




EMPLOYMENT LAW UPDATE

2020

EDUCATE. EMPOWER. EXCEL.



Virtual Edition

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PROGRAM AGENDA

Day 1 – October 13, 2020

8:30 – 8:45	Registration / Login
8:45 – 8:55	Welcome and Introductions <i>J. Travis Hockaday</i>
8:55 – 9:55	<u>Good Trouble: Making It Good, Avoiding the Trouble</u> <i>Kimberly J. Korando and Taylor M. Dewberry</i> Every employer has heard the call to action on diversity, equity and inclusion, and there is no shortage of advice from the experts. Conversations. Goals. Always well-intended, but not always well-executed. In this session, we will discuss these and other commonly recommended actions and offer practical advice for making them good while avoiding the trouble.
9:55 – 10:50	<u>Employee Health in the Workplace: Challenges During and After COVID-19</u> <i>Rosemary Gill Kenyon</i> COVID-19 has provided an endless array of new challenges in navigating the intersection between employee health and the workplace. The virtual workplace provides some solutions, but many employers have had to brave in-person work. This session will provide a practical discussion of some of the most common challenges employers are facing and review recent guidance from agencies under federal and state disability and leave laws.
10:50 – 11:00	Break
11:00 – 11:45	<u>Supporting Employees and Reducing Costs: Employee Benefits in a Pandemic</u> <i>Caryn C. McNeill, Jamison H. Hinkle, Kara M. Brunk</i> This program will explore the opportunities to support employees created by recent legislation, the measures some employers have implemented to reduce employee benefit costs, and the practical impact of layoffs and furloughs under employer-sponsored retirement and welfare plans.
11:45 – 12:25	<u>Panel Discussion - Hot Topics in Employment Law</u> <i>Sarah W. Fox, Moderator</i> A panel of our veteran employment lawyers will discuss a number of timely topics for employers.
12:25 – 1:00	Live Questions and Answers <i>J. Travis Hockaday, Moderator</i> Our panelists will answer your questions about the day's topics, and more.

PROGRAM AGENDA

Day 2 – October 15, 2020

8:30 – 8:45	Registration/ Login
8:45 - 9:30	<p><u>Wage and Hour Update</u> <i>J. Travis Hockaday</i></p> <p>This session will cover the latest from the U.S. Department of Labor on key wage and hour issues, including joint employment, independent contractor classification, requirements for overtime during fluctuating workweeks, reporting and paying for telework and remote work time, and more, and will offer practical advice for compliance.</p>
9:30 – 10:20	<p><u>COVID-19's Next Wave: Legal Claims Looming for Employers</u> <i>Kerry A. Shad</i></p> <p>This session will focus on the increased legal risks employers may face based on actions already taken in response to the COVID-19 pandemic and steps employers can take now to mitigate future risk. These risks include discrimination claims in connection with layoffs/recalls/re-hiring, wage and hour violations involving failure to track hours worked at home and failure to reimburse for business expenses and WARN Act violations, among others. We also will discuss the protections provided by state immunity laws and the effectiveness (or not) of COVID-19-liability waivers.</p>
10:20 – 10:30	Break
10:30 – 11:25	<p><u>COVID-19 and the Workplace: Staying Out of Trouble</u> <i>Stephen T. Parascandola</i></p> <p>The presentation will cover the most recent OSHA requirements and guidance applicable to workplaces as employees continue to return to work (or return to work for the first time), including certain OSHA requirements and guidance offered by the Centers for Disease Control and Prevention. In addition, we will offer insights and practical tips regarding best practices, dealing with employee complaints about safety, and agency enforcement actions, reporting and recordkeeping, COVID-19 response plans, and multi-employer workplaces.</p>
11:25 – 12:20	<p><u>EEO Update</u> <i>Zebulon D. Anderson</i></p> <p>A discussion of EEOC enforcement trends and plans, as well as select cases representative of recent trends in EEO litigation.</p>
12:20 – 1:00	<p>Live Questions and Answers <i>J. Travis Hockaday, Moderator</i></p> <p>Our panelists will answer your questions about the day's topics, and more.</p>

WHO WE ARE

WHO WE ARE

PRACTICE GROUPS

EMPLOYMENT, LABOR AND HUMAN RESOURCES

The intersection of business, employment matters and the law is complex and often difficult to navigate. We approach this challenge in an effort to gain a thorough understanding of your culture and objectives. We bring a deep understanding of the law and a wealth of experience regarding its real-world application. We pride ourselves on being a vital and trusted adviser for our clients, offering responsiveness, keen insights, good judgment and a practical, solution-oriented perspective. Our employment, labor and human resources lawyers have received significant client, peer and business community recognition in such prestigious publications and ranking lists as *Chambers USA: America's Leading Business Lawyers*, *The Best Lawyers in America*®, *U.S. News – Best Lawyers*® “Best Law Firms” and *Martindale-Hubbel*®.

Our experience with a wide range of employment, labor and human resources issues enables us to work with our clients to assist them in building and maintaining an employer-of-choice reputation. We do this while minimizing the burden of regulatory requirements and the distractions of regulatory investigations and audits, employee disputes and union organizing. In addition to compliance and risk-management counseling, we develop and conduct training programs for human resources professionals and line managers, offering a range of complimentary compliance-support services. We also host an annual client conference that attracts more than 300 attendees each year.

When employers encounter litigation relating to employment discrimination, wrongful discharge or other employment-related issues, and when complaint investigations and compliance audits arise, we represent them with early risk assessment, dispute resolution services and trial advocacy.

Our clients include a wide range of regional, national and multinational corporations, emerging businesses and regulated industries. We handle employment matters nationwide for many global and publicly traded companies based in North Carolina and have frequently served as the lead employment counsel on some of their most complex, high-level transactions.

We operate as an employment and labor law boutique within a robust, full-service law firm. This affords us ready access to colleagues who focus their practice in such related areas as Employee Benefits and Executive Compensation; Environmental and OSHA; Government Contracts; Data Use, Privacy & Security; Tax; Corporate Governance; Non-Compete and Trade Secrets; and Intellectual Property.

Services:

- Wage and hour compliance
- Internal investigations

- Protecting employers: relationships and confidential information (non-competition agreements, trade secret protection)
- Employment-related litigation
- Government investigations, audits and administrative proceedings
- FMLA/ADA/Fitness-for-duty/drug-testing/absence-management program administration
- Workforce restructuring, downsizing, plant closings, merger and acquisition integration
- Executive employment and severance agreements
- Workplace harassment, training and investigations
- Human resources audits and risk management
- Affirmative action plans and OFCCP audits/corporate diversity
- Recruiting, hiring and employee selection
- Human resources policies and employee handbooks
- Workplace violence
- Union avoidance
- Temporary employees, agency staffing, independent contractors and telework programs
- Human Resources and manager training

Wage and Hour Compliance

- Enterprise-wide audits of exempt employee and independent contractor classifications for retail, hospitality, pharmaceutical, technology, distribution and other industry employers and development of strategies for reclassifying misclassified employees in ways to maximize compliance and minimize liability exposure
- Audits of time recording practices relating to donning/doffing, automatic clocking/deductions, and use of remote devices for work and development of practical solutions to maximize compliance and minimize liability exposure
- Enterprise-wide internal compensation analyses, development of processes for enhancing attorney-client privilege protection of analyses and risk management of such analyses
- Successful defense of wage and hour audits and complaint investigations conducted by the federal and state departments of labor involving donning/doffing/overtime, exempt employee classification issues and child labor issues
- Assistance with Service Contract Act issues in unionized and non-unionized settings

Internal Investigations

- Retained as special counsel by hospitals, banks, manufacturers, defense contractors and employers in a variety of industries to conduct internal corporate investigations into allegations of:
 - harassment, discrimination and employee misconduct, including allegations of pattern and practice sexual harassment and racial discrimination
 - employee embezzlement
 - kick-backs and favoritism in award of vendor contracts

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

Protecting Employers: Relationships and Confidential Information

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

Government Investigations, Audits and Administrative Proceedings

- Successfully represented leading employers before the United States Equal Employment Opportunity Commission (EEOC) and state and local fair employment practices commissions across the country in connection with investigations of single claimant and class allegations
 - These investigations have involved EEOC national priority issues, including challenges to enterprise-wide leave policies, criminal records criteria and testing, and have involved non-employee class representatives from advocacy groups
- Retained by employers after conclusion of cause findings for representation during the conciliation process and risk management of potential liability exposure
- Successfully represented federal contractors, including Department of Defense contractors, in connection with Office of Federal Contract Compliance Program (OFCCP) pre- and post-award compliance audits (including corporate management reviews) and complaint investigations. The compliance audits have included inquiries into test validation, staffing agency employees and online recruiting processes and, in some cases, have begun with asserted desk audit liability nearing \$1 million which were subsequently closed without any payment by contractor
- Successfully represented manufacturing, restaurant and hospitality, and retail employers in wage and hour audits and complaint investigations conducted by the federal and state departments of labor throughout the country involving donning/doffing in manufacturing plants, overtime, exempt employee classification and child labor issues, with some involving potential class exposure exceeding \$1 million

FMLA/ADA/Fitness for Duty/Drug-Testing/Absence Management Program Administration

- Led interdisciplinary publicly traded Fortune 500 corporate ADA task force charged with identifying Title I and Title III compliance issues; reviewing and modifying corporate policies, procedures and practices including medical testing, qualification standards and test administration accommodation

- Developed and integrated corporate policies for hospitals, banks and pharmaceutical, manufacturing and technology companies regarding FMLA/STD/ADA reasonable accommodation leave/workers' compensation leave and absence management
- Developed fitness for duty programs including functional capacity testing for manufacturing, healthcare and distribution worksites
- Developed and conducted manager/supervisor ADA/FMLA/absence management training programs
- Reviewed and developed voluntary and mandatory pre-employment, reasonable suspicion and random drug and alcohol testing programs for multistate employers

Workforce Restructuring, Downsizing, Plant Closings, Merger and Acquisition Integration

- Retained by global and publicly traded leading employers to design employee selection and staffing processes, voluntary separation programs, early retirement incentive programs and group termination programs and advise internal corporate task forces charged with such responsibilities
- Developed OWBPA-compliant releases and demographic disclosures, including those involved in complex multisite rollouts over time
- Assisted numerous companies with determining Worker Adjustment and Retraining Notification (WARN) notice requirements and developing WARN notifications
- Conducted internal adverse impact and EEO risk analyses for pre-rollout adjustments, assisted clients in assessing risk and identifying strategies to minimize the risk associated with the proposed actions
- Advised internal corporate teams charged with developing internal and external communications on reorganization activities
- Developed internal processes for enhancing attorney-client privilege protection of reorganization-related corporate documents
- Labor and employment merger and acquisition due diligence

Executive Employment and Severance Agreements

- Negotiated, reviewed and drafted executive employment, non-compete, change in control and severance agreements on behalf of executives and companies

Workplace Harassment, Training and Investigations

- Retained to revise harassment policies and investigation procedures to remedy compliance deficiencies and risk management failures resulting from commonly flawed off-the-shelf policies
- Retained to develop and conduct numerous employee awareness and manager/supervisor training programs or, in some cases, to assist in the evaluation and selection of vendor training programs
- Directed crisis management teams charged with diffusing threats of criminal arrest/prosecution and media disclosure

- Retained as special counsel to conduct internal corporate investigations into allegations of harassment, discrimination and employee misconduct, including allegations of pattern and practice sexual harassment and racial discrimination and allegations against high-ranking corporate officers

Human Resources Audits and Risk Management

- Developed internal process and templates for human resources compliance audits of policies, procedures, practices and records along with processes for enhancing attorney-client privilege protection of audit findings
- Provided advice on options and strategies for handling particular hiring, termination, promotion, reassignment and performance management scenarios, particularly with regard to underperforming employees, employees with health issues and whistleblowers
- Conducted internal adverse impact and EEO risk analyses for pre-reorganization rollout adjustments and internal compensation equity
- Developed and conducted numerous training programs for supervisors on documentation, performance management, discipline and discharge
- Drafted and negotiated numerous severance agreements

Affirmative Action Plans and OFCCP Audits/Corporate Diversity

- Reviewed, developed and updated numerous Executive Order 11246, VEVRAA and Rehab Act affirmative action plans and advised companies on all aspects of affirmative action, including appropriate statistical analysis for adverse impact calculations
- Successfully represented federal contractors in connection with Office of Federal Contract Compliance Program (OFCCP) pre- and post-award compliance audits (including corporate management reviews) and complaint investigations brought pursuant to Executive Order 11246, Rehabilitation Act of 1973 and the Vietnam Era Veterans Readjustment Assistance Act of 1974
- Successfully defended challenges to test and other selection criteria validation
- Successfully defended class complaints, including those involving non-employee class representatives from advocacy groups
- Provided legal support and general business advice to manufacturers, retail businesses and pharmaceutical companies on establishing workplace diversity programs

Recruiting, Hiring and Employee Selection

- Advised employers on background and reference checking requirements and procedures, including Fair Credit Reporting Act authorization and disclosure requirements and e-Verify
- Advised employers on validation requirements and procedures for employment tests, physical fitness requirements and other selection criteria
- Assisted employers in virtually every industry with developing recruiting and employee selection processes and documentation procedures

- Developed and presented numerous training programs for supervisors on interviewing and employee selection

Human Resources Policies and Employee Handbooks

- Authored leading North Carolina policy and form book
- Reviewed and developed hundreds of employee handbooks, Human Resources policies and procedures manuals and corporate codes of conduct – many for clients with workforces in multiple states
- Developed Bring Your Own Device (BYOD) and employee social media policies
- Developed harassment/investigation and religious accommodations procedures
- Developed and integrated corporate policies regarding FMLA/STD/ADA reasonable accommodation leave/workers' compensation, leave for fitness for duty and absence management, and developed corporate leave donation and sharing programs
- Led interdisciplinary corporate ADA task force charged with identifying Title I and Title III compliance issues; reviewing and modifying corporate policies, procedures and practices including medical testing, qualification standards, and test administration accommodation; and developing and conducting corporate manager/supervisor compliance training
- Assisted publicly traded companies in financial, healthcare, consulting and manufacturing with developing and implementing corporate record retention and destruction policies
- Advised numerous companies on the legal and practical aspects of transitioning to paperless Human Resources policies

Workplace Violence

- Advised numerous companies on handling specific threats of workplace violence
- Developed and reviewed workplace violence prevention programs and conducted related workplace training
- Served as counsel to employers' multi-disciplinary threat assessment teams

Union Avoidance

- Advised manufacturing and retail companies on handling of specific threats of union organization
- Developed union avoidance programs for global companies and conducted related training

Temps, Agency Staffing, Independent Contractors, Telework Programs

- Advised companies on the legal and practical issues of implementing a telecommuting workforce and individual telecommuting arrangements
- Advised companies on the legal and practical issues of creating an internal temporary workforce

Human Resources and Manager Training

- Developed a comprehensive training institute offering more than 50 programs to human resources professionals, business managers and line supervisors. Topics included ADA, affirmative action, EEO, employee relations, FMLA, harassment, hiring, investigations, policies, union avoidance, workplace violence, and supervisor/manager responsibilities
- Developed highly participatory and mock trial training exercise for Human Resources professionals and investigators for a large global pharmaceutical company in which they experienced first-hand how their decisions and actions played out in front of a jury. The program was customized to the client's policies and workforce
- Developed highly participatory and mock trial training exercise for supervisors in which participants experience first-hand how their decisions and actions play out in front of a jury. The program is customized to client's policy and workforce and has been delivered to employers in a wide range of industries across the country

EMPLOYEE BENEFITS AND COMPENSATION

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

Our lawyers design, review and implement a wide array of compensation and benefits programs across a full range of industries. We provide counsel regarding the ERISA, tax, securities and accounting considerations applicable to these programs.

Primary Services:

- 401(k) and profit sharing plans
- Employee Stock Ownership Plans (ESOPs)
- Cafeteria plans
- Welfare benefit plans, including group medical plans (insured and self-funded)
- Stock option and stock purchase plans
- Executive compensation
- Incentive plans
- Nonqualified deferred compensation plans
- Severance packages
- Prohibited transaction exemptions

Qualified Retirement Plans: We design, review, and implement 401(k) and profit sharing plans, ESOPs and other qualified retirement plans. We assist clients in complying with the ever-changing tax and ERISA requirements applicable to these plans, represent clients in IRS and DOL audits of their plans, and work with clients in structuring corrections for operational and fiduciary errors.

Welfare Benefit Plans: We provide similar counsel and representation with respect to cafeteria and other welfare benefit plans and issues, including group medical, life and other insurance coverage, health and dependent care flexible spending accounts, education assistance programs, COBRA and HIPAA.

Equity Compensation: We provide stock option and stock purchase plans and assist our clients with the tax, securities and accounting aspects of these plans, including tax reporting and withholding requirements, SEC disclosure and filing requirements, and expensing for financial accounting purposes.

Executive Compensation: We negotiate and prepare executive compensation packages for the officers of companies ranging from venture-backed startups to mature, publicly traded companies, and we advise compensation committees and boards of directors in developing appropriate compensation programs for

their companies. Our experience includes structuring equity compensation, deferred compensation, severance, and golden parachute arrangements.

Mergers and Acquisitions: We represent acquiring and target companies in corporate transactions and have experience negotiating how compensation and benefits programs will be treated in deals, as well as guiding our clients through the difficult issues that arise post-closing when compensation and benefits programs are eliminated or combined.

Controversies and ERISA Litigation: Our ability to provide sophisticated compliance representation is enhanced by our experience with governmental agencies and benefits-related litigation in disputes involving hundreds of millions of dollars in plan assets. We regularly represent large employers in obtaining resolution with the IRS and DOL and have successfully defended employers and fiduciaries in claims ranging from breach of duties to imprudent investing.

Additional Services: Our attorneys work closely with other attorneys at Smith Anderson, especially those who practice in the areas of tax, securities, corporate and employment law, so that our clients have the benefit of a comprehensive analysis of the legal issues related to their benefits and compensation programs.

Our Clients: Our clients range from emerging growth high-tech and biotech companies located in the Research Triangle Park and throughout the Southeast to major North Carolina banks and public utilities and local and regional manufacturing, retail and services businesses.

Our Lawyers: The lawyers in our Employee Benefits and Compensation group have experience counseling and representing clients in all aspects of employee benefits and compensation matters. They actively participate in local and national benefits groups and in the North Carolina and American Bar Associations.

MEET OUR TEAM



Zebulon D. Anderson

Attorney

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Zeb Anderson has devoted his career to the representation of private and public employers in connection with all aspects of employment-related litigation. He has represented employers in state and federal courts and before government agencies throughout North Carolina and in other jurisdictions across the country. His experience includes litigation involving employment-related statutory, as well as common law, claims arising under federal and state law and issues that arise when employees leave to join competitors, including non-compete and non-solicitation restrictions, trade secret misappropriation, tortious interference and unfair competition.

