



A Different

LEGAL

PERSPECTIVE

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A Professional Law Corporation

2024 Employment Law Update

February 13, 2024

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Employment Law UPDATE

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Content

Jan. 25, 2024

- Salt Lake SHRM's Annual Chapter Meeting
- Recently, in Nevada, The Nevada Supreme Court issues a ruling on labor pending test-completes
- In case you missed it, The NLRB found employers may record employees without consent, if the employees hear initiation
- Looking ahead: The frequently applied Chevron deference test is under review

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Employment Law UPDATE

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Content

Jan. 11, 2024

- New Year Resolutions for HR Professionals
 - Amending Handbooks to Comply with Recent NLRB Decisions
 - Amending Severance Agreements to Comply with Recent NLRB Decisions
 - Ensuring that Independent Contractors are Properly Classified
 - Amending Handbooks to Ensure that Nursing Employees Are Accommodated

Now Happening at Parsons



Join Parsons Behle & Latimer at Salt Lake SHRM's Annual Chapter Meeting

Members of Parsons Behle & Latimer's employment and

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You must enter before Noon to be eligible for the drawing.

* You'll also have the option to download a PDF copy of today's presentation once you've completed the form.

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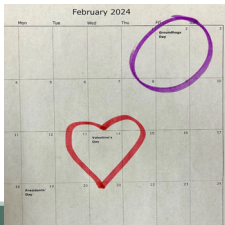
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Legal Disclaimer

This presentation is based on available information as of Feb. 13, 2024, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

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HR Law is a Tale of Two February Holidays

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A TALE OF TWO FEBRUARY HOLIDAYS

**HR Law makes you a
Happy Valentine**



OR



A Grumpy Groundhog

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Speaking of **Happy Valentines**...



1. Tayvis?
2. Traylor?
3. Swifce?
4. Kelswift?
5. TnT?
6. Chiefwoman?
7. Swiftieman?



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To help identify more **Happy Valentines** and **Grumpy Groundhogs**, our presenters today:

SESSION ONE: 10 – 11 AM



Michael Patrick O'Brien
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SESSION TWO: NOON – 1 PM



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Equal Employment Opportunity (EEO) Update



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GRUMPY ABOUT WORKPLACE HARASSMENT

New Utah State University Study Sexual harassment and gender-based discrimination findings:

- 83.5% of respondents agreed that sexual harassment and gender-based discrimination are problems in Utah.
- 82.5% disagreed that people make a bigger deal out of these two issues than is warranted.
- The findings suggest many are uncertain of what to do if they experience or see others experience sexual harassment and other types of gender-based discrimination.
- Most survey participants do not trust that organizations in Utah would appropriately handle a sexual harassment report. In fact, only 11.1% either agreed or strongly agreed that this was the case.



Source:
[Study reveals only 25% of Utahns believe domestic violence is a problem, here's what else it found \(kslv.com\)](#)

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HAPPY ABOUT NEW EEOC GUIDANCE ON HARASSMENT

Background

- Proposed guidelines released 9/29/23; EEOC now working to finalize them.
- Last such guidance issued in 2017 but never finalized.
- Found here: <https://www.eeoc.gov/proposed-enforcement-guidance-harassment-workplace>
- EEOC says between 2016-2022, one-third of all EEOC charges included harassment allegations.
- Detailed summary of harassment law with lots of specific examples and extensive citations to real cases and court decisions.

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HAPPY ABOUT NEW EEOC GUIDANCE ON HARASSMENT

Highlights

- Protected classes include traits or characteristics linked to class (e.g., name, cultural dress, accent, manner of speech, grooming, hair textures, hair style, attire, diet).
- Sex protected class includes orientation and identity. Harassment can include:
 - intentional and repeated use of pronouns inconsistent with someone's gender identity (misgendering).
 - denial of access to bathrooms or other sex segregated facility inconsistent with gender identity. (Note new Utah law on this issue and government building public restrooms.)

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HAPPY ABOUT NEW EEOC GUIDANCE ON HARASSMENT

Highlights

- Harassment can be based on misperception that a person has a protected characteristic, for example mistakenly harassing a Hispanic employee based on belief the person is Pakistani.
- Description of "associational discrimination" (e.g., bias against a white employee married to a black person).
- Stereotyping harassment based on expectations of how persons should act or appear (e.g., based on gender... "He's not manly" or "She's not feminine enough.")
- Harassment by a supervisor may heighten severity due to supervisory power. Due to same power, a supervisor's harassment outside the workplace may be actionable.
- Sexual favoritism claims by persons who don't have sex with a supervisor but believe they do not advance as fast as co-workers who do have sex.



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GRUMPY ABOUT POSSIBLE EXPANSION OF EEO LAW

- The United States Supreme Court recently heard arguments on a case that could significantly expand the reach of EEO law.
- This issue is what is an "adverse action" that triggers the right to sue under the discrimination laws.
- Traditionally: ultimate decisions such as termination, demotion, pay cut, etc.
- Possible expansion: any term or condition or privilege of employment...scheduling, job duty assignment, office location, discipline, etc.



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GRUMPY ABOUT DIVERSITY EQUITY AND INCLUSION (DEI)

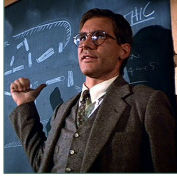
DEI is a high profile issue that will continue to be debated and scrutinized



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HAPPY ABOUT THESE DEI TAKEAWAYS

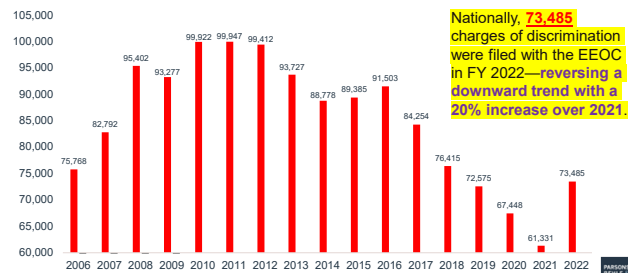
- For now, nothing has changed in employment law as a result of recent Supreme Court decisions about college affirmative action programs.
- If your DEI policy was legally compliant before the decision it still is.
- The likelihood of legal challenges to DEI is increasing.
- The likelihood of a Supreme Court ruling adverse to DEI has also increased due to the Court's current composition.
- Now is a good time to evaluate your company's DEI policies generally and for legal compliance.
- This is an area that should be monitored in the future.



