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Update on Key HR Issues for Business



THURSDAY, OCTOBER 26, 2023
DANVILLE, VIRGINIA

100 YEARS OF EXCELLENCE

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THURSDAY, OCTOBER 26, 2023
DANVILLE, VIRGINIA

- 8:25 a.m. **Welcome**
Telly Tucker, President, the Institute for Advanced Learning and Research
Glenn W. Pulley, Partner, Gentry Locke
- 8:30 a.m. **ADA, FMLA, and Workers' Compensation**
Paul G. Klockenbrink
- 9:30 a.m. **Impact of AI in the Workplace**
Harrison E. Richards
- 10:00 a.m. **Break**
- 10:15 a.m. **Hot Topics Roundtable: Update on Employment Laws including Cannabis, Pregnancy, OSHA, and NLRB**
Todd A. Leeson and Spencer M. Wiegard
- 11:30 a.m. **Update on Recent Federal Court Decisions**
W. David Paxton and Carlos L. Hopkins
- 12:15 p.m. **Lunch**

As a SHRM Recertification Provider, Gentry Locke is recognized by SHRM to offer 3.00 hours of Professional Development Credits (PDCs) for the SHRM-CP or SHRM-SCP for this day of programming.

The use of this official seal confirms that this Activity has met HR Certification Institute's® (HRCI®) criteria for recertification credit pre-approval. This Program has been approved for 3.00 HR (General) recertification credit hours toward aPHR™, aPHRi™, PHR®, PHRca®, SPHR®, GPHR®, PHRi™ and SPHRi™ recertification through HR Certification Institute® (HRCI®).



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Glenn W. Pulley

Partner

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Glenn Pulley, a Partner in Gentry Locke's Business Litigation group, was inducted as a Fellow of the American College of Trial Lawyers in 2002. He served as Chairman of the Virginia Committee of the American College of Trial Lawyers in 2013 and 2014. Since his career began in 1976, Glenn has tried more than 150 civil jury trials for plaintiffs and defendants involving personal injury/property damage, product liability, commercial, construction, employment, estates, and eminent domain.

Yet, Glenn also has maintained an active practice outside the courtroom representing individuals, businesses, and governmental and quasi-governmental clients including housing authorities, school boards, community services boards, cities, towns, and counties. Glenn's reputation and skills as a trial attorney have enhanced his ability to resolve disputes for his clients, often avoiding the expense, inconvenience, and risk of litigation.

Education

- University of Richmond School of Law, J.D. with honors and distinction
- University of Richmond, B.A. in Economics cum laude

Experience

- Was key contact for legal work for the Danville Redevelopment and Housing Authority, providing advice regarding risk management, landlord/tenant, grievances, Hope VI HUD program, the FOIA, and Procurement
- Assisted school boards and superintendents in Halifax, Pittsylvania County, Mecklenburg County; Southside Community Services and Danville Pittsylvania Community Services
- Represented the town of South Boston for over ten years

Representative Cases Taken to Trial

- Commercial Steel Erectors v. Kibby, et al. (Amherst County Circuit Court) (2022)
- Monogram Snacks v. Wild Brands (USDC W.D. Va. (Roanoke Division) 2022)
- Crown Packaging v. Belvac (USDC (W.D. Va.) (Lynchburg Division) 2022)
- Worsham v. Worsham (Lynchburg Circuit Court 2020 and Court of Appeals 2022)
- Carnell Construction Corp. v. Danville Redevelopment & Housing Auth., et al, 2013 WL 101687 (W.D.Va.)
- Skull Mountain v. BWE (Danville Circuit Court 2012)
- Wilson v. Turner, 2008 WL 222302 (USDC (W.D. Va.) 2008)
- Romar v. Tomer, Lawyers Weekly [08-T-086] (Danville Circuit Court 2008) Wilson v. Turner, 2008 WL 222302 (USDC (W.D. Va.) 2008)
- Doss v. Doss, Lawyers Weekly VLW 008-8-262 (Pittsylvania County Circuit Court 2008)
- McKinney v. Stonebridge Life Insurance, 2006 WL 2819642 (USDC (W.D. Va.) 2006)
- Coley v. Danville Redevelopment and Housing Authority, 2006 WL 118254 (USDC (W.D. Va.) 2006)
- Rogers v. Dow Agroscience, LLC, et al., 2006 WL 3147393 (USDC (W.D. Va.) 2006)
- Clements v. Mecklenburg County School Board (USDC (E.D. Va.) 2005)
- Anderson, et al. v. Cabin Lake Condominium Asso., Lawyers Weekly [02-T-200] (Danville Circuit Court 2002)
- JPS Elastomerics Corp. v. Industrial Tools Inc., 65 F. Supp.2d 376 (USDC (W.D. Va.) 1998)
- Brown v. Auto-Owners Ins. Co., 1997 WL 547975 (U.S. Court of Appeals, Fourth Circuit 1997)

Affiliations

- Fellow, American College of Trial Lawyers (2002-Present)

- Fellow, Virginia Law Foundation
- Chair, Virginia Committee of the American College of Trial Lawyers (2013-2014)
- Trustee for Averett University (2010-2013)
- Instructor, Virginia Mandatory Professionalism Class, VSB (2004 – 2007)
- Member of Boyd Graves Conference (1994-2011)
- Virginia State Bar: Board of Governors, Construction Law Section (1985-1988); Board of Governors, Litigation Section (1995-2002); Chair, Litigation Section (2000-2001)
- The Virginia Bar Association: Board of Governors (2003-2007); Construction Law Section Board (1993-1999)
- President, Danville Bar Association (1995)
- Regional Vice President, Virginia Association of Defense Attorneys (1985-1988)
- Admitted to the U.S. District Court Eastern District of Virginia, U.S. District Court Western District of Virginia, U.S. Court of Appeals 4th Circuit, and the U.S. Supreme Court

Awards

- Named a Lynchburg Business Top Lawyer in Business Law (2020-2022)
- Named to the Virginia Legal Hall of Fame (2021)
- Consistently named one of the “Best Lawyers in America” in the category of Personal Injury Litigation – Defendants (2011-2024), also listed in Best Lawyers in America – Business Edition (2016)
- Named one of the “Virginia Legal Elite” by Virginia Business magazine for Civil Litigation (2000-2008, 2011, 2014) and Construction (2012-2013)
- Designated a “Virginia Super Lawyer” for Business Litigation (2006-2023)
- Designated as a Fellow of the Virginia Law Foundation (2012)
- Peer-rated “AV/Preeminent” by the Martindale-Hubbell Law Directory
- Named a “Leader in the Law” by Virginia Lawyers Weekly (2009)

Case Studies

THE RESULTS OF CLIENT MATTERS DEPEND ON A VARIETY OF FACTORS UNIQUE TO EACH MATTER. PAST SUCCESSES DO NOT PREDICT OR GUARANTEE FUTURE SUCCESSES.

- Sep 13, 2022 — [Judgment for Enforcement of Post Nuptial Agreement & QTIP Trust](#)
- Aug 10, 2022 — [Snack Food Brands Change Orders Suit](#)
- Apr 12, 2022 — [\\$700,000 Judgement in Breach of Contract Dispute](#)
- Aug 25, 2020 — [\\$8,000,000 awarded in Products Liability Case](#)
- Apr 4, 2018 — [Summary Judgment in Breach of Contract action defeats \\$700,000 claim](#)
- Apr 3, 2017 — [Gentry Locke attorneys secure settlement for orphaned toddler](#)
- Nov 4, 2016 — [Settlement for Permanent Paralysis Following Wisdom Tooth Removal](#)



Paul G. Klockenbrink

Partner

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Paul Klockenbrink is a Partner in Gentry Locke's Labor & Employment law group. Paul advises and represents employers throughout Virginia regarding employment law issues, as well as the litigation of non-compete agreements, insurance defense matters and business-related claims. Paul is a frequent speaker at national and regional employment law seminars and also leads the firm's Restaurant & Hospitality practice group. During his 20+ years with Gentry Locke, Paul has brought cases to trial that involve discrimination, retaliation, sexual harassment, non-competition, defamation, malicious prosecution, premises liability and commercial motor vehicle accidents, among others. Paul is consistently noted as a *Virginia Super Lawyer* in Employment & Labor Law, and since 2009 he has earned a spot on the *Best Lawyers in America* list in Employment Law – Management.

Education

- University of San Diego School of Law, J.D. cum laude
- University of Vermont, B.A.