EXPERIENCE

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

AA CONTACT INFO

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PRACTICE AREAS

Employment Litigation
Employment, Labor and Human Resources
Higher Education
IP Litigation
Litigation
Non-Compete and Trade Secrets

BAR & COURT ADMISSIONS

Supreme Court of the United States
U.S. Court of Appeals for the Fourth Circuit
U.S. District Courts for the Eastern, Middle, and Western Districts of North Carolina
All North Carolina State Courts

EDUCATION

University of Virginia, 1994

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



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

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

HONORS & AWARDS

- Martindale-Hubbell AV Preeminent Rated
- *Best Lawyers®*, Litigation - Labor and Employment (2016-2021); Employment Law-Management (2018-2021)
- *Chambers USA: America's Leading Business Lawyers*, Labor & Employment (2015-2020)

- North Carolina *Super Lawyers* (2012-2020)
- *Business North Carolina's Legal Elite*, Employment (2017)
- North Carolina *Super Lawyers*, Rising Star (2009)
- *Benchmark Litigation*, Labor & Employment Star - South (2019-2020)

PROFESSIONAL & COMMUNITY AFFILIATIONS

- American Bar Association, Employment Section
- Defense Research Institute, Employment Law, Intellectual Property Litigation, and Diversity Committees
- North Carolina Association of Defense Attorneys, Employment and Commercial Litigation Practice Groups
- North Carolina Bar Association, Labor & Employment Section
 - Member, Section Council
- North Carolina Bar Association, Litigation Section
 - Former Member, Section Council
 - Former Editor, *The Litigator*
 - Former Treasurer
- Co-chair, Smith Anderson Lawyer Development Committee
- Member and former co-chair, Smith Anderson Diversity and Inclusion Committee
- Member and former co-chair, Smith Anderson Recruiting Committee
- Wake County Bar Association



Jenny E. Bobbitt

Attorney

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

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

EXPERIENCE

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

HONORS & AWARDS

- North Carolina *Super Lawyers*, Rising Stars (2020)
- Kentucky *Super Lawyers*, Rising Stars (2019)
- Louisville Bar Association Leadership Academy (2019)
- *Louisville Business First* "Young Leaders Award" (2018)
- Staff Editor, *Washington University Jurisprudence Review*
- CALI Excellence for the Future Award – UCC Article 2
- Scholar in Law Award

AA CONTACT INFO

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PRACTICE AREAS

Employment, Labor and Human Resources

BAR & COURT ADMISSIONS

North Carolina

Kentucky

Western District of Kentucky

Eastern District of Kentucky

EDUCATION

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

PROFESSIONAL & COMMUNITY AFFILIATIONS

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



Kara Brunk

Attorney

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Kara's practice is focused in the areas of Employee Benefits and Executive Compensation. She represents public, private, governmental and non-profit employers in designing and documenting retirement plans, welfare benefit plans, fringe benefit plans and executive compensation plans.

Prior to joining Smith Anderson, Kara was an associate in the Raleigh office of a regional law firm. Previously, Kara was an intern for Justice Timmons-Goodson at the North Carolina Supreme Court. During law school, she was a merit scholarship recipient and a recipient of the 2010 Gressman-Pollitt Award for Oral Advocacy.

EXPERIENCE

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

AA CONTACT INFO

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PRACTICE AREAS

Employee Benefits and Executive Compensation

BAR & COURT ADMISSIONS

North Carolina

EDUCATION

University of North Carolina School of Law, *high honors*, J.D., 2012

- Order of the Coif

University of North Carolina at Chapel Hill, *with distinction*, B.A. in Political Science, 2009

- Phi Beta Kappa

disabilities.

- Amending and restating qualified retirement plans to comply with the Pension Protection Act and other changes in the law.
- Advising employers regarding designing and administering benefits plans in compliance with the Internal Revenue Code and ERISA.
- Drafting and revising health and welfare plan documents and summary plan descriptions.
- Assisting employers with identifying and correcting plan errors through DOL and IRS compliance programs.
- Reviewing and amending executive compensation arrangements.
- Advised a leading CRO in Asia on the employee benefits aspects of its acquisition of CRO assets in the United States.
- Advised a publicly-traded health information technologies and clinical research company on the employee benefits aspects of its sale of a consulting line of business.
- Advised a private equity fund on the employee benefits aspects of its acquisition of a specialty pharmaceutical company.
- Advised a leading contract research organization in a definitive agreement to acquire a provider of contract research, clinical and regulatory and other consulting services. Advised specifically on benefits reps, warranties and covenants, conducted due diligence and helped the company navigate integration issues.

HONORS & AWARDS

- *Best Lawyers®*, "Ones to Watch," Employee Benefits (ERISA) Law (2021)
- North Carolina *Super Lawyers*, Rising Stars (2020)
- Staff Member and Contributing Editor, *North Carolina Law Review*, 2010-2012

PROFESSIONAL & COMMUNITY AFFILIATIONS

- Board Member, Food Runners Collaborative, 2017-Present, Secretary, 2019
- Board Member, Raleigh Kiwanis Foundation, 2016-2018
- President, Triangle Benefits Forum, 2016-2019
- Board Member, Domestic Violence Action Project, 2010-11
- Member, Civil Legal Assistance Clinic, 2011-12
- North Carolina Bar Association
 - Membership Committee, 2017-Present
 - YLD Community Relations Committee, 2016-2017

- Wake County Bar Association



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Taylor Dewberry joined Smith Anderson in 2017. She is an associate in Smith Anderson's Employment, Labor and Human Resources practice group. Her practice focuses on employment-related counseling and defending employers against claims involving discrimination, wrongful discharge, retaliation, harassment and civil rights claims. She has represented clients in state and federal courts and agencies throughout North Carolina.

EXPERIENCE

- Advised a 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.

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PRACTICE AREAS

Employment, Labor and Human
Resources
Higher Education

BAR & COURT ADMISSIONS

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

EDUCATION

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

CLERKSHIPS

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

HONORS & AWARDS

- The National Black Lawyers Top 100, Top 40 Under 40 (2020)
- Executive Notes Editor, *Washington University Journal of Law and Policy*

PROFESSIONAL & COMMUNITY AFFILIATIONS

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

Appeals for the Fourth Circuit



Sarah W. Fox

Attorney

Wells Fargo Capitol Center
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Raleigh, North Carolina 27601
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Sarah Fox has more than 30 years' experience in employment and labor law, coupled with commercial litigation. Sarah clerked with the Honorable Robert D. Potter, Chief Judge for the U.S. District Court for the Western District of North Carolina and is a member of the Fourth Circuit Judicial Conference. She is a recipient of the *Triangle Business Journal's* Women in Business Award, has been honored as one of the Top 50 Female *Super Lawyers* by North Carolina *Super Lawyers*, is listed in *The Best Lawyers in America®*, and elected to *Business North Carolina's* Legal Elite. Sarah is active in industry associations and community organizations including having served on multiple boards and as Chair of the Foundation of Hope, President of The Badger Iredell Foundation, Inc., President of Capital Area Preservation, President of The Junior League of Raleigh, and served on the Executive Committees of the NC Museum of History Associates and SAFEchild.

Her practice includes federal and state discrimination laws; workplace investigations; human capital management; wage and hour compliance; executive shareholder claims; workforce policies, procedures and handbooks; employment agreements; executive compensation; restructuring; wrongful discharge; severance and separation programs; merger and acquisition workplace transitions; confidentiality, assignment of inventions, and non-competition agreements; trade secrets and fiduciary duties; harassment; ADA; FMLA; workplace violence; OSHA; drug and alcohol compliance; compensation for tax-exempts; and alternative staffing.

Sarah has been a guest lecturer in employment law at North Carolina State University in the Masters in Accounting Program, conducted human resource training, led diversity initiatives and training and is a frequent speaker and author on employment matters. She has substantial experience in conducting workplace

AA CONTACT INFO

Jacqueline Williams
Phone: 919.838.2050
jwilliams@smithlaw.com

PRACTICE AREAS

Employment Litigation
Employment, Labor and Human Resources
Litigation
Non-Compete and Trade Secrets
OSHA and Workplace Safety

BAR & COURT ADMISSIONS

Supreme Court of the United States
U.S. Court of Appeals for the Fourth Circuit
U.S. District Courts for the Eastern, Middle and Western Districts of North Carolina
All North Carolina State Courts

EDUCATION

Wake Forest University, J.D., *cum laude*, 1983

- Wilson Academic Scholar, Wake Forest University School of Law

Tulane University, B.A., 1977



investigations and successfully litigating federal and state claims, including discrimination claims, non-competition and employee misappropriation claims and executive shareholder claims.

Prior to joining Smith Anderson, Sarah was a founding partner of the employment and labor practice in the Raleigh office of a global law firm.

EXPERIENCE

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

HONORS & AWARDS

- *Best Lawyers®*, Employee Benefits (ERISA) Law (2013-2021), Litigation - Labor & Employment (2021)
- *Best Lawyers®*, "Lawyer of the Year," Raleigh Employee Benefits (ERISA) Law (2021)
- *Business North Carolina* Legal Elite
- Martindale-Hubbell AV Preeminent Rated
- North Carolina *Super Lawyers*, Top 50 Female Super Lawyers
- *Triangle Business Journal*, Women in Business Award

PROFESSIONAL & COMMUNITY AFFILIATIONS

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

CLERKSHIPS

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

- North Carolina Bar Association, Employment Law Section
- North Carolina Bar Foundation, Development Committee 2018-Present
- Badger-Iredell Foundation
 - President 2001-2002
 - Board of Directors 1996-2002
- Capital Area Preservation
 - President 1995-1996
 - Board of Directors 1992-1995
- Cerebral Palsy Center of North Carolina, Inc., Past Board of Directors
- Duke University Health System, Duke Raleigh Hospital Past Advisory Board
- Foundation of Hope
 - Chair, 2006-present
 - Board of Trustees, 1995-present
- Greater Raleigh Chamber of Commerce, Chair Human Resources Roundtable 2004-2011
- Governor's Summit on Volunteerism, Delegate
- Guatemala Mission, 2008
- Head Start Volunteer Award
- Junior League of Raleigh
 - President 1996
 - Board of Directors 1992-1995
 - Sustaining Advisor 2005-2006
 - Executive Committee 1993-1994
 - Community Vice President 1993-1994
 - Provisional Chair 1994-1995
- Leadership Raleigh Alumnus
- North Carolina Inaugural Ball, Co-Chair 2001
- North Carolina Museum of History, Hugh Morton Event Co-Chair 2004



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



Jamison H. Hinkle

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

Jamie also frequently advises corporate clients ranging from start-ups to global publicly-traded companies with respect to the adoption and administration of annual and long-term incentive and bonus plans, nonqualified deferred compensation arrangements and various equity-based compensation plans, including stock option, restricted stock and restricted stock unit (RSU) awards. He works closely with the firm's business lawyers in addressing employee benefits and executive compensation due diligence, correction, and integration issues that arise in connection with mergers, acquisitions and other corporate transactions.

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

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

AA CONTACT INFO

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PRACTICE AREAS

Employee Benefits and Executive Compensation

Insurance Regulation

Private Client Services

Tax

Trusts and Estates

BAR & COURT ADMISSIONS

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

All North Carolina State Courts

EDUCATION

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

Duke University, A.B., 1991

Jamie practiced employee benefits and estate planning in the Raleigh office of a global law firm and with a national corporate firm before he joined Smith Anderson in 2000.

EXPERIENCE

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

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

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

HONORS & AWARDS

- *Best Lawyers®*, Employee Benefits (ERISA) Law (2013-2021)
- North Carolina *Super Lawyers* Rising Star, ERISA (2013)

PROFESSIONAL & COMMUNITY AFFILIATIONS

- American Bar Association
- North Carolina Bar Association
 - Tax, Business Law, and Estate Planning & Fiduciary Law Sections
 - Council Member, Tax Section Council, North Carolina Bar Association (2001-2015)
 - Chair, Employee Benefits Committee, Tax Section, (2005-2014)
- Wake County Bar Association
- Director, Food Runners Collaborative, Inc. (2011-2016; Chair, 2014)
- Former Director, Junior Achievement of Eastern North Carolina, Inc.
- National Association of Stock Plan Professionals (NASPP), Carolinas Chapter
- Triangle Benefits Forum (TBF)



J. Travis Hockaday

Attorney

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Travis Hockaday has practiced with Smith Anderson since September 2003 and leads the firm's Employment, Labor and Human Resources practice group. His practice focuses on providing employment-related counseling and risk management advice to clients in a variety of industries, both public and private, and identifying and managing employment-related issues in mergers, acquisitions and reorganizations. He also represents clients in state and federal courts and agencies throughout North Carolina and other jurisdictions.

His experience includes defending employers against claims involving discrimination, wrongful discharge, retaliation, harassment and civil rights claims; defending wage and hour, ERISA and other benefit-related claims; and representing clients in investigations conducted by, and proceedings before, both federal and state departments of labor, the Equal Employment Opportunity Commission, the U.S. Department of Justice, the North Carolina Industrial Commission and the North Carolina Division of Employment Security.

Travis is a frequent speaker on employment and labor law issues and regularly conducts training for human resources professionals and executive management.

EXPERIENCE

- Advised a EU-based clinical research organization in a definitive agreement to acquire the pharmacovigilance business from a global, listed healthcare services company for approximately \$10,000,000 in cash.
- Advised a private equity fund and its contract research solutions portfolio company in their acquisition of a statistical programming, consulting, and data management company.

AA CONTACT INFO

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PRACTICE AREAS

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

BAR & COURT ADMISSIONS

U.S. Court of Appeals for the Fourth Circuit

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

All North Carolina State Courts

EDUCATION

University of North Carolina, J.D., 2003

Campbell University, B.A., *summa cum laude*, 2000



- Advised a company specializing in video game and software development in a definitive agreement to acquire a company that developed a presence-based social networking platform connecting users online through live video on mobile and desktop apps.
- Advised a private equity fund in its acquisition of a leading provider of staffing resources to the biotechnology, pharmaceutical and medical device companies for clinical trial needs.
- Defending employers against claims involving discrimination, wrongful discharge, retaliation, harassment and civil rights claims.
- Defending wage and hour, ERISA, and other benefit-related claims.
- Representing clients in investigations conducted by both federal and state Departments of Labor, the Equal Employment Opportunity Commission and the U.S. Department of Justice.
- Advised a leading CRO in Asia on the employment law aspects of its acquisition of CRO assets in the United States.
- Advised a publicly-traded health services company on the employment law aspects of its acquisition of a health services division of a privately-held company for \$105 million in cash.
- Advised a leading healthcare services provider on the employment law aspects of its \$60 million cash acquisition of a global sourcing company.
- Advised a private equity-backed medical device repair services company on the employment law aspects of its sale of its wholly-owned operating subsidiaries to a strategic buyer operating in the medical device repair services industry.
- Advised a publicly-traded health information technologies and clinical research company on the employment law aspects of its acquisition of a consulting business focusing on orphan drug designations.
- Advised a private equity fund on the employment law aspects of its acquisition of a specialty pharmaceutical company.
- Advised a frozen foods company on the employment law aspects of its definitive agreement to acquire a frozen snacks business.
- Representing clients before the North Carolina Employment Security Commission.
- Advising clients regarding the development of effective employee handbooks, policies and practices.
- Representing employers and individuals in connection with allegations of violation of non-compete agreements, unfair competition and tortious interference with contract.
- Providing training to management, human resource professionals and employees regarding numerous employment-related topics, including workplace discrimination and harassment, religion in the workplace, unemployment compensation, the Family and Medical Leave Act and the Uniformed Services Employment and Reemployment Rights Act.
- Advising clients on variety of state and federal regulatory issues.
- Serving as outside counsel to a state licensing agency.

HONORS & AWARDS

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

PROFESSIONAL & COMMUNITY AFFILIATIONS

- American Bar Association, Labor & Employment and Litigation Sections
- North Carolina Association of Defense Attorneys
- North Carolina Bar Association, Young Lawyers Division, Labor & Employment, and Litigation Sections
- Member, North Carolina Bar Association Lawyer Effectiveness/Quality of Life Committee (2008-2012)
- Member, Society for Human Resources Management
- Wake County/Tenth Judicial District Bar Association
- Class of 2003 Reunion Representative, University of North Carolina School of Law



Rosemary Gill Kenyon

Attorney

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Rose Kenyon's practice involves all aspects of employment and labor law counseling and litigation, across a wide variety of industries and companies, both public and private. She has extensive experience advising companies on their most strategic and high risk employment issues. Rose also works with companies on employment matters in mergers and acquisitions and has extensive experience drafting complex employment agreements and separation agreements on behalf of both companies and executives. Rose is a frequent speaker on emerging employment and labor law trends and regularly conducts training for human resources professionals and executive management. Rose also serves as a mediator to resolve disputes outside of litigation.

Prior to joining Smith Anderson, Rose served for 13 years as in-house counsel for Carolina Power & Light Company (now known as Duke Energy), having served as Deputy General Counsel.

Rose serves as Chair of the firm's Pro Bono Committee.

Early in her career, Rose practiced with a civil practice firm in Richmond, Virginia.

EXPERIENCE

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

AA CONTACT INFO

Cheryl Baber
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cbaber@smithlaw.com

PRACTICE AREAS

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

BAR & COURT ADMISSIONS

U.S. Court of Appeals for the Fourth Circuit

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

U.S. District Courts for the Eastern and Western Districts of Virginia

North Carolina, 1986

Virginia, 1980

Michigan, 1979

EDUCATION

University of Notre Dame, J.D., 1979

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

resolution of significant transition issues regarding the misclassifications of workers (e.g., wage and hour, independent contractor), leased employee arrangements, liability for significant paid-time-off balances, professional employer organization arrangements, non-competition agreements, 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.
- Advised a leading provider of patient affordability, access, adherence, and support services on cross-border employment matters related to our client's acquisitions of a healthcare information management software company and a provider of mobile-based medication management and adherence solutions for the life sciences sector.
- Successfully defended numerous whistleblower claims under federal and state laws.
- Successfully defended employers against systemic claims of race discrimination, and sensitive harassment and gender discrimination claims before the EEOC and the OFCCP.

CLERKSHIPS

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

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

HONORS & AWARDS

- Fellow, College of Labor and Employment Lawyers
- *Chambers USA: America's Leading Business Lawyers*, Labor & Employment (2008-2020)
- *The Best Lawyers in America*®, Employment Law - Management (2016-2020)
- Women of Justice Award, *North Carolina Lawyers Weekly* (2012, 2019)
- North Carolina Pro Bono Honor Society
- North Carolina *Super Lawyers* (2012-2020)
- North Carolina *Super Lawyers*, Top 50 Women (2014)
- Academy of Women of the YWCA of the Greater Triangle, Inducted 2004
- Martindale-Hubbell AV Preeminent Rated
- Fellow, American Bar Foundation

PROFESSIONAL & COMMUNITY AFFILIATIONS

- North Carolina Bar Association

- Board of Governors (2005-2008)
- Chair, Strategic Planning and Emerging Trends Committee (2008-2011)
- Chair, Women in the Profession Committee (2001-2004)
- Chair, Dispute Resolution Section (1995-1996)
- Council Member, Corporate Counsel Section (1989-1997)
- Sections of Labor and Employment, Litigation and Dispute Resolution
- American Bar Association
 - Sections of Labor and Employment, Litigation and Dispute Resolution
- Wake County Bar Association and Tenth Judicial District Bar
 - Grievance Committee (2013-2016)
 - Strategic Planning Committee (2015-2016)
- Saint Mary's College Alumnae Association, Board of Directors (Notre Dame, IN) (2015-present)
 - Committee Chair and Member of Executive Committee
- Community Music School of Wake County, Board of Directors (2014-present)
 - President (2019-present)
 - Secretary (2017-2019)
 - Member of Executive Committee (2016-present)
 - Chair of Search Committee for Executive Director (2018)
- Habitat for Humanity of Wake County
 - Board Chair (2011-2013)
 - Board of Directors (2005-2013)
 - Honorary Co-Chair, Women's Build (2014)
 - Honorary Chair, 17th Annual Holiday Home Tour & Party (2017)
- Pines of Carolina Girl Scout Council
 - President (1992-1995)
 - Board of Directors (1986-1995)



Kimberly J. Korando

Attorney

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Kim Korando is recognized as one of North Carolina's leading employment lawyers by *Chambers USA: America's Leading Business Lawyers*, *Law and Politics North Carolina Super Lawyers*, *Best Lawyers®* and *Business North Carolina Legal Elite*. She founded the firm's Employment, Labor and Human Resources practice group and served as its inaugural leader.

For more than 30 years, Kim has served as a trusted advisor to public and private companies throughout the U.S. in matters of financial, reputational and operational significance. Her work has led to *Chambers' USA* client reviews describing her as "simply outstanding on employment law," "a diligent top tier attorney," who does "a first class job" and "has a way of looking at several different sides of a situation to evaluate it clearly," and "is exceedingly bright, capable and practical, and gives current pragmatic advice."

Kim serves as general outside employment and labor and human resources counsel to public and private companies in a wide variety of industries including utilities, pharmaceuticals, biotechnology, hospitals and healthcare, automotive, semiconductor, paper/cellulose and furniture manufacturers, insurance, banking, retail, hospitality, and food and beverage distribution, as well as municipalities and law firms.