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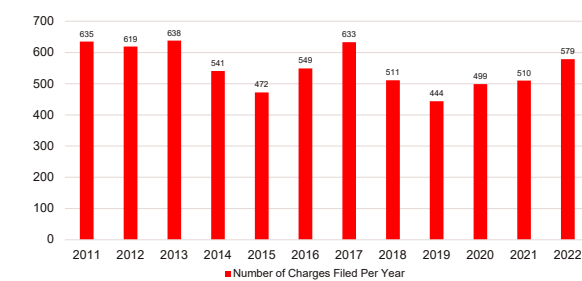
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GRUMPY ABOUT EEOC CHARGE DATA (UPDATED MARCH 2023)



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Charges Filed at the UALD



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EEOC/UALD Charge Statistics

www.eeoc.gov/statistics/enforcement-and-litigation-statistics

For 2022, the top 5 most frequently-filed charges **nationally** were:

Retaliation (51.6%)
Disability (34%)
Race (28.6%)
Sex (27%)
Age (15.6%)

For 2022, the top 5 most frequently-filed charges in **Utah** were:

Retaliation (58.5%)
Disability (47.1%)
Sex (27.3%)
Age (23.2%)
Race (19.7%)



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HAPPY ABOUT PREGNANT WORKERS FAIRNESS ACT



December 22, 2022
Congress passed the **Pregnant Workers Fairness Act (PWFA)**



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PREGNANT WORKERS FAIRNESS ACT

- PWFA requires that employers with at least **15 employees** must provide reasonable **accommodations** for pregnant applicants and employees that are needed for pregnancy, childbirth and related medical conditions.
- PWFA was **effective June 27, 2023**. Utah already had a similar law in place.
- EEOC has issued proposed regulations. **Final regulations due out any day**. (Actually, due by end of December 2023.)



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GRUMPY THAT PWFA IS NOT EXACTLY LIKE ADA

- PWFA accommodations are **similar to but also different** from the accommodation analysis under the Americans with Disabilities Act (ADA).
- Like the ADA, reasonable workplace accommodations must be provided to pregnant applicants/employees unless an undue hardship.
- **Unlike the ADA, essential job functions must be modified** or eliminated if only needed on **temporary basis** (up to 40 weeks) and not an undue hardship.



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PREGNANT WORKERS FAIRNESS ACT

- **Unlike the ADA, the proposed PWFA rules identify four accommodations that should be granted in almost every circumstance.**
- These are allowing covered employees: (1) to have extra time for bathroom breaks; (2) to have food and drink breaks; (3) to drink water on the job; and (4) to sit or stand as necessary.
- **Employers not allowed to get health care provider confirmation that an employee needs these four accommodations.**
- **Some other restrictions on when employers can get health care documentation.**



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PREGNANT WORKERS FAIRNESS ACT

- The proposed rule contains a "non-exhaustive list" of conditions covered by the Act.
- The list is quite broad, and includes current pregnancy, past pregnancy, potential pregnancy, lactation (breastfeeding and pumping), **use of birth control, menstruation, infertility and fertility treatments, endometriosis, miscarriage, stillbirth and "having or choosing not to have an abortion."**
- The proposed rule also states that the Act covers postpartum anxiety and depression.



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HERE'S SOME MORE HR LAW THAT WILL
MAKE YOU FEEL LIKE EITHER A...

A Happy Valentine



OR



A Grumpy Groundhog

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NLRB Updates

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What is the NLRB?

- The federal agency tasked with enforcing the National Labor Relations Act (NLRA).
- The NLRA covers the rights of unionized workers . . .



- The NLRA also codifies rights of *all* employees in Section 7 of the Act. In that Section, the NLRA guarantees employees' right to engage in concerted activity (when two or more employees take action for their mutual aid or protection regarding terms and conditions of employment).

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A Handbook Provision to Consider . . .

- In order to protect everyone's rights and safety, it is the Company's policy to implement certain rules and regulations regarding your behavior as a team member. Conduct that maliciously harms or intends to harm the business reputation of the Company will not be tolerated. You are expected to conduct yourself and behave in a manner conducive to efficient operations. Failure to conduct yourself in an appropriate manner can lead to corrective action up to and including termination.



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We protect what matters.

NLRB Issues *Stericycle* Decision, Changing the Standard for Employer Conduct Rules



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Have you checked your handbook lately?

On August 2, 2023, the NLRB issued a long-anticipated opinion in a case called *Stericycle*, which analyzes whether employer conduct rules are lawful.

Your policies likely address conduct standards, such as rules requiring professionalism and civility.

These rules need to be balanced against an employees' Section 7 rights to engage in **concerted activity** (to discuss together, or complain about, the terms and conditions of employment).

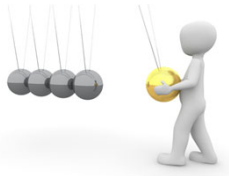
Prior to *Stericycle*, we applied an employer-friendly balancing test to weigh the conduct rule against the Section 7 rights.

Facially neutral rules about professionalism and civility were presumptively valid.



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The Pendulum Swings Back in Favor of Employees



Stericycle reversed that precedent, adopting a new case-by-base balancing approach to determine if a conduct rule has "a reasonable tendency to chill employees from exercising their Section 7 rights."

The Board will read conduct rules from the perspective of a "reasonable employee." If a "reasonable employee" could interpret the rule in a way that limits Section 7 rights, the rule will be presumptively invalid.

The employer's intent in making the rule is irrelevant.



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Another Handbook Provision to Consider . . .

- The Company strictly prohibits unlawful retaliation against any team member or applicant for employment who reports discrimination or harassment, or who participates in good faith in any investigation of unlawful discrimination or harassment. All complaints will be promptly investigated. All parties involved in the investigation will keep complaints and the terms of their resolution confidential to the fullest extent practicable.



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Confidentiality Instructions Changed Too

For internal investigations, many employers instruct all witnesses to maintain the confidentiality of the investigation—during and after the investigation.

- For supervisors, there's no change. Recall that supervisors don't have Section 7 rights. Feel free to tell them to keep it secret.
- But what about non-supervisors?



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Confidentiality Instructions to Non-Supervisors

- In 2019, the NLRB ruled that employer rules requiring employee confidentiality during open investigations are lawful. But you needed to apply “individualized scrutiny” in each case to maintain confidentiality post-investigation, e.g., to protect the integrity of the investigation, or to protect the complainant against mistreatment or retaliation.
- In *Stericycle*, the NLRB overruled their 2019 decision with respect to confidentiality instructions during the pendency of the investigation. Now, you need a specific reason—during and after the investigation—to maintain confidentiality.



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So . . . what can we do?

- The standard is retroactive, so start thinking through this today.
- Look for workplace rules or policies addressing employee conduct, behavior, social media use, or speech.
 - Can those rules be more narrowly tailored?
- Add disclaimer language
 - Address policies' non-application to protected Section 7 rights.
- Remove language in handbooks about confidentiality in investigations—handle on a case-by-case basis.



