potential legal crisis. I recommend him without reservation."
– **Client quote in Chambers USA**

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.
- Represented a private equity fund in its acquisition of a leading contract research organization and contract development and manufacturing organization specializing in cell and gene therapy.

CREDENTIALS

Recognition

- *Chambers USA*, Labor & Employment (2025)
- *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 (2019-2026)
 - Employment Law - Management (2025-2026)
- 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

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*, Labor & Employment (2008-2025)
- *The Best Lawyers in America*®
 - Employment Law - Management (2016-2026)
 - Litigation - Labor and Employment (2024-2026)
- Women of Justice Award, *North Carolina Lawyers Weekly* (2012, 2019)
- North Carolina Pro Bono Honor Society
- *Business North Carolina* Legal Elite, Employment (2024-2025)
- Super Lawyers
 - North Carolina Super Lawyers (2012-2025)
 - 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

- North Carolina
 - Michigan (inactive)
 - 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 (inactive)
-





James C. King

ATTORNEY

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919.821.6785



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

- District of Columbia
- 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
-



Kimberly J. Korando

ATTORNEY

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"Kim is fantastic, knowledgeable, reliable and truly a great support. Her advice and guidance are always appreciated and valued because she is accurate, on point and level headed." –
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*, Labor & Employment (2005-2025)
- *The Best Lawyers in America®*
 - Employment Law - Management (2007-2026)
 - Labor Law - Management (2007-2026)
 - "Lawyer of the Year," Raleigh, Employment Law - Management (2024 and 2026)
 - "Lawyer of the Year," Raleigh, Labor Law - Management (2013 and 2021)
- *Business North Carolina* Legal Elite, Employment Law (2022)
- North Carolina Super Lawyers (2006-2025)
- 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
-



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

- *The Best Lawyers in America®*
 - Commercial Litigation (2024-2026)
 - Litigation - Labor and Employment (2024-2026)
- Super Lawyers
 - North Carolina Super Lawyers (2025)
 - North Carolina Super Lawyers Rising Star (2014-2022)
- *Benchmark Litigation*
 - 40 & Under List (2018-2023)
 - North Carolina Future Star (2024-2025)
 - 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
-



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. He also currently serves as a coach in Campbell Law School's advocacy program, training students in the art of appellate advocacy and preparing them for advocacy competitions each semester.

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, Middle and Western Districts of North Carolina
-



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 136 NCAA Division I football teams play live.

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)
- *Best Lawyers: Ones to Watch® in America*
 - Litigation – Labor and Employment (2026)
 - Labor and Employment Law – Management (2026)
 - Natural Resources Law (2026)

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

- North Carolina
- 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 Eastern District of North Carolina
- U.S. District Court for the Southern District of West Virginia
- West Virginia



Caryn Coppedge McNeill

ATTORNEY
Management Committee

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919.821.6746



"Caryn is an expert in her space and continues to provide excellent service with very strong commercial awareness." – Client quote in Chambers USA

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 long-term incentive 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 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.
- Represented a private equity fund in its acquisition of a leading contract research organization and contract development and manufacturing organization specializing in cell and gene therapy.

CREDENTIALS

Recognition

- *Chambers USA*, Employee Benefits & Executive Compensation (2021-2025)
- *The Best Lawyers in America*®
 - Employee Benefits (ERISA) Law (2010-2026)
 - "Lawyer of the Year," Raleigh, Employee Benefits (ERISA) Law (2013, 2016, 2018, 2020, 2024, 2026)
- National Conference of Bar Foundations Excellence Award (2025)
- North Carolina Super Lawyers (2014-2025)
- *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
- Elected Member, The American Law Institute (ALI)



Education

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

Bar & Court Admissions

- North Carolina
-





Kelsey I. Nix

ATTORNEY

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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 in successfully defending one of the nation's 15 largest banks against patent infringement claims for online banking, point-of-purchase payments, and secure data storage systems in multiple cases in the Eastern and Western Districts of Texas.
- Lead counsel for dental technology and device company in asserting patents against an international competitor in the District of Delaware, where I won a precedential opinion defeating a motion to dismiss on invalidity grounds.
- Lead counsel representing a leading digital media company in trade secret, copyright and breach of contract cases in the Middle District of North Carolina and Northern District of Illinois.
- Lead counsel in successfully defending an enterprise technology developer and supplier for software and business intelligence companies against patent infringement claims in the District of Delaware.

- Lead counsel in successfully defending an international digital identity company against patent infringement claims in the Northern District of California involving e-signature technology.
- 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)
-



**Stephen T.
Parascandola**
ATTORNEY

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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 Justice. 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.

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*, Environmental (2013-2025)
- *The Best Lawyers in America®*, Environmental Law (2007-2026)
- *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



Susan Milner Parrott

ATTORNEY

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919.821.6664



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 (2025-2026)
- 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

David A. Pasley

ATTORNEY

dpasley@smithlaw.com
919.821.6797



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 (2023-2026)
- Articles Editor, *North Carolina Law Review*, 2017
- 2015 Gressman-Pollitt Award for Best Overall Oral Advocacy

Clerkships

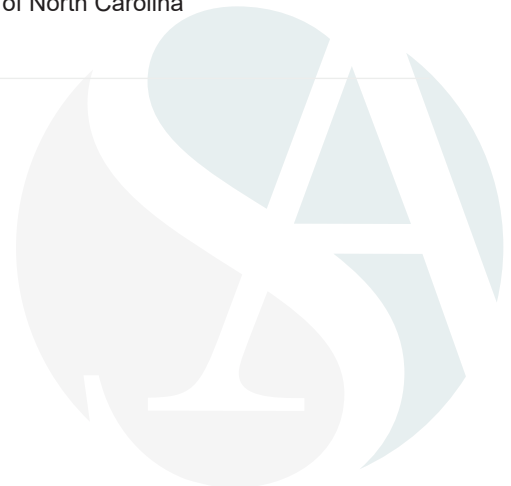
Honorable Thomas D. Schroeder, United States District Court for the Middle District of North Carolina

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



Edward F. Roche

ATTORNEY

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919.821.6730



*"Ed is responsive, with great thought leadership. Great analytical skills. Frequently wins." –
Client quote from BTI Consulting Group*

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.
- Defended an insurance company in pre-litigation contract dispute concerning the implementation of a software platform and amounts allegedly due under the underlying contract. Reached a favorable settlement that avoided tens of millions in payments sought from the other side and allowed the parties to continue a business relationship.

CREDENTIALS

Recognition

- *The Best Lawyers in America®*, Litigation - Labor and Employment (2026)
- *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 (2022-2025)
- *BTI Consulting Group*, Client Service All-Stars (2025)

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 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





Shameka C. Rolla

ATTORNEY

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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

Recognition

- *North Carolina Lawyers Weekly* NC Excellence in Law Phenoms List (2025)

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

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 (2022-2026)
 - Real Estate Law (2026)

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
-



Kerry A. Shad

ATTORNEY

Management Committee | Co-Chair, D&I
Committee

kshad@smithlaw.com

919.821.6672



"Kerry is exceptional. She is direct and clear in communications, understands our business, people and strategy, and balances being assertive with innovative solutions." – 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*, Labor & Employment (2012-2025)
- *Business North Carolina* Legal Elite, Employment (2008, 2014-2015, 2022, 2024-2025)
- *Benchmark Litigation*
 - Top 50 Labor & Employment Litigators (2024-2025)
 - North Carolina Litigation Star (2023-2025)
 - North Carolina Labor and Employment Star (2018-2024)
 - Top 250 Women in Litigation (2021-2025)
- *The Best Lawyers in America®*
 - Employment Law - Management (2009-2026)
 - Litigation - Labor and Employment (2009-2026)
 - "Lawyer of the Year," Raleigh, Litigation - Labor and Employment (2026)
 - "Lawyer of the Year," Raleigh, Employment Law - Management (2022)
- Super Lawyers
 - North Carolina Super Lawyers (2012-2025)
 - Top 50: Women North Carolina Super Lawyers (2024)
- *North Carolina Lawyers Weekly*, Power List, Employment Law (2021, 2023-2025)
- *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
-



AI Unpacked (2025): Essentials for Busy Professionals

AI Unpacked (2025): Essentials for Busy Professionals

//////
Darrell A. Fruth
November 5, 2025

EXPECT EXCELLENCE®

Navigating the AI Landscape

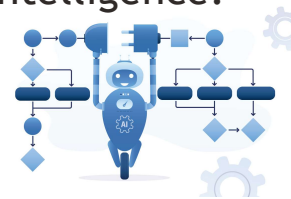
- 
-  Fundamentals of AI and LLMs
 -  Important technical issues
 -  Tools for business
 -  Risks
 -  Regulations
 -  Developing an AI strategy for your organization

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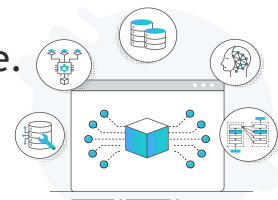
Demystifying Artificial Intelligence

- AI systems learn from data to identify patterns and make predictions.
- Performance can resemble human intelligence.
- Used for decades.
- Chat-GPT brought to mainstream.



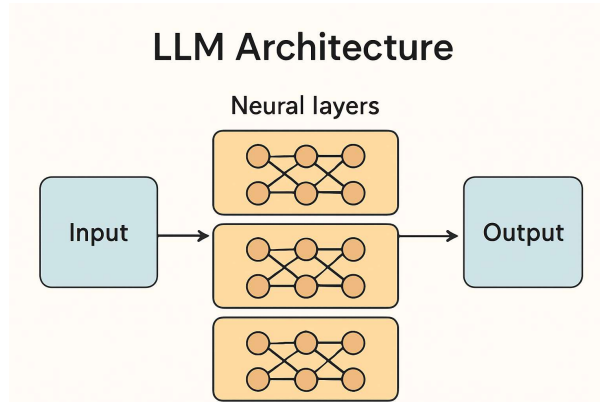
Large Language Models

- LLMs reply to and generate natural language.
- Trained to identify statistical relationships between words, phrases and concepts.
- Predicting the next word: is it more than that?
- Question of whether LLMs can ever achieve “general” intelligence.





Large Language Models



LLM Vocabulary

- Training: Learn associations from massive datasets.
- Parameters: Internal variables represent associations.
- Weights: Values represent strength of associations.
- Tuning: Adjusting for specific data or behavior.
- Inference: Running the model.
- Context Window: How much the model can “remember.”



Peering under the hood

- Controlling the “temperature” of a model
- Simplified example: guess the next word
 - No _____



Open and Closed Models

Open-Source Models	Most Free Models	Closed Systems
Code, parameters, and weights are publicly available.	User-entered data and result can be used for future training.	Provider does not see user-entered data or results.
Allows for modification, redistribution and greater transparency.	Is not directly training on inference but still raises privacy concerns.	Often used for proprietary models or in highly regulated industries.
Meta's LLaMA	ChatGPT (free version)	Enterprise-level LLMs (separate instances)



The Challenge of Hallucinations

- Plausible-sounding, but inaccurate statements.
- Limited understanding of the world (only knows statistical relationships).
- It wants to provide answers that sound good to humans.
- Mitigation strategies: fact-checking, human review, using specialized models.



How AI Empowers Business

- Operational (backend) efficiency.
- Outward facing work.
- New products and services.





Foundational Models

- OpenAI: GPT
- Anthropic: Claude
- Meta: LLaMA
- Google: Gemini



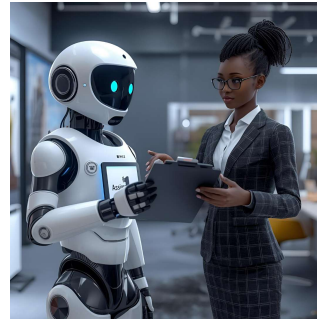
Wrappers

- Interface for more specific applications.
 - Coding: Cursor, Replit AI
 - Writing: Grammarly
 - Legal: Harvey



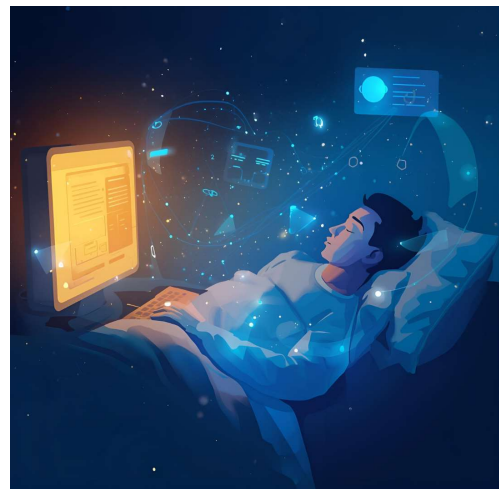
AI Assistants

- Automate tasks for humans
 - Chatbots: ChatGPT
 - Research tools: Notebook LM
 - Note taking: Otter.ai or READ.ai
 - Text to [X]: Midjourney, Speechify, Sora



AI Agents

- Act on human's behalf using tools to achieve goal
 - Auto: "self" driving
 - Email: spam filters
 - HR: resume screening
 - Custom: endless examples





Navigating the Risks of AI

- Privacy concerns: Use of information by vendors.
- Over-reliance: Sounds so “good.”
- Lack of transparency: Results not reproducible.
- Bias: Will reflect bias in training and tuning.



IP Risks

- Rights to copy training data?
- Does output infringe copyrights?
- Can you register a copyright or obtain a patent on output generated by an AI model?



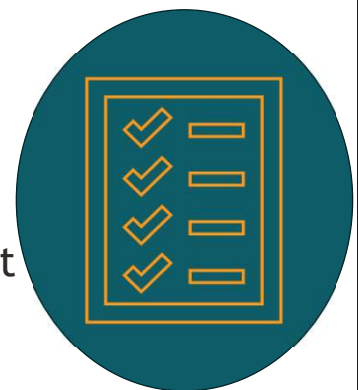
Security Risks

- Sophisticated phishing scams
 - Voice cloning
 - Hyper-specific targeting at scale
- Hacking bots and vibe coded cyberattacks



Protecting Client Data in the Age of AI

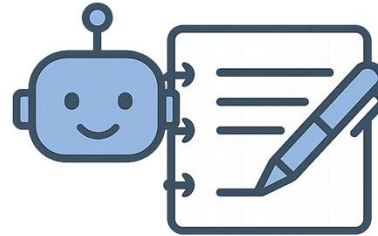
- Vet providers and their security measures.
- Monitor data shared with AI tools.
- Consider local implementations that keep data out of the cloud.





Example: AI Note Takers

- Practical risks
 - Inaccuracies, overreliance, vendor use of data
- Legal risks
 - Privilege, data security, wiretapping



The Evolving Legal Framework for AI

US Law: No general-purpose AI law (yet).

- HIPAA, Credit reporting, civil rights, labor laws (fairness and transparency requirements)
- Antitrust (collusion by algorithm), consumer protection (AI washing).

EU Law: Risk-based regulation.



The Evolving Legal Framework for AI

State Law:

- Automated decision-making, consumer rights and deepfakes (Colorado).
- AI Chatbot notice (California) and consent (Illinois).
- Risk-based disclosure requirements (Virginia).
- More to Come: Expect additional state regulation.



Building Your AI Roadmap





Developing AI Use Policy

- Acknowledge the balance between opportunity and risk.
- Encourage use of vetted tools; define what is off limits.
- List uses and notice / consent requirements.
- Have a clear procedure for evaluating new tools and uses.
- Explain training requirements.
- Regularly assess and revise your policy.



Putting Your AI Strategy into Action

- Train staff on AI Use Policy.
- Attend conferences to stay in touch with peers.
- Monitor and evaluate the use of AI tools and their impact.
- Continuously adapt and improve your AI strategy.



Embracing the Future with AI

- AI is a powerful tool that can revolutionize business.



- Need to use AI responsibly and ethically.
- A strategic approach to AI implementation is crucial.
- Stay informed and adapt to the evolving AI landscape.

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AI Unpacked (2025): Essentials for Busy Professionals

Darrell A. Fruth
November 5, 2025

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HR Meets AI: Friend, Foe or Lawsuit?



HR Meets AI: Friend, Foe or Lawsuit?



Kimberly J. Korando
November 5, 2025

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Things AI can do for HR



Recruiting and Selection

- Recruiting, resume screening, candidate sourcing, matching
- Test candidate aptitude and cognitive ability
- Conduct interviews

Employee Support and Service

- Virtual assistants (chatbots): hiring and onboarding new employees, employee support & service to answer frequently asked questions
- Learning/development/coaching: personalized learning recommendations, content generation, coaching aids, plan employee career paths, succession planning

Operational

- Monitoring employee productivity
- Improving employee productivity using GenAI

HR Must Understand What and How the AI Tool Makes Assessments

If the AI tool determines the factors and their weights, obtain the following information from the vendor **in writing**:

1. Description of each factor and its assigned weight.
 2. Is the weight assigned by the vendor, the company, or the AI tool itself?
 3. Are the factors and the weights disclosed to the user?
 4. Does the AI tool identify the inputs or fields, or does a human determine them?
5. Is the company allowed to remove a factor or change a factor's assigned weight or otherwise modify the algorithm?
6. How often does the algorithm change? Does it change automatically?
 7. Does the algorithm improve over time?
 8. Does the vendor notify the company of any changes and the reasons for the changes?

Compliance Pitfalls and Bias Concerns

Compliance Pitfalls

Failure to Meet Legal Standards
(employment, AI, data privacy and security)

Insufficient Transparency

Neglecting Human Oversight

Vendor Reliance Without Due Diligence

Bias Concerns

Biased Training Data

Proxy Discrimination

Accessibility

Algorithmic Drift

Compliance Pitfalls

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Failure to Meet Legal Standards

Federal employment: Title VII, ADA, ADEA still apply. If AI screens out protected classes disproportionately, employer, not vendor, is liable.

State and local laws governing AI, include:

- Illinois Artificial Intelligence Video Interview Act: Notice, consent, and other requirements for video interviews using AI
- Maryland Facial Recognition Law: Restricts facial recognition and other biometric information in the employment application process
- New York City Automated Employment Decision Tool (AEDT) Law: Prohibits use of AEDT in hiring or promotion decisions unless the tool has been the subject of an independent audit, a summary of the audit results is publicly available, and employer provides advance notice to employees or applicants about the tool's use
- California: Civil Rights Division approved regulations regarding discrimination as a result of the use of AI (eff. Oct. 1, 2025); Automated Decision-Making Technology regulation (proposed): Pre-use notice, privacy disclosures, risk assessment requirements, opt-out notices, vendor contract requirements, functionality and discrimination provisions
- Colorado Senate Bill 24-205 (eff. February 1, 2026): Implements regulation for use of AI in employment
- Texas HB 149 (eff. January 1, 2026): Prohibits development or implementation of AI that intentionally discriminates on the basis of a protected characteristic and eliminates disparate impact as a recognized cause of action
- Utah AI consumer protection requirements (Utah Code § 13-32-12) and the Utah AI policy Act (Utah Code § 13-72-101 to 13-72-305; Utah Admin. Code R166-72-1 to R166-72-7): May impact employer use of AI

Data Privacy and Security laws: Collecting and processing personal data through AI systems may run afoul of data protection laws (GDPR, CCPA, state privacy statutes) if proper safeguards and disclosures are not in place.