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

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

AA CONTACT INFO

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PRACTICE AREAS

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

BAR & COURT ADMISSIONS

Supreme Court of the United States
U.S. Court of Appeals for the Fourth Circuit
U.S. District Courts for the Eastern, Middle and Western Districts of North Carolina
All North Carolina State Courts

EDUCATION

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

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

EXPERIENCE

Crossborder

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

Compensation and FLSA

- Conducted enterprise-wide compensation analyses focusing on identifying and correcting pay equity issues.
- Developed discretionary and “unlimited” paid time off programs implemented to replace accrued leave programs.
- Conducted enterprise-wide audits of worker classification and developed strategies for reclassifying misclassified workers and practical solutions for time recording practices (including donning/doffing, automatic clocking/deductions and use of remote devices for work) for manufacturing, healthcare, hospitality, distribution, technology and other industry employers.

Affirmative Action, Diversity Initiatives and EEO

- Developed and presented briefings for boards and other governing bodies addressing institutional leadership on these initiatives.
- Successful defense of EEOC investigations and OFCCP compliance audits focusing on allegations of class-wide race, gender and disability discrimination in hiring, promotion, compensation and terminations, including challenges to criminal history, testing and other employee selection criteria.
- Successfully resolved (pre-litigation) allegations of systemic race and gender discrimination, including those made by current employees and supported by national and local civil rights groups, and allegations of harassment against executives and high ranking officials.
- Regularly establishes and annually updates affirmative action plans for defense and other federal contractors (financial, healthcare, pharmaceutical, manufacturing, consulting, distribution, hospitality) with special emphasis on risk management regarding analysis of employment activity, compensation, recruiting and selection procedures.

Whistleblowing/Retaliation

- Strategic advice on managing whistleblowing employees.
- Successfully defended whistleblower and retaliation complaints before the U.S. Department of Labor, EEOC and other agencies, including environmental and financial fraud complaints.

Internal Investigations

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

Restructuring and Organizational Changes

- Designed RIFs, lay-offs, furloughs and recovery programs.
- Designed comprehensive workforce restructuring programs, including voluntary separation programs and employee selection and staffing processes that have been successfully defended before the U.S. Court of Appeals.

WorkHealth Initiatives and Risk Management

- Developed and integrated corporate policies for hospitals, banks and pharmaceutical, manufacturing and technology companies to manage leave (FMLA/STD/ADA reasonable accommodation leave/workers' compensation leave) and mandatory paid sick leave obligations. Developed fitness for duty programs including functional capacity testing for manufacturing, healthcare and distribution worksites.
- Developed mandatory vaccine policies designed to maximize herd immunity while minimizing liability for ADA and Title VII reasonable accommodation violations and served as reviewer of exemption requests.
- Developed drug-testing programs, including random testing programs and programs in medicinal and recreational marijuana and CBD jurisdictions.
- Led interdisciplinary publicly-traded Fortune 500 corporate ADA task force charged with: identifying Title I and Title III compliance issues; reviewing and modifying corporate policies, procedures and practices including medical testing, qualification standards and test administration accommodation.

Crisis Management

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

Labor

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

Training

- Develops customized content for training programs on establishing and maintaining respectful workplaces (including diversity, inclusion and microaggressions), interviewing and selection, performance management and legal aspects of managing people.
- Developed highly participatory mock trial training experience in which supervisors experience first-hand how their decisions play out in front of a jury which has been customized for employers in a wide range of industries and delivered across the country.

- Developed highly participatory mock trial training experience in which human resources professionals and internal company investigators experience first-hand how their decisions in conducting an investigation play out in front of a jury which has been customized for employers in a wide range of industries and delivered across the country.

Technology and Related Policies

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

HONORS & AWARDS

- *Best Lawyers®*, Employment Law - Management, Labor Law - Management (2007-2021)
- *Best Lawyers®*, "Lawyer of the Year," Raleigh Labor Law - Management (2013, 2021)
- *Chambers USA: America's Leading Business Lawyers*, Labor & Employment (2005-2020)
- Martindale-Hubbell AV Preeminent Rated since 1999
- North Carolina *Super Lawyers* (2006-2020)
- *Oklahoma Law Review*, Note Editor

PROFESSIONAL & COMMUNITY AFFILIATIONS

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



Isaac A. Linnartz

Attorney

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ilinnartz@smithlaw.com



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

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

EXPERIENCE

Business Litigation

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

AA CONTACT INFO

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PRACTICE AREAS

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

BAR & COURT ADMISSIONS

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

EDUCATION

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

- *Order of the Coif*

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

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

Employment Litigation

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

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

Duke University, B.A., History, 2004

CLERKSHIPS

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

The matter was mediated and favorably resolved by confidential settlement.

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

Other Litigation

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

HONORS & AWARDS

- North Carolina *Super Lawyers*, Rising Stars (2014-2020)
- *Benchmark Litigation*, Labor & Employment Star - South (2020)
- *Benchmark Litigation*, 40 & Under Hot List (2018)
- Selected, North Carolina Bar Association's Leadership Academy, Class of 2016
- Executive Editor, *Duke Law Journal*

PROFESSIONAL & COMMUNITY AFFILIATIONS

- North Carolina Bar Association
- Wake County Bar Association
- North Carolina Association of Defense Attorneys



Caryn Coppedge McNeill

Attorney

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

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

EXPERIENCE

- Represented a North Carolina bank and its parent with respect to the employee benefits aspects of an approximately \$220 million merger with another bank.
- Advised a multinational Fortune 500 provider of product development and integrated healthcare services on benefits-related matters in its merger with a NYSE-listed global information and technology services company, creating a leading information and tech-enabled healthcare service provider. The equity market capitalization of the joined companies was more than \$17.6 billion at closing.
- Provided employee benefits advice to a global LED lighting and semiconductor manufacturing company in connection with its agreement to sell \$850 million of assets to a publicly

AA CONTACT INFO

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PRACTICE AREAS

Employee Benefits and Executive
Compensation
Higher Education

BAR & COURT ADMISSIONS

North Carolina

EDUCATION

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

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 private equity fund and its contract research solutions portfolio company in their acquisition of a statistical programming, consulting, and data management company.
- Represented a pharmaceutical company being acquired by a global biopharmaceutical company and negotiated related 280G treatment and future severance protection and incentive arrangements for seller's employees.
- Advised a public biotherapeutic company about the 409A issues associated with extending the term of expiring options and the correction of same.
- Represented an institutional ESOP trustee in connection with the purchase of 100% of the stock of a chemical supplier.
- Advise multiple companies about a variety of issues associated with the administration of their qualified retirement plans, including creating investment policy statements, reviewing investment performance and replacing investment options; analyzing fiduciary issues related to changes in employer contributions or other plan design issues due to changes in economic circumstances; and correcting operational failures arising in day-to-day plan administration.
- Advised a semiconductor and LED company on employee benefits aspects of the divestiture of its lighting products business unit for an initial cash payment of \$225 million plus the potential to receive an earn-out payment based on the business's post-closing performance.
- Advised a publicly traded health services company on the employee benefits aspects of its acquisition of a health services division of a privately held company for \$105 million in cash.
- Advised a 100% Employee Stock Ownership Plan-owned company providing support services to the poultry industry in an acquisition by a private equity-backed buyer for approximately \$21 million in cash and equity.
- Advised a private equity fund on the employee benefits aspects of its acquisition of a specialty pharmaceutical company.

HONORS & AWARDS

- *Best Lawyers®*, Employee Benefits (ERISA) Law (2010-2021)
- *Best Lawyers®*, "Lawyer of the Year," Raleigh Employee Benefits (ERISA) Law (2013, 2016, 2018, 2020)
- North Carolina *Super Lawyers* (2014-2020)
- North Carolina *Lawyers Weekly* "Women of Justice" Award Recipient (2019)

- *North Carolina Lawyers Weekly* "Leaders in the Law" Honoree (2017)
- Martindale-Hubbell AV Preeminent Rated
- Triangle Business Leader Media's Pro Bono Impact Award

PROFESSIONAL & COMMUNITY AFFILIATIONS

- President, North Carolina Bar Association (2017-2018)
- Elected Member, The American Law Institute
- Carolinas Chapter of The ESOP Association
- National Association of Stock Plan Professionals
- Triangle Benefits Forum
- Chair, Board of Trustees, Ravenscroft School (2015-2017)
- Fellow, American Bar Foundation



Stephen T. Parascandola

Attorney

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

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

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

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

AA CONTACT INFO

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PRACTICE AREAS

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

BAR & COURT ADMISSIONS

North Carolina
New York
Florida

EDUCATION

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

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.

EXPERIENCE

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



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

HONORS & AWARDS

- *Best Lawyers®*, Environmental Law (2007-2021)
- *Chambers USA: America's Leading Business Lawyers*, Environmental (2013-2020)
- *Business North Carolina* "Legal Elite," Environmental
- Martindale-Hubbell AV Preeminent Rated
- North Carolina *Super Lawyers* (2010-2013, 2016-2020)
- Marquis *Who's Who in American Law*
- Fluent in Italian and Spanish; conversational and written Portuguese

PROFESSIONAL & COMMUNITY AFFILIATIONS

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



Susan Milner Parrott

Attorney

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sparrott@smithlaw.com



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

EXPERIENCE

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

AA CONTACT INFO

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PRACTICE AREAS

Employee Benefits and Executive Compensation

Employment, Labor and Human Resources

Litigation

BAR & COURT ADMISSIONS

Supreme Court of the United States

U.S. Court of Appeals for the Fourth Circuit

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

All North Carolina State Courts

EDUCATION

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

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

Duke University, B.A., with honors 1974



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

HONORS & AWARDS

- Martindale-Hubbell AV Preeminent Rated
- Fellow, American Bar Association

PROFESSIONAL & COMMUNITY AFFILIATIONS

- American Bar Association
- North Carolina Bar Association, Labor & Employment Section
- North Carolina Bar Association
 - Personnel Committee, Past Member
- North Carolina State Bar

- Board of Continuing Legal Education, Past Member
- Wake County Bar Association
 - Professionalism Committee, Past Member
- Community Foundation
 - Wake County Advisory Board, Past Member
- White Memorial Presbyterian Church
 - Elder



Kerry A. Shad

Attorney

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kshad@smithlaw.com



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

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

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

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

EXPERIENCE

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

AA CONTACT INFO

Tracy Benning
Phone: 919.821.6654
tbenning@smithlaw.com

PRACTICE AREAS

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

BAR & COURT ADMISSIONS

Supreme Court of the United States
United States Court of Appeals for the Fourth Circuit
United States District Courts for the Eastern, Middle and Western Districts of North Carolina
All North Carolina State Courts

EDUCATION

University of North Carolina, J.D.,
with honors, 1991

- Editorial Board, *North Carolina Law Review*
- Order of the Coif

Florida State University, B.S., 1985

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

- Retained by employers after EEOC issued cause findings for representation during the conciliation process and risk management of potential liability exposure.
- Served as "in-house" employment litigation counsel to large company managing employment litigation in jurisdictions across the country.
- Represented clients in arbitrations arising out of business sales and alleged violations of non-competition agreements.
- Developed highly participatory and mock trial training exercise for HR professionals and investigators for large global pharmaceutical company in which they experienced first-hand how their decisions and actions play out in front of a jury. The program was customized to client's policy and workforce.

HONORS & AWARDS

- *Best Lawyers®*, Employment Law - Management, Litigation - Labor & Employment (2009-2021)
- *Chambers USA: America's Leading Business Lawyers*, Labor & Employment (2012-2020)
- *Benchmark Litigation*, Labor & Employment Star - South (2019-2020)
- Martindale-Hubbell AV Preeminent Rated
- North Carolina *Super Lawyers* (2012-2020)
- *Triangle Business Journal's* "Women in Business Award" (2015)

PROFESSIONAL & COMMUNITY AFFILIATIONS

- American Bar Association, Employment and Litigation
- North Carolina Bar Association, Employment and Litigation Sections
- North Carolina Association of Defense Attorneys, Employment and Commercial Litigation
- Wake County Bar Association

Good Trouble: Making It Good, Avoiding the Trouble



Good Trouble: Making it Good, Avoiding the Trouble



Kimberly J. Korando

Taylor M. Dewberry

October 13, 2020

EXPECT EXCELLENCE®

Will this time be different?

2

What needs to change and how?

3



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4



Overview

- **Why**
 - Reasons
 - Objectives
- **Manner**
 - Size
 - Scale
- **How**
 - Approach
 - Method
- **When**
 - Where
 - Frequency
- **Bonus Material?**

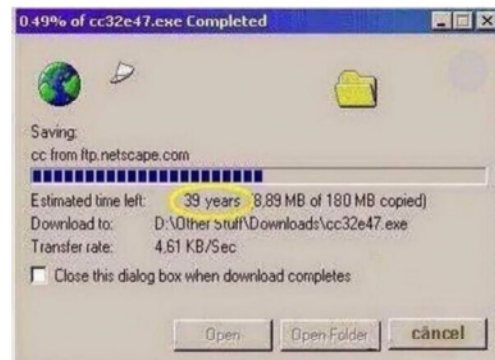
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- **Why.** Here we will discuss why these discussions may need to happen.
 - Reasons why discussing race is important
 - Focus the company on the clear objectives for the conversation
- **Manner.** What size should the conversation be and what should be the scale of the conversation.
 - Are we ready to have a company-wide conversation (indicators)?
 - How can we have a small conversation?
 - If we have a town hall what are some considerations?
- **How.** How can we discuss these tricky issues?
 - What should be the approach?
 - How can we actively listen?
 - What should we avoid?
- **When.** Where should these conversations happen and to what frequency?
 - How do we make them sustainable?
 - How often should they happen?

“The World Wide Web”



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 SMITH
ANDERSON

“The World Wide Web”

- Current Events and the Internet
- Controversial Posts Management

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7



The Why? - Current Events



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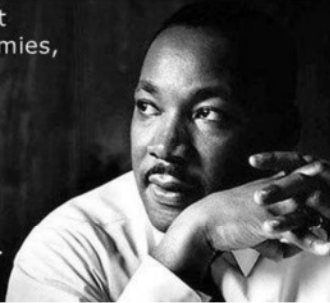
8



The Why? - Silence

"In the end,
we will remember not
the words of our enemies,
but the silence
of our friends."

Martin Luther King Jr.



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The Why? - Current Diversity Initiatives



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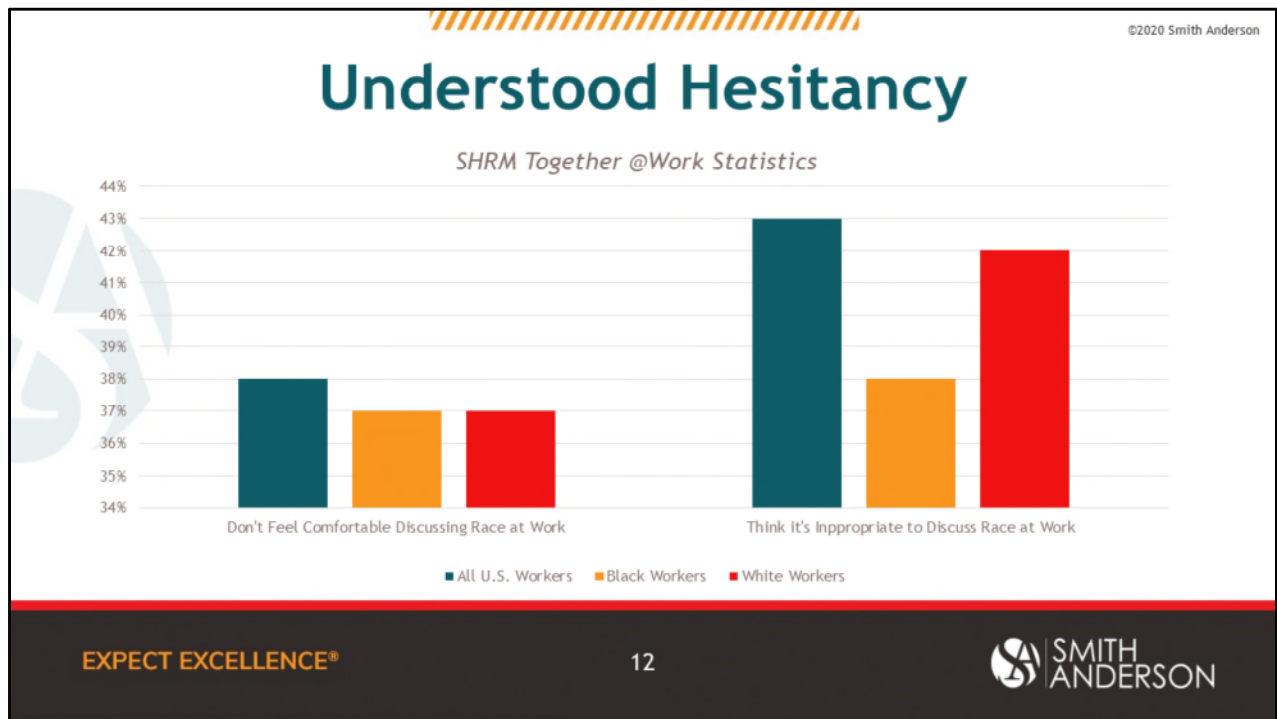
The Why? - Remote Employees



EXPECT EXCELLENCE®

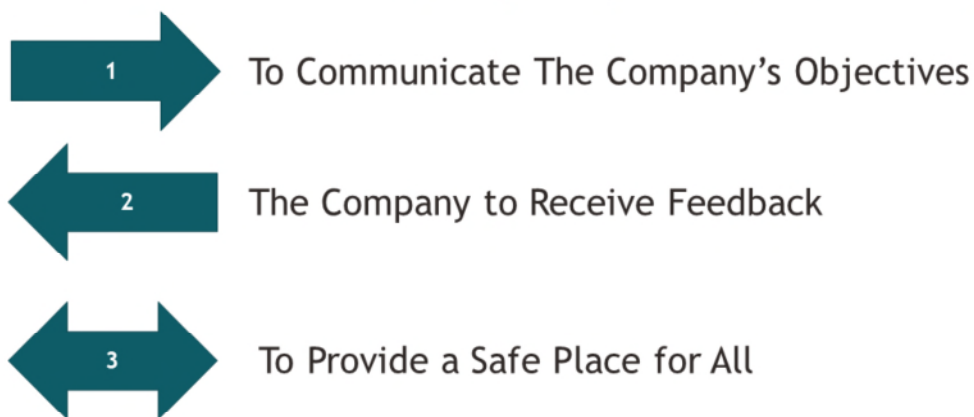
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The Journey to Equity and Inclusion Summer 2020 – SHRM @Work – These statistics were included in an article in SHRM. “The U.S. worker survey was a sample of 1,257 U.S. workers surveyed using the AmeriSpeak Omnibus, a probability-based panel developed by NORC at the University of Chicago that is designed to be representative of the U.S. household population.” The survey was administered June 11 through June 15, 2020, and contained an oversample of Black respondents.”

The Reasons - Company Objectives



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1. **Objective One (Communicate).** To communicate clearly the Company's stance on issues of race and racism.
2. **Objective Two (Receive Feedback).** To receive feedback on what the Company can do to better address issues of race and racism.
3. **Objective Three (Safe Space).** To provide an opportunity for employees to vent about how they are feeling.

The Manner - Company-wide Discussions

- Indicators:
 - Diversity and inclusion goals are clearly articulated and reviewed annually to assess effectiveness towards diversity and inclusion.
 - Employees already feel valued or feel like they don't need to "cover" significant parts of their identity.
 - Formal programs already exist to promote an inclusive environment such as mentoring, professional development opportunities, employee network groups, etc.
 - The Company is vested in finding creative ways to attract top diverse talent and an openness to suggestions from people at all levels in the organization.
 - Flexibility exists to accommodate personal responsibilities outside of the job.

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Source Material: Winters Group - <https://www.wintersgroup.com/resources/bic-addressing-race-racism-workplace/> (Discussing extensive resources on indicators of whether your company is ready to discuss race).