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NLRB Enters the Non-Compete Fray

- On May 30, 2023, NLRB General Counsel (GC) Jennifer Abruzzo issued a memorandum declaring that overbroad non-compete agreements are unlawful because they chill employees from exercising their rights under Section 7.
- Abruzzo asserts that non-competes interfere with Section 7 rights by making workers believe they'll have a harder time replacing lost income if they're discharged for exercising their Section 7 rights. Abruzzo's memorandum is not an official statement or ruling by the NLRB. But, as the NLRB's GC, Abruzzo sets the direction for regional offices and instructs them on the types of complaints to file against companies.



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NLRB Issues Final Rule on Joint-Employer Status

▪ Under the new standard, two entities may be considered joint employers if each entity has an employment relationship with the employees and they share or codetermine one or more of the employees' essential terms and conditions of employment, which are defined *exclusively* as:

- (1) wages, benefits, and other compensation;
- (2) hours of work and scheduling;
- (3) the assignment of duties to be performed;
- (4) the supervision of the performance of duties;
- (5) work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline;
- (6) the tenure of employment, including hiring and discharge; and
- (7) working conditions related to the safety and health of employees.



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That may sound like a lot of grumpy groundhogs . . .



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The Supreme Court for Employers:
Changes and Cautions from the 22-23 Term



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Religious Accommodation – Raising the Bar

Title VII of the Civil Rights Act of 1964 requires employers provide reasonable accommodations for their employees' religious beliefs and practices.

In late June 2023, the United States Supreme Court issued a decision in *Groff v. DeJoy*—a case that reset the standard for the burden an employer must meet in demonstrating that it is not required to grant an employee's request for a religious accommodation.

What is an "undue hardship"?



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Religious Accommodation – Raising the Bar



An employee may seek an exception to a dress standard to allow for religious garb, or ask for a Saturday or Sunday off for worship, etc.

Courts have long maintained that employers must provide such religious accommodations unless the request imposes an "undue hardship," defined as "more than a de minimis cost."



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Religious Accommodation – Raising the Bar

Similarly, the Americans with Disabilities Act (ADA) requires employers provide disability accommodations unless an employee's request imposes an "undue hardship."

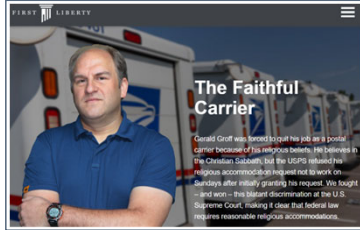
However, the standard for "undue hardship" under the ADA is far more stringent, requiring a showing of "significant difficulty or expense."



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Religious Accommodation – Raising the Bar

- The plaintiff, Gerald Groff worked for the U.S. Postal Service (USPS) and asked for Sundays off, asserting that his religion as an Evangelical Christian forbade Sunday work.
- USPS asked Groff's coworkers to voluntarily trade shifts with him, but that did not work.
- Ultimately, USPS denied Groff's request and then disciplined him when he missed work on Sundays. Groff resigned and filed suit.



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Religious Accommodation – Raising the Bar

A federal district court and appellate court found in favor of USPS because Groff's request for Sundays off imposed "more than a de minimis cost" because the request "imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale."

But the Supreme Court reversed.

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Religious Accommodation – Raising the Bar

The erroneous *de minimis* interpretation of *Hardison* has been rejected. First, on the second question presented, both parties agree that the language of Title VII requires an assessment of whether the requested accommodation would impose more than a de minimis cost on the employer. Second, as the Solicitor General's authorities underscore, Title VII requires that an employer reasonably accommodate an employee's religious practices, unless doing so would impose more than a de minimis cost on the employer. Having clarified the Title VII undue-hardship standard, we think it appropriate to leave the context-specific application of that clarified standard to the lower courts in the first instance. The Third Circuit assumed that *Hardison* prescribed a "more than a de minimis cost" test, 35 F. 4th, at 175, and this may have led the court to dismiss a number of possible accommodations, including those involving the cost of incentive pay, or the administrative costs of coordination with other nearby stations with a broader set of employees. Without foreclosing the possibility that USPS will prevail, we think it appropriate to leave it to the lower courts to apply our clarified context-specific standard, and to decide whether any further factual development is needed.

Takeaways

The *de minimis* standard is out, but the work of making "context-specific" determinations of how to apply the undue-hardship standard has been left to the lower courts.

Be careful about "coworker impacts," and keep an eye on "reasonably accommodating the practice," not simply thinking about whether certain workplace changes are reasonable.

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How Does SCOTUS Feel About Religious Accommodations?



As **HAPPY** as Justice Neil Gorsuch giving *himself* a Valentine's cake!
As **HAPPY** as Justice Brett Kavanaugh going country line dancing!
... with his colleague Justice Sonia Sotomayor!

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What's Next for DEI Initiatives?

Title VI of the Civil Rights Act of 1964 provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

That's Title VI, not Title VII.

But: Section 1981 of the Civil Rights Act of 1866 "offers relief when racial discrimination blocks the creation of a contractual relationship, as well as when racial discrimination impairs an existing contractual relationship"

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What's Next for DEI Initiatives?

In *Students for Fair Admissions v. Harvard/UNC*, a nonprofit sued Harvard and UNC, "arguing that their race-based admissions programs violate Title VI and the Equal Protection Clause of the Fourteenth Amendments.

Lower courts found both admissions programs "permissible under the Equal Protection Clause and [the Supreme Court's] precedents."

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What's Next for DEI Initiatives?

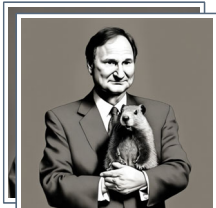
What's Next for DEI Initiatives?

Although Title VI and Title VII have similar language, **affirmative action in the employment context is distinct from the education context** and governed by different rules and case law.

With very few exceptions, discussed below, an employer **cannot consider race or other protected characteristics when making decisions.**



How Does SCOTUS Feel About Affirmative Action at UNC and Harvard?



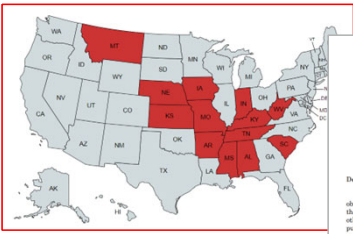
As **GRUMPY** as a groundhog being squeezed by Justice Sam Alito!

As **GRUMPY** as a groundhog forced to pose for an oil painting while being cradled by Justice Sam Alito!

»



What's Next for DEI Initiatives?