Failure to Meet Legal Standards (cont'd)

TIPS

- 
- Keep updated on the expanding state and local laws on use of AI
 - AI tools must be designed, selected, and monitored to prevent discrimination or disparate impact on the basis of protected characteristics (e.g., race, color, sex, national origin, religion, age, disability, or other status protected by law)
 - Obtain bias audits and fairness testing reports before deployment and, after deployment, conduct them at least annually under an attorney-client privilege
 - Obtain EPLI coverage for AI-related risks
 - Configure application process to require execution of an arbitration provision with class action waiver

Insufficient Transparency

AI systems operate as “black boxes,” making it difficult to explain why a candidate was rejected or chosen.

Lack of explainability can violate legal requirements for providing reasons for employment decisions.

TIPS

Provide notice when an AI tool is used to evaluate or assist making employment decisions:

- Purpose of the tool and type of data analyzed
- How outputs are used
- Rights to request human review or appeal

Maintain documentation of all AI tools used, how it is used, what data it processed and how the employment decision is made

Neglecting Human Oversight

Overreliance on AI without meaningful human review may lead to unlawful outcomes, especially if the tool makes errors that go unchecked.

TIPS

- AI is a tool, not a decision-maker
- Use AI to assist, not replace, human judgement
- Keep a human-in-the-loop (a qualified person) for review and approval of all employment decisions before action is taken

Vendor Reliance Without Due Diligence

Employers may assume third-party AI tools are compliant, but liability typically falls on the employer.

Due diligence, audits, and contracts must explicitly address compliance responsibilities.

TIPS

- Don't trust, verify
- Require vendors to provide documentation of bias audits, validation studies, and explainability reports
- Require contractual obligations for compliance and cooperation with audits
- Use the AI Vendor Due Diligence Checklist

Bias Concerns

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Bias Concerns



Biased
Training Data

Proxy
Discrimination

Accessibility

Algorithmic
Drift

Biased Training Data



If historical hiring data used to train AI reflects discrimination, AI will replicate and even amplify those patterns.

Tips:

Ensure the tool has undergone a bias audit and obtain a full copy of the report from the vendor

Proxy Discrimination

AI may use neutral-seeming factors (e.g, zip code, college, or employment gaps) that act as proxies for protected characteristics, leading to disparate impact.

AI may seek to remove bias by omitting protected-class data (e.g., gender or race), but algorithm relies on indirect indicators of those traits.

Tips:

Review AI tool outputs for disparate impact, accuracy, and reliability annually under an attorney-client privilege

Algorithmic Drift

Over time, AI models can “drift” and evolve in ways that create new unintended biases, requiring ongoing monitoring and revalidation.

Tips:

Review AI tool outputs for disparate impact, accuracy, and reliability annually under an attorney-client privilege

If disparate impact or other issues are identified, suspend use until corrective actions can be evaluated

Accessibility

AI-driven assessments (e.g., gamified testing or voice analysis) may disadvantage people with disabilities, non-native speakers, or those from underrepresented groups.

Tips:

Determine the disability accommodation and accessibility options available from the vendor by asking:

Is the tool compliant with the most current version of the Web Content Accessibility Guidelines (WCAG) at the highest levels? Require documentation verifying this representation.

What accommodations can the tool make for individuals who have:

- Visual impairments?
- Hearing impairments?
- Physical impairments?
- Cognitive or seizure impairments?

What processes are available for applicants and employees to request disability accommodations? How are individuals notified of these processes?

Who determines whether accommodation requests should be granted?

AI Vendor Due Diligence Checklist

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AI Vendor Due Diligence Checklist



Audit History

Litigation
History

AI Tool
Validity Study

Job Analysis

Vendor's Data
Processing
and Storage

Biometric
Privacy
Implications

AI Vendor Due Diligence Checklist

Audit History

Has a bias audit been done on the tool?

- When last performed, who conducted it (independent third party), will vendor provide a full copy of the bias audit report?

As part of the bias audit or otherwise, have selection rates, scorings and impact ratios been assessed by sex (male or female) and race/ethnicity?

If so:

- Was actual or sample data used for the assessments?
- Will the vendor share the selection rates, scoring rates, and impact ratios?

Will the vendor assist the company or an independent third-party auditor (or both) to perform a bias audit before launch and on an ongoing basis?

AI Vendor Due Diligence Checklist (cont'd)

Litigation History

Has the vendor or the AI tool been subject to litigation or administrative charges?

- If so, when, what were the claims, and what is the status of the litigation or charges?

What assistance does the vendor provide to defend discrimination claims or indemnify the company against legal claims?

Can the company access the algorithm or underlying data if necessary to defend against a legal dispute, such as before the EEOC, the OFCCP, or a state or local administrative agency, or in federal or state court litigation?

AI Vendor Due Diligence Checklist (cont'd)

AI Tool Validity Study

Has the vendor validated or otherwise tested the algorithm to determine whether accurate inferences can be made from the results for the company's intended use?

- If so, when was the last time it did so, how often does it do so, who performs the validity study?

Obtain written description of the validation methodology.

How does the vendor conclude whether the results reveal cause for concern about any potential bias?

Is there a potential for false positives?

Does the vendor exercise any bias mitigation efforts in creating the model or monitor the algorithm to ensure that it is performing as intended and accurately?

- If so, obtain a description of the efforts and/or monitoring.

AI Vendor Due Diligence Checklist (con't)

Job Analysis

Does the vendor conduct a job analysis in connection with the tool?

If so:

- How does the vendor analyze the jobs for which the company is hiring or managing?
- What resources and information does the vendor need from the company to conduct a job analysis?
- Who conducts the job analysis? What are their qualifications?

AI Vendor Due Diligence Checklist (cont'd)

Vendor's Data Processing and Storage

How and where is the data recorded?

What precautions are taken to safeguard data?

For how long is the company's data stored?

Will the vendor modify retention dates:

- as individuals' status change from applicants to employees?
- to reflect requirements in federal, state, or local law or regulation?
- if notified that relevant data is subject to a litigation hold notice?

Does the vendor archive or maintain records showing when it altered an algorithm?

What is the vendor's process for anonymizing individuals' information?

What are the algorithm's data-searching capabilities?

Can the vendor export its information into a spreadsheet aggregating candidate information? If not, at a minimum, can the vendor permit separate access to each candidate's information?

AI Vendor Due Diligence Checklist (cont'd)

Biometric Privacy Implications

Does the tool collect any biometric identifiers (e.g., voiceprints or other unique biological patterns or characteristics used to identify a specific individual)?

If so:

- Does it provide notice about the biometric identifiers being collected, and what steps it is taking to protect the privacy of the information?
- How does it get the individual's consent to collect the biometric identifiers?
- How is the biometric information used? Stored? How and when is it destroyed?
- What steps are taken to safeguard the biometric information?
- Do these procedures comply with applicable biometric privacy laws (e.g., requirements regarding notice, collection, use, storage, and destruction)?

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AI Deep Fakes and Job Seeker Cheats



4Q24 Gartner survey of 3,290 job candidates: 4 in 10 candidates admitted using AI during the application process to generate text for:

- Résumé/CV (54%)
- Cover letter (50%)
- Writing sample (36%)
- Answers to assessment questions (29%)

2Q25 Gartner survey of 3,000 job candidates: 6% admitted to participating in interview fraud – either posing as someone else or having someone else pose as them in an interview.

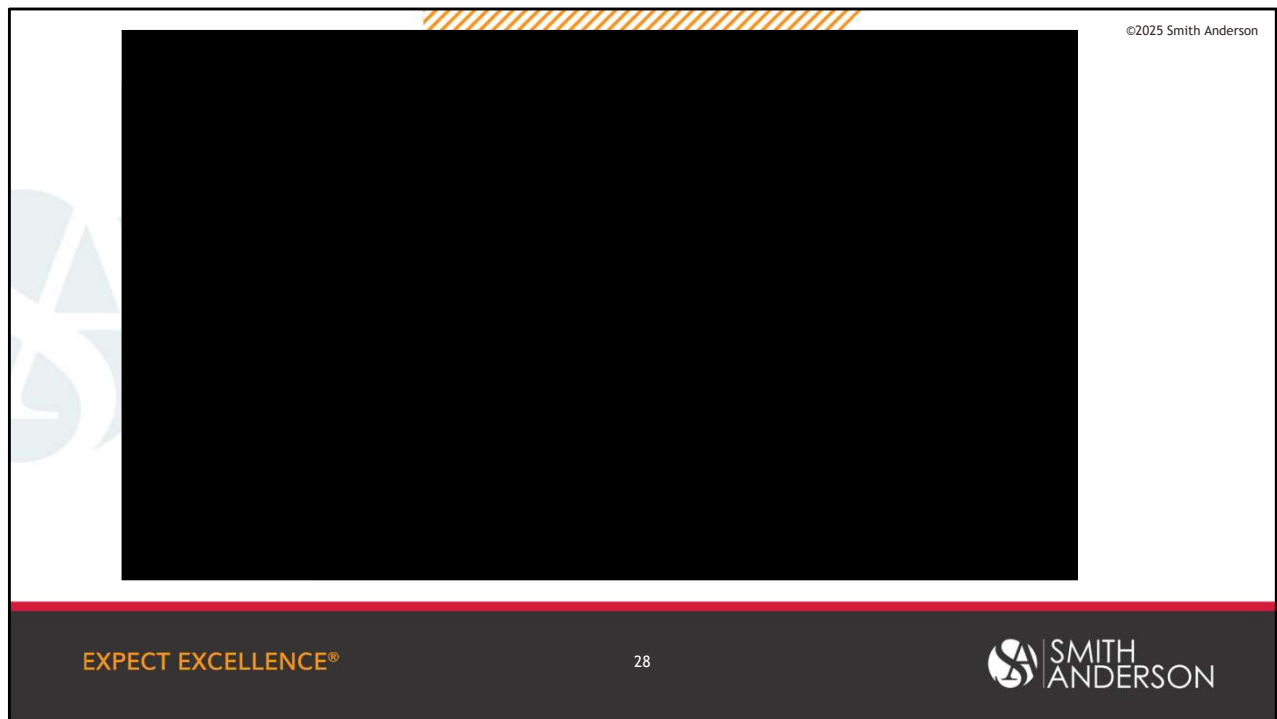
Gartner predicts that by 2028, one in four candidate profiles worldwide will be fake.

Gartner, Inc. NYSE: IT

Other Means of Deceit



- Deep Fake videos
- Voice manipulation
- Fabricated resumes
- Real-time AI assistants to answer technical questions



CBS Morning, How scammers are using AI to create fake job applicants, June 16, 2025

Red Flags



Interviews and
Virtual
Connections

Social Media
Profiles and
Resume

Background
Check

New Employee

Technical

Red Flags—Social Media Profiles and Resume

Biographical information does not appear to match candidate

Sparse social media profiles

Newly created LinkedIn profile or one that doesn't match experience

No LinkedIn photo, stock AI image or stock photo

LinkedIn profile no longer available or links to a different person

Virtual or VOIP phone number

Near perfect resume with every skill for job

Multiple location education/work histories

Inconsistencies in location, employment and education history

Multiple emails, different names, misspelled name

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D. Drummond, N. Glasser, E. Sullivan, D. Walton, The Imposter Problem: Deep Fake Employees in the World of AI and Remote Work (Oct. 14, 2025)

Red Flags—Interviews and Virtual Connections



- Sounds scripted, reading answers
- Unusual communication patterns or interaction
- Robotic difficulty answering questions about city they live in, zip code
- Candidate asks for questions to be repeated multiple times
- Only gives high level answers to questions without details
- Does not ask questions about the company or role
- Goes on/off camera or does not turn camera on
- Uses virtual background
- Connection problems
- Wears headphones

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D. Drummond, N. Glasser, E. Sullivan, D. Walton, The Imposter Problem: Deep Fake Employees in the World of AI and Remote Work (Oct. 14, 2025)

Red Flags—Background Check



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D. Drummond, N. Glasser, E. Sullivan, D. Walton, The Imposter Problem: Deep Fake Employees in the World of AI and Remote Work (Oct. 14, 2025)

Red Flags—New Employee

New employee looks different than interviewee

Does not work on camera

No show to in-person events

Time of day in background does not match location

Lots of “people noise” in the background

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D. Drummond, N. Glasser, E. Sullivan, D. Walton, The Imposter Problem: Deep Fake Employees in the World of AI and Remote Work (Oct. 14, 2025)

Red Flags—Technical

Foreign IP address

Non-sanctioned VPN use

Request for different type of device (Mac v. Windows)

Request for/use of remote access tools (e.g., AnyDesk, Jump Desktop Connect)

Request for/use of tools to prevent laptop from sleeping

Immediate change of address after hire

Laptop's physical location does not match employee's stated location

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D. Drummond, N. Glasser, E. Sullivan, D. Walton, The Imposter Problem: Deep Fake Employees in the World of AI and Remote Work (Oct. 14, 2025)

Prevention Tips

Virtual interviews

- Request candidate to hold up photo ID in front of face
- Do not allow candidate to be off-camera
- Do not allow candidate to wear headphones/earbuds
- Ask candidates for details about the cities in which they have lived and projects on which they have worked

IT/Security

- Use strong identity and access management controls
- Use enhanced monitoring and logging for remote IT worker activities
- Maintain log of all network activities
- Lock down USB, restrict use of keyboard/video/mouse switches
- Use endpoint detection and response (EDR) software to detect Remote Desktop Protocol (RDP) and VPN use or logins from multiple locations in a short time
- Retain ability to track laptop location and keep record of shipping addresses

In-person Interactions

- In-person Interview
- In-person I-9 verification
- In-person on-boarding
- In-person attendance at a company event (confirm person who attends matches the photos of the interviewee)

Onboarding

- Ensure name on direct deposit account matches employee name

D. Drummond, N. Glasser, E. Sullivan, D. Walton, The Imposter Problem: Deep Fake Employees in the World of AI and Remote Work (Oct. 14, 2025)

Final Thoughts Recap

- Identify and inventory currently used technology tools used to make employment decisions
- Stay current with federal and state AI-related employment laws
- Obtain/ensure that EPLI covers AI risk
- Conduct due diligence on AI tools before purchasing; require bias audits or fairness testing from vendors; purchase/license agreement should be reviewed by legal counsel for appropriate representations, warranties, indemnification
- Obtain employee/candidate consent when required and provide a clear explanation of how AI will be used
- Require qualified human review (trained to identify and respond to AI flags) of AI-generated outputs before final decisions are made
- Conduct adverse impact and other assessments of AI tool at least annually under attorney-client privilege
- Keep vigilant for fake candidates and cheaters



HR Meets AI: Friend, Foe or Lawsuit?



Kimberly J. Korando
November 5, 2025

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Everything Everywhere All at Once: DEI, Executive Orders & Legal Uncertainty



Everything Everywhere All at Once: DEI, Executive Orders and Legal Uncertainty



Taylor M. Dewberry

James C. King

November 5, 2025

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Preliminary Executive Orders

- Following the inauguration, President Trump issued a series of Executive Orders (“EOs”) addressing Diversity, Equity and Inclusion (“DEI”) and Diversity, Equity, Inclusion and Accessibility (“DEIA”) in employment
 - These executive orders impact federal contractors, federal grant recipients, private sector employers and federal agencies
- Importantly, these EOs (and the subsequent federal agency activities they have spawned) do not target all DEI/DEIA activities and programs
 - Instead, they focus on eliminating “illegal” DEI/DEIA programs and activities as well as federal contractor affirmative action requirements for women and minorities

Preliminary Executive Orders Cont'd

- EO 14173 “Ending Illegal Discrimination and Restoring Merit-Based Opportunity”
 - Seeks to “encourage” private sector to end “illegal” discrimination/preferences
 - Revokes EO 11246 requiring covered federal contractors to establish and maintain affirmative action programs for women and minorities
 - Affirmative action for veterans and individuals with disabilities remains in place under the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA) and the Rehabilitation Act, respectively.
- EO 14151 “Ending Radical and Wasteful Government DEI Programs and Preferencing”
 - Directs the OMB, the Attorney General, and OPM to terminate:
 - All DEI, DEIA, and environmental justice “offices and positions”
 - All equity action plans, equity actions, initiatives, or programs, or “equity-related” grants or contracts

Initial Agency-Level Responses

- Following the initial set of EOs, several federal agencies put out statements, letters and other guidance materials addressing the Administration's directives
 - Following EO 14173, OPM issued a memorandum highlighting some practices it believes constitute unlawful discrimination such as mandatory "diverse slate" policies and employee resource groups that promote basing employment decisions on protected characteristics
 - Following the revocation of EO 11246, DOL announced it was halting various enforcement activities, reduced OFCCP's headcount by a reported 90%, and announced it would be updating the OFCCP website to reflect the new focus on statutory requirements surrounding affirmative action plans for veterans and individuals with disabilities.

EEOC and DOJ Preliminary Response

- On March 19, 2025, EEOC and DOJ released two technical assistance documents that were focused on “educating the public about unlawful discrimination related to ‘diversity, equity, and inclusion’ (DEI) in the workplace”
 - “What to Do If You Experience Discrimination Related to DEI at Work”
 - Provided guidance to employees who may have experienced discrimination “related” to DEI at work
 - “What You Should Know About DEI-Related Discrimination at Work”
 - Provides an overview of Title VII’s prohibition against workplace discrimination
- The press release for these documents acknowledged that:
 - “DEI is a broad term that is not defined in Title VII of the Civil Rights Act of 1964”
 - Adoption of DEI “does not change longstanding legal prohibitions against the use of race, sex, and other protected characteristics in employment”

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EEOC Informal Guidance: What To Do If You Experience Discrimination Related to DEI at Work (https://www.eeoc.gov/what-do-if-you-experience-discrimination-related-dei-work?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=)

- Explains that DEI policies/programs may be unlawful if they involve an employer or covered entity taking an employment action motivated – in whole or in part – by an employee’s race, sex, or another protected characteristic
- Explains that DEI-related discrimination can take many forms, including:
 - Disparate Treatment
 - Limiting, Segregating, and Classifying (referencing closed membership ERGs & race-limited trainings)
 - Harassment (noting depending on the facts, DEI training may give rise to a colorable hostile work environment claim).
 - Retaliation (including opposition to DEI training)

EEOC also issued a more detailed Q&A about the same topics.