Experience

- Represent management and companies in broad cross section of industries on labor and employment issue that arise on a daily basis such as hiring, union avoidance, leave issues under FMLA/ADA, wage and hour issues, investigation of misconduct, termination issues, unemployment claims and EEO Complaints
- Extensive litigation experience involving claims of theft and trade secrets and disclosure of confidential information in violation of noncompetition/nondisclosure agreements
- Representation of companies before EEOC, Department of Labor, and other agencies, including mediation
- Representation of management and training of supervisors regarding union activity
- Obtained multiple defense verdicts in federal jury trials in sexual harassment and ADA cases
- Obtained dismissal of lawsuits and claims on behalf of companies in discrimination cases
- Representation of publicly traded company in alleged discrimination matter and Sarbanes Oxley claim along with separation issues involving former executive
- Representation of local school boards and municipalities in connection with termination issues and separation packages

Affiliations

- Member, Labor & Employment Section, Virginia Bar Association
- Member, Labor & Employment Section, American Bar Association
- Member, Virginia State Bar
- Member, California State Bar (inactive)
- Member, Society for Human Resource Management; National, Roanoke, and Lynchburg
- Member, Board of Directors, Roanoke Area Ministries (2017-Present)
- Board Member, Roanoke Wildlife Rescue (2014-Present)
- Member, University of San Diego Law Review, 1987-1988
- Co-Chair (2000-present) and Former Chair (1998-1999), Roanoke Jingle Bell Run for Arthritis Foundation (1998-1999)
- Member, Board of Directors, Arthritis Foundation – Virginia Chapter (1999-2005)
- Frequent speaker for business groups throughout region

Awards

- Named one of The Best Lawyers in America[®] in the field of Employment Law – Management (2009-2024) Labor & Employment Litigation (2011-2024)

- Named to Virginia Super Lawyers in the area of Employment & Labor (2007-2021) and Employment Litigation: Defense (2021-2023), included in Super Lawyers Corporate Counsel edition (2009) and Super Lawyers Business Edition US in the area of Employment & Labor (2012-2014)
- Designated one of Virginia's Legal Elite in Labor & Employment Law by Virginia Business magazine (2007, 2016, 2019-2022)
- American Jurisprudence Awards in Torts (1986) and Evidence (1987)

Case Studies

THE RESULTS OF CLIENT MATTERS DEPEND ON A VARIETY OF FACTORS UNIQUE TO EACH MATTER. PAST SUCCESSES DO NOT PREDICT OR GUARANTEE FUTURE SUCCESSES.

- Aug 4, 2016 — [Employer Defeats Hostile Workplace Claim](#)
- Sep 1, 2015 — [Allegation of Americans with Disability Act Discrimination Against Municipality Dismissed](#)
- May 29, 2015 — [University Prevails on Motion to Dismiss Claims by Former Employee](#)
- Apr 23, 2015 — [Company Prevails Twice in Hostile Work Environment Claim](#)



Harrison E. Richards

Associate

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Harrison Richards is a member of the firm's Employment & Labor group where he regularly handles a wide variety of employment disputes and litigation.

Prior to joining Gentry Locke, Harrison worked in Washington D.C. at a boutique litigation firm. He has experience in state and federal courts as well as with arbitrations and administrative evidentiary hearings. Harrison earned his J.D. from The Catholic University of America's Columbus School of Law and received his B.A. from Roanoke College. He is a native of Roanoke, Virginia and is licensed in Virginia as well as Washington D.C.

Education

- The Catholic University of America, Columbus School of Law, J.D.
- Roanoke College, B.A., cum laude

Experience

- Experienced with arbitrations and administrative evidentiary hearings before the American Arbitration Association and the D.C. Office of Employee Appeals
- Labor law experience including grievances, collective bargaining, and arbitration
- Developed data processing and production specifications with clients to meet legal requirements
- Consulted with clients regarding technical, logistical, and legal issues related to data breaches
- Provided written legal research regarding various civil litigation issues presented in cases arising out of the Federal Tort Claims Act, the Privacy Act, the Tucker Act, and the Administrative Procedure Act

Admissions

- Virginia State Bar
- District of Columbia Bar



Todd A. Leeson

Partner

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Todd Leeson is the Chair of Gentry Locke's Employment law practice group. He has almost 35 years of experience representing and advising Virginia employers in employment and labor law matters and litigation. He regularly defends employment claims in Virginia courts and before agencies including the EEOC, National Labor Relations Board (NLRB), DOL, OSHA (whistleblower and retaliation claims), and the corresponding Virginia agencies (DOLI, OCR). His experience includes the defense of companies as to alleged violations of Title VII, ADA, ADEA, FLSA, FMLA, the NLRA, and Virginia employment laws. Todd regularly drafts, enforces, and/or litigates non-compete agreements and executive employment contracts. In addition, he has considerable experience representing management in labor union matters including union avoidance campaigns, unfair labor practice charges and labor arbitrations. He also represents Virginia colleges in various student conduct matters including Title IX and sexual misconduct complaints.

Todd is rated "AV/Preeminent" by Martindale-Hubbell, is repeatedly named one of the *Best Lawyers in America* in Labor & Employment Law, and has regularly been named to various lists, including Virginia Legal Elite. As recent examples, in 2022, Virginia Lawyers Weekly named Todd a "Go-To Lawyer for Employment Law, and in 2022 Best Lawyers in America named Todd the "Lawyer of the Year" (Labor law-management) in Roanoke. Todd was also honored by Virginia Lawyers Weekly in 2021 as a "Leader in the Law."

Education

- University of Notre Dame Law School, J.D. cum laude
- College of William and Mary, B.A.

Experience

- Represents employers in employment-related litigation in federal and state courts in Virginia
- Has been counsel of record in over 90 employment cases in the Western District of Virginia
- Extensive advice to employers on various COVID-19 workplace questions, disputes, and issues
- Successfully defended companies in over 240 EEOC charges alleging various forms of harassment, discrimination and/or retaliation
- Obtained partial summary judgment in Virginia state court in business conspiracy and breach of fiduciary duty employment case that led to \$400,000 settlement for corporation.
- Attained early dismissal or resolution of several OSHA whistleblower complaints including MAP-21, AIR-21, STAA and the FSMA
- Led team of lawyers to persuade Federal Government, and opposing counsel, to voluntarily dismiss a False Claims Act Complaint filed against a local company
- Trusted counsel to Board of Directors to negotiate separation of CEO
- Achieved dismissal of wrongful termination case filed against a global manufacturer by a terminated safety manager
- Obtained summary judgment of age discrimination case filed in Federal Court
- Prevailed in grievance hearing before City personnel board in which board upheld significant discipline against long-service manager
- Brokered settlement of challenging Title IX sexual misconduct case on behalf of college in which complainant and respondent had divergent interests
- Collaborated with college counsel to respond to OCR discrimination complaint filed by former student; OCR dismissed complaint
- Defended local restaurant in FLSA collective action tip pooling lawsuit which was recently dismissed by the court
- Moved to quash EEOC document subpoena resulting in dismissal of potential ADA class action
- Obtained dismissal of joint employer Title VII case against local company

- Negotiated early settlement of NLRB protected, concerted activity (PCA) case filed against local company
- Worked with DOL officials to resolve overtime claims filed against area restaurant
- Successful mediation of WARN Act cases filed against coal company
- Prevailed in labor arbitration upholding management right to modify union employee's work schedule
- Successful defense of College in case in which student challenged suspension decision pursuant to College's Student Conduct Code
- Achieved favorable resolution of ADA termination lawsuit filed in Virginia Federal Court
- Prosecution of business competition, trade secret, and business conspiracy case filed against global corporation who hired executive with various restrictive covenants
- Obtained dismissal of FMLA claim investigated by DOL
- Favorable resolution of a non-compete and non-solicitation case filed against a corporation and a newly-hired employee
- Favorable early resolution of an ADA termination lawsuit filed against company by a senior executive
- Successful defense in labor arbitration of management's right to demote a union president
- Attained summary dismissal of race and age discrimination case
- Expediently resolved purported FLSA collective action case filed against a construction company
- Advised company to withdraw recognition of longstanding union and prevailed on union challenge before the NLRB
- Achieved early resolution of challenging federal whistleblower claim filed against corporation
- Obtained summary judgment for nation's largest retail pharmacy chain in ADA disability discrimination lawsuit
- Represented one of the world's leading wealth management companies that was sued in a non-compete case in Virginia
- Successfully prosecuted trade secrets case resulting in \$245,000 settlement for local manufacturer
- Persuaded court to dismiss a noncompete and trade secret action filed against an employer that hired a key employee
- Obtained summary judgment in sex discrimination lawsuit filed against global retailer with operation in Virginia
- Procured summary judgment for Fortune 100 insurer in a race discrimination case filed in Roanoke
- Retained by Executive Officer of Fortune 500 retailer to negotiate his executive employment contract with the Company
- Successfully represented management in several Union labor arbitration cases involving discharge or contract interpretation issues
- Acquired summary judgment for local college in tenure denial case
- Litigated significant ULP case with NLRB involving potential back pay or reinstatement of 23 terminated employees; case resolved on favorable terms
- Obtained summary judgment in ADA disability discrimination case against national bank
- Achieved partial summary judgment for Fortune 500 automotive supplier in sexual harassment and retaliation case
- Obtained defense verdict for local sheriff in race discrimination lawsuit; defense verdict affirmed on appeal
- Procured dismissal of wrongful termination case filed against health care employer by terminated nurse
- Obtained summary judgment for Fortune 500 company in Title VII equal pay case
- Procured summary judgment for employer in FLSA overtime lawsuit
- Represented several local businesses faced with Union organizing efforts and/or campaigns.
- Successfully conciliated case against local construction company in which EEOC had found "cause" in support of EEOC charge
- Obtained preliminary injunction for local software company in trade secrets and business conspiracy case
- Successfully represented local utility company as to several unfair labor practice allegations filed against it with the National Labor Relations Board
- Mediated employment-related cases on behalf of local companies in this region
- Obtained dismissal of Family Medical Leave Act (FMLA) case filed against one of the nation's largest food service distribution companies
- Achieved summary judgment in ADEA case arising out of reduction in force by local manufacturer
- Negotiated conciliation of EEOC religious discrimination charge on behalf of large fast food restaurant
- Successful defense of company in non-compete case in which company hired valuable executive from a competitor
- Favorable resolution of trade secrets and business competition case of behalf of a company who sued departing employees and their new employer
- Dismissal of ADA termination case filed against company by executive with alleged alcohol problems