The Manner - For Both Small and Large Group Discussions

When and Where Matters

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The Manner - Small Scale Conversations

- One-on-ones
- Small group conversations
- Affinity groups
- Diversity and inclusion committees

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The Manner - Large Company-wide Conversations

- Company-wide town halls
- Celebrations of culturally relevant holidays or presentations
- Volunteer work involving social justice

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The Manner - Town Halls

- What are the objectives and why are we having a company-wide conversation?
 - Objectives and Why
- Have we adequately planned the event?
- Have we conducted a thorough survey of the office climate?
 - Do co-workers trust each other?
 - How many employees have expressed interest?
- Should senior management be there?
- Should it be mandatory or voluntary?

The Manner - Virtual Town Halls

- Breakout Groups
- Provides comfort to employees in their home
- Provide both anonymous and identified opportunities for questions
- Interactive components



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The Manner - Who will Attend?

- How many individuals do you want to attend?
- Will everyone be speaking?
- How will they add to the conversation?
- Will company policy be impacted?
- Should the decision makers be invited?

How - Approach & Method

1. Acknowledge and validate
2. State your intentions
3. Acknowledge that you don't have all the answers
4. Prepare before you talk
5. Normalize discussing race in the workplace
6. Discuss and refrain from debating
7. Avoid conflating, comparing, or contrasting

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Prepare Before You Talk Resources:

- National Museum of African-American History and Culture - <https://nmaahc.si.edu/learn/talking-about-race>

Normalize Discussing Race in the Workplace:

- Articles by Stephanie Dr. Creary (UPenn) - <https://knowledge.wharton.upenn.edu/article/begin-talking-race-workplace/>
- YouTube Lecture by Dr. Creary - <https://www.youtube.com/watch?v=DNpadtcYh5I>

When - Frequency

- Strive to act or have conversation outside of current events
- Set a regular schedule
 - That doesn't cause too much fatigue
 - Find natural places to discuss
 - Consider structuring it around significant cultural events

When the Employer Should Not Start Conversations about Race & Racism

- Interview Process
 - Presumption
 - Handling questions about company diversity initiatives
- Reviews or Evaluations
- Consider workplace power dynamics

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“The World Wide Web”



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WWW - Control and Manage Conflict

- Employees will not always use the approved platforms in the most appropriate ways.
- What employees do online carries some legal risk and concerns for the employer.
- Considering the current state of the social climate, employers will want to be in tune to these issues.
- Companies should also rely on their social media policies (tips are included in the notes).

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Social Media Policies. Employers should always have an established social media policy governing social media externally and internally that provides guidelines for appropriate use of social media. Including the following:

(1) Emphasize the NLRA protections. “Nothing in the company’s social media policy is designed to interfere with, restrain, or prevent employee communications regarding wages, hours, or other terms and conditions of employment. Employees have the right to engage in or refrain from such activities.”

(2) Define which social media platforms are governed by this policy. “Social media includes all means of communicating or posting information or content of any sort on the Internet, including to your own or someone else's web log or blog, journal or diary, personal web site, social networking or affinity web site, web bulletin board or a chat room, whether or not associated or affiliated with [Employer], as well as any other form of electronic communication.”

(3) Explain the employees’ social media posts may be monitored. “Explain to employees that their personal social media accounts, online networking accounts, blogs and other communications may be reviewed.” Subject to any state specific laws prohibiting employer access. More than two dozen states have enacted laws that address employer access to

current and prospective employee's social media accounts, including other nearby states such as: Maryland (Md. Code Ann., Lab. & Empl. § 3-712), Tennessee (T.C.A. §§ 50-1-1001 - 50-1-1003), Virginia (Va. Code Ann. § 40.1-28.7:5), and West Virginia (W. Va. Code § 21-5H-1).

(4) Acknowledge the disciplinary repercussions for bad behavior online. “Before creating online content, consider some of the risks and rewards that are involved. Keep in mind that any of your conduct that adversely affects your job performance, the performance of fellow associates or otherwise adversely affects members, customers, suppliers, people who work on behalf of [Employer] or [Employer's] legitimate business interests may result in disciplinary action up to and including termination.”

(5) Inform employees that discriminatory or inappropriate postings will not be tolerated. “Inappropriate postings that may include discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct will not be tolerated and may subject you to disciplinary action up to and including termination.”

(6) Encourage respectful, honest and accurate communication online. “Remind employees that they are more likely to resolve work-related complaints by speaking directly with co-workers or speaking directly with co-workers or by using the employer's existing Open Door Policy.”

WWV - Protections for Employees

- Title VII Anti-Retaliation and State Discrimination Laws
- National Labor Relations Act (NLRA)
- No First Amendment Protections for Private Sector Employees
- State Laws Involving Off-Duty Lawful Actions

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- (1) Title VII Anti-Retaliation/State Discrimination Laws.** Be mindful that employees have a legal right to discuss/report complain about harassment, discrimination, workplace safety violations and other issues and these conversations may not always come up in the ideal manner that the employer wants to discuss difficult topics. The employer should be mindful to remind employees of their options to report race-based (and all other) forms of harassment and discrimination.
- (2) National Labor Relations Act (NLRA).** To the extent that issues of race and race relations are related to wage and working conditions, employee's conversations may be protected under the National Labor Relations Act that gives private-sector employees in both union and nonunion settings the right to discuss wages and working conditions.
- (3) No First Amendment Protections for Private Sector Employees.** Employees often believe that their statements online are protected by the First Amendment, but the First Amendment deals specifically with the federal government and prevents the federal government from interfering with freedom of speech, it does not guarantee it in private settings, including workplaces. Private-sector employees are not shielded from employment consequences under the First Amendment protections.

(1) The NLRB emphasizes some points regarding the NLRA policies and social

media (<https://www.nlr.gov/about-nlr/rights-we-protect/your-rights/the-nlr-and-social-media>):

- Employer policies should not be so sweeping that they prohibit the kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among employees.
- Companies are also prohibited from maintaining a policy that would reasonably tend to chill employees from exercising their rights under the NLRA.
- To determine whether a rule is lawful, the NLRB will first look at the nature and extent of the rule's potential impact and interference on workers' rights to discuss the terms and conditions of employment. Some rules will be considered lawful without any further review because they do not restrict workers' rights.
- Other rules will be reviewed with individual "scrutiny" or reviewed to determine the extent of potential interference with protected rights.
- For other rules, the Board will look to the legitimate business justification for the rule to determine if it outweighs any potential inference with employer rules.

(1) Be Mindful of State Laws Involving Off-Duty Lawful Activity. North Carolina Lawful Use of Lawful Products (N.C.G.S. § 95-28.2 - https://www.ncleg.net/enactedlegislation/statutes/html/bysection/chapter_95/gs_95-28.2.html) prohibits employer to fail or refuse to hire a prospective employee, or otherwise discriminate against any employee with respect to terms and conditions of employment if the prospective employee or the employee engages in or has engaged in the lawful use of lawful products if the activity occurs off the premises of the employer during nonworking hours and does not adversely affect the employee's job performance or the person's ability to properly fulfill the responsibilities of the position in question or the safety of other employees. Other states such as California, Colorado, Louisiana, New York, and North Dakota ban employers from firing or retaliating against employees for any off-duty lawful activity, these states may include components of free speech.

WWW - Enforcement on the Intranet and Company Forums

- Conversations on the intranet and company forums have increased.
- Consider issuing community guidelines including the following:
 - Encourage respect for their fellow employees;
 - Encourage employees to settle or discuss any disputes offline in-person where they can have a face-to-face conversation;
 - Remind employees of the company's anti-discrimination and harassment policies;
 - Encourage inclusion;
 - Discourage conversation that makes people feel excluded;
 - Remind employees that all electronic communication on the company's platforms are monitored and periodically reviewed; and
 - All posts that trigger an employee complaint will be reviewed and any post that violates the community guidelines will be removed immediately.

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WWW - Enforcement on the Intranet and Company Forums

- All posts that trigger an employee complaint will be reviewed and any post that violates the community guidelines will be removed immediately



WWW - Enforcement on the Intranet and Company Forums

- The best advice is to have guidelines before you face your first problem.

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WWW - Enforcement Do's and Don'ts Online

Do's

- Fairly Discipline Employees
- Reiterate and Remind
- Encourage Offline Disputes

Don'ts

- Ignore Problems
- Rely on Diverse Employees to Flag Issues for You

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Linked materials for conflict resolution:

- **SBAR Conversation (Institute for Healthcare Improvement)** - <http://www.ihl.org/resources/Pages/Tools/SBARToolkit.aspx>
- **Difficult Conversations (Yale)** - <https://your.yale.edu/policies-procedures/guides/using-desc-make-your-difficult-conversations-more-effective>

Well-intended and well-
executed...

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What needs to change and how?

Recruiting, Hiring and Retention

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Other Resources

World Economic Forum, Diversity, Equity and Inclusion Toolkit 4.0
http://www3.weforum.org/docs/WEF_NES_DEI4.0_Toolkit_2020.pdf

Goals, preferences, plus factors... The legal stuff HR needs to know

- **Preferential treatment** of any individual or group because of race, color, religion, sex or national origin **even when imbalance exists** is **NOT REQUIRED**
- **Discriminatory preference** for any group, minority or majority, is **UNLAWFUL**

BUT

- **Not all** voluntary race/sex conscious actions are **unlawful**

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Title VII

“Nothing...shall be interpreted to require any employer...to grant preferential treatment to any individual or to any group because of the race, color, religion, sex or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race...employed by any employer...in comparison with the total number or percentage of persons of such race...in any...area, in the available work force in ... any area.” 42 USC §2000e-2(j)

U.S. Supreme Court

- The Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress proscribed. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).
- Congress did not intend to prohibit all race- or sex-conscious actions taken voluntarily by employers. *Steelworkers v. Weber*, 443 U.S. 193 (1979) (literal construction of Title VII is misplaced in light of Congressional intent).
- The Court has imposed a series of limits on such voluntary affirmative action plans to ensure that they are consistent with the intent of Congress and do not undermine the

basic principle of non-discrimination.

Goals, preferences, plus factors*: What's legal? What's not?

**Based on race, ethnicity, gender or other protected characteristic*

Aspirational goals

- ... that do NOT involve preferences, plus factors, quotas, etc. are LEGAL and do NOT have to meet requirements of a voluntary affirmative action plan (AAP)

Preferences, plus factors, etc.


- ...likely are ILLEGAL unless there is bona fide voluntary AAP

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Bona fide voluntary AAP (non-government employers)

*Must meet
all 3
requirements*

- 1-Clear statistical disparity exists
- 2-Temporary duration and
- 3-Cannot trammel rights of non-minorities

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Non-government Employer Voluntary Affirmative Action

Steelworkers v. Weber, 443 U.S. 193 (1979) (race)

Johnson v. Transportation Agency, 480 U.S. 616 (1987) (race and sex)

To be lawful, voluntary affirmative action must meet these requirements:

- 1) Factual predicate: Clear statistical disparity (statistically significant) between minority/women representation in surrounding labor market and their representation in the positions at issue. For example, substantial underrepresentation of women in traditionally male jobs is sufficient factual predicate. No admission of prior discrimination by employer is needed.

3 ways to establish the factual predicate:

- actual past discrimination by employer
- statistical disparity that would establish prima facie pattern or practice without regard to whether employer discriminated, or
- manifest imbalance in traditionally segregated job categories

- 2) Plan is temporarily in place only for as long as needed to eliminate a manifest imbalance, not maintain representation once underrepresentation is eliminated **Tip:**

Use “attain” language in plan documents, e.g., “to attain a work force whose composition reflected the proportion of minorities and women in the relevant labor force.”

- 3) Plan cannot trammel rights of non-minorities, such as by resulting in layoff, discharge or absolute bar to advancement

Tip: Race/sex can only be permissible “plus factor” when no minority candidate is insulated from competition with non-minority AND no non-minority is foreclosed from any slot

Voluntary AAP: Do's and Don'ts

Do's	Don'ts
Written, temporary (attain language)	Unwritten, indefinite (maintain language)
Narrowly tailored goals	Goals disproportionate to imbalance
Plus factor in multi-factor subjective "holistic" assessment	M/W* insulated from competition with non-M/W Non-M/W excluded from consideration Strict quota, set asides or automatic "bonus" points
Neutral alternatives considered	Use in layoff or discharge selections Modify outcomes to remedy disparate impact
*Minorities and/or women (MW)	

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Minorities and/or women (MW)

Goals, preferences and plus factors: By Stage of Process

Recruiting	Hiring	Promotion	Layoff/Termination
<ul style="list-style-type: none"> Targeted and active outreach to MW to increase representation in pool permitted Bona fide AAP not required Legally defensible as long as resulting applicant pool resembles relevant labor market 	ASPIRATIONAL GOALS—NO PREFERENCE/PLUS FACTOR—NOT SUBJECT TO AAP REQUIREMENTS		
	<ul style="list-style-type: none"> Preference/plus factor for M/W permissible when bona fide AAP exists 	<ul style="list-style-type: none"> Preference/plus factor for M/W requires: <ul style="list-style-type: none"> bona fide AAP and promotion expectation is “diffuse” (i.e. not settled by seniority or like practices) 	<ul style="list-style-type: none"> Preference/plus factor that trammels rights of non-minorities is not permitted

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Recruiting Notes

- Employer generally has latitude in choosing among non-discriminatory recruiting methods. But if hiring claim challenges the recruiting method, then the litmus test will be whether the applicant pool resembles the relevant labor market.
- Where multiple recruiting methods are used and some cause disparate impact, no violation will be found as long together the recruiting methods result in a representative applicant pool.

Identify, attract and hire

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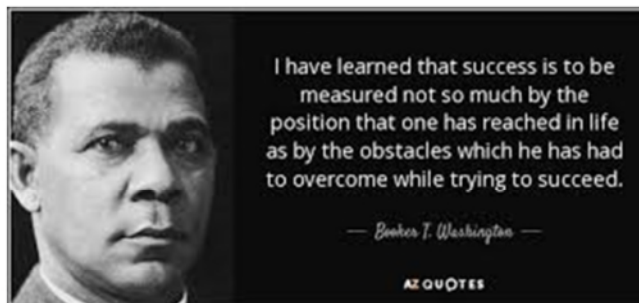
38



Recruiting Best practices: Stocking the pond

Before you post

- Align branding and marketing with DEI
- Redefine “best qualified”
 - Understand what really makes a successful asset to the organization



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Branding and Marketing

- Images, employee testimonials and success stories
- Highlight employee resource and affinity groups
- Social justice statement, actions

Redefining Best Qualified Tips

- Does 1 or 2 years more experience in same job, or which school was attended, or GPA, or some other readily achievable skill listed on a resume really make your most successful assets? Or, is it employees who are good collaborators, problem-solvers, embrace change, team first mentality, an internal drive to be the best they can be?
- Consider how colleges go about thinking out of the box for potential and talent.

1st generation college

Worked way through school, w/ children, single parent even better

Questions Worth Asking

What thing you have done are you most proud of and why?

What was most challenging thing you faced and what did you do to overcome it?

What did you learn from that experience? What would you do differently next time

and why?

Where do you want to be in 5 years and how do you plan to get there?

What are you looking for in a job?

A year from now, why would I be glad we hired you?

Recruiting Best Practices: Stocking the pond

Numbers matter

- Set a “qualified” applicant % goal for MW
 - Apply to headhunters and staffing agencies too

Examples in practice

- Rooney rule (must consider 1 Black for NFL head coaching position)
- Mansfield rule (law firms must consider 30 percent women and attorneys of color)

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- Goals should be set at time of posting and based on minority/female representation in the relevant labor market
- Consider removing names from resumes/screening profiles. M. Bertrand, S. Mullainathan, **Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination** [American Economic Review vol. 94, no. 4, September 2004](#) (pp. 991-1013)

Abstract

We study race in the labor market by sending fictitious resumes to help-wanted ads in Boston and Chicago newspapers. To manipulate perceived race, resumes are randomly assigned African-American- or White-sounding names. White names receive 50 percent more callbacks for interviews. Callbacks are also more responsive to resume quality for White names than for African-American ones. The racial gap is uniform across occupation, industry, and employer size. We also find little evidence that employers are inferring social class from the names. Differential treatment by race still appears to still be prominent in the U. S. labor market.

Rooney Rule

In May 2020, the NFL announced that it will expand the Rooney Rule to require additional

interviews of minority candidates. The league will require clubs to interview at least two external minority candidates for head coaching openings. The NFL continues to search for ways to fix the Rooney Rule after another hiring cycle where minority candidates were significantly bypassed, including just three of the past 20 head coaching openings going to minorities.

Mansfield Rule

Inspired by Rooney rule, named after Arabella Mansfield, the first woman admitted to the bar in the United States, it measures whether law firms affirmatively consider at least 30 percent women, lawyers of color, LGBTQ+ lawyers, and lawyers with disabilities for leadership and governance roles, equity partner promotions, formal client pitch opportunities, and senior lateral positions.

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Recruiting Best Practices: Targeted and active outreach yields diverse applicant pools

HBCUs	Non-HBCUs	Minority Job Fairs
Diverse Professional Associations	Community Organizations	Military

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HBCUs

As of January 2020, 107 HBCUs with more than 228,000 students enrolled.
<https://www2.ed.gov/about/offices/list/ocr/docs/hq9511.html>

Listed by state: <https://hbculifestyle.com/list-of-hbcu-schools/>

In North Carolina (state with most undergraduates enrolled in HBCU):

[Elizabeth City State University](#) Elizabeth City

[Fayetteville State University](#) Fayetteville

North Carolina A&T State Greensboro

North Carolina Central University Durham

Winston-Salem State Winston-Salem

[Barber-Scotia College](#) Concord

[Bennett College](#) Greensboro

[Johnson C. Smith University](#) Charlotte

Livingstone College Salisbury

St. Augustine's College Raleigh

Shaw University Raleigh

Latinx

- Association of Latino Professionals in Finance and Accounting (ALPFA)ALPFA Charlotte <https://www.alpfa.org/page/charlotte> (job board); student chapters
- Hispanic Association of Colleges and Universities <https://www.hacu.net/hacu/default.asp>

Diverse professional associations (e.g., National Black MBA Association, ALPFA)

Community: Black churches and radio stations, community centers in urban areas

Can referral bonuses for successful minority or women candidates be larger than referral bonuses for other successful candidates?

Probably yes, but such disparities can lead to public criticism and perhaps tied to positions with underrepresentation

Recruiting Best Practices: Targeted active outreach tips

HBCUs

- Recruit from 1 for every non-HBCU recruited from
- Set a minimum number of call-backs from each school
- Build relationships with career development offices
- Black sororities/fraternities are rich source of service-minded people

Non-HBCUs

- At each, connect with the diverse student organization for referrals, mixers, etc.

Minority job fairs

- Attend 1 for every non-minority job fair attended

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Non-HBCU Diverse Student Organizations

- Google is your friend
- Examples:
 - Minority Student Caucus (UNC Gillings School of Global Public Health)
<https://sph.unc.edu/students/minority-student-caucus/>
 - Minority Business Student Alliance (UNC Kenan-Flagler Business School)
<https://heellife.unc.edu/organization/minority-business-student-alliance>
 - Women and Minority Engineering Programs (NCSU) internship programs
<https://www.engr.ncsu.edu/wmep/mep/> <https://www.engr.ncsu.edu/wmep/>
 - National Society Minorities in Hospitality (ECU)
<https://business.ecu.edu/studentorgs/>

Minority Internship Programs: Are they legal?

It depends...