(https://www.eeoc.gov/wysk/what-you-should-know-about-dei-related-discrimination-work?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=)

EEOC issued a notice regarding a settlement with some of the law firms regarding its DEI-related investigations. (<https://www.eeoc.gov/newsroom/eeoc-settlement-four-biglaw-firms-disavow-dei-and-affirm-their-commitment-merit-based>)

Follow Up Executive Orders

- On April 23, 2025, President Trump issued an EO titled “Restoring Equality of Opportunity and Meritocracy.”
 - The EO states that “disparate-impact liability” creates a near insurmountable presumption that unlawful discrimination exists where there are any differences in outcomes in certain circumstances among different races, sexes, or similar groups, even if there is no facially discriminatory policy or practice or discriminatory intent involved, and even if everyone has an equal opportunity to succeed
 - The EO directs “all agencies” to “deprioritize enforcement of all statutes and regulations to the extent they include disparate-impact liability” and further directs the Attorney General to prepare a report identifying “all existing regulations, guidance, rules, or orders that impose disparate-impact liability or similar requirements,” and to “detail agency steps for their amendment or repeal, as appropriate under applicable law”

Follow up Agency-Level Responses

- On May 19, 2025, DOJ announced the establishment of the Civil Rights Fraud Initiative
 - The Initiative will utilize the False Claims Act to investigate and pursue claims against any recipient of federal funds that “knowingly violates civil rights” and “falsely certifies compliance with such laws”
 - DOJ noted that “the False Claims Act is also implicated whenever federal-funding recipients or contractors certify compliance with civil rights laws while knowingly engaging in racist preferences, mandates, policies, programs, and activities, including through diversity, equity, and inclusion (DEI) programs that assign benefits or burdens on race, ethnicity, or national origin”

Follow up Agency-Level Responses

- On May 25, 2025, the EEOC's Acting Chair sent out a "message" challenging disparate impact as a legal theory
- The letter advised employers that they may not use information about their employees' race/ethnicity or sex to facilitate unlawful employment discrimination based on race, sex, or other protected characteristics in violation of Title VII

Follow Up Executive Orders Cont'd

- EO 14319 “Preventing Woke AI In the Federal Government”
 - Focuses on providing guidance to agency heads responsible for procuring AI tools and resources
 - Labels “diversity, equity, and inclusion” as a “pervasive and destructive” ideology
 - Directs government agencies to only procure Large Language Models (“LLMs”) that “do not manipulate responses in favor of ideological dogmas such as DEI”

DOJ - Guidance for Recipients of Federal Funding

- On July 29, 2025, DOJ published its guidance for recipients of federal funding to clarify the application of federal anti-discrimination laws to programs or initiatives that involve discriminatory practices
 - The guidance focuses on the “significant legal risks of initiatives that involve discrimination based on protected characteristics”
- The guidance identifies “Best Practices” as non-binding suggestions to help entities to comply with federal anti-discrimination laws
 - Further recommends that all entities that “receive federal financial assistance or that are otherwise subject to federal anti-discrimination laws” should review the guidance as part of their compliance programs

DOJ Guidance - Cont'd

- In relevant part, the guidance identifies the following practices as potentially unlawful and discriminatory:
 - Preferential hiring/promotion based on protected characteristics
 - Providing opportunities/benefits/advantages to individuals/group based on protected characteristics in ways that disadvantage other individuals/groups
 - Use of “proxies” for protected characteristics
 - Using ostensibly neutral criteria that functions as a substitute for a protected characteristic
 - Segregation based on protected characteristics
 - Organizing programs, activities, or resources in a way that separates or restricts access based on a protected characteristic
 - Trainings that promote discrimination/hostile environments
 - Training programs that stereotype, exclude, or disadvantage individuals based on protected characteristics

Enforcement Priorities

- DEI has been routinely identified as an enforcement priority for both EEOC and DOJ
 - EEOC has announced “rooting out unlawful DEI-motivated race and sex discrimination” as a key area of focus
 - DOJ has announced its commitment to “investigate, eliminate, and penalize illegal DEI and DEIA ... in the private sector”

Reverse Discrimination Case Law Review

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Case Trends

- More reverse discrimination legal challenges or threatened challenges
 - Many of the claims are brought under Section 1981 or Title VII
 - Per Bloomberg search, there have been **~362** DEI-related cases filed since the last ELU (10/29/2024)

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Bloomberg Search (searched on 10/21/2025): (("diverse" OR "diversity" OR "inclusion" OR "belonging" OR "DEI" OR "DEIA" OR "JEDI" OR "D&I" OR "Divisive concepts" OR "social justice" OR "social equity" OR "woke") NP/3 (program OR initiative OR fellowship OR Mentor! OR ERG OR policy OR training OR "affinity group")) AND (employ! OR hir! OR promot! OR dischar! OR terminat! OR demot! OR reassign!) AND ("§1981" OR "Title VII")

SCOTUS Developments Affecting Reverse Discrimination Cases

- **April 17, 2024** - *Muldrow v. City of St. Louis*, the Supreme 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 (resolving a circuit split on the issue)
- **June 5, 2025** - *Ames v. Ohio Department of Youth Services*, the Supreme Court unanimously held that majority-group plaintiffs are not required to meet a heightened evidentiary standard than minority groups in reverse discrimination cases (resolving a circuit split on the issue)

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***Ames v. Ohio Dep't of Youth Servs.*, 605 U.S. 303(2025)**

- Plaintiff claimed she suffered discrimination because she was straight, and the employer favored LGBTQ+ employees
- The 6th Circuit required the plaintiff to show “background circumstances to support the suspicion that the defendant was that unusual employer who discriminates against the majority”
- The Court unanimously held that majority-group plaintiffs are not required to meet a higher evidentiary standard than minority groups in reverse discrimination cases (resolving a circuit split on the issue)
- The concurring opinion discussed issues with DEI policies

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

- 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
- Importantly, the Court explicitly underscored three consequences of its decision

- It changes the legal standard used in any circuit that previously required a showing of “material,” “serious,” “significant,” or “substantial” harm
- It lowers the bar that Title VII plaintiffs must meet
- As a result, the Court expects that “many cases” will be decided differently

(<https://www.smithlaw.com/newsroom/publications/Supreme-Court-Lowers-The-Bar-For-Title-VII-Claims>)

Preferential hiring/promotion based on protected characteristics

- *Raza v. Accenture LLP* (N.D. Ill. Apr 14, 2025)
 - Alleged that he was terminated because he was male and in retaliation for making complaints about discrimination
 - The CEO (female) hired in 2019, announced a goal to achieve gender parity in the workplace by 2025
 - His Senior Managing Director told him he should not expect to be promoted anytime soon because the Company's gender parity target required a certain number of female candidates to be promoted before him
 - He was terminated in a RIF and was not given a clear reason for termination

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Raza v. Accenture LLP, 1:25-cv-03999 (N.D. Ill. Apr 14, 2025)

- Complaint Allegations
 - Raza brought claims under state and federal anti-discrimination laws
 - Senior Manager in the AI/Analytics role
 - Alleged that he was terminated because he was male and in retaliation for making complaints about discrimination
 - The CEO (female) hired in 2019, announced a goal to achieve gender parity in the workplace by 2025
 - Between 2023 and 2025, he was denied promotion opportunities to Managing Director
 - His Senior Managing Director told him he should not expect to be promoted anytime soon because the Company's gender parity target required a certain number of female candidates to be promoted before him
 - Managers and counselors informed him that the approach was discriminatory
 - He was terminated in a RIF and was not given a clear reason for termination

Preferential hiring/promotion based on protected characteristics

- *Raza v. Accenture LLP* (N.D. Ill. Apr 14, 2025)
 - Company's defense was that he was terminated for performance reasons
 - October 7, 2025, the case was dismissed after the parties filed a joint stipulation of dismissal

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***Raza v. Accenture LLP*, 1:25-cv-03999 (N.D. Ill. Apr 14, 2025)**

Preferential hiring/promotion based on protected characteristics

- *Robinson v. Walmart* (E.D. Pa. Oct 02, 2025)
 - A White male employee alleged reverse discrimination because Walmart implemented DEI programs that prioritized the retention and promotion of non-White employees
 - Claims he was subject to retaliation, including suspension and termination after reporting misconduct by two Black Senior Leaders (Unit VP and Regional VP)

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Robinson v. Walmart, 5:25-cv-05699 (E.D. Pa. Oct 02, 2025)

- Robinson worked for Walmart since 2000 and was most recently a Market Manager
- Alleges that Walmart's DEI program "implicitly promoted racism and explicitly encouraged the hire, retention, and promotions of individuals based on illegal qualifications of race"
- Robinson made complaints about "misconduct" by two senior leaders (Black)
- Shortly after the complaint, he was suspended and terminated
- Robinson requested that the company be enjoined from maintaining its DEI program
- The complaint does not share specifics about how the DEI program affected the employment decision

Preferential hiring/promotion based on protected characteristics

- *Critelli et al v. Danaher Corporation et al* (M.D. Fla. Sep 15, 2025)
 - Class of White male employees arguing that the company's DEI policy discriminated against individuals over 40 and encouraged the "systematic discrimination" against White men
 - Argued that they were denied various opportunities to interview for promotions because those opportunities were provided to underrepresented individuals

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***Critelli et al v. Danaher Corporation et al*, 6:25-cv-01780 (M.D. Fla. Sep 15, 2025)**

Notably, on September 3, 2025, the Eastern District of Virginia, dismissed a proposed class action against Gannett Co. Inc. alleging non-minority plaintiffs faced systemic discrimination due to race and gender parity commitment. *Bradley v. Gannett Co. Inc.*, 1:23-CV-1100, (E.D. Va. Sept. 3, 2025). The plaintiffs are currently appealing the decision.

Preferential hiring/promotion based on protected characteristics

- *Critelli et al v. Danaher Corporation et al* (M.D. Fla. Sep 15, 2025)
 - The company's goal was to have half the applicants for open positions come from underrepresented groups
 - "Women and POC comprised less than 50% of the qualified applicants for management positions"
 - "By artificially populating an interview pool with underrepresented candidates disproportionate to the applicant, Danaher discriminated against applicants who were not from an underrepresented group"

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Critelli et al v. Danaher Corporation et al, 6:25-cv-01780 (M.D. Fla. Sep 15, 2025)

Preferential hiring/promotion based on protected characteristics

- *Critelli et al v. Danaher Corporation et al* (M.D. Fla. Sep 15, 2025)
 - The company modified its standards for diverse candidates only in order to open the roles to more diverse applicants, and would place them on a shortlist to move forward to the hiring manager
 - The company tethered manager performance evaluations and compensation to meeting DEI Policy objectives

Other Hiring Decision Cases

- *Duvall v. Novant Health, Inc.* (4th Cir. 2024)
- *Rhoden vs. CBS et al* (Cal. Super. Ct. Jan 22, 2025)
- *John Loeffler v. IBM et al* (C.D. Cal. Jun 25, 2025)
- *Romak et al v. Shell Inc. et al* (S.D. Tex. Aug 26, 2025)

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Romak et al v. Inc et al, 4:25-cv-04042 (S.D. Tex. Aug 26, 2025)

- This matter is still ongoing
 - As of October 20, 2025, the complaint has been filed and amended, and the answer has been filed
- The named employees held various positions at Shell and were eliminated during a reorganization
- The processes for the reorganization were not fair to White individuals
- The plaintiffs had to re-apply for their positions and less qualified non-White applicants were selected
- The plaintiffs argue that the diversity hiring practices led to their termination
 - The company's "pillars and aspirations" were to hire and promote individuals based on immutable characteristics
 - The company sought to better reflect the communities in which it worked
 - There were allegedly corporate documents affirming that protected class was a motivating factor in hiring decisions
 - The company had a goal to achieve 15% ethnic minority group representation in its Senior Management

John Loeffler v. International Business Machines Corporation et al, 2:25-cv-05765 (C.D.

Cal. Jun 25, 2025)

- This matter is ongoing
 - As of October 20, the company has filed a motion to dismiss the claim
- The plaintiff is a white male over 40 who held a senior role managing multimillion dollar government contracts
- The plaintiff argues that he was denied commission, reassigned to a less desirable sales area, and placed on a PIP with unattainable targets
- He alleges that his termination was part of IBM's strategy to meet internal DEI quotas and the quotas were tied to executive bonuses and job security.

***Rhoden vs. CBS et al*, 25STCV01775 (Cal. Super. Ct. Jan 22, 2025)**

- The plaintiff was a contract video editor and was allegedly promised a full-time position after months of praised work
- He was not considered for the position when it opened, and a Hispanic woman was selected with less experience
- A manager allegedly told him "We have too many straight, white men in our department"

Hiring Decision Cases

- Key Takeaways:
 - Clearly distinguish aspirational goals from quotas or any promotion metrics
 - Leader's language matters
 - Explain that approach to hiring managers
 - Do not tie diversity metrics to compensation
 - Be cautious about diverse slate commitments
 - Have clear documentation on the termination reasons

DEI Training Challenges

- *Chislett v. New York City Dep't of Educ.* (2d Cir. Sept. 25, 2025)
 - White educator claimed that she suffered a hostile work environment fostered by mandatory implicit bias trainings
 - Claims under Section 1983 because she was a public employee
 - Lower court granted summary judgment for the defendant

Chislett v. New York City Dep't of Educ., 24-972-CV(2d Cir. Sept. 25, 2025)

DEI Training Challenges

- *Chislett v. New York City Dep't of Educ.* (2d Cir. Sept. 25, 2025)
 - Argued that the already racially-charged work environment was further exacerbated by the implicit bias trainings
 - “interest in excellence was perfectionism and consistent with white supremacy”
 - “there is white toxicity in the air, and we all breathe it in”
 - Participants were lined up to reveal a “color line of privileges that favored whites”
 - Racially-charged conversations spilled over from the training

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Here are more quotes from the case regarding the alleged hostile environment

“During the first bias training on May 4, 2018, the instructor told participants that “white colleagues must take a step back and yield to colleagues of color” and “recognize that values of [w]hite culture are supremacist.” *Id.* at *2.

“...Deputy Chancellor, told an employee, “We've all taken on whiteness.” *Id.*

“Dr. Ruby Ababio-Fernandez, who developed the implicit bias initiative and became the OEA's Senior Executive Director, declared: “There is white toxicity in the air, and we all breathe it in.” *Id.*

Chislett described the rules as explaining that “whites who wanted to withdraw or not participate in order to be safe were demonstrating white fragility, and it was no longer [the] right [of white people] to be safe in the workplace.” *Id.* at 3.

DEI Training Challenges

- *Chislett v. New York City Dep't of Educ.* (2d Cir. Sept. 25, 2025)
 - Held that a reasonable jury could find she was subjected to a hostile work environment claim
 - Racist comments were expressed during the trainings
 - Physical segregation of White employees
 - She was singled out for her race
 - Negative generalizations and stereotypes about White people were targeted at her during the trainings
 - Spillover from the trainings, “took a racialized tone”

DEI Training Challenges

- *Chislett v. New York City Dep't of Educ.*, 24-972-CV(2d Cir. Sept. 25, 2025)
 - Second Circuit clarified
 - Implicit bias trainings are not “per se racist”
 - “What matters here is the way the trainings were conducted. When employment trainings discuss any race ‘with a constant drumbeat of essentialist, deterministic, and negative language [about a particular race], they risk liability under federal law.’”

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Here is the full quote regarding the training

“We do not suggest that the conduct of implicit bias trainings is per se racist. See [Vavra v. Honeywell Int'l Inc.](#), 688 F. Supp. 3d 758, 770 (N.D. Ill. 2023) (holding that an employer's requirement that employees attend implicit bias training does not, by itself, violate Title VII) (collecting cases), *aff'd*, [106 F.4th 702 \(7th Cir. 2024\)](#). What matters here is the way the trainings were conducted. When employment trainings discuss any race “with a constant drumbeat of essentialist, deterministic, and negative language [about a particular race], they risk liability under federal law.” [De Piero v. Pa. State Univ.](#), 711 F. Supp. 3d 410, 424 (E.D. Pa. 2024). And when a municipal agency consistently ignores the racial harassment of employees in both trainings and workplace interactions, it can be held liable.”

Id. at *12.

DEI Training Challenges

- Challenges regarding DEI training have had mixed results
 - *Chislett* - a win for the plaintiff and perhaps providing supporting reasoning for other challenges to DEI training
 - *Vavra v. Honeywell Int'l, Inc. (2024)* - a win for the employer on different facts
 - The employee had not watched the training to understand its content or application
 - Assumed it would vilify white people and treat people differently based on their race

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Here are the notes from last year's presentation on the *Honeywell case*

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

- Filed December 23, 2021
- 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
- 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
- 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

DEI Training Challenges

- Key Takeaways
 - Carefully review training language
 - Take complaints about the training seriously
 - General “discomfort” with the training likely won’t equal discrimination
 - Issues occur when it is repeated/targeted conduct
 - DEI training is not per se harassment

What is Illegal D&I in the Workplace

- The Administration has challenged or forecasted increased scrutiny for a variety of existing practices including (but not limited to):
 - Mandatory Diverse Slate Policies
 - Use of proxies for protected characteristics
 - Programs that promote “equity” rather than “equality”
 - Efforts to “rebalance” workforces
 - Diversity “goals” or “targets”
 - Diversity-based compensation incentives
 - Recruitment efforts aimed at “underrepresented groups”
 - Trainings that create a hostile work environment

Practical Impact

- There has been a clear shift in focus with the change in Administration.
 - For example, EO14281 explicitly directs enforcement activities and priorities.
- As a result, there are a variety of programs and practices that were typically not subject to regulatory scrutiny that are now forming the basis for discrimination claims:
 - Mentorship/training opportunities
 - Employee affinity groups (Employee Resource Groups, Business Resource Groups)
 - DEI training/workplace training materials

Recommendations for Compliance

- Review existing D&I-related Programs for compliance with federal, state, and local laws with a particular focus on:
 - Quotas, preferences, plus factors, and set asides for any group (e.g., race, sex, protected characteristic)
 - Compensation and incentives tied to achieving diversity hiring metrics or "penalties" for failing to achieve D&I goals
 - Diverse candidate slate or diverse hiring panel requirements
 - Closed groups/programs (e.g., mentorship or leadership development programs, employee affinity or resource groups) where participants need to identify with/be a member of a protected class or where activities are segregated by a particular characteristic
 - D&I training materials (including third-party training materials) with attention to content that could be viewed as equity ideology or otherwise discriminatory

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Recommendations for Compliance Cont'd.

- Review all public/internal materials and messaging:
 - Many challenges to D&I programs rely on publicly available information such as company websites, SEC filings, tweets, internal reports, etc.
 - Internal and external messaging surrounding D&I have been cited as evidence of allegedly discriminatory hiring and other employment practices.
- Commence training for HR, D&I professionals, and leadership focusing on distinguishing legal and illegal D&I activities:
 - Many D&I activities are neither clearly legal/illegal. It is important that relevant stakeholders are aware of the margins to make informed decisions based on the company's risk tolerance.
 - Consider designating one or more employees who are responsible for tracking updates related to the enforcement of federal anti-discrimination laws.

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Recommendations for Compliance Cont'd.

- Take employee complaints or objections related to D&I activities, programs, and trainings seriously.
 - Consideration should be given to allowing employees to opt out, where appropriate.
- Emphasize the company's commitment to EEO and non-discrimination:
 - By way of example, references to "equity" have been construed as running afoul of *equal* opportunity.
 - Companies should also continue to ensure that all employment decisions are based on hiring, promoting, and retaining the best, most qualified person for the role without regard to protected characteristics.