Affiliations

- Board of Directors, Jefferson Center (2023-Present)
- Board of Directors, Downtown Roanoke, Inc. (2014-2023); Chair of board (2021-22)
- Board of Directors, Family Service of Roanoke Valley (2016-2023); Chair of board (2020)
- Council member, Labor Relations & Employment Law Section of Virginia Bar Association (2008-2013, new term begins Jan. 1, 2024)
- Virginia State SHRM Legislative Director (2012-14)
- Board member, Roanoke Valley SHRM (2007-2009); Past President (2000)
- Board of Trustees, Taubman Museum of Art (2007-2012)
- Board of Directors, Roanoke Regional Chamber of Commerce (2010-2012)
- Elder, Salem Presbyterian Church (2011-2013, 2016-2018)

- Member, Federal Bar Association (2011-Present)
- Faculty Member, The Management Institute at Roanoke College (2011-Present)
- Associate member, National Association of College and University Attorneys (2014-Present)
- Past President, Downtown Roanoke Rotary Club (2004-2005)
- Chair, Virginia State SHRM Conference (2002)
- Member, Labor & Employment Section, American Bar Association (1989-2018)
- Member, Labor & Employment Section, Virginia Bar Association (1989-Present)
- Member and Past President, William & Mary Roanoke Alumni Association
- Graduate, Trial Advocacy Institute of UVA Law School (2000)
- Frequent speaker for SHRM, business and college groups in Virginia
- Author of dozens of employment law articles

Awards

- Named “Go-To Lawyer” for Employment Law by Virginia Lawyers Weekly (2022)
- Named “Roanoke Lawyer of the Year” for Labor Law – Management (2022)
- Named one of The Best Lawyers in America® in the areas of Employment Law – Management (2011-2024), Labor & Employment Litigation (2011-2024), and Labor Law – Management (2019-2024)
- Designated one of the “Legal Elite” in the Labor/Employment law by Virginia Business magazine (2016-2017, 2019-2022)
- Named a “Leader in the Law” by Virginia Lawyers Weekly (2021)
- Designated a Virginia Super Lawyer in the area of Employment & Labor Law (2014-2019) and Super Lawyers Business Edition US in the area of Employment & Labor (2014)
- Named a “Legal Eagle” for Employment Law – Management and Litigation – Labor & Employment by Virginia Living magazine (2012)
- Named a Top Rated Lawyer for Labor and Employment law by American Lawyer Media (2013)
- VBA Community Servant with 50 hours or more of certified pro bono legal and nonlegal community service, The Virginia Bar Association (2004-2010)

Published Work

- **[Beyond the headlines: Virginia Values Act poses significant legal risks to Virginia Employers](#)**; Law360; May 15, 2020
- **[#MeToo and the Male Business Executive: A Call For Proactive Leadership](#)**; Corporate Counsel Magazine; April 27, 2018.
- **[Preventing Harassment in the Workplace: An Updated Analysis of the EEOC’s Call for a “Reboot”](#)**; Bloomberg BNA Daily Labor Report; January 6, 2017.
- **[Five Steps Virginia Employers Should Take to Help Avoid Whistleblower or Retaliation Claims](#)**; Virginia Human Resources Today; Winter/Spring 2014.
- **[EEOC Seeks to Provide Job Protection for LGBT Employees](#)**; Virginia Human Resources Today; Summer/Fall 2013.
- **[Policy Prohibiting Wage Discussion Found Unlawful](#)**; Virginia Human Resources Today; Winter/Spring 2013.
- **[Employers Face Significant Challenges Complying with the ADA Amendments Act](#)**; Virginia Human Resources Today; Summer/Fall 2012.

Case Studies

THE RESULTS OF CLIENT MATTERS DEPEND ON A VARIETY OF FACTORS UNIQUE TO EACH MATTER. PAST SUCCESSES DO NOT PREDICT OR GUARANTEE FUTURE SUCCESSES.

- May 16, 2014 — **[Virginia Company Prevails in Hard-Fought Labor Arbitration Case](#)**



GENTRY LOCKE

Attorneys



Spencer M. Wiegard

Partner

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Spencer Wiegard is a Partner and Chair of the firm's Construction Law practice group. Spencer focuses his practice in the areas of construction law and construction litigation. He represents general contractors, subcontractors, trade contractors, suppliers, and design professionals. Spencer is a member of the Board of Governors for the Virginia State Bar Construction Law and Public Contracts Section and a member of both the Board of Directors and the Legislative Committee for the Associated General Contractors of Virginia ("AGCVA"). He currently serves on the Executive Committee for the Roanoke District of the AGCVA, and served as the AGCVA Roanoke District President from 2017-2019. From 2010-2018, Spencer has consistently been recognized as a Virginia Rising Star in Construction Litigation by "Virginia Super Lawyers." In 2019, Spencer was recognized by Virginia Business Magazine's "Legal Elite" list in the area of Construction Law.

Spencer counsels and advises his clients concerning a range of legal issues, including contract drafting and negotiation, mechanic's liens, surety bond claims, professional and occupational licensing issues, and OSHA issues and claims. Spencer's construction litigation practice involves breach of contract disputes, payment disputes, claims, construction defect disputes, design defect disputes, mechanic's lien enforcement actions, payment bond claims, OSHA enforcement actions, professional licensure, and regulatory matters.

Education

- College of William and Mary, Marshall-Wythe School of Law, J.D.
- University of Virginia, B.A.

Experience

Construction Law

- Represented owners, design professionals, general contractors, subcontractors, and suppliers in the preparation, negotiation, interpretation, and revision of contracts concerning public and private construction projects throughout Virginia, the mid-Atlantic, southeast, and northeast.
- Represented owners, general contractors, subcontractors, and suppliers in payment disputes and other contractual disputes.
- Represented owners, general contractors, subcontractors, and suppliers in alleged construction defect matters.
- Represented design professionals in alleged design defect matters.
- Represented owners, general contractors, subcontractors, and suppliers in arbitration proceedings, mediation, and litigation in both state and federal courts.
- Prepared, reviewed, and revised contracts, subcontractor, and purchase orders for general contractors, subcontractors, and suppliers.
- Represented road and bridge contractors in bid disputes, claims and disputes involving the Virginia Department of Transportation.
- Represented localities concerning claims and disputes arising out of road and utility construction projects.
- Represented general contractors, subcontractors and suppliers in preparing, recording, perfecting, and enforcing mechanic's lien claims.
- Represented owners, general contractors, and subcontractors in defending and/or bonding-off mechanic's liens.
- Represented general contractors, subcontractors, and sureties in defending payment bond claims and mechanic's lien release bond claims.
- Represented subcontractors and suppliers in asserting and litigating mechanic's lien claims.
- Represented manufacturers and retailers of modular and manufactured homes in disputes with homeowners and investigations and enforcement actions by the Virginia Department of Professional and Occupational Regulation (Board

- for Contractors) and the Virginia Department of Housing and Community Development (Manufactured Housing Board).
- Represented contractors, design professionals, and realtors in enforcement and licensing matters before the Virginia Department of Professional and Occupational Regulation.
- Reviewed and revised contracts for licensed Virginia contractors concerning compliance with regulatory requirements.
- Provided training for licensed contractors concerning compliance with Board for Contractors regulations.

Health and Safety Law

- Represented employers in the construction, manufacturing, and general industry fields during VOSH and OSHA investigations and inspections, and in response to citations concerning alleged violations of health or safety regulations, including matters involving injuries to multiple employees, amputations, and fatalities.
- Assisted employers with health and safety compliance audits.
- Assisted employers in preparation of health and safety policies and procedures.
- Assisted employers concerning firearms and weapons carry laws and in setting weapons and workplace violence policies.

Firearms Law

- Represented a Virginia firearm retailer in a Federal Lawsuit filed by the City of New York in the Eastern District of New York concerning alleged handgun trafficking.
- Represented of firearm retailers and distributors in products liability actions.
- Counseled and assisted major retailer in setting its firearms carry policies for all United States stores.