July 13, 2023

Dear Fortune 100 CEOs:

We, the undersigned Attorneys General of 13 States, write to remind you of your obligations as an employer under federal and state law to refrain from discriminating on the basis of race, whether under the label of "diversity, equity, and inclusion" or otherwise. Treating people differently because of the color of their skin, even for benign purposes, is unlawful and wrong. Companies that engage in racial discrimination should and will face serious legal consequences.

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How Do Red-State AGs Feel About *Private* DEI Initiatives?



As **WARY** as Kansas Attorney General Kris Kobach emerging from a hole in the ground, seeing his shadow, and retreating back to safety.

... in the style of Wes Anderson.

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What's Next for DEI Initiatives?

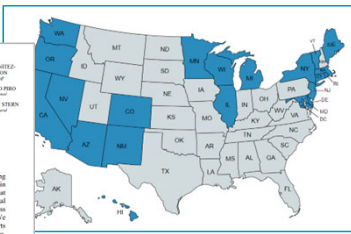
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July 19, 2023

Dear Fortune 100 CEOs,

We recently reviewed a letter sent to you by 13 state attorneys general, purporting to remind you of your obligations as an employer under federal and state law to refrain from discriminating on the basis of race. While we agree with our colleagues that "companies that engage in racial discrimination should and will face serious legal consequences," we are focused on actual unlawful discrimination, not the baseless assertion that any attempts to address racial disparity are by their very nature unlawful. We condemn the letter's use of intimidation, which purports to work to undermine efforts to reduce racial inequities in corporate America. As the chief legal officers of our states, we recognize the many benefits of a diverse population, business community, and workforce, and share a commitment to expanding opportunity for all.

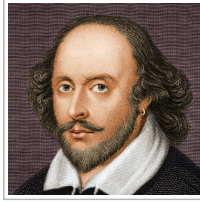
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What's Next for DEI Initiatives?

"The first thing we do, let's [get] all the lawyers."
--Henry VI, Pt. 2, Act IV, Scene 2



Two Biglaw Firms Sued Over Diversity Initiatives
Affirmative action in college was only the first target.
By KATHRYN RUBINO on August 22, 2023 at 2:29 PM

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What's Next for DEI Initiatives?

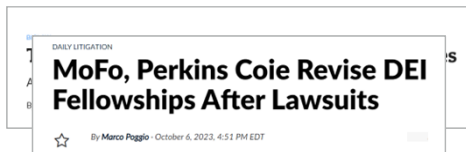


Lawyers suing **lawyers** . . .
about hiring **certain lawyers** . . .
instead of **other lawyers**.

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What's Next for DEI Initiatives?



What made these programs targets?

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What's Next for DEI Initiatives?

Takeaways

The decision in *SFFA v. Harvard/UNC* has no direct current legal impact on employers. The framework (Title VI/Equal Protection Clause) does not apply to private employers, and in the context of employment, the use of race in employment decisions was **already** (nearly always) prohibited.

Employers may still: promote diversity in the workplace, have DEI training (generally), implement DE&I programs and policies, improve hiring pipelines, etc.

But DE&I programs will likely be subject to increased scrutiny and more frequent legal challenges. We recommend you work with legal counsel to assess the benefits and costs of any current program and to ensure compliance with existing law.



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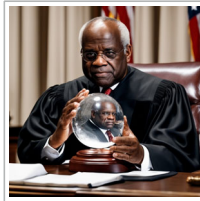
What May Be on Tap for Next Year?

Muldrow v. City of St. Louis (heard Dec. 6, 2023)

The New York Times

Supreme Court Leans Toward Police Officer in Job Bias Case

The officer, Jantrop Muldrow, said she had been transferred to a less desirable position based on her sex. Lower courts said that she had not shown concrete harm.



The Supreme Court appears poised to conclude that *transfers* could constitute discrimination within the meaning of Title VII, even if the employee does not suffer economic damages.

At oral argument, JJ. Thomas and Barrett asked directly about the overlap between decisions regarding "differential treatment in the workplace" and DEI initiatives.



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Scan the QR code to enter now!

You must enter **before Noon** to be eligible for the drawing.



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* You'll also have the option to download a PDF copy of today's presentation once you've completed the form.



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Trending ADA Accommodation Issues

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Reasonable Accommodation Under The ADA

ADA

Americans with Disabilities Act



The ADA requires employers to make "reasonable accommodations" to the known physical or mental limitations of an otherwise qualified individual . . . Unless such covered entity covered entity can demonstrate that an accommodation would be an undue hardship."

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Reasonable Accommodation Under The ADA

An "otherwise qualified individual" is an individual who:

- 1) can perform their essential job functions of a job in spite of their disability; or
- 2) who can perform the essential functions of their job with a reasonable accommodation.



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Reasonable Accommodation Under The ADA

Reasonable accommodations include, for example, the following:

- Job restructuring
- Part-time or modified work schedules
- Reassignment to a vacant position
- Acquisition or modification of equipment or devices
- Adjustment or modifications of examinations, training materials, or policies
- The provisions of qualified readers or interpreters
- Other similar accommodations



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Reasonable Accommodation Under The ADA

The ADA **does not** require an employer to do any of the following as a reasonable accommodation:

- Relieve an employee of any essential job function
- Modify an employee's essential job function
- Reassign existing employees or hire new employees

"Essential job functions" are those that "bear more than a marginal relationship to the job at issue."

Essential job functions are determined by looking at the employer's judgement, employee's written job description, the amount of time performing the job function, and the consequences of not requiring the employee to perform the function.



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Case Study #1



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Hannah v. United Parcel Service 72 F.4th 630 (4th Cir. 2023)

- Delivery driver for UPS
- Diagnosed with hip bursitis
- Drove a high-capacity truck that had a "stiff suspension, which made for a rough ride that aggravated Hannah's injury"
- Requested a padded seat which UPS provided
- Despite this accommodation Hannah was only able to work sporadically



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Hannah v. United Parcel Service 72 F.4th 630 (4th Cir. 2023)

- Hannah was cleared to return to work so long as he avoided sitting for prolonged periods for a period of time
- In connection with his return to work, Hannah requested one of the two following accommodations:
 - To be provided with a **smaller vehicle** which would have a softer suspension; or
 - To be assigned to an **"inside job"** within a 30-mile radius

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Hannah v. United Parcel Service 72 F.4th 630 (4th Cir. 2023)

- UPS met with Hannah and determined that neither option was feasible
 - A smaller vehicle would require **multiple trips** or to share route with another driver. Violate the company's **collective bargaining agreement**.
 - **No inside job** was available. Would consider him for one if it became available.
- UPS allowed Hannah to keep his job and take **unpaid leave until he could return to work**



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LATIMER

69

Hannah v. United Parcel Service 72 F.4th 630 (4th Cir. 2023)

- The court held requested accommodations would not allow him to perform the essential functions of his job
 - "UPS designed the delivery routes and assigned trucks to them with the capacity that it determined was needed to complete the routes. And when an employee, such as Hannah, bid on the route, the essential functions of the job of driving that route were so defined.
- The court emphasized that "consideration is to be given to the employer's judgment as to what functions of a job are essential" and that an employee "is not free simply to redefine the job.