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Special Considerations for Government Contractors

- Review all existing state and federal contracts to determine what, if any, obligations the company has related to D&I:
 - This review should identify areas where their contractual obligations (such as those imposed by Federal Acquisition Regulation ("FAR") clauses, collective bargaining agreements, or state or local affirmative action laws) contradict the terms of the Executive Order or stated positions of the Administration.
- Establish ongoing contact with the company's contracting officers:
 - Employers should stay in regular contact with their contracting officers to understand their evolving FAR and compliance obligations under any existing contracts.

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Special Considerations for Government Contractors Cont'd.

- Review all affirmative action activities, related policies, and forms to ensure compliance with EO 14173:
 - Ideally, this review is conducted by legal counsel under privilege. As part of this review, federal contractors should review EEO/AA policy statements and tag-lines, invitations to self-identify, and contracts with EO clause provisions and remove all references to federal affirmative action.
- Modify non-compliant activities, programs, policies, and contracts:
 - Federal contractors are clear targets for future investigations and litigation related to their D&I programs and activities. Where possible, modifications to any existing activities, programs, policies, contracts, and grants should be done in coordination with legal counsel.

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Risk Mitigation for D&I Programs

- Ideal D&I 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, inclusion, belonging, and accessibility policies and a culture grounded in these values.

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Risk Mitigation for D&I Programs Cont'd.

- D&I 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).

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Risk Mitigation for D&I Programs Cont'd.

- D&I programs cannot include:
 - Using protected categories, such as race, to decide who to hire or promote.
 - Setting aside positions to be filled by a woman or racial/ethnic minority.
 - Setting a quota for a specific number of individuals to be hired based on a protected class characteristic.
- Other high-risk activities include:
 - Allowing employees with hiring decision-making power to have access to demographic information.
 - Tying in compensation with certain diversity hiring targets.
 - Publishing or creating aspirational goals for workforce diversity.

Key Takeaways

- This is a rapidly developing area of law. We expect continued guidance and clarification in the coming months.
- Employers may still provide and support legal D&I programs and activities within their organization. Employers need to be mindful of how they develop, operate and maintain these programs to avoid unwanted regulatory scrutiny.
- Federal contractors must discontinue federal affirmative action programs for women and minorities and coordinate with their federal contracting officers regarding FAR compliance.
- All employers should continue to ensure that all employment decisions and opportunities are merit-based and not based on protected characteristics.

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Everything Everywhere All at Once: DEI, Executive Orders and Legal Uncertainty



Taylor M. Dewberry

James C. King

November 5, 2025

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Balancing Health and Compliance: Practical Guidance for Navigating the ADA and FMLA in the Workplace



Balancing Health and Compliance: Practical Guidance for Navigating the ADA and FMLA in the Workplace



Kevin M. Ceglowski

Lauren E. Davis

November 5, 2025

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Americans with Disabilities Act (ADA)

- Became law in 1990
- Law was amended in 2008 - the Americans with Disabilities Act Amendments Act (ADAAA)
- Prohibits discrimination against individuals with disabilities (including in the workplace)
- Ensures that individuals with disabilities have the same rights and opportunities as others



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ADA - Title I (Employment Practices)

- Applies to:
 - private employers with 15 or more employees
 - state and local governments
 - employment agencies
 - labor unions
 - agents of the employer, and
 - joint management labor committees

ADA - Title I (Employment Practices)

- Enforced by the EEOC
- Prohibits discrimination in the workplace:
 - Including, during and related to recruitment, hiring, promotion, termination, compensation, and benefits

ADA - Title I (Employment Practices)

- Requires that employers provide **reasonable accommodations** to **qualified** candidates and employees with **disabilities** by engaging in an **interactive process** (unless doing so would cause undue hardship)
- **Qualified** - meets job-related requirements and can perform the essential functions with or without reasonable accommodation
- **Disability** - a *physical or mental* impairment that *substantially limits* one or more of the *major life activities* of the individual
- **Interactive Process** - an informal process to clarify what the individual needs and to identify a reasonable accommodation
- **Reasonable Accommodation** - a change in the work, workplace, or application process that helps make it possible for an individual with a disability to perform or apply for a job

ADA - Reasonable Accommodations

Examples of Reasonable Accommodations

- | | |
|--|--|
| <ul style="list-style-type: none"> • Modify or reduce work schedule • Allow remote work • Allow additional leave after FMLA is exhausted or before employee is eligible • Reassignment to another position that is vacant • Light duty/work restrictions (eliminating non-essential duties) | <ul style="list-style-type: none"> • Modify or make exceptions to policies/practices, including attendance or leave policies • Modify facility/workspace for accessibility or acquire/modify equipment • Provide assistive devices, readers or interpreters |
|--|--|

Noncompliance with the ADA

- Potential consequences:
 - EEOC charges filed (or state agency charges)
 - Costly litigation
 - Poor public perception
 - Low employee morale
 - Reputational damage



So, how do you avoid those
consequences?

Establish Company Policies

- **Equal Employment Opportunity (EEO) Policy:**

- Indicate that you are an EEO employer
- State acts that you prohibit (i.e., discrimination)
- Establish that you will make reasonable accommodations to qualified individuals with disabilities

Establish Company Policies

- **Disability Accommodation Policy:**

- Provide the process for requesting a reasonable accommodation for a disability
- Encourage (but do not require) written requests that include relevant detail
- State the circumstances you may request medical information from an employee

Update Job Descriptions

- Have written job descriptions for every role:
 - Reflect the essential functions and qualifications of the position
 - May include physical requirements such as lifting, walking, or sitting
 - Can include certain intellectual or social requirements (handle a stressful, fast-paced environment, communicate effectively with the public)

Document the Interactive Process

- Document every step:
 - The initial request
 - Accommodation selection
 - Accommodation implementation
- Document any failure to engage in the process:
 - Failures to respond to communication
 - Efforts made to contact the employee

Understand when you can (and can't) request medical records



- **Green Light** - the disability or need for accommodation is not obvious

- May ask for reasonable records about the disability and limitations (NOT an employee's complete medical record or information relating to another medical condition the employee has)



- **Red Light** - the disability or need for accommodation is obvious OR sufficient information has already been provided

Train HR and Managers

- Must be familiar with the company policies and the law
- Should be able to recognize requests for accommodation even if the request does not use any “magic words”
- Document requests and the steps taken in the interactive process
- Keep discussions about performance and medical conditions separate (while showing compassion)
- Most importantly - ***Communicate clearly and consistently***

Family and Medical Leave Act

Family and Medical Leave Act (FMLA)

- Provides up to 12 workweeks of job-protected, unpaid leave (additional leave available for military-related reasons) if an employee's impairment qualifies as a serious health condition
- Requires group health benefits to be maintained during the leave
- Covers public agencies, including local, state, and federal employers, and local education agencies (schools); and private sector employers who employ **50 or more employees** for at least 20 workweeks in the current or preceding calendar year (including joint employers and successors of covered employers)

FMLA - Employee Eligibility

- Worked 1,250 hours during the 12 months prior to the start of leave +
- Work at a location that has 50 or more employees within 75 miles +
- Worked for the employer for 12 months

FMLA - Use of the Leave

- The birth, adoption, or foster placement of a child
- Caring for an immediate family member with a serious health condition
- Medical leave when unable to work because of a serious health condition
- Qualifying exigency of a spouse, son, daughter, or parent who is a military member on covered active duty or called to covered active-duty status (or notified of an impending call or order to covered active duty)

FMLA - Serious Health Condition

- Inpatient care
- >3 days incapacity plus continuing care
- Pregnancy or prenatal care
- Chronic condition
- Permanent or long-term condition
- Multiple treatments

FMLA - Unpaid Leave

- Only requires unpaid leave
- An employee can elect (or the employer can require the employee) to use accrued PTO for some or all of the FMLA leave period

Noncompliance with the FMLA

- Potential consequences:
 - Costly litigation
 - An employee may file a private civil action
 - Managers may be subject to personal liability for violations
 - DOL Complaints
 - Poor public perception
 - Low employee morale



So, how do you avoid those consequences?

Post the required FMLA notice

- Keep posted on the premises (in conspicuous places where employees are employed) a notice that:
 - Explains the FMLA's provisions
 - Provides information concerning the procedures for filing complaints related to FMLA violations
- Include this general notice in the employee handbook
- Ensure the 12-month period is defined

Respond to requests promptly

- Must notify an employee of whether the employee is eligible to take FMLA leave within 5 business days of:
 1. The request *or*
 2. The employer learning that an employee's leave may be for a FMLA-qualifying reason

Appropriately obtain medical certification

- If medical certification is needed, allow the employee at least 15 calendar days to obtain it
- Advise the employee if the certification is incomplete, provide in writing what additional information is necessary, and allow the employee a reasonable opportunity to cure (at least 7 days)
- Only require an additional medical opinion if there is a reason to doubt the validity of the initial certification

Properly track leave

- Accurately track the amount of FMLA taken
- Coordinate overlapping FMLA leave with other leave policies (like PTO or short-term disability)
- Leave may be used in the smallest increment of time the employer allows for other time off usage, so long as the smallest increment is no more than one hour

Understand job restoration requirements

- The FMLA requires that upon return from the leave, the employee be returned to the same job, or one that is nearly identical
- Nearly identical jobs must:
 - Offer the same general work schedule
 - Be at a geographically proximate worksite
 - Involve substantially similar duties/status/responsibilities
 - Include the same level of skill/effort/authority
 - Offer identical pay and benefits

Continue communication with employee

- If you have reason to believe that the employee is abusing leave - ask for recertification from a healthcare provider
- If the employee does not return to work when FMLA leave expires - may have to consider accommodation under the ADA (or other law), but will need to communicate with employee to assess

FMLA & ADA

- An employee may request leave that is potentially covered under both acts:
 1. Determine the eligibility & rights under each act separately
 2. Consider if the acts overlap regarding what action to take
- When FMLA leave is exhausted, the ADA may require additional unpaid, job-protected leave as a reasonable accommodation
- When an employee does not qualify for FMLA leave, leave may be a reasonable accommodation under the ADA

Questions?



Balancing Health and Compliance: Practical Guidance for Navigating the ADA and FMLA in the Workplace



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November 5, 2025

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HR Island – Outsmart, Outwork, Outlast an I-9 Audit



HR Island: Outsmart, Outwork, Outlast an I-9 Audit



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November 5, 2025

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Why?

- I-9 and E-Verify are subset of broader immigration compliance
- Unlawful to knowingly hire/employ a person not authorized to work in the U.S.
 - Includes both “actual” and “constructive” knowledge
 - And, constructive knowledge can include failing to complete or not properly completing I-9s



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Why?

- Increased enforcement
- Potential actions:
 - Form I-9 inspections
 - Employer receives Notice of Inspection requesting production of I-9s and other documents (usually within 3 business days)
 - Worksite enforcement action
 - Unannounced visit by ICE

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The Basics

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Immigration Reform and Control Act (IRCA)

- IRCA requires all U.S. employers to verify the identity and employment eligibility of all employees hired after 11.6.86
 - Requirement satisfied by having employees complete a Form I-9 when hired
- To comply with IRCA:
 - Complete Form I-9
 - Retain documents as necessary
 - Do not discriminate

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Form I-9 Sections

- Section 1 - Employee Information & Verification
- Section 2 - Employer Review & Verification
- Supplement A - Preparer or Translator Certification
- Supplement B - Reverification & Rehire

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Section 1

- Each new employee must complete and sign this section **by their first day of work**
 - May be earlier, but not before accepting the job offer
- Must include SSN if employer is enrolled in E-Verify
- If a preparer or translator is used, must complete Supplement A
 - The date the employee enters next to their signature should match the date the preparer/translator signed the supplement

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Section 1. Employee Information and Attestation: Employees must complete and sign Section 1 of Form I-9 no later than the **first day of employment**, but not before accepting a job offer.

Last Name (Family Name)		First Name (Given Name)		Middle Initial (if any)	Other Last Names Used (if any)	
Address (Street Number and Name)		Apt. Number (if any)	City or Town		State ZIP Code	
Date of Birth (mm/dd/yyyy)	U.S. Social Security Number		Employee's Email Address		Employee's Telephone Number	
I am aware that federal law provides for imprisonment and/or fines for false statements, or the use of false documents, in connection with the completion of this form. I attest, under penalty of perjury, that this information, including my selection of the box attesting to my citizenship or immigration status, is true and correct.		Check one of the following boxes to attest to your citizenship or immigration status (See page 2 and 3 of the instructions.):				
		☐ 1. A citizen of the United States				
		☐ 2. A noncitizen national of the United States (See Instructions.)				
		☐ 3. A lawful permanent resident (Enter USCIS or A-Number.)				
		☐ 4. An alien authorized to work until (exp. date, if any)				
		If you check Item Number 4., enter one of these:				
		USCIS A-Number	OR	Form I-94 Admission Number	OR	Foreign Passport Number and Country of Issuance
Signature of Employee					Today's Date (mm/dd/yyyy)	

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Section 2

- Employer must complete and sign this section **within 3 business days of hire**
- Employer must review the acceptable documents showing employment authorization:
 - Confirm documents appear genuine and relate to specific employee
- Employer **cannot** specify the document(s) to be provided

Section 2 - Acceptable Documents

- Need a List A document **OR** List B + List C documents
 - **List A** - Establishes identity + employment authorization (ex: Passport, Permanent Resident Card)
 - **List B** - Establishes identity (ex: Driver's License, Voter's Registration Card)
 - **List C** - Establishes employment authorization (ex: Social Security Card, Birth Certificate)

Section 2 - Authorized Representative

- Authorized representative can be any person the employer designates or hires, or with whom employer contracts
- Authorized representative must perform all employer duties (reviewing Section 1 and completing Section 2)
- Employees cannot act as an authorized representatives for their own I-9
- Employers are liable for any violations in connection with the form or the verification process (including violations committed by the authorized representative acting on employer's behalf)

Section 2. Employer Review and Verification: Employers or their authorized representative must complete and sign Section 2 within three business days after the employee's first day of employment, and must physically examine, or examine consistent with an alternative procedure authorized by the Secretary of DHS, documentation from List A OR a combination of documentation from List B and List C. Enter any additional documentation in the Additional Information box; see Instructions.

	List A	OR	List B	AND	List C
Document Title 1					
Issuing Authority					
Document Number (if any)					
Expiration Date (if any)					
Document Title 2 (if any)	Additional Information				
Issuing Authority					
Document Number (if any)					
Expiration Date (if any)					
Document Title 3 (if any)					
Issuing Authority					
Document Number (if any)					
Expiration Date (if any)					
☐ Check here if you used an alternative procedure authorized by DHS to examine documents.					
Certification: I attest, under penalty of perjury, that (1) I have examined the documentation presented by the above-named employee, (2) the above-listed documentation appears to be genuine and to relate to the employee named, and (3) to the best of my knowledge, the employee is authorized to work in the United States.					
Last Name, First Name and Title of Employer or Authorized Representative			Signature of Employer or Authorized Representative		First Day of Employment (mm/dd/yyyy):
					Today's Date (mm/dd/yyyy)
Employer's Business or Organization Name			Employer's Business or Organization Address, City or Town, State, ZIP Code		

Supplement A - Preparer/Translator Certification

- Must ensure this page is completed and retained if preparer or translator assists employee with Section 1
- Preparer/translator must complete, sign, and date one of the certification areas provided
- If the employee does not use a preparer or translator, no need to print, provide, or retain this supplement with an employee's I-9

Last Name (Family Name) from Section 1.		First Name (Given Name) from Section 1.		Middle Initial (if any) from Section 1.	
---	--	---	--	---	--

Instructions: This supplement must be completed by any preparer and/or translator who assists an employee in completing Section 1 of Form I-9. The preparer and/or translator must enter the employee's name in the spaces provided above. Each preparer or translator must complete, sign, and date a separate certification area. Employers must retain completed supplement sheets with the employee's completed Form I-9.

I attest, under penalty of perjury, that I have assisted in the completion of Section 1 of this form and that to the best of my knowledge the information is true and correct.

Signature of Preparer or Translator			Date (mm/dd/yyyy)		
Last Name (Family Name)		First Name (Given Name)		Middle Initial (if any)	
Address (Street Number and Name)		City or Town		State	ZIP Code

I attest, under penalty of perjury, that I have assisted in the completion of Section 1 of this form and that to the best of my knowledge the information is true and correct.

Signature of Preparer or Translator			Date (mm/dd/yyyy)		
Last Name (Family Name)		First Name (Given Name)		Middle Initial (if any)	
Address (Street Number and Name)		City or Town		State	ZIP Code

I attest, under penalty of perjury, that I have assisted in the completion of Section 1 of this form and that to the best of my knowledge the information is true and correct.

Signature of Preparer or Translator			Date (mm/dd/yyyy)		
Last Name (Family Name)		First Name (Given Name)		Middle Initial (if any)	
Address (Street Number and Name)		City or Town		State	ZIP Code

I attest, under penalty of perjury, that I have assisted in the completion of Section 1 of this form and that to the best of my knowledge the information is true and correct.

Signature of Preparer or Translator			Date (mm/dd/yyyy)		
Last Name (Family Name)		First Name (Given Name)		Middle Initial (if any)	
Address (Street Number and Name)		City or Town		State	ZIP Code

Supplement B - Reverification & Rehire

- Formerly Section 3 of the I-9
- Only complete if employee:
 - Requires reverification
 - Is rehired within 3 years of the date of the original I-9 being completed
 - Provides proof of a legal name change
- Complete one of the reverification sections provided for each applicable event

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Instructions: This supplement replaces Section 3 on the previous version of Form I-9. Only use this page if your employee requires reverification, is rehired within three years of the date the original Form I-9 was completed, or provides proof of a legal name change. Enter the employee's name in the fields above. Use a new section for each reverification or rehire. Review the Form I-9 instructions before completing this page. Keep this page as part of the employee's Form I-9 record. Additional guidance can be found in the [Handbook for Employers: Guidance for Completing Form I-9 \(M-274\)](#).

Last Name (Family Name) from Section 1.		First Name (Given Name) from Section 1.		Middle Initial (if any) from Section 1.	
Date of Rehire (if applicable) (mm/dd/yyyy)	New Name (if applicable) Last Name (Family Name) First Name (Given Name) Middle Initial				
Reverification: If the employee requires reverification, your employee can choose to present any acceptable List A or List C documentation to show continued employment authorization. Enter the document information in the spaces below.					
Document Title	Document Number (if any)		Expiration Date (if any) (mm/dd/yyyy)		
I attest, under penalty of perjury, that to the best of my knowledge, this employee is authorized to work in the United States, and if the employee presented documentation, the documentation I examined appears to be genuine and to relate to the individual who presented it.					
Name of Employer or Authorized Representative		Signature of Employer or Authorized Representative		Today's Date (mm/dd/yyyy)	
Additional Information (Initial and date each notation.)					
☐ Check here if you used an alternative procedure authorized by DHS to examine documents.					