- Probably **illegal** to limit eligibility to minorities or women
- Probably **okay** to define eligibility as “underrepresented groups” including but not limited to X, Y, and Z

Tip:

- Pitch all internship programs to HBCUs, diverse student groups and other diverse referral sources

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- Getty Foundation sued for limiting internship to minority groups (<https://bbs.boingboing.net/t/white-woman-wants-minority-internship-sues-getty-foundation/77631>)
- modifies eligibility requirement. <https://www.nbclosangeles.com/news/local/woman-sues-getty-foundation-claims-she-was-denied-internship-because-shes-white/2004332/>
- http://www.getty.edu/foundation/initiatives/current/mui/mui_students.html (lasted visited Oct. 1, 2020)

Getty Marrow Undergraduate Internships: Students

Eligibility

Students must:

Be of a group underrepresented in museums and visual arts organizations, including, **but not limited to**, individuals of African American, Asian, Latino/Hispanic, Native American, or Pacific Islander descent;...(emphasis added)

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Military: Top 10 Reasons to Hire a Vet (other than 43% active duty military are diverse)



Leadership Experience	Strong Personal Integrity	Ability to Work as a Team Member and Team Leader	Performance Under Pressure
Possession of Valid Security Clearance	Strong Work Ethic	Specialized Advanced Training and Technical Skills	Flexibility and Adaptability
	Discipline	Attention to Detail	

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Source: U.S. Colonel (Ret.) Kirk G. Warner, author of *Zone of Action: A JAG's Journey Inside Operations Cobra II and Iraqi Freedom*, and Smith Anderson partner

Military hiring links:

- NC4ME: <https://nc4me.org/> see employers tab
- Military ONESource <https://www.militaryonesource.mil/military-life-cycle/separation-transition/military-separation-retirement/transition-assistance-programs-and-resources>
- Soldier For Life – Transition Assistance Program: <https://www.sfl-tap.army.mil/>
- Military Transition Assistance Program: <https://www.military.com/military-transition/transition-assistance-program-overview.html>
- USDOL Veterans Transition Assistance Program: <https://www.dol.gov/agencies/vets/programs/tap>
- Bradley-Morris, Inc. <https://www.bradley-morris.com/2020/04/02/bradley-morris-recruitmilitary-appointed-by-u-s-army-human-resources-command-and-army-transition-assistance-program-as-contracted-provider-of-employment-transition-services-to-soldiers-veterans/>

Also see:


<https://www.foxbusiness.com/features/ten-reasons-to-hire-a-veteran>

<https://www.military.com/hiring-veterans/resources/10-reasons-to-hire-vets.html>
<https://blog.careeronestop.org/top-10-reasons-to-hire-a-veteran/>
<https://talentculture.com/10-reasons-why-you-should-hire-a-veteran/>
<https://www.businessinsider.com/reasons-companies-should-hire-military-veterans-2016-11>
<https://communities.usaa.com/t5/Going-Civilian/10-Reasons-Why-Hiring-Military-Veterans-is-Great-for-Your/ba-p/214526>
<https://www.pewresearch.org/fact-tank/2019/09/10/the-changing-profile-of-the-u-s-military/>
<https://www.cfr.org/backgrounders/demographics-us-military>


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Targeted and active outreach drives more diverse applicant pools

From this:



To this:



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Tips

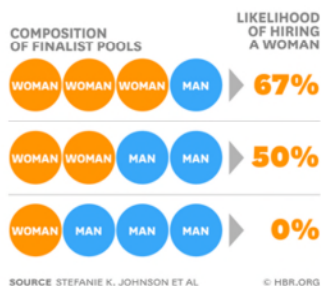
Consider removing names from resumes/screening profiles. M. Bertrand, S. Mullainathan, **Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination** [American Economic Review vol. 94, no. 4, September 2004](#) (pp. 991-1013):

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Interviews and Selection: Finalist Pool Best Practices

The Relationship Between Finalist Pools and Actual Hiring Decisions

According to one study of 598 finalists for university teaching positions.



“The odds of hiring a minority were 193.72 times greater if there were at least two minority candidates in the finalist pool (controlling for the number of other minority and white finalists).”

TAKEAWAY:

Set interview pool AND finalist goals > 1

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S. Johnson, D. Hekman, E. Chan, **If There's Only One Woman in Your Candidate Pool, There's Statistically No Chance She'll Be Hired**, Harvard Business Review, April 26, 2016

Interviews and Selection: Best Practices

Staffing

- Career fairs staffed with at least one minority and one woman company representative
- Resumes screened by minority and women staff with written screening protocol
- Diverse multi-interviewer panel and decision-makers

Interviews and ratings

- Structured interview questions (remember redefining best qualified)
- Avoid undefined “fit” characterization, it can be a code word for sameness

Technology

- Technology, algorithms have biases too - conduct due diligence and annually audit impact

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Technology

Recent studies have shown that technologies have biases too and can actually deepen inequities. Technology sector lacks diversity and that has led to blind spots in technology design, especially with machine learning algorithms, and adverse impact. World Economic Forum, Diversity, Equity and Inclusion Toolkit 4.0
http://www3.weforum.org/docs/WEF_NES_DEI4.0_Toolkit_2020.pdf

Two questions to ask vendors:

- Details on the due diligence on whether the product has biased outcomes by race, ethnicity and gender
- Diversity of the team(s) that designed/created the product and what bias mitigation training they received

Audit Annually to Catch Bias in Artificial Intelligence

<https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/artificial-intelligence-diversity.aspx>

...And then retain

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Retention Keys and questions to ask

It's a culture issue

- Feel valued and safe?
- Comfortable being authentic self—dress, hair, talk?
- Paid equally?
- Demonstrable career development and promotions?

Role models, success stories and allies, advocates and mentors in management?

People managers

- Educated on expectations and how to support DEI?
- Held accountable for their behaviors and progress toward goals?

and you likely need more than 1 ...

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Retention Tips

People managers

- People managers have the power to make employees feel valued and safe and create an environment and opportunities success
- Managers focus on what is being measured and incentivized positively or negatively
- Regular check-ins with each employee to see what they need, ask about how they are doing, understand employee aspirations and trouble shoot issues
- Performance evaluation feedback from colleagues based on frequency of interaction (not just supervisor/manager)

Role models

- The higher the position, the more benefit to be gained in filling with a diverse candidate, especially an internal diverse candidate

Feeling valued and safe

- Executive Order on discontinuing federal agency training on racial sensitivity that discussed topics such as white privilege and critical race theory (legal institutions inherently racist and race is social construct) on the grounds that it is divisive and anti-American

- Most attorneys currently advising clients to not ditch training over concerns of division
- Microaggression training is a big must-have together with workplace conversations that may be best path forward
- Unconscious bias training alone may not be effective or even constructive. F. Gino, **What Facebook’s Anti-Bias Training Program Gets Right**, Harvard Business Review, August 24, 2015 <https://hbr.org/2015/08/what-facebooks-anti-bias-training-program-gets-right>:
 “In fact, just raising *awareness* of unconscious biases is not sufficient to end them in organizations.... To effectively combat them, training programs also need to help people *accept* that biases affect them, stress their *concern* about the consequences, and assure people are willing to learn *to replace* those tendencies with ones that more closely match their values (e.g., not having prejudice).”

“Never, ever be afraid to make some noise, and get in
good trouble, necessary trouble”

Rep. John Lewis
1940-2020

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Lift Every Voice and Sing

By James Weldon Johnson

Lift every voice and sing
Till earth and heaven ring,
Ring with the harmonies of Liberty;
Let our rejoicing rise
High as the listening skies,
Let it resound loud as the rolling sea.
Sing a song full of the faith that the dark past has taught us,
Sing a song full of the hope that the present has brought us,
Facing the rising sun of our new day begun
Let us march on till victory is won.

Stony the road we trod,
Bitter the chastening rod,
Felt in the days when hope unborn had died;
Yet with a steady beat,
Have not our weary feet
Come to the place for which our fathers sighed?

We have come over a way that with tears has been watered,
We have come, treading our path through the blood of the slaughtered,
Out from the gloomy past,
Till now we stand at last
Where the white gleam of our bright star is cast.
God of our weary years,
God of our silent tears,
Thou who has brought us thus far on the way;
Thou who has by Thy might Led us into the light,
Keep us forever in the path, we pray.
Lest our feet stray from the places, our God, where we met Thee,
Lest, our hearts drunk with the wine of the world, we forget Thee;
Shadowed beneath Thy hand,
May we forever stand.
True to our God,
True to our native land.

<https://www.youtube.com/watch?v=D93maBSPQcM>



Good Trouble: Making it Good, Avoiding the Trouble



Kimberly J. Korando

Taylor M. Dewberry

October 13, 2020

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Employee Health in the Workplace: Challenges During and After COVID-19

Employee Health in the Workplace:

Challenges During and After COVID-19



Rosemary Gill Kenyon

October 13, 2020

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Moving Forward in the Midst of COVID-19

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What stage are you operating now?

- Operating on-site fully
- Operating on-site partially with some employees working remotely
- Operating totally remotely

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Make a Plan for Moving Forward

Comprehensive Operational Plan

- Resource for employer and employees to understand operational standards
- Address various scenarios
- Provide flexibility
- Keep employees informed about the future to minimize anxiety

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3



Unique Considerations for Operating During a Pandemic

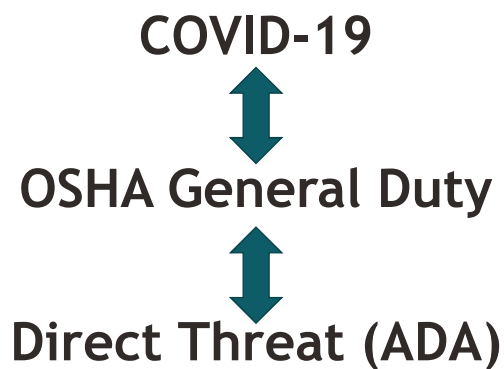
• OSHA General Duty Obligations	• Business Need to Operate
• CDC Guidance	• Feasibility of Remote Work
• Government Orders	
• COVID-19 Exposures and Community Spread	
• Employee Morale and Health	

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Unique Obligations When Operating In Person



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Infectious Disease Policies

- Must develop and enforce
 - Safety protocols
 - Baring sick employees from workplace

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Testing and Health Inquires Allowed During COVID-19

- Daily Health Screens
 - CDC recommends and required in some places
- COVID-19 Testing
 - Periodically, as a condition to return to work, when reasonable basis exists (e.g., exhibits symptoms, exposed, household member diagnosed or has symptoms, recovered from COVID-19)
- Medical documentation for requests for accommodations or leave or fitness for duty

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Testing and Health Inquires Allowed During COVID-19

Employer Dos and Don'ts:

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

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Moving Forward under the ADA

Use traditional ADA analysis

- Is there a covered disability? Request medical documentation.
- Can the employee perform the essential functions of the job?
- Is there a reasonable accommodation?
- Use the interactive process!

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Moving Forward under the ADA

Reasonable Accommodations

- Review and reconsider what are *essential functions* vs. *marginal functions* in the COVID-19 and post-COVID-19 era.
- Making exceptions during COVID-19 will not necessarily bind an employer down the road, if proper justification is provided.

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Moving Forward under the ADA

- Reasonable Accommodations
 - Be creative
 - Remote work is not the only answer
 - Extra PPE, barriers, shift work, other

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Higher Risk Workers - CDC Categories

- Pre-existing conditions are likely disabilities
- Cannot bar from workplace unless the individual presents a “direct threat” to him/herself or to others (high standard) and no other reasonable accommodation is available

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Higher Risk Workers - Age

- Being 65 or older is identified as a risk category by the CDC
- Not a disability in itself
- Employers may offer flexibility to older workers even if not offered to younger employees
- Employer may not bar older workers from workplace

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Sensitive Cases

- Family member at higher risk
- Anxiety and mental health issues

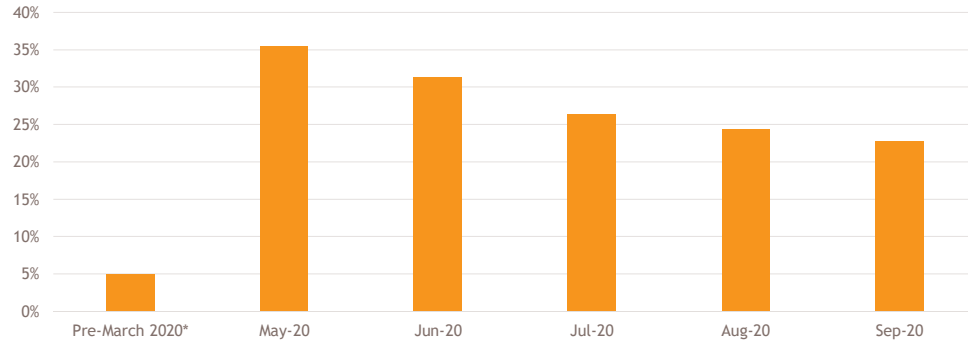
See, *Mental Health, Substance Use, and Suicidal Ideation During the COVID-19 Pandemic*,
Center for Disease Control and Prevention,
<https://www.cdc.gov/mmwr/volumes/69/wr/mm6932a1.htm>

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Remote Work as an Accommodation During and Post-COVID-19?



Percent of Employed Workforce Teleworking

U.S. Bureau of Labor Statistics

*Cushman & Wakefield, Global Office Impact Study & Recovery Timing, September 2020

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Remote Work as an Accommodation During and Post-COVID-19?

- When litigated pre-COVID-19, courts ruled in favor of employers who denied this accommodation about 70% of the time
- Lessons learned from teleworking during COVID-19:
 - Much work may be done remotely
 - Some work still cannot be done remotely - healthcare, manufacturing, retail
- What is the future for in-person attendance requirements?

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COVID-19 - Vaccines and Antibodies Tests

- May an employer:
 - Require a flu vaccine?
 - Require a COVID-19 vaccine?
 - Require a COVID-19 antibody test?
- It depends - the landscape is evolving
- Subject to potential accommodations for medical and religious reasons

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Moving Forward Enforcing Safety Rules

Wearing a mask violates my rights!

- Medical or religious accommodations should be considered, if appropriate
- Employer does not have to dispense with safety rule - compliance is an essential function
- If employee believes requirement is unsafe (e.g., vaccine)
 - Explain safety reasons behind requirement
 - Proceed cautiously to minimize OSHA retaliation claims

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Managing Anxiety about Returning to Work

What is your game plan?

- Keep employees informed
- Explain safety precautions and protocols
- Employers may ask employees if they need a reasonable accommodation in advance

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Managing Leave Laws in the Midst of COVID-19

- State and Local Laws (proliferating)
- ADA and FMLA
- Emergency federal legislation

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Managing Leave Laws in the Midst of COVID-19

Families First Coronavirus Response Act (FFCRA), March 18, 2020

- Covered employers <500 employees
- Effective - April 1 - December 31, 2020

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Managing Leave Laws in the Midst of COVID-19

Expanded FMLA Leave (Paid after 2 weeks)

- Eligible employee -- worked 30 days
- Parents of children whose school or childcare is closed or unavailable
- Not an add-on to 12 week allotment of traditional FMLA leave taken
- Subject to other FMLA rules (e.g., offer health care benefits, no retaliation, no interference)

Emergency Paid Sick Leave (EPSL)

- All employees eligible
- 6 reasons for leave
- 2 weeks or up to 80 hours
- No retaliation

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Managing Leave Laws - FFCRA Leave

- **U.S. Department of Labor**
 - Regulations, April 2020
 - Revised Regulations, September 2020
 - Guidance and Qs and As

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Managing Leave Laws - FFCRA Leave

- **Leave is required only if work is available - affirmed in revised regulations**
- **No leave if:**
 - If employer has closed or ceased operations
 - If employee may telework
 - If employer is closed due to government stay-at-home order or employee can work because exempted as essential worker

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Leave for Parents

Every Employer's Challenge

- Regular FMLA does not cover the unavailability of school or childcare
- Consider state and local leave laws
- Many employers are being flexible
- Many parents, particularly women, are dropping out of workforce

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FFCRA Leave - Parents

FFCRA leave is available for school or childcare closures

- Leave due to intermittent school closures is not considered “intermittent” leave, so employer consent is not required under revised DOL regulations. Each full day closure is a new reason for leave.
- A school is considered closed if it is not offering in person classes even if offering virtual classes.
- If an employee chooses virtual classes when in person classes are available, not entitled to leave.

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FFCRA Leave - Healthcare Worker Exclusion

- DOL Revised regulations narrowed definition of healthcare worker who could be excluded from coverage
- New definition covers:
 - Healthcare workers as defined under traditional FMLA, and
 - Healthcare workers who are employed in diagnostic services, preventative services, treatment service or other services that are integrated with and necessary to the provision of patient care which, if not provided, would adversely impact patient care.

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FFCRA Leave - Employer Leave Policies

Emergency Paid Sick Leave

- Employee has discretion to use EPSL or any accrued paid leave from employer - up to 80 hours

FMLA Leave Expansion

- Initial two weeks, employee may elect to use employer provided paid leave, but employer may require it to be counted against overall FMLA entitlement
- So, employee may use EPSL, employer provided leave, or both to top off to 100%

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Managing Leave Laws - FFCRA Leave

Practice Pointers:

- Very technical law and details matter
- Tax credits may not be available if employer provides more leave than is allowed
- Avoid claims, including retaliation claims
- Over 70 lawsuits filed already, and more are anticipated

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COVID-19 Enforcement and Employment Litigation

- Expect aggressive EEOC, DOL, OSHA and state agency enforcement.
- Expect huge numbers of charge and complaint filings for discrimination, retaliation, denial of leave, whistleblower, etc.
- Over 700 employment related lawsuits due to COVID-19 already filed nationwide.

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Post-COVID-19 Trends

- What will the new normal look like and when will we return to it?
- How will employers balance telework and in person attendance?
- Will there be permanent paid leave legislation at the federal level?
 - Business getting frustrated with patchwork of state and local leave laws.

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Resources

- EEOC: <https://www.eeoc.gov/>
- DOL: <https://www.dol.gov/>
- State agencies

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Stay Safe and Healthy!

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Employee Health in the Workplace:

Challenges During and After COVID-19



Rosemary Gill Kenyon
October 13, 2020

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Supporting Employees and Reducing Costs: Employee Benefits in a Pandemic

Supporting Employees and Reducing Costs: Employee Benefits in a Pandemic




Caryn C. McNeill, Jamison H. Hinkle & Kara M. Brunk
October 13, 2020

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Overview

- 
- Recent legislation providing ways to support employees
 - Cost reduction measures
 - Impact of layoffs and furloughs under retirement and welfare plans

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Recent Legislation and Guidance

Qualified Retirement Plans

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CARES Act and Retirement Plans

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

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CARES Act-Related Distributions (CRDs)

Special distributions from eligible retirement plans up to \$100,000 made prior to Dec. 31, 2020:

- Exempt from 10% early withdrawal penalty
- Still subject to income taxes but exempt from usual 20% automatic withholding; income (and taxes) may be spread across 3 tax years (2020, 2021, and 2022)
- CRDs may be repaid or rolled over to IRA or other qualified plan within 3-year period
- No consideration of financial need to qualify

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CARES Act-Related Distributions (CRDs) (cont'd)

CRDs limited to certain “qualified individuals:”

- Participant (or spouse or dependent) diagnosed with COVID-19 or SARS-CoV-2;
- Participant (or spouse or member of household) experiences adverse financial consequences due to pandemic-related shutdown, furlough, layoff, lack of child care, quarantine, or other factors;
- Business owners who shut down their business or reduce their hours due to pandemic; or
- Individuals who meet other criteria set by IRS.