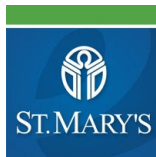
70

Hannah v. United Parcel Service 72 F.4th 630 (4th Cir. 2023)

- Court found that UPS's accommodation of placing Hannah on unpaid leave was reasonable
 - Hannah argued that the accommodation was not reasonable because such leave "prevented him from earning wages."
 - Court rejected this argument: "[w]hile a period of unpaid leave might not always be a reasonable accommodation, such leave may be reasonable where the disability that interferes with an employee's capacity to complete assigned tasks is temporary and there is reason to believe that a leave of absence will provide a period during which the employee will be able to recover and return to work."



71



Case Study #2



72

Kinney v. St. Mary's Health, Inc.
76 F.4th 635 (7th Cir. 2023)

- In 2016, St. Mary's Hospital hired Anna Kinney as its Director of Imaging Services
 - Kinney supervised 120 employees in the radiology department
 - Kinney was required to monitor the "plan for patient care services" and to act as a liaison between the radiology department and other departments
 - Kinney oversaw the installation and maintenance of equipment
 - Kinney's job description said that the job required "using personal protective equipment as required"



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73

Kinney v. St. Mary's Health, Inc.
76 F.4th 635 (7th Cir. 2023)

- Kinney was diagnosed with ADHD in 2015 and PTSD in 2017
- In 2018, Kinney applied for and was granted intermittent FMLA leave. She only used two days of leave from October 2018 to December 2020.
- In March 2020, Kinney began working remotely due to the COVID-19 pandemic and going to the hospital two to three times a month
- In August 2020, the Hospital adopted safety protocols which included the wearing of masks and asked its department heads to return to work

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74

Kinney v. St. Mary's Health, Inc.
76 F.4th 635 (7th Cir. 2023)

- Kinney stopped going to hospital because she was unable to wear a mask due to her anxiety.
- Kinney did not tell her supervisor and did not obtain permission to do so
- In October 2020, in response to complaints about Kinney's job performance, her supervisor told her she needed to work in person several times a week
- Kinney told her supervisor that she could not wear a mask
- On October 29, 2020, Kinney submitted a note from her doctor stating that she could not wear a mask due to her anxiety and recommending that she be allowed to work from home

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75

Kinney v. St. Mary's Health, Inc.
76 F.4th 635 (7th Cir. 2023)

- Kinney's supervisor suggested a protective face shield and that she speak to her doctor about it
- Kinney told her doctor that a protective face shield would cause her the same anxiety. Kinney never told that information to her supervisor or obtained a verifying physician note.
- Having never heard from Kinney regarding the face shield, the Hospital told Kinney she needed to return to work by December 7



76

Kinney v. St. Mary's Health, Inc.
76 F.4th 635 (7th Cir. 2023)

- On January 12, 2021, Kinney submitted a second physician's note requesting that she be allowed to work remotely or in-person two days a week for five to six hours day "performing as many of her responsibilities as possible in her office using remote technology so that mask wearing is kept to a minimum."
- The next week Kinney attended a staff meeting at the hospital in person without a mask
- Kinney was reprimanded and her alternate request for accommodation was denied



77

Kinney v. St. Mary's Health, Inc.
76 F.4th 635 (7th Cir. 2023)

- From January 2021 to May 2021, Kinney worked in person two days a week spending most of her time in her office unmasked.
- Kinney used intermittent FMLA leave and accrued paid leave to cover the remaining three days of the week
- After her leave ran out, Kinney took a leave of absence that was scheduled to end on August 9, 2021.
- On August 1, 2021, Kinney wrote to her supervisor stating that she had spoken to her doctor and would be returning to work. She resigned instead.



78

Kinney v. St. Mary's Health, Inc.
76 F.4th 635 (7th Cir. 2023)

- Kinney filed a suit
- The court: "under the ADA, an employee who cannot comply with a **valid safety requirement** for her position will not be considered qualified"
- Thus, the court asked "whether a reasonable accommodation would allow the employee to perform her job in compliance with legitimate safety requirements"



79

Kinney v. St. Mary's Health, Inc.
76 F.4th 635 (7th Cir. 2023)

- The court held that "when COVID-19 safety precautions, including wearing a mask in the hospital, went into place, it became apparent that Kinney was **not a qualified individual** for her position and that she was seeking an **accommodation that would not be reasonable under the circumstances**. She was not able or willing to perform the **in-person work that was essential** to her position while wearing the personal protective equipment that her job required."



80

Kinney v. St. Mary's Health, Inc.
76 F.4th 635 (7th Cir. 2023)

- Court explained that when considering whether working remotely is reasonable that courts should "focus on the **specific job and its essential functions** and specific possible accommodations" **rather than generalities "about the obvious benefits of physical presence** in a workplace."
- The court explained that previous decisions had generally held that working from home was rarely a reasonable accommodation under the ADA and was disfavored "because most jobs require the kind of teamwork, personal interaction, and supervision that simply cannot be had in a home office situation."



81

Kinney v. St. Mary's Health, Inc.
76 F.4th 635 (7th Cir. 2023)

- Court noted that, "that **technological advances** have made working from home **more feasible** so that employers cannot rely on an automatic presumption **working from home is unreasonable**. The many lessons learned about working from home effectively during the pandemic have reinforced that point."



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LITERACY

82

Kinney v. St. Mary's Health, Inc.
76 F.4th 635 (7th Cir. 2023)

- Nonetheless, the court explained that "[t]he fact that many employees were able to work remotely temporarily when forced to do so by a global health crisis does not mean that those jobs do not have essential functions that require in-person work over the medium to long term. Determining whether a specific job has essential functions that require in-person work has become much more of a **case-specific inquiry**."