Affiliations

- Secretary, Virginia State Bar's Construction and Public Contracts Section (present)
- Treasurer, Virginia State Bar's Construction and Public Contracts Section (2021)
- Member, Board of Governors of the Virginia State Bar Construction and Public Contracts Law Section (2012-2018, 2019-Present)
- Statewide coordinator for Pro Bono Hotlines, The Virginia Bar Association Young Lawyers Division (2008-2015); Co-chair of Pro Bono Hotline for the Roanoke Valley (2006-2008)
- Member, Board of Directors, Associated General Contractors of Virginia (2017 – Present); Legislative Committee (Member, 2007-Present); Associate Member (2006-present)
- Member, Executive Committee, Associated General Contractors of Virginia, Roanoke District (2006-Present); District President (2017-2019); District Vice President (2015-2017)
- Associate Member, Transportation Construction Alliance
- Member, Board of Directors, Military Family Support Centers, Inc. (2006-2019)
- Member, Board of Directors, Southwest Virginia Ballet (2015-Present)
- Member, Board of Directors, Roanoke Valley SPCA (2015-Present); Vice President (2017-Present)
- Secretary, Roanoke City Republican Committee (2008-2012)
- Member, William and Mary Environmental Law and Policy Review (2002-2004)
- Member, The Virginia Bar Association
- Member, Virginia State Bar
- Member, American Bar Association
- Member, Roanoke Bar Association

Awards

- Named a Virginia Super Lawyers Rising Star in the area of Construction Litigation (2010-2018)
- Named "Legal Elite" in field of Construction Law by Virginia Business Magazine (2019-2022)
- Roanoke Bar Association Volunteer Service Award for over 25 hours of pro bono and community service (2006)

Published Work

- Co-Author, Deal...or No Deal? Identifying and Addressing Gray Areas in Construction Contracting, The Construction Lawyer, Journal of the ABA Forum on the Construction Industry, Volume 33 No. 3 (Summer 2013).
- Co-Author, Key Points to Consider in Filing and Challenging a Mechanic's Lien, Virginia Lawyer magazine, Volume 59 (October 2010).
- The Brownfields Act: Providing Relief for the Innocent or New Hurdles to Avoid CERCLA Liability, William and Mary Environmental Law and Policy Review, Vol. 28, Number 1, Fall 2003.
- Contributing Editor – Virginia Section – Tort Law Desk Reference- A Fifty State Compendium (2005 and 2006 Editions).



GENTRY LOCKE

Attorneys



W. David Paxton

Partner

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David Paxton advises and represents businesses, business owners, and executives in the areas of labor & employment law, complex litigation and whistleblower claims, and also represents colleges and universities on a broad array of issues. He regularly advises businesses and non-profits in connection with executive compensation, nondisclosure agreements, and noncompete agreements, and represents parties in litigation involving claims of breach of contract, unfair competition and trade secrets. As the demand for internal investigations has grown, David has been engaged by businesses, financial institutions, colleges and universities, local government agencies and non-profits to lead and conduct investigations into allegations of misconduct or unlawful activities, and he works closely with the firm's white-collar practice.

David serves as the key contact for the firm's *Chambers'* rated Labor & Employment Practice Group team, and has been a leader in ALFA International, the premier global legal network since 1988. He is a frequent guest speaker at national and regional employment law seminars and has consistently been named to *Best Lawyers in America* for Labor & Employment law since 2001. In 2021, David was named by Virginia Lawyers Weekly as one of Virginia's "Go To Lawyers for Employment Law."

Education

- University of Virginia School of Law, J.D.
- U.S. Naval Justice School, Honor Graduate
- Hampden-Sydney College, B.A. summa cum laude, Phi Beta Kappa; Omicron Delta Kappa; Baker Scholar

Experience

Complex & Multi-Party Litigation

- Lead and directed a 13-month long internal investigative team, consisting of 70 lawyers, accountants, and IT members, tasked with investigating financial and business operations of a non-profit university over a 12-year time period
- Represented Drummond Coal, an international mining company, in a week long jury trial in federal court in Roanoke, Virginia, in connection with a complex contract dispute with Norfolk Southern, which resulted in a verdict for Drummond and \$35 million in relief granted; the jury verdict and relief awarded was upheld on appeal to 4th Circuit
- Represented a national retail company and obtained summary judgment on all claims filed in federal court in Newport News, Virginia by a customer who alleged defamation and race discrimination, and the ruling was not appealed.
- Represented a private equity and venture capital firm, and its owner in defense of a lawsuit filed in federal court in Roanoke, Virginia asserting ERISA and securities violations, and successfully obtained dismissal of all claims
- Trial counsel for Rolling Stone and Sabrina Erdely in *Eramo v Rolling Stone*, a case tried to a jury for 3.5 weeks in federal court in Charlottesville, Virginia
- Secured summary judgment for the plaintiff in *Doe v Alger*, a seminal case that recognized the due process rights of students at state universities accused of sexual misconduct based on a property right in continued enrollment
- Represented and successfully defended defendant in special litigation committee investigation of a derivative action for breach of fiduciary duty, where state court dismissed the shareholder's claims based on special litigation committee report
- Represented President of Peanut Corporation of America in connection with Congressional and criminal food safety investigations, and in lawsuit to secure D&O coverage for defense costs
- Represented national restaurant chain in connection with false "mouse in the soup" claims resulting in the felony criminal conviction of mother and son who made false allegations
- Secured jury verdict for three members of insurance company's Board of Directors in defense of claims brought by Commissioner of Insurance for fraud, fiduciary duty, conspiracy and securities violations. Also later recovered more than \$3 million in attorney fees on indemnity claims in case affirmed by Supreme Court of Virginia in *Gross v Weingarten*

- Trial and appellate counsel to college athlete accused of sexual assault and prevailed on the constitutional challenge to civil remedy under VAWA before U.S. Supreme Court in *United States v. Morrison*
- Secured summary judgment on multiple §1981 race discrimination claims brought by the Washington Lawyers Committee on behalf of customers and employees against large franchisee of national restaurant chain, and case not appealed.
- Secured dismissal of anti-trust and constitutional claims brought against state association that regulates public school athletics in Virginia by local media organization seeking to broadcast playoff games

Employment Litigation

- Represented national, privately held company and obtained summary judgment dismissing claims filed in federal court in Roanoke, Virginia by a former employee alleging wrongful discharge and unpaid commissions and district court's decision was affirmed by 4th Circuit
- Represented subcontractor and successfully defended a FLSA collective action filed in federal court in Roanoke, Virginia by a large class of drywall workers who alleged unpaid overtime
- Represented high-tech manufacturer and successfully defended claims filed in federal court in Lynchburg, Virginia by a former employee who claimed to be an atheist and alleged religious discrimination and retaliation
- Represented publicly traded, national restaurant chain and successfully defended claims filed in federal court in Newport News, Virginia by a kitchen staff member who alleged race discrimination
- Represented private college and successfully defending claims filed in federal court in Roanoke Virginia by a professor who alleged disability discrimination, failure to accommodate, retaliation and FMLA violations
- Represented US subsidiary of multinational company and successfully defend a complex whistleblower claim brought under the Energy Reorganization Act before OSHA Administrative Law Judge and Administrative Review Board in Washington, DC
- Directed internal investigation conducted by former FBI agent of senior officials of a local governmental agency accused of various act of misconduct, which led to no charges or litigation
- Directed internal investigation conducted by former FBI agent into alleged claims of misconduct of a senior executive of large regional financial institution, which lead to a resolution with no subsequent litigation
- Obtained \$4 million jury verdict in federal court in Abingdon, Virginia for a privately held company against its former president on claim to recoup bonus paid under theory of unjust enrichment
- Represented and successfully prosecuted claims on behalf of a US subsidiary of an international pharmaceutical company against a former employee and a newly formed company on claims of breach of contract and tortious interference; *Shire, LLC v Mickle*, a case brought in federal court in Roanoke, Virginia
- Represents employers on a broad cross-section of industries on Title VII and ADEA claims of discrimination, harassment and retaliation, as well as wage and hour disputes in federal and state courts
- Represented multiple employers and employees in litigation involving claims of theft of trade secrets, unauthorized disclosure of confidential information, violations of non-competition/restrictive covenants, and other business torts
- Represented national manufacturer and retailer on claims of sexual harassment by former female employee to successful, pre-litigation resolution
- Represented national manufacturer on claims involving age and disability discrimination to successful resolution

Colleges & Universities

- Represents and advises college and university administrators on a broad cross-section of issues relating to governance and compliance issues, student misconduct, Title VI, Title IX, Clery Act, FERPA, campus security issues, health and safety issues, including COVID related concerns, vendor contract review and negotiation, student educational and intern programs, faculty issues, including tenure, and EEO and general employment issues
- Prepares policies and procedures, and provides training on Title IX and other legal requirements; advises Title IX Coordinators on Title IX requirements in connection with student, faculty and student claims; and represents and defends private colleges before EEOC, DOE, and in federal court on claims of alleged violations of Title IX, Title VI and common law claims
- Conducted multiple internal investigations for colleges and universities into Title IX claims and other allegations of employee misconduct resulting in corrective action and no litigation
- Represented college coaches against public universities on breach of contract, and on matters where there are alleged NCAA violations