Date of Rehire (if applicable) (mm/dd/yyyy)		New Name (if applicable) Last Name (Family Name) First Name (Given Name) Middle Initial			
Reverification: If the employee requires reverification, your employee can choose to present any acceptable List A or List C documentation to show continued employment authorization. Enter the document information in the spaces below.					
Document Title	Document Number (if any)		Expiration Date (if any) (mm/dd/yyyy)		
I attest, under penalty of perjury, that to the best of my knowledge, this employee is authorized to work in the United States, and if the employee presented documentation, the documentation I examined appears to be genuine and to relate to the individual who presented it.					
Name of Employer or Authorized Representative		Signature of Employer or Authorized Representative		Today's Date (mm/dd/yyyy)	
Additional Information (Initial and date each notation.)					
☐ Check here if you used an alternative procedure authorized by DHS to examine documents.					

Date of Rehire (if applicable) (mm/dd/yyyy)		New Name (if applicable) Last Name (Family Name) First Name (Given Name) Middle Initial			
Reverification: If the employee requires reverification, your employee can choose to present any acceptable List A or List C documentation to show continued employment authorization. Enter the document information in the spaces below.					
Document Title	Document Number (if any)		Expiration Date (if any) (mm/dd/yyyy)		
I attest, under penalty of perjury, that to the best of my knowledge, this employee is authorized to work in the United States, and if the employee presented documentation, the documentation I examined appears to be genuine and to relate to the individual who presented it.					
Name of Employer or Authorized Representative		Signature of Employer or Authorized Representative		Today's Date (mm/dd/yyyy)	
Additional Information (Initial and date each notation.)					
☐ Check here if you used an alternative procedure authorized by DHS to examine documents.					

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Electronic Form I-9s

- Employer permitted to complete, sign, and store electronic versions of Form I-9 since October 2004
- May electronically generate and retain Form I-9 if:
 - Employees receive instructions for completing the form
 - Resulting form is legible
 - Form's name and content and the sequence of the data elements and instructions are unchanged
 - No additional data elements or language are inserted
 - The standards specified in the regulations are met

E-Verify

- Internet-based system that compares information from the I-9 to government records to confirm that an employee is authorized to work in the U.S.
- Requires employee's social security number and photo on the identity document provided
- If applicable, must use E-Verify within 3 business days of the date of hire

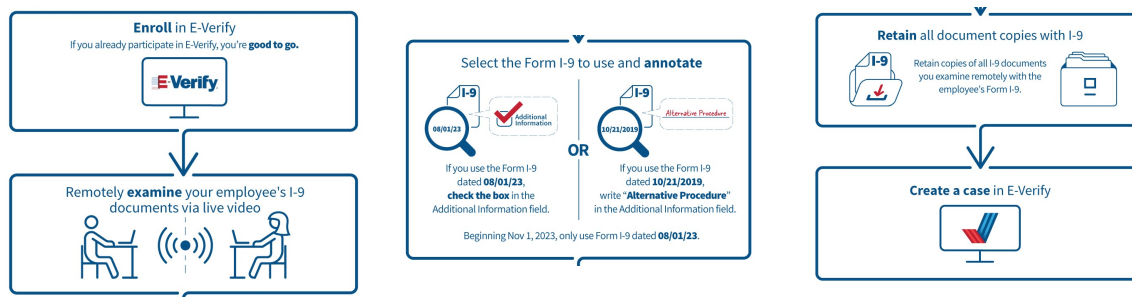
E-Verify, cont.

- Employers may use voluntarily
- Use may be required by federal contract (look for E-Verify clause)
- Required under some states' laws
 - North Carolina: mandatory for employers with 25 or more employees in the state

COVID-era regulations

- Historically, employers had to physically examine documents presented by employees to prove their identity and employment eligibility
- During COVID - temporary flexibilities offered by ICE allowed employers to defer in-person document review under certain circumstances
 - EXPIRED on July 31, 2023
- But, remote inspection is still allowed for employers enrolled in E-Verify if they meet certain criteria and follow a specific process (that includes a live video interaction)

How to Participate in Remote Examination



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Training is essential

- It's not "just paperwork"
- Train HR/applicable staff on proper I-9 completion and compliance:
 - Don't request specific documentation
 - Complete the form timely
 - Keep the forms separate & accessible
 - NEVER backdate
 - Ensure legible
 - Only re-verify if necessary

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Training is essential, cont.

- Failure to train:
 - May be deemed “bad faith” on part of employer
 - May cause technical violations to be converted to substantive violations

The Problems

Common Form I-9 Issues

- Completion on an expired I-9 form
 - CHECK to make sure using current form
- Omitting required information (birthdate, address, full name, document numbers or expiration dates)
- Sections 1 or 2 not signed/completed within the required timeframe
 - Remember - Section 1 by or on first day of work; Section 2 within 3 business days of first day of work

Common Form I-9 Issues, cont.

- Incomplete acceptable document information (or in the alternative, more documents than necessary to satisfy the I-9 requirements are provided)
- Invalid or expired documents accepted
- Completion on a Spanish form for an employer not located in Puerto Rico
 - Only employers in Puerto Rico may complete the Spanish-language version (but any employer may use as a translation tool)

Penalties

- Paperwork violations - \$288 to \$2,861 per violation
 - Substantive (examples: missing I-9; completing late; missing name; no signatures; unacceptable documents recorded; Supplement B issues)
 - Technical (examples: missing birthdate; missing employee or employer address; missing date of hire; missing company rep title, company name, or address; failing to complete preparer/translator certification)

Penalties, cont.

- Five factors considered in determining total civil penalty amount:
 1. Size of the business
 2. Good faith of the employer
 3. Seriousness of the violations
 4. Involvement of unauthorized workers
 5. History of previous violations

Common E-Verify Issues

- Selecting incorrect List B document from drop-down
- Accepting restricted Social Security card
- Not ensuring List B document has a photo
- Creating duplicate cases for same employee without reason
- Creating case after third business day following first day of work
- Creating cases for employees hired before employer signed up for E-Verify

Common E-Verify Issues

- Failing to download Further Action Notices and provide to employees
- Having tentative nonconfirmation cases (TNC) open for more than 10 federal government working days following mismatch
- Taking premature action against or terminating employees who receive a mismatch
- Failing to close open cases with final case results

Do you have a problem?

Proactive approach vs. “head in the sand”?

Internal Audits

- Employers may conduct internal audits of I-9s to ensure ongoing compliance
- Key preliminary questions:
 - Why are we doing this?
 - Should we do this ourselves?
 - Do we know what we are doing?
 - Are we prepared to deal with the results?

Internal Audits, cont.

- Options:
 - Using internal resources
 - Third-party vendor (directly or under direction of outside counsel)
 - Outside counsel
- Carefully consider benefits of attorney-client privilege
- Carefully vet vendors and outside counsel

Internal Audits, cont.

- Can review all I-9s or a sample (provided the sample is selected based on neutral and non-discriminatory criteria)
- Communicate to employees before and during the audit in a transparent manner
- If discover errors - draw line through incorrect info + enter correction + initial and date (do not conceal original entries)
 - Section 1 - employee must correct
 - Section 2 - employer must correct

Internal Audits, cont.

- If discover missing I-9s, complete using current version, but do not backdate; attach memo
- If discover copies of I-9 documents that do not appear to be genuine, address with employee and give opportunity to provide other documents from Lists
- Generally cannot require new I-9s from all existing employees (outside M&A context)
- See <https://www.ice.gov/doclib/guidance/i9Guidance.pdf>

Planning for M&A Activity

Mergers and Acquisitions

- If selling/merging, expect that potential buyers/parties will do diligence on I-9/E-Verify compliance
 - Noncompliance can affect deal value and result in special ongoing indemnity obligations
- If buying, buyer and its lawyers should carefully explore seller's compliance

Mergers and Acquisitions, cont.

- Employers who have acquired another company or have merged with another company may choose to treat employees who are continuing their employment with the related, successor, or reorganized employer as:
 - New hires (employers must complete a **new I-9**)
 - Continuing in employment (employers must obtain and maintain the previously completed I-9)

Mergers and Acquisitions, cont.

- If treating as new hires, must complete new I-9s for all
 - Enter the effective date of sale as the employee's first day of employment
 - Must plan ahead for flurry of I-9/E-Verify activity immediately after closing
- If treating as continuing in employment, must obtain and maintain the previously completed I-9
 - Take them with all of their "warts" - liable for any errors or omissions on the previously completed I-9

HYPOTHETICALS

Hypothetical #1

- Jeff works in HR at a growing company. A new employee, Parvati, forgets to bring their acceptable documents for identification and authorization, but promises to bring them the following workday. Parvati does not bring Jeff the documents the next day and Jeff forgets to follow-up with Parvati until two weeks later.
- *What potential compliance issues could this cause and what next steps should you take?*

Answer #1

- *Late Completion* - Section 2 of the I-9 must be completed within 3 business days of Parvati's start date. If audited by ICE, the company could face penalties.
- Next steps:
 - Complete Parvati's I-9 immediately
 - Document the delay (prepare a memo to attach to I-9 to explain why completed late)
 - Do NOT backdate
 - Train and review processes

Hypothetical #2

- Rob works in HR and is located in Boston. Rob's company has remote workers in states all over the country. The company just hired a new remote employee - Ozzy. Rob emails Ozzy a Form I-9 and asks them to complete Section 1 before their start date. Ozzy emails the Form I-9 back. Rob then asks Ozzy to scan their acceptable documents over so that Rob can complete Section 2.
- *Is this process compliant?*

Answer #2

- **Nope**
 - The documents must be physically examined in the presence of Ozzy, unless the company is enrolled in E-Verify (in which case, additional requirements must also be met)
 - Rob should consider designating an authorized representative to inspect Ozzy's documents in person and complete Section 2 on the company's behalf

Questions?

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HR Island: Outsmart, Outwork, Outlast an I-9 Audit

J. Travis Hockaday

Lauren E. Davis

November 5, 2025

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Workforce Transitions and Legal Traps: Navigating RIFs, OWBPA and WARN



Workforce Transitions and Legal Traps: Navigating RIFs, OWBPA, and WARN



Kevin M. Ceglowski

November 5, 2025

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Introduction

- Managing workforce reductions while complying with key laws
- Focus Areas: WARN Act, ADEA, and OWBPA
- Session Goals:
 - Understand employer obligations
 - Identify common legal traps
 - Apply practical compliance strategies

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Terminations Framework

RIF Planning Checklist

-  Legal Requirements
-  Compliance with company policies
-  Consider past practices
-  Consistency Pretext-free
-  Consistency Pretext-free

Common Reasons for Work Force Reduction (RIF)

- Cost reduction or restructuring
- Redundancy or role elimination
 - Lack of work
- Changing skills needs
- Physical relocation or site closings
- Outsourcing or offshoring



Workforce Reductions (RIFs)

- Definition: Permanent or temporary layoffs due to business necessity
- Common Reasons: Cost reduction, restructuring, mergers
- Legal Imperative: Consistent criteria and proper documentation

Key Statutes in Play

- WARN Act: Advance notice requirements
 - 100 or more employees (federal law)
- OWBPA: Waivers of age discrimination claims
 - Employees age 40 or older
- Other Laws: ADEA, Title VII, ADA, state mini-WARN laws

WARN Act Overview

- Purpose: Protect workers from sudden job loss
- Coverage: Employers with 100+ full-time employees
- Triggers:
 - Plant closing: 50+ employees
 - Mass layoff: 50+ employees & 33% of workforce

Group Layoff/Reductions In Force

- WARN Act
 - Covered employer - 100 or more employees or 100 or more employees collectively working at least 4,000 hrs./week
 - Affected employee - employee that reasonably may be expected to experience an employment loss as a result of a proposed plant closing or mass layoff

Group Layoff/Reductions In Force

- WARN Act:
 - Plant closing - permanent or temporary shutdown of single site of employment, or one or more facilities or operating units at single site, resulting in employment loss at the single site occurring within any 30-day period, for 50 or more employees (excluding part-time)
 - Mass layoff - RIF, not qualifying as a plant closing, resulting in employment loss at the single site within any 30-day period, for 50-499 employees and that number is at least 33% of active employees or for 500 or more employees

WARN Act Notice Requirements

- WARN Act
 - Detailed analysis required to determine whether obligations triggered
 - Covered employer must give at least 60 days' notice of plant closing or mass layoff to affected employees, state dislocated worker unit, and local government (some exceptions apply)

What Must Notice Contain?

Unrepresented Employee Notices

- Whether planned action is permanent or temporary
- Statement that entire facility is to be closed (if applicable)
- Expected date plant closing or mass layoff will commence

What Must Notice Contain?

- Expected date individual employee will be separated
- Whether bumping rights exist
- Name and telephone number of a company official to contact for further information

State Dislocated Worker Unit/ Local Government Notices

- Name and address of the employment site where the plant closing or mass layoff will occur
- Name and telephone number of a company official to contact for further information
- Expected date of the first separation
- Number of affected employees
- **Additional information must be maintained on-site and accessible to state and local official, if requested**

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Requirement to Update Notice

If **date** of plant closing or mass layoff is **delayed**:

- Less than 60 days: New date, reason for postponement, reference to initial notice
- 60 days or more: New notice required



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WARN Exceptions

- Faltering Company: Attempting to secure capital
- Unforeseeable Circumstances: Sudden and unexpected downturns
- Natural Disasters: Direct result of natural events
- Exceptions narrowly applied; document justification carefully

Other Special Circumstances

- Short-term layoff extension
- Certain sale of business transactions

WARN Act Common Problems

- Applying the part-time employee rules
- Identifying single-site of employment
- Counting employment losses (which employees, which reasons, over what period)
 - Overlapping terminations within 30/90 day windows
- Changes in termination date
- Calculating notice date
- Content of notice

State Mini WARN Acts

- Mini-WARN Acts and other notification laws
 - California, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, New Hampshire, New Jersey, New York, Tennessee, Vermont, Washington, and Wisconsin
- Often lower thresholds or longer notice periods

WARN Violations & Penalties

- Employer Liability: Up to 60 days' back pay and benefits
- Civil Penalties: \$500/day for failure to notify local officials
- Mitigation: Early or partial compliance reduces risk
- Often presents as class action lawsuits

OWBPA Overview

- Amended ADEA
- Purpose: Protect employees 40+ from uninformed waivers
- Key Principle: Waivers must be knowing and voluntary
- Applies To: Individual and group layoffs

OWBPA Release Requirements

- Plain language
- References ADEA rights
- Cannot waive future claims
- Consideration beyond owed pay
- Advice to consult attorney
- Review Periods: 21 days / 45 days (group)
- 7-day revocation period

Group Layoff Disclosures

- Required for group RIFs involving employees aged 40+
- Must include: decisional unit, eligibility criteria, time limits
- Job titles and ages of those selected and not selected

Group Layoff/Reductions In Force

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

Release Considerations

- Age discrimination waivers:
 - Understandable
 - Waiver must refer to rights/claims under ADEA
 - No prospective waiver
 - Consideration must be in excess of anything to which employee already is due
 - Advise employee in writing to consult attorney
 - 21 days for consideration (45 if offered with exit incentive or other termination program to group/class)
 - Seven days for revocation (regardless of whether review period is 21 or 45 days)

RIF Planning Checklist

- Identify legitimate business reason
- Establish objective selection criteria
- Conduct adverse impact analysis
- Align WARN and OWBPA timelines
- Plan communications and documentation

Common Legal Traps

- Subjective or inconsistent selection criteria
- Late WARN notice or incomplete disclosure
- Noncompliant OWBPA waiver language
- Poor documentation of decision rationale



Severance Agreements

- Include: Release, confidentiality, non-disparagement, non-admission
- Must meet OWBPA standards for validity
- Avoid vague or coercive language

Integrating WARN and OWBPA

- Step 1: Determine WARN applicability
- Step 2: Coordinate with severance timing
- Step 3: Ensure consistent messaging and disclosure
- Step 4: Track review and revocation periods

Communication Best Practices

- Clear, transparent messaging minimizes litigation risk
- Provide FAQs and designated HR contact
- Offer outplacement support to preserve morale
- Do you need crisis PR help?
- Consider attorney-client privilege issues

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Workforce Transitions and Legal Traps: Navigating RIFs, OWBPA, and WARN

Kevin M. Ceglowski
November 5, 2025

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Benefit Plan Governance: From Fiduciary Fundamentals to Best Practices

Benefit Plan Governance: From Fiduciary Fundamentals to Best Practices



Kara Brunk

November 5, 2025

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Benefit Plan Governance

- ERISA Fiduciary Status
- Fiduciary Duties Overview
- Hot Topics
- Best Practices

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ERISA FIDUCIARY STATUS

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Who is a Fiduciary?

Two types of fiduciaries for ERISA purposes:

1. Named Fiduciaries
2. Functional Fiduciaries

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Who is a Fiduciary (cont'd)?

1. Named Fiduciaries

- ERISA requires that every plan have one or more “named fiduciaries” designated by the plan with general authority for plan operation and administration
- Named Fiduciaries are fiduciaries by designation and definition (e.g., Plan Sponsor, Plan Administrator)
- Named Fiduciaries are personally liable for all aspects of plan operation unless duties properly delegated to another fiduciary or co-fiduciary

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Who is a Fiduciary (cont'd)?

2. Functional Fiduciaries

- ERISA employs a functional test - fiduciary status determined based on functions performed rather than title or position
- Functional Fiduciaries include anyone exercising:
 - authority or control over plan assets;
 - discretionary authority over the plan's management; and
 - discretionary authority or responsibility in the plan's administration.
- Settlor vs. Fiduciary

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Who is a Fiduciary (cont'd)?

Fiduciaries generally include the:

- Plan administrator
- Investment committee members
- Investment manager
- Trustee

Specific to Each Employer/Plan

- Consider governance structure
 - Who is the plan sponsor?
 - Differentiating between fiduciary and settlor responsibilities
 - Who is the plan administrator?
 - Is there a committee?

Specific to Each Employer/Plan (cont'd)

- Investment Authority
 - Has investment authority been delegated? Is there a 3(21) or 3(38)?
- Claims Authority
 - Does a third-party have discretion with respect to claims? (Common to ASOs)

Example - Employer ABC, Inc.

Plan Name	401(k) Plan	Pension Plan	NQDC Plan	Welfare Plan
Plan Administrator	Retirement Committee	Retirement Committee	Retirement Committee	Plan Sponsor *Third-party claims administrator
Investment Manager / Advisor	3(38) Investment Manager	3(38) Investment Manager	Follows 401(k) Plan	N/A
Trustee	Third-Party	Third-Party	N/A	N/A

FIDUCIARY DUTIES OVERVIEW

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Take-Aways

- What is required of fiduciaries is prudence, not perfection
- The hallmark of a prudent fiduciary is a prudent process

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ERISA Fiduciary Duties

- ERISA fiduciary duties are “the highest known to the law”
- The Big Four Fiduciary Duties:
 - Duty of Loyalty (Exclusive Benefit Rule)
 - Duty of Procedural Prudence
 - Duty to Diversify Investments
 - Duty to Follow Plan’s Terms (consistent with ERISA)

ERISA Fiduciary Duties (cont’d)

Other General ERISA Fiduciary Duties

- Establish and maintain a trust for plan assets
- Obtain fidelity bond covering all persons handling plan assets
- Follow strict code of conduct avoiding self-dealing, conflicts of interest, and other “prohibited transactions”
- Assume personal liability for fiduciary breaches

MONITORING INVESTMENTS

Big Picture Concerns

- Are the plan assets safe and are they still appropriate?
- Are plan participants receiving appropriate communications?
- Is plan governance in place?
- Should any changes be made to the plan's investment strategy or investments?