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CARES Act-Related Loans (CRLs) and Loan Suspensions

Increase in Loan Amounts:

- Loan limits raised to maximum of 100% of vested account balance or \$100,000 for “qualified individuals” receiving loans between March 27, 2020 and September 22, 2020

Suspension of Current Loan Repayments:

- Loan payments coming due between March 27, 2020 and December 31, 2020 may be suspended for up to one year, the term of the loan extended for the length of the suspension, and loan re-amortized

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Suspension of Required Minimum Distributions (RMDs) for 2020

RMD Waiver: CARES Act provides 1-year waiver of RMDs from IRAs and qualified plans in 2020

- RMDs previously paid to a participant in 2020 were eligible to be rolled over to a qualified retirement plan or IRA by August 31, 2020

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CARES ACT-Related Plan Amendments

- Adoption of CRD and CRL provisions are optional
- Amendment deadline for employer plans (other than governmental plans) is the last day of the first plan year beginning on or after January 1, 2022 (governmental plans have until 2024)
- Prototype plan practices vary; many adopting changes automatically unless employers expressly opt out
- Employers may desire to batch with other discretionary amendments
- For RMDs, amendments may not be required depending upon plan terms; amendment deadline is last day of the first plan year beginning on or after January 1, 2022 (Notice 2020-51 provides sample amendment)

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CARES Act - Employers' Adoption of Optional Provisions

Relief	Employers Adopting
CRDs	63.5%
CRLs	36.5%
Suspend Loans	48.2%
Undecided/none	30.7%

Source: https://www.pzca.org/research/cares_snapshot2

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CARES Act - Participants' Use of Optional Relief

Relief	0%	< 1%	1-5%	6-10%	11-15%	16-20%	21-25%
CRD	18.4%	34.5%	37.9%	4.6%	0%	1.1%	1.1%
CRL	26%	52%	16%	0%	0%	2%	0%

Source: https://www.pasca.org/research/cares_snapshot2

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Recent Legislation and Guidance

Health and Welfare Plans

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IRS Notices 20-29 and 20-33: Optional Cafeteria Plan and FSA Relief

- Notice 2020-29 permits the following mid-year election changes:
 - Enroll in the health plan by an eligible employee who previously declined coverage
 - E.g., someone who waived coverage during open enrollment
 - Change plan options or add dependents
 - Drop coverage (must attest to enrolling in other “comprehensive” health coverage)
 - Health FSA or Dependent Care FSA coverage changes (including revoking, increasing, or decreasing coverage, or making a new election)
- Important: Retroactive election changes are generally not permitted and amounts that have already been contributed cannot be returned to employees or applied to another benefit.

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IRS Notices 20-29 and 20-33: Optional Cafeteria Plan and FSA Relief (cont'd)

- General Rule: “Use it or lose it”
- Notice 2020-29 permits the use of unused Health FSA and Dependent Care FSA amounts through December 31, 2020
 - *Caution: If the health FSA is not HSA-compatible then employees with unused amounts remaining at end of plan year or grace period ending in 2020 will not be eligible to contribute to an HSA during the extended period*
- Notice 2020-33 increased the maximum health FSA carryover amount to \$550

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IRS Notices 20-29 and 20-33: Optional Cafeteria Plan and FSA Relief (cont'd)

- Must disclose changes to employees and amend plan document by December 31, 2021

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IRS/DOL Joint Notice: Mandatory Extension of Certain Plan Deadlines

- Joint Notice issued by the DOL and IRS requires group health plans to extend certain timeframes for participants during the “outbreak period”
- “Outbreak period” begins March 1, 2020 and ends 60 days after the announced end of the national emergency for COVID-19
- Plans must disregard the outbreak period for purposes of determining the following periods and days:
 - HIPAA 30-day/60-day special enrollment period
 - COBRA 60-day election period
 - COBRA premium payment deadlines
 - Deadline for an individual to notify the plan of COBRA certain qualifying events (e.g., divorce)
 - Deadlines for a participant to file benefit claims, appeals, and external review requests with the plan (or to perfect an external review request).

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FFCRA and CARES Act: Impact on Group Health Plans

- Mandated Coverage for COVID-19 Testing and Procedures
- Expanded FMLA Leave for Emergency Childcare and Emergency Paid Sick Time
 - Maintain coverage on same conditions
 - Employee remains responsible for premiums

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Cost-Reduction Measures

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Reducing or Suspending Contributions to 401(k) Plans

Type of Matching or Nonelective Contribution	Can we reduce or suspend mid-year?	Is a plan amendment required?	Do we have to give advance notice to employees?
Safe Harbor* *IRS Notice 2020-52 provided temporary relief for some requirements in amendments adopted between March 13, 2020 and August 31, 2020	Yes if (1) operating at loss or (2) for any reason, if "maybe" statement in Safe Harbor Notice	Yes; can't take effect any earlier than later of when adopted or 30 days after notice	Yes
Non-Safe Harbor Required	Yes. Can be done prospectively in all cases, and perhaps for period prior to change if conditioned on 1,000 hours or last day	Yes	Generally, no
Discretionary	Yes. Same as non-safe harbor required	No	Generally, no

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Changes to Employer Contributions

Change	1-199	200-999	1,000-4,999	5,000+	All Plans
None	97.2%	92.7%	82.4%	83.7%	89.8%
Suspend Match	0%	2.4%	5.9%	11.6%	5.1%
Reduce Match	0%	0%	0%	2.3%	0.7%
Suspend Nonelective	0%	2.4%	5.9%	0%	0.7%
Reduce Nonelective	0%	0%	0%	0%	0.7%

Source: https://www.pscs.org/research/cares_snapshot2

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Impact of Layoffs and Furloughs

Group Health, Other Welfare, and Retirement Plans

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Continued Eligibility in Termination vs. LOA / Furlough

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Benefits	Termination	Furlough
Group health	No, but a termination of employment that triggers a loss of coverage will trigger COBRA (or state "mini COBRA" if < 20 employees)	Yes, depending on the terms of the plan.
Other health and welfare	No, but conversion options may be available	Yes, depending on the terms of the plan
401(k) or other retirement	No except as to vested amounts	Yes, but may impact future vesting and benefit accruals

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Continuing Group Health Plan Coverage

- A reduction in hours or leave of absence/furlough could make employees ineligible to participate.
 - Important: Check plan document terms
- If coverage is lost because of a termination of employment or reduction in hours, COBRA (or “mini COBRA”) coverage is triggered.

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Paying for Coverage During Unpaid Leave

- Employers may provide options similar to what is offered during FMLA leave
 - E.g., employer covers employee portion
- Check plan document terms

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Partial Terminations of 401(k) or Other Retirement Plans

- Generally, a partial termination occurs when a single or series of events in a Plan Year results in a reduction of 20% or more of the workforce
- Separate RIFs or layoffs can be aggregated when determining whether the 20% threshold is exceeded
- Triggers 100% vesting for affected participants

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QUESTIONS?

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Supporting Employees and Reducing Costs: Employee Benefits in a Pandemic



Caryn C. McNeill, Jamison H. Hinkle & Kara M. Brunk
October 13, 2020

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Wage and Hour Update

Wage and Hour Update 2020 Edition



J. Travis Hockaday

October 15, 2020

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Good news for employers (for now) . . .

- Proposed new rule on independent contractor status
- Final rule on joint employment (but not so fast . . .)
- Final rule on fluctuating workweek - overtime
- Final rule on regular rate exclusions
- Clarified exemption from overtime for certain commissioned employees of retail/service establishments
- Reprieve on USDOL requests for double damages

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Proposed Rule on Independent Contractor Status

- Released September 22, 2020
- Retains but “sharpens” the existing “economic reality” test
- Ultimate inquiry - is the worker in business for self (independent contractor) or is the worker economically dependent on the putative employer for work (employee)
- USDOL hopes to “clear the cobwebs and inconsistencies”
- NOT FINAL

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Proposed Rule on IC Status

- Adopts a revised “economic reality” test to determine a worker’s status as an employee or an independent contractor

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Proposed Rule on IC Status

- Replaces the following seven current economic reality test factors with two “core” factors and three “guidepost” factors
- Current factors:
 - Services are integral to business
 - Permanency of relationship
 - Amount of investment in facilities/equipment
 - Nature and degree of control
 - Opportunity for profit/loss
 - Initiative/judgment/foresight
 - Degree of independent business organization/operation

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Proposed Rule on IC Status

- Proposed new “core” factors:
 - nature and degree of worker’s control over work
 - Favors IC status when worker exercises substantial control over key aspects of performance of work
 - However, requiring worker to comply with contract terms (insurance, deadlines, QC standards, health and safety requirements) are not indicative of employee status
 - worker’s opportunity for profit or loss based on initiative and/or investment
 - Exercise of personal initiative (including management skill/business acumen)
 - Management of investment in or expenditures on helpers/material/equipment

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Proposed Rule on IC Status

- Proposed new “guidepost” factors:
 - amount of skill required for work
 - degree of permanence of working relationship between worker and potential employer
 - whether the work is part of an integrated unit of production
 - Note change from “integral” to “integrated”
 - USDOL states that current focus on whether the worker’s work is “integral” has “questionable probative value”
 - This factor will weigh in favor of employee status where worker is part of company’s integrated production process (similar to production line), whether for goods or services

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Proposed Rule on IC Status

- Advises that actual practice is more relevant than what may be contractually or theoretically possible in determining whether worker is an employee or independent contractor

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Proposed Rule on IC Status

- NO IMPACT on other tests under:
 - State laws (for example, CA's AB 5, ABC tests, etc.)
 - Other federal laws (NLRB, IRS, etc.)
- Employers still must consider all applicable tests, many of which will be more likely to result in finding of employee status

Proposed Rule on IC Status

- Comment period open only 30 days
- <https://www.dol.gov/agencies/whd/flsa/2020-independent-contractor-nprm>

Final(?) Rule on Joint Employment

- For FLSA purposes, joint employer status is relevant to whether another entity may be jointly and severally liable for wages (minimum wage, overtime)
- Effective March 16, 2020 (but note recent court action)
- First substantive update in 60 years
- To “add certainty regarding what business practices may result in joint employer status . . . [and] promote greater uniformity among court decisions by providing a clearer interpretation of FLSA joint employer status”
- Limits circumstances under which two or more entities may be jointly liable under FLSA

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Final(?) Rule on Joint Employment

- Final rule continues to recognize two situations in which employee may have joint employers:
 - Employee is employed to work for one employer and another entity simultaneously benefits from the work (vertical joint employment)
 - Example - staffing company employees working for another entity
 - Employee works a set number of hours in workweek for one employer and second set number of hours for different employer in same workweek (horizontal joint employment)

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Final(?) Rule on Joint Employment

- Employee is employed to work for one employer and another entity simultaneously benefits from the work (vertical)
 - Four-factor balancing test applies
 - Does the potential joint employer actually (directly or indirectly):
 - Hire or fire employee?
 - Supervise and control employee's work schedule or conditions of employment to a substantial degree?
 - Determine employee's rate and method of payment?
 - Maintain employee's employment records? (this factor alone not determinative)
 - Reserved right to exercise control, if not actually used, will not - standing alone - establish joint employment

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Final(?) Rule on Joint Employment

- Some factors and business models do not make joint employment status more/less likely:
 - Franchisor/franchisee model
 - Entering into brand and supply agreement
 - Providing optional resources/benefits (for example, sample handbook/forms/policies, offering health/retirement plan, allowing potential joint employer to operate on premises)
 - Contractor requires subcontractors to maintain certain practices/policies
 - Establishing workplace safety practices
 - Requiring background checks
 - Instituting sexual harassment policies
 - Requiring quality control standards to ensure consistent quality of work product, brand or business reputation

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Final(?) Rule on Joint Employment

- Whether employee is economically dependent on potential joint employer not relevant
- Certain factors irrelevant because they assess economic dependence:
 - Whether job requires special skill, judgment, initiative
 - Whether employee has opportunity for profit/loss
 - Whether employee invests in equipment/materials
 - Number of other contractual relationships that potential joint employer has entered into for similar services

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Final(?) Rule on Joint Employment

- Employee works set number of hours in workweek for one employer and second set number of hours for different employer in same workweek (horizontal)
 - Final rule does not change standard for determining joint employer status in this situation
 - If employers “sufficiently associated” with respect to employee, they must aggregate hours worked for each to determine FLSA compliance
 - Employers will be “sufficiently associated” if they have arrangement to share employee’s services; one acts in the interest of the other in relation to employee; they share control of employee directly or indirectly; or if one employer is controlled by or under common control with the other

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Final(?) Rule on Joint Employment

- <https://www.dol.gov/agencies/whd/flsa/2020-joint-employment>
- BUT:
 - September 8, 2020 - federal judge in Southern District of New York struck down most of the Final Rule as inconsistent with FLSA and too narrow
 - DOL may appeal

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Final(?) Rule on Joint Employment

- So, for now, in Fourth Circuit, this test applies:
 - whether the employers jointly determine, share, or allocate power to direct, control, or supervise, directly or indirectly
 - whether the employers jointly determine, share, or allocate the power to – directly or indirectly – hire or fire or modify terms or conditions
 - permanency and duration of relationship between the employers
 - whether, through shared management or direct or indirect ownership interest, one employer controls, is controlled by, or is under common control with the other
 - whether the work is performed on premises owned or controlled by one or more of the employers
 - whether the employers jointly determine, share, or allocate responsibility over functions ordinarily carried out by an employer, such as payroll, workers' compensation, paying payroll taxes, or providing facilities, equipment, tools, or materials

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Final Rule on Fluctuating Workweek - Overtime

- Fluctuating workweek (FWW) method, generally:
 - Non-exempt employee
 - Paid a fixed salary as straight-time compensation for all hours worked in workweek (including hours over 40)
 - Overtime pay is calculated by dividing weekly fixed salary by number of hours worked, and dividing that number by half
 - Total pay is weekly fixed salary plus half-time rate for each hour over 40 in workweek
 - Regular rate fluctuates as hours fluctuate

Final Rule on Fluctuating Workweek - Overtime

- Prior USDOL did “about face” in 2011 and took position that employers could not use FWW and pay bonuses, commissions or other compensation in addition to the weekly fixed salary
- New rule released May 20, 2020 rejects prior USDOL position:
 - Explicitly confirms that bonuses, premium payments, commissions, hazard pay and other additional pay can be paid to employees under FWW method
 - Provides that these types of additional pay must be included in regular rate calculation unless excludable under FLSA sections 7(e)(1) through (8)
 - Provides examples of calculation of overtime showing how shift differential and production bonus would affect calculation

Final Rule on Fluctuating Workweek - Overtime

- New rule also specifically lists requirements for using FWW method:
 - Hours fluctuate from week to week (even if not under 40)
 - Fixed salary does not fluctuate with hours
 - Fixed salary sufficient to provide at least minimum wage for every hour worked (though employer may supplement in occasional high hour weeks)
 - Generally, no deductions from fixed weekly salary (except in very narrow circumstances; not like salary basis exceptions)
 - Clear and mutual understanding that fixed salary is pay for total number of hours worked regardless of number of hours (but not as to calculation)
 - Employee receives overtime, in addition to fixed salary and any bonuses, premium pay, commissions, hazard pay, and additional pay, for all overtime hours at a rate of not less than one-half of regular rate of pay for workweek

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Final Rule on Fluctuating Workweek - Overtime

- Remember that some state laws restrict use of fluctuating workweek method (for example, AL, CA, NM, PA)
 - Employer must still comply with state laws
- See:
 - <https://www.dol.gov/agencies/whd/overtime/fww>
 - 29 C.F.R. §778.114
 - USDOL Opinion Letter FLSA 2020-14

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Final Rule on Regular Rate of Pay

- Effective January 15, 2020
- First significant update in over 50 years to regulations addressing determination of “regular rate of pay” (on which overtime calculation is based)
- Generally, regular rate not limited to base wages, but calculated by dividing “all remuneration paid to, or on behalf of, the employee” by the number of hours worked in a given workweek
- New rule specifies which employer-provided perks and benefits can be excluded from regular rate

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Final Rule on Regular Rate of Pay

- Excluded perks and benefits include:
 - Cost of providing certain parking benefits, wellness programs, onsite specialist treatment, gym access/fitness classes, discounts on goods/services, certain tuition benefits, adoption assistance
 - Payments of unused paid leave (sick/PTO)
 - Payments of certain penalties under state/local scheduling laws
 - Reimbursed expenses (cell phone plans, credentialing exam fees, organization membership dues, and travel (even if not solely for employer’s benefit))
 - Certain sign-on bonuses and longevity bonuses
 - Cost of office coffee and snacks to employees as gifts

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Final Rule on Regular Rate of Pay

- Excluded perks and benefits include (cont'd):
 - Discretionary bonuses, by clarifying that the label given to a bonus does not determine whether it is discretionary
 - Contributions to benefit plans for accident, unemployment, legal services, or other events that could cause future financial hardship or expense
- <https://www.dol.gov/agencies/whd/overtime/2019-regular-rate>

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Commissioned Employee Exemption

- Section 7(i) - provides exemption from overtime for certain commissioned employees of certain establishments
 - Limited to retail/service establishments
 - Commissions on goods/services must represent more than half of compensation for a “representative period” (not less than a month)
 - Limited to employees with regular rate during overtime weeks of 1.5x FLSA minimum wage rate (currently at least \$10.89/hour)

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Commissioned Employee Exemption

- Clarification to the “retail” or “service” establishment prong
 - Defined as an establishment 75% of whose annual dollar volume of sales of goods or services or both is not for resale and is recognized as retail sales or services in the particular industry
 - Decades ago, USDOL created lists of establishments “to which the retail concept does not apply” and those to which the exempt “may” apply
 - Lists created presumptions of covered and non-covered establishments, but times and industries have changed, so USDOL has withdrawn the lists
 - USDOL signaling that analysis is fact-specific; labels not determinative
- Effective May 19, 2020
- See 29 C.F.R. Part 779; 85 Fed. Reg. 29867 (May 19, 2020)

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Reprieve on double damages under FLSA

- DOL will not seek liquidated (double) damages as a matter of course in investigations, as long as:
 - No clear evidence of bad faith/willfulness,
 - Employer’s explanation shows that noncompliance was result of *bona fide* dispute of unsettled FLSA law,
 - Employer has no prior history of violations,
 - Investigation involves only individual coverage,
 - Matter involves 13(a)(1) and 13(b)(1) exemptions, or
 - Matter involves state/local government agency or nonprofit
- High-level DOL approval to seek double damages will be required

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Wage and Hour Update 2020 Edition



J. Travis Hockaday
October 15, 2020

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COVID-19's Next Wave: Legal Claims Looming for Employers

COVID-19's Next Wave:

Legal Claims Looming for Employers




Kerry A. Shad

October 15, 2020

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Legal Claims Looming

- 
- Wage & Hour
 - Other Claims
 - WARN
 - Immunity Laws
 - Waivers/Releases

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Potential Wage & Hour Traps

- Tracking Telework Hours for Non-Exempt Employees
 - In 2019 @ 24% of employees performed some work from home on an average day
 - Skyrocketed since March 2020

US DOL Wage & Hour Division Field Assistance Bulletin - August 24, 2020

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Potential Wage & Hour Traps

- FLSA places burden of tracking hours on the employer
- All hours worked or “suffered or permitted” to be worked are compensable, even if:
 - Did not ask for the work to be done
 - Did not want the work done
 - Had a rule against the work being done

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Potential Wage & Hour Traps

- Standard is - “knows or should know” work is being done
 - Employer “knows” about:
 - Actual scheduled hours
 - Hours reported by an employee
 - Other hours aware being worked

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Potential Wage & Hour Traps

- Employer “should know” about hours:
 - That would be reported through a reasonable process for employee to report unscheduled time worked
 - Ensuring employees know about it)
 - Not implicitly or overtly discouraging reporting
 - No duty to go further (e.g. review phone records, emails, accessing of employer issued devices) if have a reasonable process and employee fails to report
 - That the “evidence” suggests - for example, if supervisor is receiving late-night emails, then that’s probably “notice”

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Potential Wage & Hour Traps

- Train supervisors to:
 - Understand these rules
 - Not to impose workloads that can't be done within the scheduled hours, but if they do, don't discourage reporting
 - Be aware if employee should be reporting more hours but isn't

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Potential Wage & Hour Traps

- “Continuous Work Day” in COVID-19 Times
 - DOL Temporarily Suspended Guidance in April Requiring Pay for All Hours Between First and Last Principal Activity
 - To allow employees who telework flexibility to help children
 - TIP: Encourage employees to work in blocks of time and record breaks to attend to children

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Potential Wage & Hour Traps

- Other Challenges -
 - What is extra work and what just got delayed?
 - What about multi-tasking? Checking emails while helping child with school?
 - What about breaks (rest time vs. meal breaks)?