Labor & Employment

- Represents management in preparing executive employment agreements and in disputes with senior executives, and also represents senior executives and professionals in contract negotiations and in resolving disputes with companies, professional organizations, and non-profits, including cases governed by arbitration
- Represents and advises management from a broad cross-section of industries on full range of labor and employment issues that arise on a daily basis such as hiring, E-verify, I-9s, FMLA/ADA, USERRA, wage and hour, Affirmative Action Plans, COBRA, OFCCP audits, harassment and discrimination complaints, investigation of misconduct, OSHA complaints, termination, EEO charges, DOL investigations, and union avoidance
- Represented executive management team in negotiation of executive employment contracts which included equity compensation packages in connection with a \$250 million private equity deal

- Represented publicly traded company in contractual dispute with former employee and obtained a favorable court settlement of claims involving the valuation of stock options settlement
- Represented senior executive in a dispute with high-tech company and obtained a favorable out-of-court settlement of claims involving vesting and valuation of stock option rights.
- Represented founder and CEO of high-tech company in negotiation of executive employment contract in anticipation of venture capital investment
- Represented U.S. based companies in establishing indigenous workforce for new operations in India
- Represents management in various industries in planning and implementing workforce reductions
- Represents local school boards and police departments on employment-related matters

Religious Organizations

- Provides general corporate, governance, and employment advice to non-profit organizations and to Christian churches and ministries
- Represented Board of Directors of a Christian non-profit organization in disputes with its founder and key members of management which led to agreed-upon separation without litigation
- Represented company in acquisition of large network of Christian radio stations

Affiliations

- Fellow, Virginia Law Foundation (Inducted 2014)
- Chair, ALFA International Labor and Employment Law Section (2015-2018), Member of Labor & Employment Law Section Steering Committee (1996-Present); Member, ALFA International Board of Directors (2014-2017)
- Member, Labor & Employment Law Section, American & Virginia Bar Associations (1986-Present)
- Member, Virginia CLE Steering Committee, Labor & Employment Section (2000-2012), Chair (2010-2011)
- Board of Directors, Positive Alternative Radio, Inc. (2017-Present)
- Board of Directors, VHSL Foundation, Inc. (2004-2009)
- Board of Directors, Interfaith Hospitality Network of Roanoke Valley (2005-2009)
- Member, Planning Committee, Gridiron Club, Hampden-Sydney College (2007-2011)
- Member, Church Council, St. John Lutheran (2006-2009). President (2008-2009)

Awards

- Recognized as an AV Preeminent[®] rated attorney specializing in Civil Rights Law by Martindale-Hubbell[®] (2023)
- Named one of The Best Lawyers in America[®] for over twenty consecutive years in the area of Labor Law – Management (2024), Employment Law – Individuals & Management (1999-2024), and Labor & Employment Litigation (2011-2024), named “2017 and 2024 Roanoke Lawyer of the Year” for Labor & Employment – Litigation and “2020 Roanoke Lawyer of the Year” for Employment Law – Individuals
- Named to the “Virginia’s Top 50 List” of Virginia Super Lawyers (2007) and Virginia Super Lawyers in the area of Employment & Labor Law (2007-2023), included in Super Lawyers Corporate Counsel edition (2009-2011) and Super Lawyers Business Edition US in the area of Employment & Labor (2012-2014)
- Named “Go To Employment Lawyer” by Virginia Lawyers Weekly (2020, 2022)
- Listed in Benchmark Litigation as a Local Litigation Star for Labor & Employment and General Commercial (2012-2018) and Insurance (2018); and Benchmark Plaintiffs for Labor & Employment (2012-2014), General Commercial, and Insurance (2014)
- Designated one of the “Legal Elite” in the Labor/Employment Law field by Virginia Business magazine (2000-2016, 2018-2022)
- Designated as a Fellow of the Virginia Law Foundation (2014)
- Named a “Legal Eagle” for Employment Law – Individuals, Employment Law – Management, Labor Law, and Litigation – Labor & Employment by Virginia Living magazine (2012)
- Voted Top Employment & Labor Attorney by readers in The Roanoker magazine’s “Best Of” (2012)
- Named a Top Rated Lawyer for Labor and Employment law and Commercial Litigation by American Lawyer Media (2013)
- Inclusion on the Virginia Amateur Sports Wall of Honor in its inaugural year (2009)
- Navy Commendation Medal, Distinguished Legal Work (1983)

Published Work

- Co-author, [FTC’s Proposed Rule to Ban Noncompete Agreements – Initial Reactions](#) (Winter 2023)
- Co-author, [Virginia’s New Laws](#) (Summer 2020)
- Co-author, [OSHA Changes Course: Employers Must Now Determine if COVID-19 Infection is Job-Related](#) (Spring 2020)
- Author, [DOL Issues New WARN Act FAQs](#) (Spring 2020)
- Co-author, [A Strange New Normal: The Pandemic and a New Virginia Law Usher in the Decade of the Whistleblower](#), (Spring 2020)
- Author, [EEOC Weighs in on Employer Duties](#) (Spring 2020)

- Author, [Employer's Guide to Responding to an Employee Positive COVID-19 Test](#) (Spring 2020)
- Co-author, [Revised CDC Guidance for Critical Industry Workers](#) (Spring 2020)
- Author, [New Procedures for Virginia Unemployment Benefits in Wake of COVID-19](#) (Winter 2020)
- Author, [Workplace Cleaning and Disinfection Recommendations](#) (Winter 2020)
- Author, [Virginia Department of Health Sets New Ground Rules for Employees Returning to Work Amidst COVID-19 Pandemic](#) (Winter 2020)
- Co-author, [Developing an Effective Business Response to COVID-19](#) (Winter 2020)
- Co-author, three-part series involving Sex in the Workplace (Fall/Winter 2019-2020):
 - [Sex in the workplace: Virginia high court weighs in on employer responsibilities — Part I](#)
 - [Sex in the workplace: Virginia high court weighs in on employer responsibilities — Part II](#)
 - [Sex in the workplace: Virginia high court weighs in on employer responsibilities — Part III](#)
- Author, [Employer Alert: New Overtime Rule Effective January 15, 2020](#) (Winter 2019)
- Author, [Protected Activity: How Far Can an Employee Go to Collect Evidence?](#) (Winter 2018)
- Author, [Size No Longer Matters: ADEA Applies to All State and Local Government Employees](#) (Fall 2018)
- Author, [Employers: Update Your Summary of Rights Form for Background Checks](#) (Fall 2018)
- Co-author, [Rule 68 Offers of Judgment – a Useful Defense Tool](#); The VADA Journal of Civil Litigation, Vol. XXIV, No. 4 (Winter 2012-2013)
- Co-Author, The Virginia Lawyer: A Deskbook for Practitioners, Chapter 4, Employment Law: Employee Rights and Employer Responsibilities (2000-2007)
- Co-Author, Annual Survey of Virginia Law: Labor & Employment Law, 40, University of Richmond Law Review, 241 (2005 & 2007)

Case Studies

THE RESULTS OF CLIENT MATTERS DEPEND ON A VARIETY OF FACTORS UNIQUE TO EACH MATTER. PAST SUCCESSES DO NOT PREDICT OR GUARANTEE FUTURE SUCCESSES.

- Sep 23, 2019 — [Gentry Locke's David Paxton Helps Secure Jury Verdict in Favor of Multinational Corporation](#)



Carlos L. Hopkins

Partner

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Carlos Hopkins is a partner in both Gentry Locke's Criminal & Government Investigations and Government & Regulatory Affairs practice groups. Carlos previously served as Virginia's Secretary of Veterans and Defense Affairs where he was the state's top official for coordinating resources to support Virginia's veteran community. Carlos was also appointed by former Governor Terence R. McAuliffe in 2014 to serve on the Governor's Cabinet as Counsel to the Governor. At Gentry Locke, Carlos combines his criminal and civil litigation experience and Virginia-government experience to help clients navigate their most significant litigation, regulatory, and government-facing challenges.