Overview of Steps

- Determine objectives
- Develop investment strategy
 - Consider plan architecture
- Hire Investment Manager
 - Duty to monitor co-fiduciaries
- Adopt an Investment Policy Statement
 - ERISA requires a plan to have a procedure for establishing and carrying out a funding policy

Overview of Steps (cont'd)

- Monitor investments/investment options
- Take appropriate action
- Coordinate decisions with plan recordkeeper
- Document decisions

TRENDING TOPIC 1

HOT BUTTON INVESTMENTS

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ESG Considerations

- Potential fiduciary liability is not limited to selection of ESG
- ERISA plan fiduciaries have a duty to monitor service providers

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Alternative Asset Investments

- August 7, 2025 Executive Order
 - Policy shift to expand investment options for participants in employer-sponsored defined contribution plans to allow for investment in “alternative assets”
 - Directs the DOL to reexamine its guidance regarding fiduciary decisions around alternative assets, including providing safe harbors and prioritizing actions that may curb ERISA litigation
- Biden DOL previously cautioned against these investments (that statement has been rescinded)

MONITORING EXPENSES

Basic Rule

- Plan fiduciaries must monitor everything on which plan assets are spent
- “Exclusive Benefit Rule”

Primary Objectives

- It is fine for the provider to make a reasonable profit
- Plan sponsors should be able to demonstrate that fees collected by provider are:
 - Permissible according to DOL guidelines
 - Commensurate with the services being provided, and
 - In line with what’s available in the marketplace

Understand What the Plan is Paying

- Review the plan documents
 - Plan/Trust document
 - Fund prospectuses
 - Provider service and investment contracts
- Insist on full and open disclosure from the provider
- Benchmark against the market
- If you don't have the expertise, consider retaining someone who does (prudent expert rule)

Implement Ongoing Processes To:

- Monitor
 - On an ongoing basis
- Adjust
 - Appropriately
- Document activities
- Communicate with participants
 - When necessary
 - DOL may require certain information be delivered to participants

TRENDING TOPIC 2 USE OF FORFEITURES

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Participant Challenges

- Emerging theory in 2023
 - Participants challenging the use of forfeited employer 401(k) plan contributions to reduce future 401(k) plan employer contributions rather than to pay plan expenses otherwise borne by participants
- Majority of district courts have sided with the plan sponsor on motions to dismiss
 - Three cases are on appeal to the U.S. Court of Appeals for the Ninth Circuit
 - DOL weighed in, siding with the plan sponsor and noted that the plaintiff's theory misconstrues the settlor and fiduciary principles
- Court decisions continue to focus on plan language

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MONITORING OPERATIONS

Monitoring Operations

- Beyond investment and traditional fiduciary issues, don't lose sight of keeping plan working properly and qualified
- Be sure plan document terms are followed
 - Eligibility
 - Vesting
 - Loan defaults
 - Forfeitures
- Keep plan up to date with legal and regulatory requirements and changes

What the IRS is looking for:

- Late deposits of participant deferrals and loan repayments
- Failure to properly apply plan's definition of compensation
- Failure to properly update the plan document
- Failure to follow eligibility provisions
- Incorrect employer contributions
- Failure to properly apply plan's vesting provisions
- Improper use of plan forfeitures

What if there is a problem?

- IRS (and DOL) programs exist to fix them
 - SECURE 2.0 encourages self-correction
- General correction principles require that participants be put back in the position they would have been had the problem not occurred

TRENDING TOPIC 3 SECURE 2.0 FINAL CATCH-UP REGS

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Catch-up Contributions

Increased Limits (Sec. 109)

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SECURE 2.0 - “Super” Catch-up

- Effective for taxable years beginning January 1, 2025
- Increases catch-up contribution limit for individuals ages 60-63
- Increased to greater of \$10,000 or 150% of the regular catch-up amount for 2025 (indexed)

Final Regs - “Super” Catch-up

Confirms:

- There’s an exception to the usual “universal availability requirement” for “super” catch-up contributions
- “Super” catch-up is in addition to special 403(b) catch-up
- Plan amendment should expressly provide for “super” catch-ups



Catch-up Contributions

Roth Requirement (Sec. 603)

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SECURE 2.0 - Roth Catch-ups

- Effective for taxable years beginning January 1, 2024~~25~~²⁶
- Catch-up contributions must be made as Roth contributions for “high earners”
- Applies to employees with FICA wages of \$145,000 (indexed) or more in the previous year

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Final Regs - Roth Catch-ups

- Must implement effective January 1, 2026
 - Good faith standard applies prior to January 1, 2027
- Confirmed a few points that were in the proposed regs:
 - If no Roth feature, no requirement to add, but then no “high earner” catch-ups
 - Can’t require all participant catch-ups be Roth
 - Participants who do not have FICA wages (e.g., K-1) are exempt
 - Plans can “deem” pre-tax catch-ups to be Roth

Final Regs - Roth Catch-ups (cont'd)

- Added new points:
 - Allows, but does not require, wage aggregation for employers within controlled group (document process)
 - Authorizes correction methods for “separate election plans”
 - Do not need to recharacterize as pre-tax if not actually a catch-up
- Governmental 457(b) plans, final 457(b) regs still under consideration and Roth catch-up requirement to be addressed then

Final Regs - Roth Catch-ups (cont'd)

- New Correction Methods
 - Form W-2 Correction Method
 - In-Plan Roth Rollover Method
- Must apply consistently
- Deadlines to correct

TRENDING TOPIC 4 USE OF AI IN ADMINISTRATION

Potential Bias and Limited Oversight

- Third-party administrators implementing AI for eligibility and claim determinations
- Limitations includes:
 - Bias
 - Limits to competence and accuracy
 - Restricted oversight (can't see under the hood)

BEST PRACTICES

Best Practices

- Hold regularly scheduled committee meetings (quarterly)
- Have a process for selecting/monitoring investments and reviewing fees
 - Investment Policy Statement (IPS)
 - Request for proposal (RFP) every 3-5 years; request for information (RFI) more frequently
- Document the process
 - Committee minutes

Questions?



Benefit Plan Governance: From Fiduciary Fundamentals to Best Practices



Kara Brunk

November 5, 2025

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Concerted Activities: What Employee Conduct is Legally Protected?



Concerted Activities: What Employee Conduct is Legally Protected?



Nelson A. McKown
November 5, 2025

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Current State of the NLRB



David Prouty
Only sitting member of the
National Labor Relations Board



William Cowen
Acting General Counsel of the
National Labor Relations Board

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2



Since President Trump's election in November 2024, the National Labor Relations Board ("Board" or NLRB) has undergone significant changes. These changes started to take effect even before President Trump took office. On December 11, 2024, the U.S. Senate rejected President Biden's nomination to reconfirm the then current NLRB Chair Lauren McFerran. McFerran's failed reconfirmation left the NLRB with two Democrats (Gwynne Wilcox and David Prouty), one Republican (Marvin Kaplan), and two vacancies.

The NLRB is made up of 5 members who are appointed by the President and they each serve on staggered 4-year terms. Typically, Democratic Boards favor unions more and Republican Boards favor employers more, so there is always a change in labor law when a new party takes over the White House.

When President Trump came into office there were two Democratic appointees and one Republican appointee. A week after the inauguration, President Trump terminated the Board's General Counsel ("CG") Jennifer Abruzzo, which was not a surprise, and it is what President Biden did to President Trump's former GC Peter Robb. But what was surprising is that President Trump also fired Board

Member Gwynne Wilcox in the middle of her term. Whether or not the President has authority to remove a Board member without cause is currently pending before the Supreme Court, but this move left the Board with two members, which means it lacked a quorum.

When the Board lacks a quorum, it essentially means it is shut down until it regains at least 3 members. Without a quorum the Board cannot issue decisions, set or overturn precedent, or enforce certain subpoenas. Regional offices do continue to handle initial case proceedings, including intake, investigations, and holding union elections.

For employers, the Board lacking a quorum is a mixed bag. On the one hand, the NLRB lacking authority to issue decisions can delay rulings that could have been unfavorable to employers with pending cases. On the other hand, the Board is unable to change employee-friendly precedent that came through over the past four years. Like the *Cemex* case, which was the focal point of our presentation last year.

A few months ago, Board member Marvin Kaplan's term expired, and that leaves David Prouty as the only current serving member of the Board.

After GC Abruzzo was terminated, President Trump appointed William Cowen as Acting GC of the Board. Cowen is a longtime NLRB employee and is a former Board member appointed by George W. Bush.

President Trump has since appointed Scott Mayer, who is currently the Chief Labor Counsel for Boeing and James Murphy, a career NLRB lawyer for two of the open seats on the Board. He also has appointed Crystal Carey, a defense attorney at Morgan Lewis to serve as the Board's GC. Carey and Murphy have made it through the first rounds of Senate confirmation hearings, however, there is more uncertainty with Scott Mayer, given Boeing's recent strike activity and his involvement in the disputes as Boeing's Chief Labor Counsel.

Shift in Policies & Enforcement

Revoked GC Memos

- GC 23-08 & 25-01 (non-compete & “stay-or-pay” agreements)
- GC 22-06, 24-04, 21-06, & 21-07 (unfair labor practice remedies)
- GC 21-05 (injunctions)
- GC 22-02 (injunctive relief for unlawful threats)
- GC 23-02 (electronic monitoring)
- GC 25-04 (harmonize the NLRA with EEO laws)
- GC 21-03 (strengthening Section 7 rights)

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Earlier this year, Acting GC, William Cowen issued GC Memoranda ("GC Memo") 25-05, which rescinded more than a dozen GC Memos issued by the recently terminated GC Jennifer Abruzzo. Nearly all the rescinded GC Memos were significantly favorable to organized labor and employees. In addition to the fully rescinded Memos, GC 25-05 also rescinded 13 other GC Memos pending further guidance from the Board, signaling that the issues in these Memos will be a focal point of the new administration. GC 25-05 marks the anticipated shift to a more pro-employer Board.

While it is the Board itself that effectuates the decisions and establishes the precedent, it is the Board's GC who sets the course for the Board with the power to investigate and prosecute unfair labor practice charges, issue general guidance on key issues concerning employee and employer respective rights, provide direction to the Board's field offices in processing cases, and ultimately, serving up the cases that will allow the Board to reverse or establish precedential decisions.

- GC Cowen's initial memo revoked previously issued GC Memos 23-08 and

25-01, which asserted that offering or enforcing non-compete or “stay-or-pay” agreements, which require employees to remain employed for a certain period or face financial penalties, could violate the NLRA.

- GC Memos 22-06, 24-04, 21-06, and 21-07 all addressed procedural issues with unfair labor practice proceedings, with an eye toward enhancing remedies and strengthening enforcement.
- Memo 21-05 emphasized the use of injunctions to obtain interim relief in cases involving unlawful withdrawal of recognition, refusal to bargain, or refusal to hire cases.
- Memo 22-02 focused on securing early injunctive relief in response to unlawful threats during a union organizing campaign.
- 23-02 addressed concerns around electronic monitoring in the workplace, and how it can interfere with employees’ ability to engage in protected activity.
- Memo 25-04, provided guidance intended to harmonize the NLRA with federal equal employment opportunity laws and emphasized that employers could not rely on EEO policies or workplace rules to discipline or suppress protected concerted activity.
- Memo 21-03 focused on strengthening Section 7 rights under the NLRA and emphasized that protected employee activity does not need to be formally organized or involve multiple employees.

What is the law?

- National Labor Relations Act (“NLRA” or the “Act”)
 - Protects non-supervisor employees in the right to organize, join a union, bargain collectively, and to engage in other concerted protected activities
 - Referred to as Section 7 rights
 - Supervisors, are NOT protected by the Act
- Defines what is lawful and unlawful conduct for employees, unions, and employers

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The National Labor Relations Act or NLRA allows private sector employees the right to organize and join unions. Importantly, the Act only applies to employees, supervisors are not covered. The Act protects non-supervisor employees in the right to organize, join a union, bargain collectively, and to *engage in other concerted protected activities*. These rights are referred to as Section 7 rights.

They are NOT just rights for unionized employees

- The NLRA applies to non-supervisory employees in both union and union-free workplaces.

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This is a common misconception a lot of employers and employees have about the Act. It does not just apply to unionized workforces. Employees at both unionized and union-free workplaces have the same rights.

Employee Rights

- Section 7 of the NLRA provides:
 - Employees have the right to self-organize, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted protected activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any and all such activities except that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)

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Employees have Section 7 rights under the Act. The text of Section 7, it states in-part, “Employees have the **right to self-organize**, to **join labor organizations**, to **bargain collectively** and to **engage in other concerted protected activities . . . for the purpose of other mutual aid or protection.**”

Employees also have the right to refrain from any and all such activities. In addition to having the right to join a union, employees also have the right to refrain from joining a union and refrain from engaging in any of these activities.

Section 7 Rights

- Right to self organize, form, join, or assist a labor organization, to bargain collectively, and to engage in other concerted protected activities
- Two or more employees representing a group of employees, acting together in a lawful manner, for a common, legal, work-related goal or objective

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Section 7 rights include the right to self organize, form, join, or assist a labor organization, to bargain collectively, and to engage in other concerted protected activities. A “concerted protected activity” is when two or more employees representing a group of employees, act together in a lawful manner, for a common, legal, work-related goal or objective.

For example, in the hospital setting: if an employee comes to you and says, “I do not think the nurses make enough money. We should receive a raise.” Although only one individual employee made that statement, it is considered “concerted protected activity” because she is making a statement on behalf of the nurses. It does not matter if the other nurses wanted her to make that statement or not. The hospital could not punish that employee in any way for making that statement. This example works for any type of business when an employee is bringing a “group” issue or complaint to management.

How to determine, what activity is protected under Section 7?

- Protected Concerted Activities must be both:
 - “Concerted”
AND
 - Engaged in for the purpose of “mutual aid or protection”

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Section 7 provides employees the right to engage in protected concerted activities. Covered conduct must be **“both ‘concerted’ and engaged in for the purpose of ‘mutual aid or protection.’”**

An employer commits an unfair labor practice (ULP) if they “interfere with, restrain, or coerce employees in the exercise” of these protected rights.

Meyers I & Meyers II

- *Meyers I*
 - employee activity is “concerted” when it is “engaged in with or on the authority of others, and not solely by and on behalf of the employee himself”
- *Meyers II*
 - concerted activity “encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management”

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In 1984, the Board established a test for assessing concerted activity in *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*). In *Meyers I*, a truck driver was terminated after refusing to drive what he considered an unsafe truck and after reporting safety violations to the Ohio State Highway Patrol and the Tennessee Public Service Commission. Specifically, the driver had an accident while operating the truck he previously complained about, then after the accident, he contacted the Tennessee Public Service Commission to arrange for an inspection of the truck. After the inspection, a citation was issued, and the truck was placed out of service. The driver was terminated for his report and claimed his discharge violated Section 8(a)(1) of the Act. The Board held that the termination did not violate Section 8(a)(1) because for an employee’s activity to be deemed “concerted,” it must be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.”

The Board reasoned that the driver ALONE refused to drive the truck and trailer; he alone contacted the Tennessee Public Service Commission after the accident; and, prior to the accident, he alone contacted the Ohio authorities. Because the employee acted solely on his own behalf, it could not be said he

engaged in truly concerted activity.

A few years after the *Meyers I* decision in 1986, the Board was asked to revisit its holding. In *Meyers II*, the Board clarified that concerted activity “encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.” The Board explained that the definition of concerted activity is not exhaustive and whether an employee engaged in it is “based on the totality” of the evidence.

Under *Meyers II*, an individual employee who raises a workplace concern with a supervisor or manager is engaged in concerted activity if there is evidence of “group activities”—for example—prior or contemporaneous discussions of the concern between or among members of the workforce—warranting a finding that the employee was indeed bringing to management's attention a “truly group complaint,” as opposed to a purely personal grievance.

A Change in Standard: Alstate Maintenance Decision

An employee's individual "gripes" and complaints related to work do not amount to concerted activity merely because the complaints were uttered in the presence of other employees.

1. Statement made in a meeting to announce a decision affecting conditions of employment;
2. Decision announced affected multiple employees at the meeting;
3. Employee who spoke did so to complain about the decision, not merely to ask questions;
4. Speaking employee protested the decision's effect on the workforce, not solely its impact on the speaking employee; and
5. Meeting presented the first opportunity employees had to address the decision.

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The Board is constantly shifting its position on major issues depending on what political party is in the White House. Sometimes the Board favors unions, sometimes the Board favors employers, but really both groups are disadvantaged because the law is constantly changing.

An example of one of these shifts came in 2019, with the Board's decision in *Alstate Maintenance, LLC*, 367 NLRB No. 68 (2019). In *Alstate Maintenance*, a skycap employee at Kennedy International Airport was discharged for "gripping" about not being tipped by certain passengers. The employee was working with three other workers when he was approached by his supervisor who told him that they were needed to assist a soccer team with their equipment. The employee said, "we did a similar job a year prior, and we didn't receive a tip for it." When the equipment arrived to be loaded, the employees walked away. Each was terminated.

The Board held that individual griping does not qualify as concerted activity solely because it is carried out in the presence of other employees and a supervisor and includes the use of the first-person plural pronoun, *i.e.*, "We".

The Board also established a 5-factor test for determining whether there is a

reasonable inference that in making a statement at a meeting, in a group setting, or with other employees present, the employee was seeking to initiate, induce, or prepare for group action. The factors are:

1. The employee's statement was made in an employee meeting called by the employer to announce a decision affecting wages, hours, or some other term or condition of employment;
2. The employer's decision that was announced affected multiple employees attending the meeting;
3. The employee who spoke up in response to the announcement did so to complain about the decision, not merely to ask questions about how the decision would be implemented;
4. The speaking employee protested the decision's effect on the workforce, not solely its impact on the speaking employee; and
5. The meeting presented the first opportunity employees had to address the decision.

A Return to *Meyers I & II*

- Miller Plastics, 372 NLRB No. 134 (2023)
 - Overruled *Alstate Maintenance*
 - The “question of whether an employee has engaged in concerted activity is a factual one based on the totality of record evidence” and should not be limited by *Alstate*’s “unduly cramped” list of factors.
- TIP: Consult Counsel!

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The helpful *Alstate Maintenance* standard remained in effect for just over four years, until the Board, under President Biden, decided to reverse course and return to the fact-driven analysis under the *Meyers* cases. In *Miller Plastics*, the Board faced a similar set of facts presented in the *Alstate* case. In *Miller*, an employee claimed that he was terminated for questioning the company’s COVID-19 protocols and the employer’s decision to remain open during an all-employee meeting. During a company meeting the employee spoke up and shouted, “we shouldn’t be working” and voiced other concerns about the company’s lack of COVID precautions.