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LITERACY

83

Kinney v. St. Mary's Health, Inc.
76 F.4th 635 (7th Cir. 2023)

- In this case, the specific facts of the case supported the conclusion that Kinney was required to work in person.
 - Kinney's **job description** stated she would be required to wear protective personal equipment, perform evaluations, liaison between her department and other departments, and oversee the functioning of medical equipment
 - Numerous employees testified that McKinney's **absence affected** their morale or increased their workload
 - Kinney's **supervisor testified** that her role required her to work in person

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LITERACY

84



Case Study #3

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LATIMER

85

Sarkisian v. Austin Preparatory School 85 F.4th 670 (1st Cir 2023)

- Nancy Der Sarkisian was a sixty-nine-year-old, ninth-grade English teacher at Austin Preparatory School
- Prior to the start of the 2019-2020 school year, Sarkisian learned she would need **hip surgery**
- Austin Prep granted Sarkisian a leave of absence until October 2019 and hired a **substitute teacher** to teach Sarkisian's class.
- The substitute teacher was paid on a **per-diem basis** with no long-term contract.



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LATIMER

86

Sarkisian v. Austin Preparatory School 85 F.4th 670 (1st Cir 2023)

- Sarkisian emailed her supervisor stating she had suffered a **complication** and had to undergo a **second surgery**.
- Sarkisian stated she was "in a critical care rehabilitation hospital," that she "had **no idea how she would be there**," and that she would most likely "be out for the first semester."
- Sarkisian's doctor completed a Certification of Health Care Provider for Employee's Serious health condition stating Sarkisian would be out until January 5, 2020

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LATIMER

87

Sarkisian v. Austin Preparatory School 85 F.4th 670 (1st Cir 2023)

- On November 14, 2019, Austin Prep **extended Sarkisian's leave** until January 6, 2020. Austin Prep **continued to employ a substitute** teacher to cover Sarkisian's class.
- On November 17, 2019, Sarkisian had a **third surgery**
- On December 4, 2019, Sarkisian **applied for long term disability** benefits.
- Sarkisian wrote on the application that she was **"unsure"** when she **would return to work** and her doctor stated that Sarkisian would have a "total temporary disability" for "3-6 months."

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LITIGATION

88

Sarkisian v. Austin Preparatory School 85 F.4th 670 (1st Cir 2023)

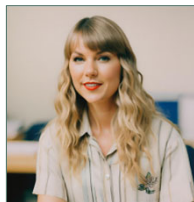
- Austin Prep sent Sarkisian's doctor an Accommodation Request Inquiry Form. The form asked for information about Sarkisian's disability and whether there was a reasonable accommodation
 - In response to the question "What Job functions is the employee having trouble performing because of the limitations" the doctor replied "all."
 - In response to the question "Do you have any suggestions regarding possible accommodations to improve performance? If so, what are they?" the doctor replied, **"She should be on total temporary disability."**

PARSONS
PEOPLE &
LITIGATION

89

Sarkisian v. Austin Preparatory School 85 F.4th 670 (1st Cir 2023)

- Austin Prep **terminated Sarkisian** stating "unfortunately, Austin Prep has a growing **need to fill your position**, and we cannot provide an extended and continuing leave of absence to fill your position"
- Sarkisian sued alleging a violation of the ADA. The district court granted summary judgment for Austin Prep holding that "regular attendance was an essential function of" Sarkisian's job.
- Sarkisian appealed



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LITIGATION

90

Sarkisian v. Austin Preparatory School
85 F.4th 670 (1st Cir 2023)

- On appeal, the court held that Sarkisian was not a qualified individual under the ADA because she was not able to perform the essential functions of her job with or without a reasonable accommodation.
- Both parties agreed that regular attendance was an essential function of Sarkisian's job.
- However, Sarkisian argued that her request for a further extension of leave would have allowed her to perform this essential function and was facially reasonable.



91

Sarkisian v. Austin Preparatory School
85 F.4th 670 (1st Cir 2023)

- The court of appeals disagreed: "an extension of leave was not a reasonable accommodation" and that "such an open-ended request for additional leave is just the type of wait-and-see approach that has been rejected as giving to a triable issue on reasonable accommodation."



92

Sarkisian v. Austin Preparatory School
85 F.4th 670 (1st Cir 2023)

- The court held that Sarkisian's request was not facially reasonable in "light of the school's need to provide continuity and adequacy of instruction in all five of her English classes;" the risk that the substitute teacher was not under contract and could leave at any time; and the "school's legitimate concern with its inability to guarantee its ninth-Grade English students high-quality education from a full-time, permanent instructor, during the 2019-20 school year."



93

Sarkisian v. Austin Preparatory School 85 F.4th 670 (1st Cir 2023)

- Sarkisian also argued that Austin Prep could have allowed her to: (1) take an unpaid leave of absence for the entire school year; (2) agreed to check in with her after three months; or (3) have other teachers cover her classes.
- The court of appeals rejected these arguments explaining that “none would have satisfied the school’s need for instruction of her five classes and its need to afford its students continuity and avoid the risk of chaotic disruption.”



94



The Story of the DOL and Independent
Contractors – *Haven’t we been here before?*



95

Have you seen...



96

Let's have a little history lesson about the DOL and Independent Contractors...

- The traditional worker classification "economic realities test" articulated in the DOL's guidance over time originates from 1947 Supreme Court decision *United States v. Silk*.
- 2015: the Obama Rule
 - Six-factor test
 - Primary focus is whether the worker is economically dependent on the employer
- 2021: the Trump Rule
 - June 2017: Withdrew Obama Rule
 - January 2021: Put in the Trump Rule
 - Five factors
 - Core factors: Control and opportunity for profit or loss



PERSONAL FINANCE LITERACY

97

And now today (again)... the Biden Rule



- Four days before Trump Rule would have taken effect in March 2021, Biden admin delayed the effective date and then withdrew it entirely
- March 2022—Texas federal district court rules it was unlawful to delay/withdraw the Trump rule and reinstated it
- October 11, 2022, Biden admin proposed new rule that would reinstate the economic realities test under the Obama rule
- 61-day comment period that ended on December 13, 2022
- Final Rule was announced on January 9, 2024
- Final Rule is effective on March 11, 2024

PERSONAL FINANCE LITERACY

98

Why is the DOL replacing the Trump rule?

- The Trump Rule designated two "core factors"—control and opportunity for profit or loss—which were given a greater predetermined weight in the analysis
- The Trump Rule considered a worker's investments and initiative only as part of the opportunity for profit or loss factor
- The Trump Rule prohibited considering whether the work performed is central or important to the potential employer's business.
- But maybe the real reason is little less high-minded....



PERSONAL FINANCE LITERACY

99

What does the Final Rule say?

- This final rule continues to affirm that a worker is not an independent contractor if they are, as matter of economic reality, economically dependent on an employer for work.
- Factors
 - (1) opportunity for profit or loss depending on managerial skill;
 - (2) investments by the worker and the potential employer;
 - (3) degree of permanence of the work relationship;
 - (4) nature and degree of control;
 - (5) extent to which the work performed is an integral part of the potential employer's business; and
 - (6) skill and initiative.
- The final rule provides detailed guidance regarding the application of each of these six factors.
- No factor has a predetermined weight, and additional factors may be relevant.