Education

- University of Richmond School of Law, J.D.
- The Citadel, B.A. in Political Science, Law and Criminal Justice

Experience

- Appointed Virginia's Secretary of Veterans and Defense Affairs by Governors Terence R. McAuliffe and Ralph S. Northam (2017-2022)
- Appointed Counsel to the Governor on the Virginia Governor's Cabinet as the Governor's primary legal advisor (2014-2017)
- Served on the personal staff of the Commanding General (CG) of the 29th Infantry Division as Chief Legal Officer in the Virginia Army National Guard
- Mentored second and third year law students participating in the Criminal Law Placement Externship Program at the University of Richmond, TC Williams School of Law (2019-2021)
- Served as Deputy City Attorney and supervised the Special Litigation and Public Safety Division in the Richmond City Attorney's Office (2013-2014)
- Owned and operated a boutique law firm representing individuals charged with various classes of felonies and misdemeanors in state and federal court (2011-2013)
- Played an integral role in developing policies and procedures to manage Virginia's public defender system as the agency's Director of Training

Affiliations

- Member, Virginia State Bar
- Board of Directors, Richmond Ambulance Authority
- Board of Directors, Virginia Voice
- Board of Directors, Richmond Public Schools Education Foundation
- Richmond Steering Committee for Just the Beginning (JTB) Program
- Life Member, The Citadel Alumni Association
- Member, Alpha Phi Alpha Fraternity
- Chairman, Virginia Military Advisory Council (2017-2022)
- Member, Virginia Code Commission (2014-2017)
- Board of Directors, Virginia Association of Criminal Defense Lawyers (2010-2013)

Admissions

- Commonwealth of Virginia
- The Fourth Circuit Court of Appeals
- The United States Court of Appeals for Veterans Claims

- The United States District Court for the Eastern District of Virginia
- The United States District Court for the Western District of Virginia

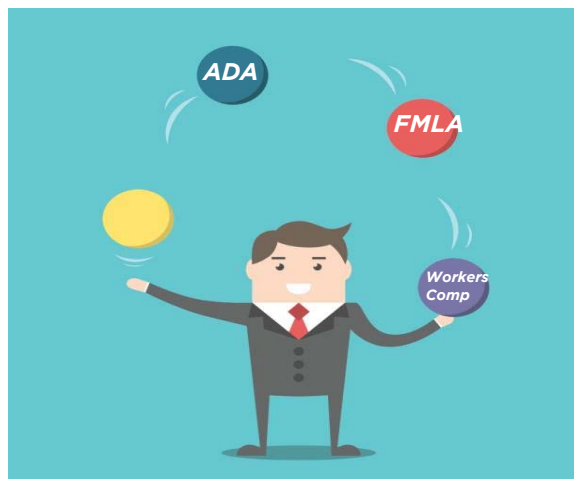
The Dreaded Never-Ending Leave of Absence & Return to Work Issues

Navigating the Three-Headed Monster:
ADA, FMLA and Workers' Compensation

Paul G. Klockenbrink

1

Which Law Applies?



2

Why is it important to recognize the interaction of these laws?

1. Each law has different rules, regulations and rights which can impose liability on the employer if not properly followed.
2. The burden is on the employer to ensure employees receive the benefits to which they are legally entitled.
3. Employees' absences can have a huge impact on your business and on other employees.
4. These laws do not always play nicely in the sandbox.

3

Which Law Applies?

- ***Workers' Compensation*** – Is this a **COMPENSABLE** injury?
- ***FMLA*** – Is employee **ELIGIBLE** and do they **QUALIFY**?
- ***ADA and Virginia Human Rights Act*** – Is condition **DISABILITY**?

4

FMLA: Who is Eligible?

- ✓ Any employee who has been employed 12 months or more, and
- ✓ Has worked 1,250 hours during past 12 months (Covers some *part-time* workers, 25 hrs/week)
- ✓ FMLA leave is without pay, unless employee has accrued paid time off



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Events Qualifying for FMLA Leave

- Birth of a child and care of newborn
- Adoption of child or placement of foster child
 - Available to both men and women
- Employee suffers serious health condition that prevents work
 - Can include workers compensation injuries
- Family member suffers serious health condition and requires employee's care/assistance
 - "Parents" -- but not "parents-in-law"
- Qualifying exigency
- Care for a covered servicemember



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Employee Notification Obligations

- Employee does not need to use any magic words or reference “FMLA”
- If foreseeable & practicable – 30 days advance notice of the need for FMLA
- Otherwise
 - As soon as practicable (one or two business days)
- If not foreseeable then as soon as practicable under the facts & circumstances (case by case)



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Kicking the Can...

Mary is 72 years old and works as an office receptionist. For the past year and half, she has been taking a lot of time off. She will take 2-3 days and then bring in a vague medical note excusing her from work for those days. In the last three months alone, she has taken 14 days off .

Mary’s supervisor has been lenient with her because of her age and because she has been with the company a long time. However, her co-workers are beginning to complain to HR because they have to fill in for her when she’s gone. The most recent complaint was, “We know that she has a bad back and headaches but it’s not fair that she gets to take so much time off while we have to do her job along with our own.”

One day, Mary tells her supervisor she needs to be out for another two days for medical appointments. Frustrated, her supervisor sighs and says (within earshot of others), “Again? Fine – I guess we’ll deal with it.”

What should the Company do?

Should they have done something different before now?



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What is Your Role?

- ❖ All requests for time off due to health issues promptly reported to HR
- ❖ All “doctor notes” or medical documents sent to HR - no files in desk drawers
- ❖ Don’t make “threats” of discipline if someone asks about time off
- ❖ Don’t use email to communicate employee health information

9

Curbing Intermittent Leave Abuse

- *Require scheduled FMLA intermittent leave* for foreseeable medical treatment. The employee should schedule time off with “reasonable notice” to avoid disrupting operations.
- *Obtain a second medical opinion.* Obtain medical certification with the projected number of treatments, dates, and projected recovery period.
- *Seek recertification* as often as possible.
- *Transfer to a different position* in order to make the intermittent absences less disruptive.
- ***Keep records of all absences and the reasons for the absences.***

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On and On

James is recovering from heart surgery. He has one week left of FMLA leave. Due to some unforeseen complications, his doctor thinks he needs to be out of work for an additional six weeks.

- Because his FMLA leave is up, can the company terminate James?

The Company agrees to accommodate James' need for the additional six weeks of leave. However, four weeks into that leave, James provides a note from his doctor indicating that he will be able to telework only for the foreseeable future.

- Is the Company required to accommodate James?
- If so, how long?

WHAT IF THE MEDICAL PROBLEM LASTS MORE THAN 12 WEEKS - CAN I LET THE PERSON GO?

It depends -
You must consider ADA
issues

Americans with Disabilities Act (ADA)

What is a disability?

- Person with a physical or mental impairment that substantially limits one or more major life activity; or
- Person with a record of such an impairment; or
- Being regarded as having such an impairment
 - Not actually disabled but caught in stereotype

Key Points

- ADA mandates an individualized inquiry in determining whether a disability or condition disqualifies a person from a particular position.
- Person is otherwise qualified if he or she can perform the essential functions of the job with or without reasonable accommodation.
- If an accommodation is necessary, it must be “objectively reasonable”. Does not have to be employee’s preferred accommodation.
- Employer must engage in the interactive process.

It's all downhill from here...

- An employee broke his hip while skiing (not work-related). The injury required surgery and extensive rehab. The employee used all 12 weeks of FMLA to recover. At the end of his FMLA leave, the employee is ready to return to work, but states he cannot perform many of the job tasks.
- What is your response?

Interplay between FMLA and ADA

- FMLA:
 - The employee could be terminated.
- ADA:
 - Employer must determine if the employee could perform the essential functions of the position with reasonable accommodation.
 - If the answer is “no”, the employer must determine whether there is a vacant position available for which the employee is qualified with or without reasonable accommodation and there is no undue hardship.

The Differences

ADA

- Disabilities
- No “limit” on leave
- Reasonable accommodation
- Medical Certification permitted
- Undue hardship defense
- Notice can be by employee or initiated by employer.

FMLA

- Serious health conditions
- 12 weeks of leave
- Medical Certification permitted
- No undue hardship defense
- Notice required via identification of an FMLA leave-qualifying reason for the requested leave.

Workers' Compensation

Elements of a Compensable Injury

1. Injury;
2. By accident;
3. Arising out of;
4. In the course of;
5. With medical causation; and
6. Need for medical treatment and/or death.



Critical First Steps

- Notice of the accident
 - Within 30 days unless “reasonable excuse” given.
 - Employer must show prejudice.
- Panel of physicians
 - Employer must provide panel of at least three different providers - not just three different facilities.
 - Must offer them at the time the injury is reported or as soon as practicable after the accident.
- Witness interviews and preservation of surveillance or other evidence

Compensable or Not?

- A cashier clocks out for the evening. While she is walking through the parking lot, a family member with a grudge strikes her with his car.

Compensable or Not?

- A warehouse worker unloads trucks for several hours a day. As he does this, his back starts to ache. Over the course of his shift the pain worsens.
- His co-worker tries to help him with one of the trucks and pulls his back lifting a particularly heavy box.



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Interplay of ADA, FMLA, and Workers' Compensation Laws



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Medical Documentation

- **ADA**

- You may require sufficient documentation to establish that the employee has a disability.
- Documentation must be reasonable and must relate to the specific condition for which leave as an accommodation has been requested.

- **FMLA**

- You may require medical certification. (Use the DOL Forms)
- You may require second or third medical opinions (at your expense) and periodic recertification of a serious health condition.

- **Workers' Compensation**

- Medical information that pertains to the employee's on-the-job injury, i.e., return to work notes, medical work restrictions



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Benefits While on Leave

- **ADA**

- No specific requirements but cannot discriminate and must provide same benefits as those provided to employees on non-ADA leaves of absence.

- **FMLA**

- Health coverage must be continued at same level; other benefits are determined by the employer's established policy for providing such benefits when the employee is on other forms of leave.

- **Workers' Compensation**

- Not required to be continued unless run concurrently with FMLA leave.