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Potential Wage & Hour Traps

- Commute Time - if employee is working from home and has to go to the office for a meeting, travel time from home office and back may be compensable time

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Potential Wage & Hour Traps

- Time Spent Because of Screening and/or Social Distancing
 - Like donning and doffing cases
 - Temperature checks, filling out questionnaires, waiting to enter building and/or to ride elevator
 - Safest approach is to include it in compensable time

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Potential Wage & Hour Traps

- Exempt Employees
 - Furloughed, but worked part of a week?
- Expense Reimbursement - phone, internet, equipment, etc.
 - FLSA - cannot require employees to directly pay or reimburse employer for business-related expenses if would cause employee's wage rate to fall below minimum wage or overtime compensation thresholds
 - Some states have special rules
 - For example, in California, an employer must reimburse an employee for all "necessary expenditures or losses incurred by the employee in direct consequence or discharge of his or her duties." Cal. Lab. Code § 2802.

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Claims Related to COVID-19

- Remote Work and Leave
 - FFCRA claims - < 500 employees
 - Denial of leave
 - Retaliation for taking leave
 - No required administrative process for claims
 - Lost wages, liquidated damages and attorneys' fees
 - Individual liability possible for managers, HR, executives

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Claims Related to COVID-19

- Remote Work and Leave
 - “Heightened Risk” due to preexisting conditions
 - Do employers need to factor this in?

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COVID-19 and “Disability”

Peebles v. Clinical Support Options, Inc. (D. Mass. September 2020)

- Facts:
 - Employee provides social services to highly traumatized at-risk clients
 - Employee has “moderate asthma”
 - In March doctor recommended telework due to increased risk from COVID-19
 - In May employer asked all managers to return to office
 - Employee requested 4 weeks of additional remote work - allowed
 - In June telework request denied because managers need to be in the building to provide supervision and in-person client visits if requested

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COVID-19 and “Disability”

- Employee reluctantly returned, but had to take lunch in the car and was exposed to people without masks
- End of July renewed request to work from home - denied
- On August 10 Employee submitted “conditional resignation” effective September 5
- August 27 Employer allowed managers with children to work from home 2 days a week
- Employee renewed request - denied

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COVID-19 and “Disability”

- Employee sent email - will work in office for a week, but will resume telework on September 8
- Employer said “will enforce applicable policies” if telework starting September 8
- Employee viewed this as threat of termination

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COVID-19 and “Disability”

- Filed lawsuit on September 3:
 - Disability discrimination
 - Failure to accommodate/no interactive process
 - Hostile work environment

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COVID-19 and “Disability”

- District Court issued preliminary injunction prohibiting termination for 60 days
 - Asthma can be a disability “at least during the COVID-19 pandemic”
 - Whether it “substantially limits” a person is a fact-specific question
 - Consider the “heightened risk of impairment” or of “death or serious injury” if contract the virus

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COVID-19 and “Disability”

- Telework can be a reasonable accommodation - here, employee successfully teleworked for 4 months
- Providing KN95 masks, hand sanitizer and wipes, air purifier, and separate private workspace are safety rules, not individualized accommodation

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COVID-19 and “Disability”

- Cannot issue a blanket requirement that “all managers must come to work”
- Option to use leave or take a personal leave of absence is not a reasonable accommodation - doesn’t enable employee to do their job
- Likely irreparable harm if accommodation denied or if terminated
 - Risk of injury/death if infected
 - 16.1% unemployment in Massachusetts
 - Loss of health insurance

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COVID-19 and “Disability”

- *Silver v. City of Alexandria*, 2020 WL 3639696 (W.D. La. July 6, 2020)
 - 98 year old with [aortic valve disease](#), [systolic heart failure](#) and a permanent pacemaker.
 - Elected city councilman and asked to attend meetings remotely
 - Defendant argued that he is not entitled to claim those disabilities BECAUSE they are only COVID-19-related and only “situational”
 - Rejected
 - Neither the ADA nor the Rehabilitation Act contain any language to limit application to certain environmental or health-related situations.
 - “The determination of a qualifying disability in this case cannot be looked at in a vacuum.”
 - “. . . the pandemic is the unprovided-for case.”
 - “. . . consideration of Mr. Silver’s documented serious underlying medical situation, in light of the pandemic’s existence, is the proper way to make the disability determination here.”

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COVID-19 and FMLA

- Having COVID-19 can be a “serious health condition”
- Is a self-isolation/quarantine an “incapacitation”?

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COVID-19 and other Discrimination

- Age and Pregnancy Discrimination
 - People 65+ at greater risk if contract virus
 - But cannot “protect” them by not hiring or not recalling them, or by terminating them
 - Same for pregnant women
 - Need to consider carefully requests for leave and remote work

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Risk Mitigation

- All requests to work from home and/or for leave should be treated as potential requests for reasonable accommodation and/or FMLA or similar leave
- Train managers to escalate all requests to HR
- Respond timely to all requests for remote work and leaves of absence and the responses
- Document all requests for remote work and leaves of absence and the responses
- Avoid “blanket” rules regarding return to work - individualized assessments and interactive process are critical
- Avoid inconsistent treatment in similar circumstances
- If any adverse action is taken, **MUST** document the reasons
- If employee is outside of North Carolina, be aware that several other states have broader protections (e.g., in New Jersey, COVID-19 itself is a “disability”)

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COVID-19 and federal WARN

- 60 days' advanced notice of a mass layoff or plant closing
- Shortened notice when a mass layoff or plant closing is caused by an “unforeseeable business circumstance”
 - employers must issue notices when the plant closing or mass layoff becomes “probable” — i.e., when the objective facts reflect that the layoff is more likely than not
- If layoff originally anticipated to last less than six months, but ultimately extends beyond six months, then an employment loss occurs.
- When “unforeseeable business circumstances” existed at the beginning of the furlough — justifying less than 60 days' notice before the furlough began — still must provide as much notice as possible as soon as it is “reasonably foreseeable” that an extension of the layoff beyond six months, or a permanent separation from employment, is going to happen.
- **ACTION:** Reassess and determine whether employment losses — including furloughs that were anticipated to last less than six months but may now exceed six months — are likely, and provide the required notice.

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North Carolina's COVID-19 Immunity Law

HOUSE BILL 118 signed by Governor Cooper, July 2, 2020

AN ACT TO PROVIDE LIMITED IMMUNITY FROM LIABILITY FOR CLAIMS BASED ON TRANSMISSION OF CORONAVIRUS DISEASE 2019 (COVID-19).

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House Bill 118

Article 8.

COVID-19 Limited Immunity.

§ 99E-70. Definitions.

The following definitions apply in this Article:

- a) **COVID-19.** - The disease caused by the SARS-CoV-2 virus. **Person.** - An individual; corporation; nonprofit corporation; business trust; estate; trust; partnership; limited liability company; sole proprietorship; association; joint venture; government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal entity.

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House Bill 118

§ 99E-71. Limited immunity.

- a) In any claim for relief arising from any act or omission alleged to have resulted in the contraction of COVID-19, including any claim based on violation of subsection (b) of this section, no person shall be liable for any act or omission that does not amount to gross negligence, willful or wanton conduct, or intentional wrongdoing.

“Gross negligence” defined:

“[W]anton conduct done with conscious or reckless disregard for the rights and safety of others.” *Suarez ex rel. Nordan v. Am. Ramp Co.*, 831 S.E.2d 885, 893 (2019) (quotation omitted).

In English: Mistakes, bad mistakes vs. really, really bad mistakes, or worse.

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House Bill 118

§ 99E-71. Limited immunity.

- b) Every person shall provide, with respect to any premises owned by the person or under the person's possession, custody, or control, reasonable notice of actions taken by the person for the purpose of reducing the risk of transmission of COVID-19 to individuals present on the premises. No person shall be liable for the failure of any individual to comply with rules, policies, or guidelines contained in the notice required by this subsection. This subsection shall not apply to premises owned by an individual, other than premises that are used in the operation of a sole proprietorship.
- c) This section does not apply to claims before the Industrial Commission seeking benefits payable under the Workers' Compensation Act, Article 1 of Chapter 97 of the General Statutes.

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Is this adequate
notice as
required by
H118?

NOTICE!

ENTER AT YOUR OWN RISK
DURING THESE TIMES OF C-19

WE ARE TAKING ALL PRECAUTIONS AND STEPS
SERIOUS

- CLEANING AND SANITIZING WAITING ROOM
- CLEANING AND SANITIZING ALL DOOR
HANDLES AND DOORS
- IF YOU CHOOSE TO NOT ENTER YOU CAN
CALL US AT THE SHOP (819-851-9519) AND
WE CAN MEET YOU OUTSIDE OR WE CAN
PICK UP AND DELIVER YOUR VEHICLE FROM
YOUR HOME

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Know your Ws!

WEAR
a cloth face covering.

WAIT
6 feet apart.
Avoid close contact.

WASH
your hands often
or use hand sanitizer.

Is this
adequate
notice as
required
by
H118?

STOP

- Put on a mask BEFORE you walk through the door
- If you don't have one, you can buy them at Walgreens
- Go to the bar first so we can explain Phase 2 re-open protocols
- Thank you!

NO MASK = NO ENTRY



Thank you!

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House Bill 118

§ 99E-72. Applicability.

- a) This Article applies to claims arising no later than 180 days after the expiration or rescission of Executive Order No. 116 issued March 10, 2020.

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COVID-19 Liability Waivers/Releases

- Are They Necessary?
- Will They Hold Up?

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COVID-19's Next Wave:

Legal Claims Looming for Employers



Kerry A. Shad

October 15, 2020

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COVID-19 and the Workplace: Staying Out of Trouble

COVID-19 and the Workplace: Staying Out of Trouble



Stephen T. Parascandola


October 15, 2020

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Introduction to OSHA and its Role in Reopening America

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- 
- Primary Law Governing Worker Safety
 - Federal Program and Approved State Programs

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- Standards and Rules
- Guidance (including CDC Guidance)
- “General Duty Clause”

The “General Duty Clause” under OSHA

- Section 5(c)(1) of the OSH Act
- Vague Yet All-Encompassing
- What it Means During the Pandemic

The Role of the CDC and COVID-19 Guidance

- National Institute for Occupational Safety and Health
- Interplay Between OSHA and CDC
- CDC Guidance

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Applicable CDC Guidance

- General Guidance for Employers Responding to COVID-19
- Industry-Specific Guidance for COVID-19 Risks
- Guidance for Cleaning and Disinfecting Workplaces

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Specific OSHA Standards and Rules Relating to COVID-19 and the Workplace

- COVID-19 is Somewhat Novel OSHA Issue
- Look to Existing OSHA Standards and Rules for Framework
- Hazard Assessments, PPE, and Preparedness and Response Plans are Good Examples

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Hazard Assessments

- Check the Workplace for Hazards
- Consider Engineering and Administrative Controls
- Hierarchy of Controls

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Personal Protective Equipment

- Determine Appropriate PPE
- Provide Appropriate PPE
- Train Employees on PPE

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Infectious Disease Preparedness and Response Plan

- Sanitary Practices (Hand-Washing and Respiratory Etiquette)
- Employment Policies (Stay at Home, Flexible Hours, Isolating Potentially Infected Employees)
- Housekeeping Practices (Cleaning Equipment and Surfaces)

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Best Practices

- Local Governments
- Industry Guidance
- Role of Best Practices and the General Duty Clause

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Communications with Employees

- More is Better
- Show the Company Cares and Knows the Guidance
- Keep Complaints Down

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Multi-Employer Workplaces

- Multi-Employer Liability Under OSHA
- Multi-Workplace Buildings
- Contractors, Vendors, and Shared Spaces

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Dealing with Employee Complaints

- Types of Complaints
- Responding to Complaints
- Responding to Inspections Arising from Complaints

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Coronavirus Reporting and Recordkeeping Requirements under OSHA

- Reporting Coronavirus Incidents
- Coronavirus Recordkeeping Requirements

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Dealing with Enforcement Action During the Pandemic

- How to Respond
- Steps to Take to Ward Off Enforcement Action

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Enforcement Trending

- Whistleblower Complaints Trending Up Again
- Citations on the Rise
- Six Months to Bring Enforcement Action in NC

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Look for Individual State COVID-19 Standards

- Virginia Emergency Temporary Standard
- California Aerosol Transmissible Diseases Standard

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COVID-19 and the Workplace: Staying Out of Trouble



Stephen T. Parascandola

October 15, 2020

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EEO UPDATE

EEO UPDATE



Zebulon D. Anderson

October 15, 2020

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EEOC Developments

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Administrative Statistics

- Volume

- FY 2019 = 72,675 charges
- Fewest since 1992
- Over last 10 years, retaliation and disability claims have increased the most
- Retaliation has remained most common claim for a decade - now 54% of all charges and continuing to ↑
- Seems focused on ↓ inventory and settling through mediation

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Administrative Statistics

- Location

- FY 2019: NC - 4.6% 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

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Litigation Statistics

- In FY 2019 - 144 new merits lawsuits filed by EEOC
 - Down 28% from prior year
 - Much less litigation than 10-15 years ago
 - Finite resources focused on systemic litigation
 - \$39.1 million in recovered damages - lowest in 10 years
 - 95% success rate (settlements and jury verdicts)
 - 50% jury trial success rate (3 wins and 3 losses)

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Systemic Statistics

- Systemic cases involve 20+ employees and are focused on matters in which the alleged discrimination has a broad impact
- FY 2019
 - 450 systemic investigations resolved = \$28M
 - Substantial ↑ in volume from prior year
 - Systemic charges: far more likely to result in “cause” determination
 - New lawsuits: 12% were systemic and 19% were multi-victim
 - Active lawsuits: 22% are systemic and 22% are multi-victim
 - EEOC had 100% success rate (settlement and verdict)

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EEOC Composition

- General Counsel
 - Sharon Gustafson - R- confirmed August 2019 and term ends July 2023
- Five Commissioners
 - Janet Dhillon - R - confirmed May 2019 and term ends July 2022
 - Keith Sonderling - R - confirmed September 2020 and term ends July 2024
 - Andrea Lucas - R - confirmed September 2020 and term ends July 2025
 - Charlotte Burrows - D - Confirmed August 2019 and term ends July 2023
 - Jocelyn Samuels - D - Confirmed September 2020 and term ends July 2021
- What it Means
 - With 3 added in September, this is the first time there has been a full EEOC during Trump administration
 - EEOC will be Republican controlled until at least July 2022

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Strategic Enforcement Plan: FY 2017-2021

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

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2017-21

3. Addressing selected emerging and developing issues

- Inflexible leave policies
- Duty to accommodate pregnancy-related limitations
- LGBTQ protection
- Temporary worker and “independent contractor” protection
- Muslim protection

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2017-21

4. Ensuring equal pay for all workers

5. Preserving access to legal system

- Releases; arbitration; and retaliation

6. Preventing Systemic Harassment

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Pattern or Practice Claims

- Section 707 of Title VII states that the EEOC may bring a lawsuit if a “person or group of persons is engaged in a pattern or practice of *resistance* to the full enjoyment of any of the rights secured by this subchapter”
- In September 2020, the EEOC issued an Opinion Letter:
 - Section 707 claims must be based on intentional *discrimination/retaliation* prohibited by Sections 703 or 704 of Title VII - it does not create an independent basis for liability
 - Section 707 claims may be pursued in court only after a charge has been filed and conciliation attempted

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Pattern or Practice Claims

- The EEOC previously had taken a different position in some cases
- Opinion Letter is not binding on courts
- Burrows (the lone D at the time) opposed the letter - “Today, the Commission not only abandons its duty to enforce the law as Congress intended, but it does so without any opportunity for prior public notice and comment.”

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Opioid Guidance

- In August 2020, EEOC issued Q&A guidance regarding opioid use and the workplace
- <https://www.eeoc.gov/laws/guidance/use-codeine-oxycodone-and-other-opioids-information-employees>
- Does not cover new ground, but does provide useful information
- The key points:
 - “The ADA allows employers to fire you and take other employment actions against you based on illegal use of opioids, even if you do not have performance or safety problems. But if you aren’t disqualified by federal law and your opioid use is legal, an employer cannot automatically disqualify you because of opioid use *without considering if there is a way for you to do the job safely and effectively.*”
 - “[O]pioid addiction (sometimes called “opioid use disorder” or “OUD”) is itself a diagnosable medical condition that can be an ADA disability. You may be able to get a reasonable accommodation for OUD. But an employer may deny you an accommodation if you are using opioids illegally, even if you have an OUD.”

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Supreme Court of the United States

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Bostock v. Clayton County

- Background
 - Title VII prohibits discrimination “because of . . . sex”
 - For decades, federal courts and the EEOC had concluded that Title VII’s prohibition on sex discrimination *did not* include a prohibition on sexual orientation discrimination.
 - While Title VII prohibits employment discrimination because of “race, color, religion, sex, or national origin,” “sexual orientation” is not on the list;
 - When Congress enacted Title VII in 1964, Congress did not intend to prohibit sexual orientation discrimination;
 - In 1964 when Title VII was written, an ordinary understanding of its prohibition on sex discrimination would not have included sexual orientation discrimination;
 - Since 1964, on several occasions Congress has considered legislation that would add “sexual orientation” to the list of protected traits, but each time the legislation had failed to become law.

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- Beginning in 2012, the EEOC changed its position and concluded that Title VII does prohibit such discrimination
- Some courts agreed with the EEOC, and some disagreed
- Supreme Court combined three cases to decide the issue
 - *Zarda v. Altitude Express* (2nd Cir. 2018)
 - The Second Circuit concluded that Title VII prohibits discrimination because of sexual orientation
 - The Seventh Circuit had reached the same conclusion in 2017
 - *Bostock v. Clayton County Bd Commissioners* (11th Cir. 2018)
 - The Eleventh Circuit reached the opposite decision
 - *EEOC and Stephens v. R.G. & G.R. Harris Funeral Homes* (6th Cir. 2018)
 - The Sixth Circuit concluded that Title VII prohibits discrimination because of transgender or transitioning status

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- The Supreme Court considered a lot of material before reaching a decision
 - The briefs and arguments of all parties in the three cases
 - Over 50 *amicus* briefs by interested non-parties
 - EEOC arguments in favor of an interpretation of Title VII that includes a prohibition on sexual orientation and gender identity discrimination
 - US DOL arguments taking the opposite position

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- Writing for the 6-3 majority, Justice Gorsuch, who was nominated by President Trump to succeed Justice Scalia, relied on a “textualist” method of statutory interpretation and prior decisions by Justice Scalia
- At the outset, he delivered the Court’s conclusion
 - “Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.”

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- He also addressed the counter-arguments
 - “Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren’t thinking about many of the Act’s consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters’ imagination supply no reason to ignore the law’s demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it’s no contest. Only the written word is the law, and all persons are entitled to its benefit.”

Bostock

- According to the Court, the meaning of the text of Title VII has been clear and unambiguous since it was written in 1964, and that text prohibits discharging an individual because of the individual’s sexual orientation or transgender status.
- To reach this conclusion, the Court undertook a detailed analysis of the key text of the statute, including the terms “sex,” “because of,” “discriminate,” and “individual.”

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- After doing so, it reached its textualist conclusion:
 - “From the ordinary public meaning of the statute’s language at the time of the law’s adoption, a straightforward rule emerges: An employer violates Title VII when it intentionally fires an individual employee based in part on sex. . . . If the employer intentionally relies in part on an individual employee’s sex when deciding to discharge the employee—put differently, if changing the employee’s sex would have yielded a different choice by the employer—a statutory violation has occurred. . . . The statute’s message for our cases is equally simple and momentous: An individual’s homosexuality or transgender status is not relevant to employment decisions. That’s because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex

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- If you change an employee’s sex and the outcome of the challenged employment decision also would have changed, then you have employment discrimination because of sex - this involves a focus on the *individual* and *but-for* causation.
- So, if an employer fires a gay man because he is sexually attracted to men, it has violated Title VII because if the sex of the man was changed to a woman (who was sexually attracted to men), then the employer would not fired him

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- After reaching this conclusion about the ordinary public meaning of the statute, the Court then addressed each of the counter-arguments and reached several ancillary conclusions
 - The *label* given to a discriminatory practice is irrelevant to the analysis (*i.e.*, rejecting the argument that discrimination because of “sexual orientation” is different than discrimination because of “sex”);
 - Sex need not be the sole or even the primary cause of the adverse action to provide the foundation for a Title VII violation, it simply has to be *a cause*;
 - An employer cannot escape liability by claiming that it treats male and female employees equally as *groups* because the focus is on the *individual* (*i.e.*, rejecting the argument that discrimination on the basis of sexual orientation is not sex discrimination because it impacts both men and women equally)

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- Finally, the Court rejected policy arguments raised in opposition to its conclusion
 - “Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations. In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee’s sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.”