Relying on the *Alstate* decision, the employer argued that the employee’s COVID concerns were individual gripes that were not intended to induce group activity. The Board disagreed, and overruled *Alstate* and returned to the more vague and malleable standard in *Meyers I & II* which provides a factual review of “the totality of all available evidence” to determine whether the employee was engaged in Section 7 protected activity.

In *Miller Plastics*, the Board called for a broad interpretation of the claimed

concerted activity based on the context in which the complaint was made. Thus, under this new/old standard, employers will be forced to return to the opaque "totality" analysis to discern whether a complaint by a single employee or a conversation between an employee and supervisor is likely to be viewed as protected concerted activity.

Implications of Miller Plastics

- Employers must be cautious when taking disciplinary action against employees who have complained about:
 - Wages;
 - Hours; or
 - Working conditions.
- Less ability for employers to argue bright-line rules that an employee's individual concerns are not concerted activity

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Returning to the totality of the circumstances test will likely bring more employee conduct, questions, and remarks under the cover of protected activity. Additionally, even if an employee raises a concern with the employer and did not have the “intent to induce” concerted activity at the time the statement was made, the activity still could be concerted if it later sparks group action or complaints.

The totality of the circumstances test requires a much more thorough and detailed analysis of the facts of a given situation. Employers need to weigh decisions that may involve protected concerted activity very carefully.

Unfair Labor Practices By Employers

- Section 8 of the NLRA prohibits employers from interfering with, restraining or coercing employee(s) in the exercise of their Section 7 rights
- This means supervisors cannot commit any “adverse employment action” against an employee(s) for engaging in any “protected concerted activity”
 - Disciplining/terminating an employee for:
 - discussing wages with co-workers
 - discussing the “benefits” of having a union
 - making a social media post complaining about work

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Section 8 of the Act prohibits employers from interfering or restraining employees in the exercise of their Section 7 rights. Supervisors cannot undertake any “*adverse employment action*” against an employee for engaging in any “protected concerted activities.”

Unions also cannot interfere with employees’ Section 7 rights, and employees can similarly file unfair labor practice charges against unions.

Unfair Labor Practices By Employers

- Section 8(a)(4) makes it unlawful for employers to discharge or retaliate against an employee for:
 - Filing a charge with the NLRB;
 - Providing an affidavit to NLRB investigators; or
 - Testifying at an NLRB hearing.

Section 7 Rights - Protected Concerted Activity

- Sign a union authorization card
- Say they want a union
- Attend union meetings
- Wear union buttons, stickers, or T-shirts
- Post on social media about terms and conditions of employment
- Discuss (and complain about) wages, hours, benefits, or other working conditions
- Discuss the benefits of a union during work time (if other nonwork-related subjects are permissible)
- Refuse to work in unsafe conditions
- Engage in a lawful strike

**Are employees protected in
expressing or discussing
political and social justice
issues at work?**

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MAYBE?

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Protected Concerted Activity: Political & Social Justice Issues

- *Home Depot, USA*, 373 NLRB No. 25 (2024)
 - Black Lives Matter marking was protected concerted activity
 - An individual employee's action is "concerted" if it is a "logical outgrowth" of employees' prior or ongoing protected concerted activity

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Early last year, the Board expanded the types of messages employees are permitted to display in the workplace in the *Home Depot* case.

In that case, the Board found that Home Depot violated the Act when a management employee told a sales specialist in its flooring department that he had to remove his "BLM" marking from his standard orange Home Depot apron. Importantly, this was not an employee in a warehouse, this was a customer-facing employee. Home Depot had a dress code policy that prohibited "displaying causes or political messages related to workplace matters." Because of this policy, the employee was asked to remove the marking, which he refused to do. The employee's manager informed him that he could not work with the marking on his apron, and two days later the employee resigned noting "ongoing racial harassment and discrimination during his employment."

At the beginning of the employee's employment, he and several other employees complained to management about racial harassment from a supervisor and the vandalism of a Black History Month poster in the employee breakroom. Following this conduct the employee placed the BLM marking on his apron.

The Board relied on the "logical outgrowth theory" and held that the employee's

individual activity of wearing a BLM marking on a Home Depot apron was an extension of prior workplace complaints about racial discrimination that began shortly after the employee started working six months prior. Therefore, wearing the marking was protected concerted activity under Section 7.

To be protected under Section 7 the activity needs to be (1) concerted and (2) engaged in for the purpose of “mutual aid or protection.” The Board held an individual employee’s actions are ‘concerted’ within the meaning of Section 7 if there is a ‘logical outgrowth’ of employees’ prior or ongoing protected concerted activity.”

In *Home Depot*, the Board held the employee’s refusal to remove the “BLM” marking was “concerted” because it was closely linked to the prior complaints about racial discrimination. Additionally, the actions were for “mutual aid or protection” when the employees discussed concerns about the racially discriminatory conduct towards black employees with management.

Home Depot, USA, cont.

- The Board rejected Home Depot’s “special circumstances” defense
- Member Kaplan’s Dissent
 - Disagreed that the marking was “concerted” or for “mutual aid or protection”
 - “logical outgrowth theory” is not applicable absent a “plainly evident” connection

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Home Depot argued in defense that even if the Act protected the BLM marking, “special circumstances” allowed for the company to instruct the employee to remove what it considered a controversial message. Home Depot raised concerns of public image, employee safety, and employee dissension in support of its decision. The Board’s majority rejected each of these arguments, explaining that (1) Home Depot allowed some personalization of the aprons, (this goes back to the earlier example of the Duke and UNC buttons on uniforms), (2) there was also no concrete, imminent safety risk from customers, and (3) employee conflict was not a sufficient concern absent obscene or objectively offensive language.

The lone Republican appointee on the Board at the time, Marvin Kaplan dissented from the opinion because he felt the BLM marking was not “concerted” or for “mutual aid or protection” and therefore, Home Depot should have been able to legitimately direct the employee to remove the marking. He reasoned that the logical outgrowth theory is not applicable absent a “plainly evident” connection between protected, concerted activity and the challenged activity, which Kaplan found was lacking in this case. He also reasoned that

Black Lives Matter is a global organization that is not focused on workplace discrimination issues, but rather community, political, and societal issues, specifically police brutality.

Takeaways from *Home Depot*

- Workplace activity connected to a societal or political cause could be subject to the NLRB's protection where it has ANY temporal or subjective connection to ANY workplace complaint or dispute

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Under the *Home Depot* ruling, employers faced with any workplace complaint, even if only a single employee is involved, must account for the potential that the Board will deem purely individual employee activity as protected.

Also, workplace activity linked to societal or political causes are now subject to labor law protection where they have any temporal or subjective connection to a workplace complaint or dispute. Employers should expect the Board to reject most “special circumstances” justifications for restricting employee messaging or other activities even in customer-facing areas.

Social Media Postings

- Employee social media posts about wages, hours, and other terms and conditions of employment ARE typically protected

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Employee social media posts that discuss wages, hours, and other terms and conditions of employment are protected if they are concerted and engaged in for mutual aid or protection. Importantly, the Board has consistently held that concerted activity directed toward supervisory conduct, such as “rude, belligerent, and overbearing behavior” which directly affects the employees' work, constitutes protected activity under the Act. *Arrow Electric Co.*, 323 NLRB 968, 970 (1997).

Social Media Postings

- Pier Sixty LLC, 362 NLRB 505 (2015)
 - When does “abusive” conduct towards employers on social media lose its protection?
 - Totality of the circumstances test
 - 9 factors

Pier Sixty LLC Factors

1. Whether the record contained any evidence of the employer's hostility toward the protected activity;
2. Whether the employer provoked the employee's conduct;
3. Whether the employee's conduct was impulsive or deliberate;
4. The location of the employee's post;
5. The subject matter of the post;
6. The nature of the post;
7. Whether the employer considered language similar to that used by the employee to be offensive;
8. Whether the employer maintained a specific rule prohibiting the language at issue; and
9. Whether the discipline imposed was typical for similar violations.

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In the case, *Pier Sixty*, was a catering service company in New York that was undergoing a union organizing campaign. The campaign started in part because of concerns that management repeatedly treated the employees disrespectfully and in an undignified manner. Two days before the union election, a supervisor named Bob approached three servers and yelled at them during an event to “spread out” and stop chitchatting. Bob, the supervisor, made the statement in front of guests. After this incident, one of the servers that was yelled at took a break and made a posting on his personal Facebook page, which was visible to his Facebook “friends,” which included some co workers.

**“Bob is such a NASTY
MOTHER F*CKER don’t know
how to talk to people!!!!!!
F*ck his mother and his
entire f*cking family!!!!
What a LOSER!!!! Vote YES
for the UNION!!!!!!”**

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YES!!! Protected!!!

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The Board held that the posting was directed at the supervisor who mistreated him and sought redress through the upcoming union election, so it was protected concerted activity. Surprisingly, the Board found that the comments were not so egregious as to exceed the Act's protection and all 9 of the factors weighed in the employee's favor. The Board found the employer was hostile towards the employees' union activity, the employee found the supervisor's comments in front of guests disrespectful, and the employee's reaction was impulsive. Importantly, the Board found that the comments did not interrupt the employer's work environment or its relationship with its customers and the overwhelming evidence established that profanity was tolerated throughout the workplace. Given the totality of the circumstances, the Board held the employee's termination was unlawful.

Examples of Concerted Activity that is NOT Protected

- The NLRA does NOT protect employees who engage in:
 - Secondary boycotts
 - Work slow-downs or intermittent strikes
 - Picket-line violence

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The Act generally prohibits employers from retaliating against employees for engaging in concerted activity. However, not all concerted activity is protected by the Act. For example, the Act does not protect employees who engage in:

- Secondary boycotts, (which is a pressure tactic where a union boycotts a neutral third-party company that does business with the employer involved in the labor dispute). For example, a union is on strike against a construction contractor. The union then urges the public to boycott a different, neutral company that provides building materials to the construction contractor. The goal is to pressure the neutral company to stop doing business with the construction contractor, which in turn pressures the construction contractor to cave in to what the union wants. This is an unlawful secondary boycott and violates Section 8(b)(4) of the Act.
- Work slow-downs or intermittent strikes. A work slow-down is where employees refuse to work on certain assigned tasks while still accepting pay or while remaining on the employer's property. That is referred to as a partial strike, and it is unprotected. The Act allows employees to withhold labor in a full strike, but not partial intermittent strikes or work slowdowns. The reason is the employees are exerting economic pressure on the employer while still being paid and without risking their full job loss.
- Picket-line violence is not protected.

What else can interfere with Section 7 rights?

Stericycle, 372 NLRB No. 113 (2023)

- Overly broad rules, policies and practices that reasonably chill the exercise of Section 7 rights are UNLAWFUL
- Rule or policy that is ambiguous as to Section 7 application and contains no limiting language or context that clarifies otherwise is UNLAWFUL

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Employers need to revisit their work rules and policies in their employee handbooks to ensure noting chills employees in the exercise of their Section 7 rights. The Board’s decision in the *Stericycle* case allows employers to promulgate and maintain workplace rules only as long as they are narrowly tailored to “advance legitimate and substantial business interests,” and minimize the risks of interfering with workers’ rights to act collectively.

A policy or rule is presumptively unlawful to maintain if an employee could reasonably interpret it to have a coercive meaning that in any way limits Section 7 rights to engage in concerted activity.

The Board looks closely at confidentiality, non-disparagement, and social media policies to determine if they “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.”
- Employers 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.

Tips and Final Thoughts

- When determining whether an employee's activity is protected under Section 7, the conduct must be “both ‘concerted’ and engaged in for the purpose of ‘mutual aid or protection.’”
 - Concerted- engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself
 - Mutual aid or protection- employee(s) involved are seeking to improve terms and conditions of employment or otherwise improve their lot as employees



Concerted Activities: What Employee Conduct is Legally Protected?



Nelson A. McKown
November 5, 2025

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EEO Update

EEO UPDATE



Zebulon D. Anderson

November 5, 2025

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EEOC DEVELOPMENTS

Administrative Statistics

- Volume

- FY 2024 = 88,531 charges
- 9% ↑ and largest volume since FY 2016
- Retaliation has remained most common claim for over a decade - close to 50% of all charges include this claim
- Second most common is disability at around 40% of all charges
- Large increase in charges under the relatively new Pregnant Workers Fairness Act (from 188 to 2,729)
- Cause finding in only 2.1% - essentially unchanged
- Employees recovered \$469M - the most ever

Administrative Statistics (cont.)

- Location

- FY 2024: NC - remains almost 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 2024 - 111 new merits lawsuits filed by EEOC
 - 29% decrease from FY 2023
 - Not surprising given a change in administration
 - About 31% of the lawsuits sought relief for multiple people
 - 72% of the lawsuits involved termination claims; 35% involved harassment claims; 29% involved disability accommodation claims; and 19% involved hiring claims
 - Much less EEOC litigation than 10-15 years ago
 - When EEOC pursues litigation, its results are successful
 - 97% success rate (settlements and jury verdicts)
 - Litigation resolutions: 132 cases (96% ended with settlement) for \$40.4M benefitting 4,304 people - significant increase from prior year

Systemic Statistics

- Systemic cases have been an 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 2024
 - Systemic charges: far more likely to result in “cause” determination
 - New lawsuits: 32% are systemic or multi-party - a notable decrease (see later discussion)
 - Active lawsuits: 42% systemic or multi-party
 - 100% litigation success rate (settlement and verdict) = \$23.9M for 4,074 people
 - EEOC litigation in recent years has been *heavily* focused on systemic and multi-party cases, but that may be changing

Systemic Examples in 2024

- *EEOC v. DHL Express (USA), Inc.*, No. 1:10-cv-06139 (N.D. Ill. Apr. 24, 2024)
 - In 2010, the EEOC alleged that a package delivery service discriminated against a class of 83 Black delivery drivers with respect to terms and conditions of employment, in violation of Title VII.
 - The discrimination included assigning Black drivers more dangerous and demanding routes and more arduous dock work, and segregating drivers based on race.
 - The four-year consent decree provided \$8.7 million to the aggrieved individuals, enjoined retaliation and segregation of employees based on race or on the racial demographics of the assigned delivery areas, and required periodic reporting, annual training on race discrimination, and notice posting.
 - **Note that litigation with the EEOC can be slow and costly.**

Systemic Examples in 2024 (cont.)

- *EEOC v. Sunshine Raisin Corp. d/b/a National Raisin Company and Real Time Staffing Services, LLC d/b/a Select Staffing*, No. 1:21-cv-01424 (E.D. Cal. Mar. 12, 2024 & July 24, 2024):
 - In this Title VII lawsuit, the EEOC alleged that a dried fruit manufacturer and a company that provides temporary and direct placement employment services subjected three Charging Parties and a class of mostly monolingual Spanish-speaking female agricultural production workers to sexual harassment, discharged one of the Charging Parties in retaliation for her complaint about being sexually harassed, and constructively discharged another Charging Party.
 - Charging Parties and the class of aggrieved individuals were assigned to National Raisin by Select Staffing and were subjected to ongoing sexual harassment for years by a male National Raisin coworker.
 - The harassment included groping and touching of private parts, kissing, inappropriate and unwelcome comments, requests for sex and dates, and intimidation and threats. Defendants ignored complaints about the male harasser for years.
 - The three-year decree with National Raisin provides for \$2 million in monetary relief, and the three-year consent decree with Real time Staffing provides for \$500,000.
 - **Note that using a staffing agency does not insulate you from liability.**

Systemic Examples in 2024 (cont.)

- *EEOC v. Lilly USA, LLC and Eli Lilly & Co.*, No. 1:22-1882 (S.D. Ind. Oct. 10, 2023)
 - In this ADEA lawsuit, the EEOC alleged that a pharmaceutical company engaged in a nationwide pattern or practice of refusing to hire individuals 40 years or older for the position of pharmaceutical sales representative because of age.
 - In 2017, Lilly's Senior Vice President for Human Resources and Diversity announced that, going forward, the company would have a goal of 40% "early career hiring" as part of an effort to increase the number of millennials in the company's workforce.
 - Thereafter, Lilly managers nationwide altered their hiring practices in favor of younger candidates for sales representative positions.
 - The two-and-a-half-year consent decree provides for \$2.4 million to 1,980 aggrieved individuals and enjoins rejecting applicants for sales representative positions because of age.
 - **Note that words matter.**

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Single Plaintiff Trial Example 2024

- *EEOC v. McLane Company*, No. 5:20-cv-1528 (N.D.N.Y. Feb. 9, 2024):
 - The EEOC alleged that a supply chain services company violated the ADA by failing to interview and hire Charging Party, who is deaf, because of her disability.
 - Charging Party applied for two warehouse positions, and, on the same day, defendant left a message for Charging Party about her applications. Charging Party returned defendant's call using a Telecommunications Relay Service, which uses an operator to facilitate telephone calls between people with hearing or speech disabilities and others, and during this call, defendant became aware of Charging Party's disability.
 - Although defendant indicated to Charging Party that someone would call her back to discuss the positions, the following day, defendant rejected her application and continued to seek employees.
 - After a four-day trial, the jury found in favor of EEOC and awarded Charging Party \$25,000 for lost wages and benefits, \$150,000 for non-pecuniary compensatory damages, and \$1.5 million in punitive damages, for a total of \$1.675 million.
 - In a post-trial ruling, the court reduced the combined compensatory and punitive damages to the statutory cap of \$300,000.
 - **Note that even when alleged wage loss is low, trials are dangerous and damages can be high.**

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EEOC Composition

Status at end of 2024

- 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

EEOC Composition

2025 Changes

- General Counsel
 - Karla Gillbride - D - Confirmed October 2023 and term ends October 2027
 - **Fired in January 2025**
 - **Andrew Rogers - R - Acting GC, but leaving for role at DOL Wage & Hour Division**
 - **Catherine Eschbach - R - new Principal Deputy GC**
 - **New GC role is vacant**
- Five Commissioners
 - Kalpana Katagul - D - Confirmed August 2023 and term ends July 2027
 - **Brittany Panuccio - R - Confirmed October 2025 and term ends July 2029**
 - Andrea Lucas - R (**Named acting Chair January 2025**) - **Confirmed August 2025 (for second term) and term ends July 2030**
 - Charlotte Burrows (Chair) - D - Confirmed August 2019 and term ends July 2028
 - **Fired January 2025- unprecedented - considering legal action**
 - Jocelyn Samuels (Vice-chair) - D - Confirmed September 2020 and term ends July 2026
 - **Fired January 2025 - unprecedented - has filed lawsuit**

EEOC Composition

What does this Mean

- The EEOC had only two members (and no quorum) from January to October, which limited its ability to implement new rulemaking, adopt or rescind published guidance, or authorize litigation that departed from precedent or prior EEOC positions.
- Now that the quorum has been restored (3 of 5 slots filled), we anticipate that the Trump Administration will take steps to advance its administrative agenda
- Acting Chair Lucas's published EEOC bio gives a sense of what that agenda will look like at the EEOC:
Acting Chair Andrea R. Lucas understands that our nation's civil rights laws reject identity politics and instead focus on individual rights and equality. She prioritizes evenhanded enforcement of civil rights laws for all Americans, including by **rooting out unlawful DEI-motivated race and sex discrimination; protecting American workers from anti-American national origin discrimination; defending the biological and binary reality of sex and related rights**, including women's rights to single-sex spaces; **protecting workers from religious bias and harassment**; and remedying other areas that have been historically under-enforced by the agency.