100

How is the Final Rule similar to Trump Rule?



- Both rules advise that **independent contractors** are workers who (as a matter of economic reality) are in business for themselves, whereas **employees** are workers who are (as a matter of economic reality) economically dependent on the employer for work.
- Both rules identify economic dependence as the "ultimate inquiry" of the analysis.
- Both rules provide a non-exhaustive list of factors to assess economic dependence.
- Both rules caution that no single factor is determinative.
- Both rules clarify that economic dependence does not focus on the amount of income the worker earns, or whether the worker has other sources of income.



101

How is the Final Rule different from the Trump Rule?

- Returns to a totality-of-the-circumstances economic reality test (no single factor is assigned any predetermined weight).
- Considers six factors (instead of five), including the investments made by the worker and the potential employer.
- Provides additional analysis of the control factor.
- Returns to the DOL's consideration of whether the work is integral to the employer's business (rather than whether it is exclusively part of an "integrated unit of production").
- Provides additional context to some factors, including a discussion of exclusivity in the context of the permanency factor and initiative in the context of the skill factor.
- Omits a provision from the Trump Rule which minimized the relevance of an employer's reserved but unexercised rights to control a worker.



102

How does the Final Rule differ from the Proposed Rule?



- The Department received approximately 55,400 public comments in response to the Proposed Rule
- The final rule also advises that costs to a worker which are **unilaterally imposed** by a potential employer are not "investments" indicative of independent-contractor status.
- The Final Rule states that actions taken by the potential employer for the **sole purpose** of complying with specific, applicable federal, state, tribal, or local law or regulation would not indicate "control."



103

The Final Rule's Guidance on the Control Factor

- This factor considers the potential employer's control (including reserved control) over the performance of the work and the economic aspects of the working relationship.
- Facts relevant to control: Does the potential employer set the worker's **schedule**, supervise the **performance** of the work, or explicitly limit the worker's ability to **work for others**?
- Does the potential employer use technological means to **supervise** the performance of the work (such as by means of a device or electronically), reserve the right to supervise or **discipline** workers, or place demands or restrictions on workers that do not allow them to **work for others** or work when they choose?
- Does the potential employer control **economic aspects** of the working relationship (e.g., control over prices or rates for services, and the marketing of the services or products provided by the worker)?



104

The Final Rule's Guidance on the Control Factor

- Actions taken by the potential employer for the sole purpose of complying with a specific law/regulation are not indicative of control.
- Examples:
 - A publication's requirement that a writer comply with libel law
 - A home care agency's requirement that all individuals with patient contact undergo background checks in compliance with a specific Medicaid regulation.
- Actions taken by the potential employer that go beyond **legal compliance** and instead serve the **employer's own compliance** (methods of safety, quality control, or contractual or customer service standards) may be indicative of control.
- Example: A home care agency's imposition of extensive provider qualifications, such as fulfilling comprehensive training requirements (beyond training required for relevant licenses), may be probative of control.



105

The Final Rule's Guidance on the "Integral Part of Employer's Business" Factor

- This factor considers whether the work performed is an **integral** part of the potential employer's business.
- This factor **does not** depend on whether any **individual worker** in particular is an integral part of the business, but rather whether the **function** they perform is an integral part of the business.
- This factor weighs in favor of the worker being an employee when the work they perform is **critical, necessary, or central** to the potential employer's principal business.



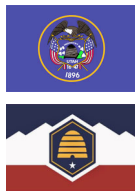
106

Some things to keep in mind...

- The Final Rule only applies to FLSA.
 - Doesn't impact NLRA, IRS, state law
- The **DOL** will certainly follow the Final Rule's guidance when conducting an audit.
- While not controlling, the **courts** will likely cite the 2024 rule as persuasive authority
 - But existing case law continues to control, as it is courts—and not regulatory agencies—that create binding precedent law.
- Various organizations are almost certainly going to challenge the legality of the Final Rule
- So, we're almost certainly going to repeat this day again.



107



UTAH LEGISLATIVE UPDATE



108



Did the 2023 Legislative Session make you a grumpy groundhog or a happy Valentine?

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109



Salt Lake SHRM Contributes to Passage of Workplace Violence Protective Order Bill!

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110

HB 324: Workplace Violence Protective Orders

- Passed and went into effect July 1, 2023.
- Allows an employer to petition a court for a protective order if the employer "reasonably believes" that "workplace violence" has occurred or that violence has been threatened.



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111

Need a protective order? Go to the website.

- Utah Courts published instructions and sample forms online.
<https://www.utcourts.gov/en/self-help/categories/protect-order/work-viol.html>

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UTAH STATE COURTS
The Judicial Branch of Utah

About UsSelf-HelpFormsLegal HelpRecordsCareersMedia

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Self-HelpProtection from AbuseProtective Orders

Workplace Violence Protective Order

Introduction
This page explains what a Workplace Violence Protective Order is, and how to request one.

Who can get a Workplace Violence Protective Order?
If you are an employer, you can ask for a Workplace Violence Protective Order. You can request it to protect your business, your employees, or both. If one of your employees has been targeted for workplace violence, you will need to try your best to let them know that you are asking for the protective order.

Enforcing the protective order

- Not to hurt or threaten to hurt employees while they are at work
- Stay away from a workplace

Responding to a Workplace Violence Protective Order

Utah Code 78B-7-1101 to 78B-7-1105

Who can get a Workplace Violence Protective Order?
If you are an employer, you can ask for a Workplace Violence Protective Order. You can request it to protect your business, your employees, or both. If one of your employees has been targeted for workplace violence, you will need to try your best to let them know that you are asking for the protective order.

Asking to change a Workplace Violence Protective Order

Forms

113

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113

Let's welcome a new class to the Utah protected class family...



Immunity Status

114

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114

38

H.B. 131 VACCINE PASSPORT PROHIBITION

Passed and went into effect on May 3, 2023

Found at:
https://le.utah.gov/~2023/bills/static/HB_0131.html

- ❖ This law effectively creates a new protected class by prohibiting employers from considering "immunity status" as a term and condition of employment.
- ❖ "Immunity status" means an indication of whether an individual is immune to a disease, whether through vaccination or infection and recovery.

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115

H.B. 131 VACCINE PASSPORT PROHIBITION

Passed and went into effect on May 3, 2023

Found at:
https://le.utah.gov/~2023/bills/static/HB_0131.html

Employers may not consider an employee's "immunity status," i.e., require that an employee be vaccinated unless an employer...