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Conclusion

- While many employers already prohibited sexual orientation and gender identity discrimination, now all covered employers must do so; and a failure to do so has more serious consequences. So, employers should
 - Review their Equal Employment Opportunity policies to assess whether they prohibit discrimination and harassment because of sexual orientation or gender identity;
 - If such prohibitions are not included, they should be added;
 - Any such new policies should be circulated to all employees;
 - Consider soon conducting sexual harassment training that is focused on sexual harassment because of sexual orientation or gender identity, and certainly update any future harassment training programs to cover those topics; and
 - Make sure that managers and Human Resources personnel are aware of this legal development and take steps to ensure compliance when making and vetting adverse employment actions, as well as when making hiring decisions.

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Broader Impact

- While the *Bostock* Court carefully limited the scope of its decision and stated that its holding did not necessarily extend to other statutes or fact patterns, other courts already are relying on it in other areas
- *Grimm v. Gloucester County School Board* (4th Cir.)
 - Defendant issued a policy that prevents students from using a restroom that does not match their “biological gender”
 - Grimm, a transgender male student, asserted Constitutional and Title IX claims
 - Title IX prohibits discrimination “on the basis of sex,” and citing *Bostock*, the 4th Circuit “ha[d] little difficulty” concluding that the Defendant’s policy was discriminatory
 - This case and/or similar cases likely will reach the Supreme Court

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Broader Impact

- *Frappied et al v. Affinity Gaming Black Hawk* (10th Cir.)
 - Plaintiffs included eight women over 40 who were fired by new ownership
 - The case involved several issues, but focusing on one here
 - Plaintiffs asserted Title VII claims alleging that they were fired because they were “older women” - a so-called “sex-plus” claim
 - Here, the plus factor was age - a factor not covered by Title VII
 - Nonetheless, revisiting its prior decisions in light of *Bostock*, the Court held that sex + age claims are viable under Title VII and, focusing on the individual, if a female plaintiff can show that she would not have been discharged if she was male, then she has established a Title VII claim
 - *Bostock*’s focus on but-for causation and the individual likely will have broad impact

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Comcast v. NAAAM

- Congress passed the Civil Rights Act of 1866 (“Section 1981”) in the aftermath of the Civil War
- It states that “[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens.”
- In 1975, the Supreme Court ruled that Section 1981 provides a claim for employment discrimination on the basis of race

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Comcast

- In this case, the Court had to decide the appropriate causation standard that applies to a Section 1981 claim
- The plaintiff asked the Court to conclude that a plaintiff merely had to prove that race was “a motivating factor” in the decision
- The defendant argued that a plaintiff should have to prove that “but-for” race, the plaintiff would not have experienced discrimination

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Comcast

- Writing for what was essentially a unanimous Court, Justice Gorsuch focused on the text of the statute
- The Court concluded that while the text was not clear, “but-for” causation was the appropriate standard
- The Court examined other aspects of the law in 1866, as well as subsequent Supreme Court precedent, and it concluded that all pointed toward but-for causation

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Comcast

- The Court acknowledged that in 1991 Congress amended Title VII to include a “motivating factor” causation element
- But, the Court concluded that there was no reason to believe or conclude that what Congress did in 1991 had impact on the meaning of an 1866 statute
- In sum, the Court held that “[t]o prevail [on a Section 1981 claim] a plaintiff must initially plead and ultimately prove that, but for race, [the plaintiff] would not have suffered the loss of a legally protected right.”

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Conclusion

- Plaintiffs alleging race discrimination can bring both Title VII claims and Section 1981 claims
- In recent years, many plaintiffs have relied more on Section 1981 claims because they do not require the plaintiff to first go to EEOC and they have remedies that are in some ways broader
- But after *Comcast*, it is clear that, while in some ways Section 1981 claims may be preferable to Title VII claims for plaintiffs, they will be harder to prove because under Section 1981 plaintiffs must prove “but-for causation,” whereas under Title VII they simply must prove “motivating factor” causation.

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Our Lady of Guadalupe School v. Morrissey-Berru

- One of the questions expressly left open by *Bostock* was the impact of that decision on religious institutions
- This case continues a series of recent Supreme Court decisions that discuss the impact of employment laws on religion
- (In fact, just last week, at the start of the term, Justices Thomas and Alito issued a statement critical of the *Obergefell* case that recognized a constitutional right to same-sex marriage, complaining that the Court had favored a “novel constitutional right” over the religious liberty interest protected by the First Amendment)

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OLG

- This case combined two decisions from the 9th Circuit
- In both of those cases, the 9th Circuit had concluded that elementary school teachers at religious schools could pursue federal discrimination claims and were not exempt from those laws under what is known as the “ministerial” exception
- The Supreme Court, in a 7-2 decision written by Justice Alito, reversed both decisions

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OLG

- The First Amendment to the United States Constitution states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”
- It protects the right of religious institutions to decide matters “of faith and doctrine” without government intrusion
- It also protects religious institutions’ autonomy “with respect to internal management decisions that are essential to the institution’s central mission,” including “the selection of individuals who play certain key roles”

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OLG

- Based on these principles, over the years, district courts had developed a “ministerial exception” to federal discrimination laws that prohibited certain employees of religious schools from pursuing claims
- In 2012, in *Hosanna-Tabor v EEOC*, the Supreme Court unanimously approved the ministerial exception

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OLG

- The Court in that case focused on several factors:
 - The title held by the plaintiff (which included the word “minister”);
 - The religious training received by the plaintiff;
 - The plaintiff took advantage of tax laws that benefit ministers;
 - The plaintiff’s job duties included a role in conveying the religion’s message and mission

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OLG

- In these cases, the Ninth Circuit had weighed those factors and concluded that the plaintiffs were not entitled to the ministerial exception because they did not have “minister” in their job titles and did not have a lot of religious training.
- The Supreme Court rejected that approach, explaining that the factors in *Hosanna-Tabor* should not be applied like that

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OLG

- Instead, the Court explained that “[w]hat matters at the bottom, is what an employee does. And, implicit in our decision in *Hosanna-Tabor* was a recognition that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school”
- And, in these cases, the plaintiffs performed “vital religious duties” that included providing education consistent with the religious tenets of the religious schools at which they were employed and, therefore, they were covered by the ministerial exception and could not pursue discrimination claims
- In sum, “When a school with a religious mission entrusts a teacher with the responsibilities of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school’s independence in a way that the First Amendment does not allow.”

Conclusion

- The Court has interpreted the “ministerial exception” broadly
- It is hard to imagine that many teachers at religious schools will not be covered by that exception, which means that such schools will have broad protection from discrimination and employment lawsuits - when brought by teachers and other officials
- It also suggests that the Court will interpret the scope of the First Amendment broadly when it interacts with employment law at other times, and we can anticipate similar outcomes in future decisions

Little Sisters of the Poor v. Pennsylvania

- Affordable Care Act (“ACA”) required group health plans to provide “preventative care and screenings” coverage
- The government adopted regulations under this provision that included a “contraceptive mandate”
- Much litigation ensued, including arguments based on the Religious Freedom Restoration Act (“RFRA”)
- And, a new President was elected with a new administration

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LSOP

- Two additional rules were adopted
 - Religious exemption: An employer that objects to contraception based on sincerely held religious beliefs
 - Moral exemption: An employer that objects to contraception based on sincerely held moral grounds
- These exemptions are available to all employers, even publicly traded companies
- In this case, the Court, in a 7-2 decision by Justice Thomas, concluded that these rules were permitted under the ACA and were not procedurally flawed

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Conclusion

- An issue left open by the case is whether the exemptions were *arbitrary and capricious* and whether they were *required* by the RFRA
- Two Justices wrote a separate opinion, arguing that the RFRA required at least the religious exemption
- Two Justices wrote a separate opinion, suggesting that the exemptions may be arbitrary and capricious
- We should anticipate more Supreme Court cases that address the intersection between religion (and the RFRA) and employment laws

Retaliation

Gogel v. Kia Motors Mfg. (11th Cir. En Banc)

- Andrea Gogel worked for KIA, which was a subsidiary of KMC (based in Korea)
- Jackson was the SVP of HR and Admin for KIA
 - Tyler was HR Manager and reported to Jackson
 - Gogel was Team Relations Manager and reported to Jackson
 - Team Relations was responsible for HR matters after on-boarding, including workplace investigations
 - As Team Relations Manager, Gogel led such investigations, and she was expected to help the company handle such matters in-house and to avoid litigation

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Gogel

- Ledbetter worked in the General Affairs department
 - General Affairs was responsible for office furniture, special events, and other administrative tasks
- Ledbetter was responsible for Protocol and Events
 - Events had to be consistent with Korean protocol
 - So, when Korean executives visited, she had to greet them with flowers and pour them wine

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Gogel

- Ledbetter did not like those responsibilities and complained to Gogel
- Ledbetter also reported to Gogel that she believed that her boss was having an affair with the President of KMC
- In late 2008, Gogel asked Jackson whether she could investigate the alleged affair
 - Concern about favoritism
 - Concern about whether the affair was consensual
- Jackson declined to authorize an investigation
- Then, the HR Coordinator for KMC asked Gogel to investigate, but to not tell Jackson
- Before she completed the investigation, he changed his mind and told her to stop the investigation and destroy all records

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Gogel

- In March 2009, Tyler (HR Manager) was promoted with a new title
- Gogel was unhappy she did not get a similar promotion and complained to Jackson that she believed Korean management discriminated against women
- Jackson asked Tyler to investigate
- Tyler prepared a report in September 2010 that outlined the concerns employees had with Korean management
- When Jackson met with Gogel to discuss her concerns, she told him that she wanted an independent investigation

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Gogel

- On November 10, 2010, Gogel filed a Charge of Discrimination with EEOC alleging sex and national origin discrimination
- On November 19, 2010, Tyler filed a Charge of Discrimination with EEOC alleging national origin discrimination and retaliation
- They both were represented by the same law firm

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Gogel

- In December, Jackson and in-house counsel met separately with Gogel and Tyler and asked them to sign an agreement
 - They would not discuss their Charge with co-workers
 - They would not ask co-workers to assist with their Charges
 - They would not malign the company to co-workers
 - They would not try to access company files to support their claims
- They signed the agreement

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Gogel

- At the end of December 2010, Gogel received a \$12k bonus
- Tyler, however, breached the agreement by downloading dozens of documents and forwarding hundreds of work emails to his personal email
- He was fired
- He sued alleging retaliation
- The court granted KIA's summary judgment motion
- He appealed and lost

Gogel

- Meanwhile, on December 10, 2010, Ledbetter had filed a Charge of Discrimination with EEOC, alleging sex, race, and national origin discrimination
- Jackson found out about the Charge on December 23
- He immediately was alarmed because the Charge revealed that Ledbetter was represented by the same firm that represented Gogel and Tyler
- He suspected that Gogel and Tyler were recruiting employees to sue the company
- Two employees reported to Jackson that they had noticed Gogel spending a lot of time with Ledbetter and that Ledbetter had told them that she was planning to pursue claims against the company, that she was working with the law firm that was helping Gogel and Tyler, that Gogel was encouraging her to sue the company, and that Gogel was the ringleader

Gogel

- On January 19, 2011, Jackson confronted Gogel with the allegations and evidence
- She denied the allegations (and she continued to deny the allegations throughout her subsequent lawsuit, though she did admit to providing the lawyer referral)
- Jackson did not believe her and terminated her employment because he believed that she had been encouraging employees to sue the company, that her acts were inconsistent with her job duties, and that, therefore, he had lost confidence in her

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Gogel

- Gogel then filed a new Charge with EEOC, alleging retaliation
- Afterwards, Gogel filed this lawsuit, alleging sex and national origin discrimination, as well as retaliation
- The district court granted summary judgment for the employer, and she appealed
- The panel affirmed summary judgment on the discrimination claims, but reversed on the retaliation claim
- The 11th Circuit then heard the case *en banc*, affirming summary judgment on the discrimination claim and focusing solely on the retaliation claim

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Gogel

- Title VII prohibits retaliation against employees who:
 - Participate in a Title VII investigation, proceeding, or hearing
 - Oppose any practice made unlawful by Title VII
- To make a *prima facie* case of retaliation, an employee must show: (i) protected activity, (ii) adverse action, and (iii) a causal connection between the two
- Then, the employer must show a non-retaliatory reason for the adverse action, after which the employee must show that the employer's reason was a pretext for retaliation
- Ultimately, the employee must prove that but-for her protected activity, she would not have experienced the adverse action

Gogel

- Gogel alleged that she was discharged on January 19 because she filed a Charge on November 10, and the Court concluded that she had stated a *prima facie* case of retaliation
- The Court also concluded that KIA had offered a non-retaliatory reason - the fact Jackson believed she had recruited another employee to sue the company

Gogel

- The Court then concluded that Gogel had failed to show pretext
 - After she filed her Charge, she received a raise
 - She did not suffer any adverse action until after Jackson learned about the Ledbetter Charge and received the witness reports
 - While Gogel denied the recruitment, whether she *actually* recruited Ledbetter was not the real issue - the issue was whether Jackson *reasonably believed* that she had done so
 - And, Gogel offered no evidence to refute that Jackson reasonably believed she had recruited Ledbetter to sue

Gogel

- Gogel next argued that KIA's reason for terminating her employment - that she recruited Ledbetter to file a lawsuit - could not provide a defense because such action would have been protected oppositional activity
- The Court rejected this argument

Gogel

- To qualify as protected oppositional activity, “the manner in which an employee expresses her opposition . . . must be reasonable.”
- If the oppositional activity “so interferes with the employee’s performance of her job that it renders her ineffective in the position for which she was employed” then it is not reasonable or protected

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Gogel

- Gogel was an HR employee and her job responsibilities included investigating employee concerns and attempting to resolve those disputes in-house and avoid litigation
 - She certainly had a protected right to report concerns about her employment to EEOC
 - And, she had a protected right to report to management concerns about her employment or the company’s treatment of other employees
 - But, she did not have a protected right to refer an employee to a lawyer or to solicit an employee’s pursuit of litigation against the company
- Accordingly, the Court rejected her argument that KIA’s reason was unlawful and affirmed summary judgment for KIA

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Driskell v. Summit Contracting Group (4th Cir.)

- Summit is a general contractor
- Driskell was employed as an Assistant Superintendent and was assigned to a project in Charlotte
- He reported to Rhyner, who reported to Fudge
- Fudge reported to Padgett (President and CEO)
- Driskell's father also worked for Summit

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Driskell

- In June and July 2015, Driskell noticed that Rhyner was drinking alcohol at lunch and then returning to work intoxicated and acting belligerently
- For example, one day Rhyner returned to work after lunch drunk and brandishing a handgun, which was against company policy

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Driskell

- Driskell reported his concern to Fudge, believing that Rhyner's intoxication was a safety issue
- Fudge informed Padgett
- Driskell's father reported Driskell's concerns to Padgett's wife, who also was an executive
- The Padgetts, however, did not believe the Driskells and wrote in emails that they believed the Driskells were scheming to file a "bogus lawsuit"

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Driskell

- After another incident with Rhyner's drinking, Driskell reported his concerns directly to Padgett
- Padgett sent Born to investigate
- Rhyner denied the allegations, and Born told Driskell to stop reporting things because what happens at the job site stays at the job site
- Born then took Rhyner to lunch and bought him beer
- Born submitted a report to Padgett, concluding that Driskell was a "good kid," but needed to "grow a pair of balls"

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Driskell

- The next day, Driskell and Rhyner met
- Rhyner had been drinking and told Driskell that his team needed to work harder
- Driskell said that if he pushed them harder it would yield safety issues
- When Driskell turned to leave, Rhyner repeatedly punched him in the face
- Driskell fought back, and Rhyner told Driskell he was fired

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Driskell

- Driskell reported this incident to Padgett
- Padgett told Driskell that he was not fired
- Driskell said he would quit if Rhyner was not discharged, and Padgett did not respond
- Later, Fudge told Driskell to return his work tools, which surprised Driskell because he planned to return to work
- Driskell reported Rhyner to the police, and Rhyner was charged with assault

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Driskell

- The next day, Ms. Padgett sent several internal emails, claiming that the Driskells were engaged in a “scam” and were “plotting a bogus lawsuit”
- Driskell did not report to work that day or the next (and he had no PTO) because he was injured in the fight and doctor advised him to stay home for two days
- During those days, he reached out to Fudge and asked where he should next report to work when he was cleared to return by his doctor
- At the direction of Ms. Padgett, Fudge did not respond, and in emails the company discussed who would be the “designated terminator” and “give [Driskell] the boot.”

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Driskell

- The company deactivated Driskell’s phone and iPad
- He suspected that meant he had been fired, so he reached out to Fudge who did not respond
- So, the next day he returned his phone and iPad, believing he had been discharged

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Driskell

- Driskell filed a lawsuit, alleging wrongful discharge and REDA (NC Retaliatory Employment Discrimination Act) claims
- He advanced two theories: (i) he was fired because he complained about Rhyner's drinking and safety issues, and (ii) he was fired because the company thought he would file a workers' compensation claim as a result of injuries suffered during the fight

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Driskell

- Case was tried to a jury verdict
- Driskell was awarded \$65k in lost wages and \$681k in punitive damages (which was capped by statute at \$250k)
- And, the Court also awarded him \$442k in attorneys' fees

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Driskell

- To prove his retaliation claim, Driskell had to prove: (i) protected activity, (ii) adverse action, and (iii) causal connection between the two
- Summit argued that there was no adverse action because Driskell quit

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Driskell

- The Court rejected that argument
 - While Driskell did threaten to quit, a threat to quit is not the same as quitting
 - Summit would not respond to his emails and texts
 - Summit deactivated his work devices
 - When Driskell turned in his work devices, Summit did not tell him he was making a mistake
- So, the Court concluded that the evidence supported the jury's conclusion that he was fired

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Driskell

- Summit argued that internal complaints are not protected activity
- The Court rejected that argument too:
 - Simply proposing to a supervisor a way to comply with safety rules is not protected activity
 - But an internal complaint alleging ongoing safety violations is protected activity
 - When deciding whether the activity is protected, a court should consider: (i) whether the report led to an investigation, (ii) whether the report was made to someone other than supervisor, and (iii) whether workplace safety was a focus
- The Court concluded that Driskell's complaints were protected under this analysis

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Driskell

- Summit argued that the evidence conclusively showed that it fired Driskell for non-retaliatory reasons - insubordination and taking off two days
- The Court rejected this argument, pointing to all of the evidence that would support a conclusion of retaliatory motives:
 - Internal emails that characterized Driskell's concerns as a "scam"
 - Lackluster investigation that concluded with the observation that Driskell needed to "grow a pair of balls"
 - Failure to discipline Rhyner

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Driskell

- Summit argues that punitive damages were improper
- The Court rejected this argument
- Punitive damages may be awarded when there is clear and convincing evidence that the defendant's conduct involved fraud, malice (personal ill-will), or willful conduct (intentional disregard to rights and safety of others)
- The Court concluded that Ms. Padgett's emails and the refusal to seriously investigate or discipline Rhyner demonstrated malice
- And, Born's statement that Driskell needed to grow a pair of balls demonstrated a conscious disregard of safety
- In sum, the jury's award was affirmed, and Driskell recovered roughly \$750k

Conclusions

- Retaliation claims can be difficult to defend
- When the protected activity is close to the adverse action, then a case is particularly hard to defend
- So, when that is the case, a company must carefully weigh whether taking adverse action is worth the risk
- But, if the employee engages in improper conduct after the protected activity, that can provide a non-retaliatory reason for the adverse action
- For most employees, encouraging co-workers to pursue legal rights under Title VII would be protected oppositional activity
- But, for HR managers, in-house counsel, and other employees whose jobs involve handling employment investigations in house and avoiding litigation, such activity likely will not be protected
- And, be very careful when sending emails - they can be costly!



EEO UPDATE



Zebulon D. Anderson

October 15, 2020

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