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Benefits While on Leave

- **ADA**

- No specific requirements but cannot discriminate and must provide same benefits as those provided to employees on non-ADA leaves of absence.

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- Not required to be continued unless run concurrently with FMLA leave.



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Questions?



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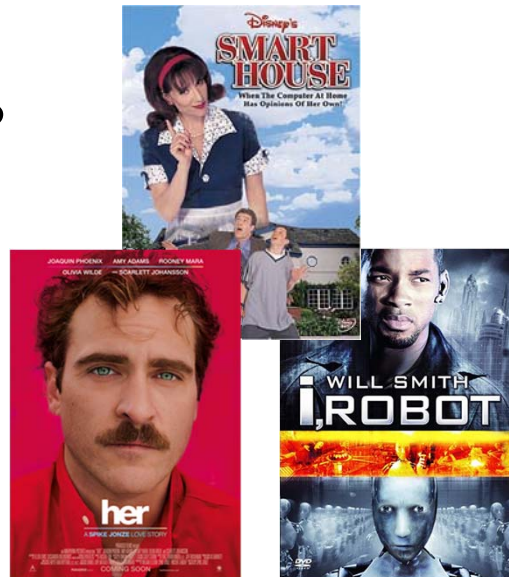
Impact of AI in the Workplace

Harrison E. Richards


1

What is Artificial Intelligence (AI)?

- Set of techniques aimed to resemble aspects of human cognition using machines
- AI tools use data and computational techniques to either make decisions or assess people in making decisions




2



Reliance on AI in the Workplace

- Companies rely on AI during recruitment, hiring, training, discipline, evaluations, compensation, and termination
- Large Employers - 83% rely on AI in employment decision-making

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Use of AI During the Pre-Employment Process

Recruitment

- Employers seek candidates to apply for jobs through general and targeted advertisements and job postings

Screening

- Assess information included in resumes and applications, screen and rank candidates, and conduct pre-employment background checks



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Use of AI During the Pre-Employment Process (Cont.)

Interviewing

- Employers conduct video interviews of applicants and apply AI to analyze and assess them through their facial expression, eye contact, and word choice

Selection

- AI can make final hiring and compensation decisions

Examples of AI Used During the Pre-Employment Stage

- Resume scanners that prioritize applications using certain keywords.
- Video interviewing software that evaluates candidates based on their facial expressions and speech patterns.
- “Virtual assistants” or “chatbots” that ask job candidates about their qualifications and reject those who do not meet pre-defined requirements.
- Testing software that provides “job fit” scores for applicants or employees regarding their personalities, aptitudes, cognitive skills or perceived “cultural fit” based on their performance on a game or test.

Use of AI During Employment

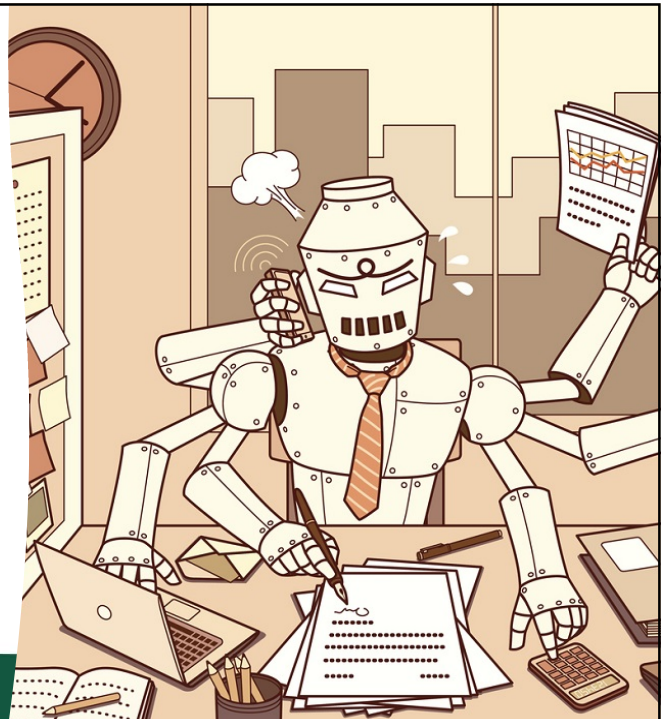
- Manage performance
 - Following log-in times, overall computer usage, and online activities
 - Eye tracking software and monitoring application usage
 - Software that rates employees on the basis of their keystrokes or other factors.



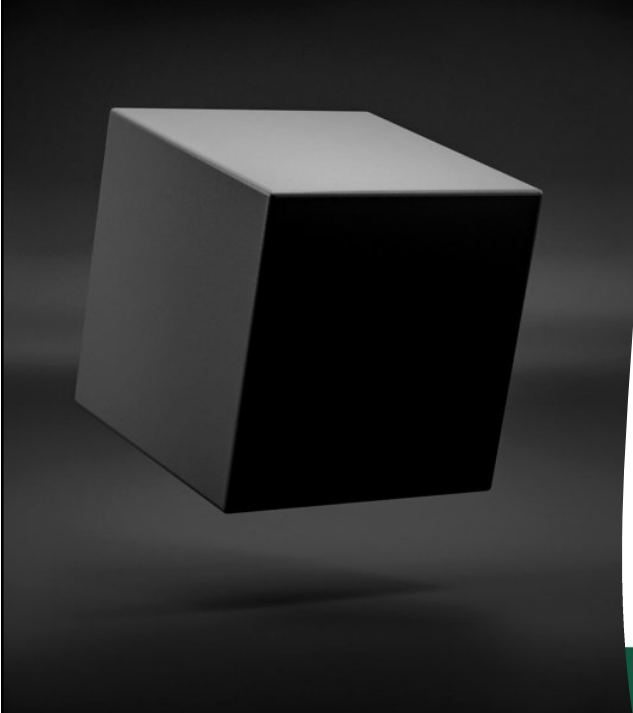
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Pros of Using AI

- More efficient – automates manual tasks
- Eliminates bias and subjectivity
- Increases and improves productivity
- Detects safety risks or malfunctions, thereby preventing work-related accidents
- Reduced costs



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Cons of Using AI

- Risk of discrimination
 - AI tools can inject subjective bias and spit out discriminatory results
 - Disproportionately screening out individuals in a protected class without justification
- The “black box” problem

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EEOC’s Regulation of AI

January 2023


- Signaled intent to enforce federal nondiscrimination laws equally regardless of whether discrimination is through old-fashioned recruiting or through AI tools
- Public hearing re: the use of AI by employers in employment decisions

April 2023

- EEOC issues joint statement with the DOJ, CFPB, & FTC re - combatting and rooting out discriminatory outcomes caused by AI.

May 2023

- EEOC trains its staff to identify discrimination caused by AI.
- EEOC issues Technical Guidance re - assessing adverse impact in software, algorithms and AI used in employment selection procedures.
- EEOC sues iTutor Group for Age Discrimination

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EEOC's Technical Guidance

Key Takeaways

- Guidelines apply when AI is used to make or inform employment decisions about whether to hire, retain, promote “or take similar actions.”
- Selection process that uses AI could have a disparate impact and violate Title VII if the selection rate of individuals of a particular protected class or combination is less than 80% of the rate of the non-protected group.
- Employers are responsible for any adverse impact caused by AI tools that are purchased or administered by third party AI vendors
- Regularly assess the impact of selection tools that use AI to make or inform employment decisions and ensure such tools are job related and consistent with business necessity.



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EEOC v. iTutorGroup, Inc., et al.

iTutor Group Lawsuit

- EEOC filed suit against iTutor for hiring discrimination in violation of the ADEA
- The EEOC alleged that iTutor's software automatically rejected over 200 job applicants between the ages of 55-60 during a one month period.

iTutor settled the case for \$365,000.

- Settlement funds go to individuals impacted
- Invitation to reapply to each person DQ'd
- Adopt changes to anti-discrimination policies
- Provide training to executives and managers to prevent future issues
- Subject to EEOC monitoring for 5 years



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Takeaways from the iTutor Case

- Demonstrates that the EEOC is following through with its promise to hold employers liable for violating federal nondiscrimination laws
- Does not matter whether the discrimination was intentional
- Success in the iTutor case likely mean the EEOC will be emboldened to pursue others in the near future.
- Likely only a matter of time before new suits will be filed by the EEOC.
 - If the AI tool screens out a group of prospective workers, employers will likely face a costly class action claim

When Does AI Violate Title VII?

- When an employer is using an algorithmic decision-making tool as a selection procedure, that tool may violate Title VII prohibitions against disparate impact discrimination if:
 - The tool has an adverse impact on individuals of a particular race, color, religion, sex or national origin.
 - The employer cannot establish that the use of the tool is related to the job and consistent with business necessity.
 - A less discriminatory tool was available but not used.