- ❖ (i) establishes a nexus between a vaccination requirement and the employee's assigned duties and responsibilities; or
- ❖ (ii) identifies an external requirement (e.g., the government) for vaccination that is not imposed by the employer and is related to the employee's duties and responsibilities.

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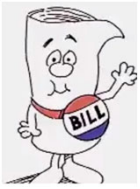
116



What do you think about the current 2024 Legislative Session?

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117



Some employment-related bills
already have passed.

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118

H.B. 257 Sex-Based Designations for Privacy

Passed with portions
already effective, and
balance effective May
1, 2024.

Found at:

<https://le.utah.gov/~2024/bills/static/HB0257.html>

- ❖ This bill addresses government-owned bathrooms and changing facilities.
- ❖ In a nutshell, an individual may only use a public restroom or changing room that corresponds to the individuals' biological sex.

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119

How does H.B. 257 impact public employers?

In recent guidance entitled "Sexual Orientation and Gender Identity (SOGI) Discrimination," the EEOC reminds us that it takes **"the position that employers may not deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee's gender identity."**

- ❖ HB 257 only applies to public facilities that are "open to the general public."
- ❖ This definition expressly excludes facilities "only accessible to employees of a government entity; or any area that is not normally accessible to the public."

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120

H.B. 261 Equal Opportunity Initiatives (aka the anti-DEI bill)

Passed and will be effective on May 1, 2024.

Found at:

<https://le.utah.gov/~2024/bills/static/HB0261.html>

- ❖ This bill impacts only public colleges, universities, K-12 schools, and government offices, including to bar DEI offices at these institutions.
- ❖ Public employers may not request DEI statements from employees or applicants, i.e., a statement articulating the individual's position on diversity, equity, and inclusion.



121

PENDING
LEGISLATION



122

H.B. 170 Unemployment Insurance Amendments

Passed House and Senate Committee; pending full Senate.

Primary bill sponsor is Rep. Trevor Lee (District 16 – Davis)

Found at:

<https://le.utah.gov/~2024/bills/static/HB0170.html>

This bill would disqualify an individual from receiving unemployment benefits if the individual fails to:

- ❖ "appear for a scheduled interview for suitable work" or
- ❖ "accept an offer of suitable work from an employer . . . within two days after the day" the offer is made.



123

H.B. 55 Employee Confidentiality Amendments

Passed House; passed Senate Cmte with amendment; pending passage in Senate, before heading back to House.

Primary bill sponsor is Rep. Kera Birkeland (District 4 – Daggett, Duchense, Morgan, Rich, Summit)

Found at:
<https://le.utah.gov/~2024/bills/static/HB0055.html>

- ❖ This bill makes nondisclosure and nondisparagement clauses related to sexual assault and sexual harassment invalid—even when signed post-dispute.
- ❖ Employers who attempt to enforce such clauses with respect to sexual assault or harassment may be liable for costs and attorneys’ fees.
- ❖ Would apply retroactively to Jan. 1, 2023.

124

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124

Senate Adds Anti-Retaliation Clause to HB 55

After an employee makes an allegation of sexual harassment or sexual assault, an employer of **any sized-business**, may not retaliate:

- Against an employee **"until a settlement agreement is reached"**,
 - except that an employer may discipline or terminate an employee in accordance with written company policy, and based on documentation detailing an employee's violation of company policy or poor performance; or
- Against an employee **based on their refusal to sign** a nondisclosure or nondisparagement clause that prohibits disclosure of sex assault or harassment.

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125

H.B. 396 Workplace Discrimination Amendments

Passed House Committee; pending floor vote in the House.

Primary bill sponsor is Rep. Brady Brammer (District 54 – Utah)

Found at:
<https://le.utah.gov/~2024/bills/static/HB0396.html>

This bill expands religious liberty protections:

- ❖ Prohibits an employer from **compelling an employee to engage in "religiously objectionable expression"** unless accommodating the employee would impose undue burden by interfering with (1) the employer's core mission or ability to conduct business in an effective manner or (2) the employer's ability to provide training and safety instructions."

126

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126

H.B. 305 Post-Employment Restrictions Amendment

Pending in the House.

Primary bill sponsor is
Rep. Brady Brammer
(District 54 – Utah)

Found at:

<https://le.utah.gov/~2024/bills/static/HB0305.html>

This bill would render a void a non-competition agreement entered into between an employer and an employee after May 1, 2024 when:

- ❖ The employee is non-exempt (i.e., hourly); or
- ❖ The employee has been laid off (the bill does not currently define "laid off").



127

H.B. 111 Employment Training Requirement Limitations

Passed in House;
failed in Senate
Committee.

Primary bill sponsor is
Rep. Tim Jimenez
(District 28 - Tooele)

Found at:

<https://le.utah.gov/~2024/bills/static/HB0111.html>

This bill would have made it unlawful for an employer (public or private) to train an employee that:

- ❖ Members of one protected class are morally superior to others.
- ❖ Individuals, by virtue of their protected class, are inherently racist and/or responsible for discrimination.
- ❖ That an individual should be subjected to discrimination to achieve DEI.
- ❖ That virtues including merit, excellence, hard work, fairness, neutrality are racist or sexist.



128

H.B. 111 Employment Training Requirement Limitations

- ❖ The House has amended HB 111 to remove any limits on training.
- ❖ Now, the bill only prohibits an employer from requiring that an employee or applicant sign a statement about the concepts outlined in the prior slide.
- ❖ But again, it did **NOT** receive a favorable recommendation from the Senate Business and Labor Committee.



129

Honorable Mentions

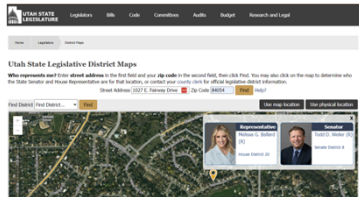
- ❖ **HB 205: Minimum Wage Amendments.** This bill would repeal minimum wage exemptions for individuals with disabilities. Failed in House Committee.
- ❖ **HB 454: Minimum Wage Modifications.** This bill would increase the minimum wage by 2026 to \$19/hour for employees 23 and older, scaling down based by age to \$10/hour for employees under 18. Pending in House.
- ❖ **HB 252: Labor Union Amendments.** This bill places restrictions on public employee labor organizations. It's been circled.



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Have your voice heard!

Find your representative at <https://le.utah.gov/GIS/findDistrict.jsp>



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and the Valentines Beats go to...



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Salt Lake SHRM and
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EMPLOYMENT LAW
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For more information email admin@slshrm.org

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7:00 - 8:00 am
Registration and Breakfast
8:00 am - 1:30 pm
Programming including Lunch
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Early Bird (Now - May 3)	\$195	\$245
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SESSION ONE: 10 - 11 AM



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