EEOC Announcements

- Executive Order 14168 (January), "Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government": <https://www.whitehouse.gov/presidential-actions/2025/01/defending-women-from-gender-ideology-extremism-and-restoring-biological-truth-to-the-federal-government/>
 - "Across the country, ideologues who deny the biological reality of sex have increasingly used legal and other socially coercive means to permit men to self-identify as women and gain access to intimate single-sex spaces and activities designed for women, from women's domestic abuse shelters to women's workplace showers. This is wrong."
 - "It is the policy of the United States to recognize two sexes, male and female. These sexes are not changeable and are grounded in fundamental and incontrovertible reality. Under my direction, the Executive Branch will enforce all sex-protective laws to promote this reality"
 - The Attorney General shall issue guidance to ensure the freedom to express the binary nature of sex and the right to single-sex spaces in workplaces In accordance with that guidance . . . the General Counsel and Chair of the Equal Employment Opportunity Commission . . . shall prioritize investigations and litigation to enforce the rights and freedoms identified.
 - The EEOC "shall promptly rescind" the 2024 "Enforcement Guidance on Harassment in the Workplace".

EEOC Announcements

- January 28, 2025 EEOC Press Release:
 - Stated that the EEOC was taking what actions were possible to comply with the Executive Order
 - Removed materials promoting “gender ideology”
 - Explained that certain actions could not be taken because no quorum
 - The 2024 Harassment Guidance could not yet be rescinded but noted that Acting Chair Lucas voted against it.
 - The 2024-2028 Strategic Enforcement Plan could not yet be rescinded but noted that Acting Chair Lucas voted against it.
 - Noted that Acting Chair Lucas was opposed to guidance that took the enforcement position that harassing conduct under Title VII includes “denial of access to a bathroom or other sex-segregated facility consistent with [an] individual’s gender identity” and that harassing conduct includes “repeated and intentional use of a name or pronoun inconsistent with [an] individual’s known gender identity.”
 - February 2025: EEOC asked courts in six cases to dismiss transgender discrimination claims that it had been pursuing.

EEOC Announcements

- Enforcement Guidance on Harassment in the Workplace
 - April 29, 2024
 - <https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace>
 - Almost certainly will be rescinded before the year is over

EEOC Announcements

EEOC Strategic Enforcement Plan: FY 2024 - 28

1. Eliminating barriers in recruitment and hiring
 - E.g., improper use of AI
2. Protecting Vulnerable workers
 - E.g., immigrant and migrant workers and LGBTQI+ individuals
3. Selected emerging and developing issues
 - E.g., addressing discrimination influenced by or arising as backlash in response to local, national, or global events
4. Advancing Equal Pay for all workers
5. Preserving access to the legal system
6. Preventing and remedying systemic harassment

Almost certainly will be rescinded before the year is over

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EEOC Announcements

- February 19, 2025 EEOC Press Release:
 - “The EEOC is putting employers and other covered entities on notice: if you are part of the pipeline contributing to our immigration crisis or abusing our legal immigration system via illegal preferences against American workers, you must stop. The law applies to you, and you are not above the law. The EEOC is here to protect all workers from unlawful national origin discrimination, including American workers.”
 - “The EEOC will help deter illegal migration and reduce the abuse of legal immigration programs by increasing enforcement of employment antidiscrimination laws against employers that illegally prefer non-American workers.”
 - “Employers have many excuses for why they may prefer non-American workers, but none of these are legally permissible reasons to violate Title VII”: (i) lower cost labor, (ii) a workforce that is perceived as more easily exploited, (iii) customer preference, and (iv) biased perceptions that foreign workers have a better work ethic than American workers. “The EEOC is going to rigorously enforce the law to protect American workers from national origin discrimination.”

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EEOC Announcements

- March 5, 2025 EEOC Press Release:
 - “Today, EEOC Acting Chair Andrea Lucas promised to hold accountable universities and colleges which have created a hostile-work environment for their Jewish employees.”
- March 17, 2025 EEOC Press Release:
 - “Today, [EEOC] Acting Chair Andrea Lucas sent letters to 20 law firms requesting information about their diversity, equity and inclusion (DEI) related employment practices. Based on publicly available information, the letters note concerns that some firms’ employment practices, including those labeled or framed as DEI, may entail unlawful disparate treatment”
- April 3, 2025 EEOC Press Release:
 - Described a pending lawsuit in MDNC in which the EEOC sued the employer “for failing or refusing to hire male applicants who applied to non-managerial front-of-house positions”
 - Announced that it was “inviting male job applicants who were not hired by [the employer] to contact the federal agency for possible inclusion in a sex discrimination case.”

EEOC Announcements

- March 19, 2025 EEOC Press Release:
 - EEOC and DOJ “released two technical assistance documents focused on educating the public about unlawful discrimination related to ‘diversity, equity, and inclusion’ (DEI) in the workplace.”
 - “What to do if you Experience Discrimination Related to DEI at Work”(<https://www.eeoc.gov/what-do-if-you-experience-discrimination-related-dei-work>): encourages workers who suspect that they have experienced “DEI-related discrimination” to contact the EEOC
 - “What you Should Know about DEI-Related Discrimination at Work”(<https://www.eeoc.gov/wysk/what-you-should-know-about-dei-related-discrimination-work>): provides a Q&A about potential DEI-based discrimination
 - “Under Title VII, DEI initiatives, policies, programs, or practices may be unlawful if they involve an employer or other covered entity taking an employment action motivated—in whole or in part—by an employee’s or applicant’s race, sex, or another protected characteristic.”
 - “Far too many employers defend certain types of race or sex preferences as good, provided they are motivated by business interests in ‘diversity, equity, or inclusion.’ But no matter an employer’s motive, there is no ‘good,’ or even acceptable, race or sex discrimination.”

EEOC Announcements

- Executive Order 14281 (April), “Restoring Equality of Opportunity and Meritocracy”:
<https://www.whitehouse.gov/presidential-actions/2025/04/restoring-equality-of-opportunity-and-meritocracy/>
 - “A bedrock principle of the United States is that all citizens are treated equally under the law. . . . But a pernicious movement endangers this foundational principle, seeking to transform America’s promise of equal opportunity into a divisive pursuit of results preordained by irrelevant immutable characteristics, regardless of individual strengths, effort, or achievement. A key tool of this movement is disparate-impact liability, which holds that a near insurmountable presumption of unlawful discrimination exists where there are any differences in outcomes in certain circumstances among different races, sexes, or similar groups, even if there is no facially discriminatory policy or practice or discriminatory intent involved, and even if everyone has an equal opportunity to succeed.
 - “It is the policy of the United States to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible to avoid violating the Constitution, Federal civil rights laws, and basic American ideals.”
 - “Given the limited enforcement resources of executive departments and agencies (agencies), the unlawfulness of disparate-impact liability, and the policy of this order, all agencies shall deprioritize enforcement of all statutes and regulations to the extent they include disparate-impact liability”

EEOC Announcements

- May 20, 2025 EEOC Press Release
 - “You also should be aware that President Trump recently issued an executive order titled “[Restoring Equality of Opportunity and Meritocracy](#).” That order directed all agencies, including the EEOC, to deprioritize “disparate impact” enforcement—that is, investigations and lawsuits that challenge neutral practices that have unequal outcomes based on race, sex, or other protected characteristics—and also revoked prior Presidential approvals of certain disparate-impact regulations. The EEOC is an executive branch agency, not an independent agency. We will fully and robustly comply with this and all Executive Orders. Under my leadership, the EEOC will prioritize remedying intentional discrimination claims.”
 - “In addition, please note that under existing law, the fact that a neutral employment policy or practice has an unequal outcome on employees of a particular race or sex—that is, has a ‘disparate impact’ based on race or sex—does not justify your company or organization treating any of your employees differently based on their race or sex.”

EEOC Announcements

- Since that date, the EEOC appears to have taken steps to stop enforcing claims based on disparate impact theories and has sought to dismiss pending claims based on such theories (and recently the EEOC has been sued for taking this approach)
- This is a noteworthy change from its past practices
 - Systemic Discrimination has been an EEOC focus for over a decade, and disparate impact claims often have a systemic impact - so, will this necessarily mean a decreased focus on system discrimination?
 - Using AI in connection with hiring decisions has been challenged under disparate impact theory, but EEOC is getting out of that business now

EEOC Announcements

- August 22, 2025 EEOC Press Release
 - Described the EEOC religious discrimination activities under the new Administration
 - “During the previous administration, workers’ religious protections too often took a backseat to woke policies. Under my leadership, the EEOC is restoring evenhanded enforcement of Title VII—ensuring that workers are not forced to choose between their paycheck and their faith.”
 - Identified the following as area of success:
 - Challenging vaccine mandates
 - Enforcing religious accommodation obligations
 - Securing a \$21M settlement from Columbia University for alleged religious discrimination and harassment
 - Acting Chair Lucas serving on a task force to “Eradicate Anti-Christian Bias in the federal government”
 - We already have seen an increase in religious discrimination litigation being initiated by the EEOC

What does this mean?

- The Trump Administration has taken the position that the EEOC is an Executive Agency, not really a bi-partisan agency, and that it can be used to implement Executive policies
- The EEOC Press Releases and public statement from Acting Chair Lucas make clear that:
 - Religious discrimination, including accommodations because of religion, will be an EEOC priority, and the EEOC likely will find Title VII violations when employers fail to provide a religious accommodation
 - LGBTQ+ claims have been de-prioritized; the EEOC has ceased to prosecute pending transgender discrimination claims; and the EEOC is unlikely to bring such claims in the future
 - The EEOC actively is pursuing claims for DEI policies and practices that it believes are unlawful, and any RFI requests for DEI policies are a huge red flag
 - The EEOC actively is pursuing claims for national origin discrimination on behalf of American citizens
 - The EEOC actively is pursuing claims of “reverse discrimination” (e.g., sex discrimination claims brought by men)
 - The EEOC intends to wade back into bathroom issues, reversing prior positions
 - The EEOC will not be pursuing disparate impact claims

What does this mean?

- Up to now, because of the absence of a quorum at the EEOC, most of the EEOC’s efforts in support of these policy initiative have been passive - declining to take various actions
- Now that it has a quorum, we anticipate more direct activity, including the rescission of prior EEOC guidance and policies inconsistent with the Administration’s initiatives and the adoption of new guidance and policies that support those initiatives
- Despite the foregoing, it is very important to keep in mind that:
 - The EEOC (and the President) cannot change the law: So, for example, while Executive Order 14168 announces Executive policy on gender issues, it does not overrule Supreme Court precedent that discrimination because of sex include discrimination because of sexual orientation
 - So, for example, even if the EEOC declines to pursue transgender discrimination claims and simply issues RTS notices, those charging parties still can pursue such claims in federal court, and those courts are bound by legal precedent
 - In other words, these developments tell employers what is important to the EEOC and what are danger zones if you want to avoid a federal investigation, but they do not change legal obligations that employers owe to employees under federal law
 - None of this impacts state employment laws, which may have broader, different, or even conflicting provisions
 - In short, it just made everything more complicated

SCOTUS

SCOTUS (Ames)

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- *Ames v. Ohio Department of Youth Services*, 605 US ____ (2025)
 - In 2004, Defendant hired Ames, a heterosexual woman, to serve as an executive secretary
 - Eventually, she was promoted to program administrator
 - In 2019, she applied for a newly created management position
 - She was interviewed, but a lesbian woman was hired instead
 - A few days later, Ames was demoted from the program administrator position and received a substantial pay decrease
 - The program administrator then was filled by a gay man
 - She sued, alleging sex discrimination

SCOTUS (Ames cont.)

- The federal district court granted summary judgment for the defendant
- Under *McDonnell Douglas v. Green*, when evaluating a Title VII claim, the plaintiff first must establish a prima facie case of discrimination
- Looking at Sixth Circuit precedent, the district court concluded that because Ames was part of a “majority group,” she had to present evidence of “background circumstances,” suggesting that the defendant was the rare employer that discriminates against a majority group
- Because she presented no such evidence, her claim failed

SCOTUS (Ames cont.)

- The Sixth Circuit affirmed the decision of the district court
- The court agreed with the district court that Ames had failed to offer the required evidence of “background circumstances”
- It noted that such evidence typically would include: (i) evidence that a member of the relevant minority group (in this case, gay people) made the decision at issue, or (ii) statistical evidence showing a pattern and practice of discrimination against the majority group
- No such evidence was offered here

SCOTUS (Ames cont.)

- The Sixth Circuit decision reinforced a Circuit split
- The 6th, 8th, 10th, and DC Circuits require majority group plaintiffs to meet a higher burden at the prima facie stage
- The other Circuits do not
- Supreme Court accepted the case to resolve this Circuit split

SCOTUS (Ames cont.)

- Justice Jackson issued the unanimous opinion of the Court
 - Title VII prohibits discrimination because of sex
 - Under the McDonnell Douglas test from 1973, which the Court assumed applies at the summary judgment stage, a plaintiff must first establish a prima facie case of discrimination
 - This obligation typically is “not onerous” and simply requires evidence that “give[s] rise to an inference of unlawful discrimination”
 - For example, in a failure to hire a case it requires evidence that the plaintiff applied for a job for which she was qualified but was rejected under circumstances raising an inference of discrimination
 - The Sixth Circuit required additional “background circumstances” for majority group plaintiffs, and that was wrong

SCOTUS (Ames cont.)

- Taking a cue from recent Supreme Court cases in the employment space, the Court focused on the text of the statute
- “Title VII’s disparate-treatment provision draws no distinctions between majority-group plaintiff’s and minority-group plaintiffs.”
- Rather, the statute plainly bars discrimination against any “individual” and draws no group-based distinctions whatsoever
- This left no room for courts like the Sixth Circuit to add an extra burden for members of certain groups
- “We conclude that Title VII does not impose such a heightened standard on majority-group plaintiffs”

SCOTUS (Ames cont.)

- Justice Thomas (joined by Justice Gorsuch)
 - He joined the majority opinion in full
 - He wrote separately to expressly state that “[i]n a case where the parties asked us to do so, I would be willing to consider whether the McDonnell Douglas framework is a workable and useful evidentiary tool”
 - Essentially, it was an open invitation to litigants to challenge that 1973 Supreme Court decision, which has been applied consistently in nearly all federal (and many state) employment cases since that date
 - He then offered additional reasons for rejecting the “background circumstances” rule and noted that the rule was “nonsensical” because it requires courts to assume that only an “unusual employer” would discriminate against a perceived majority group, but many employers “have long been ‘obsessed’ with ‘diversity, equity, and inclusion’ initiatives . . . [that] have often led to overt discrimination against those perceived to be in the majority.”

SCOTUS (Ames cont.)

- What is the significance?
 - The outcome is not at all surprising
 - The plain text approach that has been favored by many of the current Justices necessarily leads to conclusion that the “background circumstances” rule has no real legal foundation
 - And, Justice Thomas correctly observed that trying to determine who is in a “majority” group and thus subject to a greater burden does not seem like a productive exercise
 - As a practical matter though, it seems likely that we will see an increase in what some previously have called “reverse discrimination” claims - e.g., claims asserted by perceived majority groups such as white people, men, Christians, etc.

SCOTUS (Ames cont.)

- It seems likely that some litigant in the future will accept Justice Thomas’s invitation to revisit McDonnell Douglas.
- And the words of his concurring opinion certainly add more fuel to the anti-DEI fire
- For now, though, this should not really require any different action from employers
- Discrimination against any person because of their sex, race, religion, etc. is prohibited regardless of whether they are a minority or majority group person
- That said, if you used to be skeptical of discrimination claims asserted by men, white people, Christians, etc., you should leave that skepticism behind and worry about these claims just as much as any others

SCOTUS (Stanley)

- *Stanley v City of Sanford, Florida*, 606 US ____ (2025)
 - Stanley started working for the defendant as a firefighter in 1999
 - At the time she was hired, the defendant offered health insurance until age 65 for: (i) those who retired with 25 years of service, and (ii) those who retired because of disability
 - In 2003, the policy changed - for those who retired because of disability, the insurance would last only 24 months
 - In 2018, Stanley retired because of disability
 - She filed a lawsuit, alleging that providing worse insurance benefits to people who retired early because of disability violated the ADA

SCOTUS (Stanley cont.)

- The district court dismissed her ADA claim
- She had to allege facts that would support a conclusion that she was a “qualified individual” with a disability at the time of the alleged discrimination
- The alleged discrimination (the reduced insurance benefit) did not occur until after she retired
- At that point she was not a “qualified individual” because she could not perform the essential functions of a job that she “holds or desires”

SCOTUS (Stanley cont.)

- The Eleventh Circuit affirmed
- It held that the ADA “does not reach allegations of discrimination against a retiree ‘who does not hold or desire to hold an employment position’”
- Sixth, Seventh, and Ninth Circuits agree with Eleventh, but Second and Third disagree
- Supreme Court took the case to resolve the split

SCOTUS (Stanley cont.)

- Justice Gorsuch delivered the opinion of the Court (7-2)
 - The ADA prohibits disability discrimination against a “qualified individual” in connection with compensation
 - A “qualified individual” is one who, with or without a reasonable accommodation “can perform the essential functions of the employment position that such individual holds or desires”
 - Thus, the statute protects people who “are able to do the job they hold or seek at the time they suffer discrimination”
 - Relatedly, the statute requires reasonable accommodations, which makes sense if the statute protects applicants and employees, but doesn’t make sense if it applies to retirees
 - And prior Court precedent established that if a person no longer can perform the job at the time of alleged discrimination, then the person cannot establish an ADA claim

SCOTUS (Stanley cont.)

- Accordingly, the Court held that to prevail on an ADA discrimination claim, an employee “must plead and prove that she held or desired a job, and could perform its essential functions with or without reasonable accommodation, at the time of an employer’s alleged act of disability discrimination”
- Thus, the ADA does not apply to retirees

SCOTUS (Stanley cont.)

- What is the significance?
 - Once again, the Court employed a plain text analysis
 - It summarily rejected the dissent’s invitation to consider legislative history or policy variable
 - It settled the circuit conflict and clearly decided that the ADA protections do not extend to retirees
 - The fact that the Court focused on statutory text that defines qualified individuals as those who “can perform” the job and statutory examples of accommodations that facilitate job *performance* indirectly raises the question of whether the Court might be willing to take up the always vexing issue of to what extent an LOA is a reasonable accommodation - but, we will have to wait



EEO UPDATE



Zebulon D. Anderson

November 5, 2025

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