State Regulation of AI

- Virginia has not yet enacted or proposed a law to regulate AI-assisted employment discrimination
- AI can still inadvertently violate other antidiscrimination laws in the state
 - Ex. – Law protecting employees who use cannabis oil for medical purposes
 - Law distinguishes “cannabis oil” from other medicinal marijuana
 - Algorithm can fail to account for these nuances and may inadvertently discriminate against protected cannabis users

Practical Suggestions

- Identify existing AI technology being used
 - More than 80% of employers use AI, but many do not realize the ubiquity and broad scope of tools using such technologies
- Understand the role of human oversight
 - Ensure that a tool does not replace human judgment and any final decisions continue to be made by HR or management.
- Vetting
 - Vet the vendor, the tool, and the data
- Avoid the “black box” problem
 - Assemble a multidisciplinary team tasked with implementing and monitoring any AI tool
- Know the law
 - This is a complex area, so employers need to ensure that their use of AI tools complies with all applicable laws.

Practical Suggestions (cont.)

- Implement policies
 - In the policy, employers should be transparent about how the tool operates, what data is being used, and how - if at all - the tool assists with decision-making processes.
- Train and educate employees
 - AI use policies should be communicated to employees and management through training and education programs
- Accommodate
 - Employers using AI tools should prepare their managers and HR teams to recognize and evaluate accommodations requests from applicants and employees.
 - The EEOC and the White House have cautioned against screening out candidates based on inaccessibility to a human alternative to an AI tool.
- Regularly conduct testing and audits
 - AI tools should be evaluated and regularly monitored to ensure that business objectives for using the tool continue to be met, the tool is implemented in a fair and unbiased manner, and any adjustments may be made.
- Stay up to date on the evolving AI landscape
 - Employers, especially those operating in multiple jurisdictions, need to stay up to date on potential laws and regulations regarding AI in employment processes.

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Questions?



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UPDATE ON FED. & Va. EMPLOYMENT LAWS

Todd A. Leeson



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EEOC Update: Claims Up, Aggressive Enforcement

- Role: Set Policy, Gatekeeper, Investigator, Enforcer of Fed. EEO laws
- Received 73,485 charges in FY '22 (up 20% from '21)
- Retaliation still highest number of charges
- EEOC filled 500 staff vacancies last year!



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EEOC's Published Enforcement Priorities

- Expanded protection of vulnerable workers
- Scrutiny of ER use of AI in recruiting
- New Pregnancy/Childbirth Laws

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New Law: PUMP for Nursing Mothers Act



- Must provide EEs w/ "reasonable break time" to express breast milk for 1 year after child's birth
- For non-exempt EEs, break time may be unpaid
- Provide space, other than bathroom, shielded from view/intrusion



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Federal Wage & Hour Division Fact Sheet

WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

Fact Sheet #73: FLSA Protections for Employees to Pump Breast Milk at Work

Revised January 2023

Under the Fair Labor Standards Act (FLSA), most nursing employees have the right to reasonable break time and a place, other than a bathroom, that is shielded from view to express breast milk while at work. This right is available for up to one year after the child's birth.

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New Law: Pregnant Workers Fairness Act (PWFA)

- Applies to ERs w/ at least 15 EEs; effective 6-27-23
- ADA-type protections to provide reasonable accommodations to EEs on basis of pregnancy, childbirth, & related medical conditions
- These protections already exist under Virginia law (for ERs w/ at least 5 EEs)! (Stay tuned—more on this later 😊)

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EEOC Sues T.C. Wheelers in Transgender Bias Lawsuit (Mar. 2023)

- Demonstrates commitment to protect “vulnerable” workers
- Allegations that management made anti-trans comments, asked invasive questions, intentionally misgendered the worker
- Imperative that ERs expand EEO harassment training of supervisors to include sexual orientation, gender identity education



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Another Legal Battleground: Use of Pronouns

- Active litigation in which manager refuses to call transgender person by their preferred name or pronoun based on religious beliefs
- Very challenging, fact-specific cases
- In addition, standard for religious accommodations may change...



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US Sup. Ct. Revisits “Religious Accommodation” Standard...

TWA v. Hardison (1977)
ER can deny religious acc. request if pose “undue hardship”— more than “de minimis” or trivial burden

ERs solid ground to deny many requests (ex: COVID-19 vaccine religious exemptions)
But test was replaced...

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Groff v. DeJoy: Postal EE & Sunday Work

- Groff is Christian who observes Sunday sabbath (no work on Sun.)
- USPS has contract to deliver Amazon packages on Sundays
- USPS denied Groff request— “undue hardship” (morale issues, having to provide premium pay due to shortfall, impact productivity)
- Supreme Court: New Test

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Are Labor Unions Becoming More Relevant?

- Union membership in private sector another record low in 2022: 6%
- Similarly, overall union membership rate down to 10.1%
- Public sector unionization rate is 33% (fire, police, teachers)
- Virginia: less than 5% of employees are Union members

Some Countervailing Developments

- 71% of persons view Unions favorably (Gallup, 2022)
- EEs more emboldened to strike, stage protests, assert rights
- President Biden seeks to be “most pro-union President ever”
- NLRB Flexing its Muscles----Pro Union, Pro EE decisions, actions

NLRB's Aggressive Actions to Rewrite Law

- Jennifer Abruzzo became NLRB General Counsel in July 2021
- August 2021, she identified 53 separate issues she intended to overrule or change---exceptionally pro-union world view
- To date, she has issued 16 additional guidance memos reflecting her unabashed desire to overturn well-settled decisions in place for decades

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Ex. of NLRB GC Overreach: No ER Speeches to EEs

- For almost 75 years, ERs have right to schedule EE meetings to discuss Company views on labor unions. (“captive audience” meetings)
- NLRB GC issued multiple memos w/ her opinion that Company cannot mandate EE attendance at these internal meetings
- Current landscape---confusion and litigation! (Seek guidance from your labor counsel)

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The Starbucks Effect on Unionization

- 1st Starbucks store organized in Buffalo in Dec '21
- To date, 300 stores have been organized
- Bernie Sanders: “Over the past 18 months, Starbucks has waged the most aggressive and illegal union-busting campaign in the modern history of our country.” (March 29, 2023)

Gen Z is the most pro union generation alive. Will they organize to reflect that?

April 11, 2023 - 5:09 PM ET

Manuela López Restrepo



Rutgers students and faculty participate in a strike at the university's main campus on Monday

...And Now the Rest of the Story

- Momentum has slowed considerably
- Not 1 Store has a Union contract (On average, it takes at least 465 days for company to negotiate and agree upon a 1st contract w/ EEs)
- Starbucks continues to operate, hire & fire employees, provide pay and benefits it deems best, and close underperforming stores



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Labor's labors lost? A year after stunning victory at Amazon, unions are stalled

Updated March 31, 2023 · 5:00 PM ET ©
Heard on Weekend Edition Saturday

 Andrea Hsu

 4-Minute Listen

+ PLAYLIST   



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New DOL Overtime Proposal

- Spring 2022, DOL W&H Division announced intent to update OT laws
- On August 30, 2023, DOL published new proposed regs
- Current salary basis floor for exempt status: \$35,568; \$55,068
- Question: What, if anything, should Employers do now??



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Cannabis & Workplace in Virginia

- Much confusion (hazy ☺)
- Employers have much more flexibility, discretion than most think
- Highly fact specific analysis when EE discloses marijuana use for purported medical reason (akin to ADA reasonable accommodation analysis)

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Key Questions When for Virginia Employers

- Is business subject to Federal drug regulations?
- Does business need to update/modify its policies/rules?
- Should business still test for Cannabis? If so, when?

Key Questions for Virginia Employers

- Should business care about lawful, off-duty use?
- What's analysis if EE seeks right to use marijuana for purported medical reason?
- What should business do if believe EE is impaired?

Practical Recommendations for Employers

- Each business needs to decide what is best for its company
- Revisit policies, protocols; tweak or update as deem best
- Best practice: transparency with applicants & EEs
- Understand that topic is evolving. Watch for trends/new laws.



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New Virginia Law: Silence No More Act

- HB 1895, the “Silence No More Act” to take effect July 1, 2023
- Final language that significantly modified and diluted from original proposal (lots of confusion)
- Final version patterned on Federal “Speak Out Act” (effective Dec. '22)



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Final Version of HB 1895

Sexual harassment; nondisclosure or confidentiality agreement.

(Silent No More Act)

- No employer ***may require*** an employee or prospective employee to execute or renew any provision in nondisclosure or confidentiality agreement ***as condition of employment.***
- This includes any provision regarding nondisparagement that has purpose of concealing details of sexual harassment claim.



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Scenario 1: Hiring Process & Agreements

- ERs may still require applicants/employees to sign standard confidentiality or non-disclosure agreements
- What you cannot do is include additional language that prohibits employee from disclosing a claim of sexual assault or sexual harassment that occurs in the future
- Reality - rare for ERs to use (more of symbolic victory)



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Scenario 2: Severance Agreement w/ Release of Claims

- Virginia Silence No More Act does not apply here (nor does Federal Speak Out Act)
- Ex: EE lodges sex harassment complaint (internal or external) and Company negotiates severance agreement w EE. Company may still include confidentiality and non-disparagement terms
- (But see my discussion below on NLRB McLaren Macomb decision)

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McLaren Macomb NLRB Decision: Oh My!

- Assume scenario in which Company wishes to offer severance pay to departing EE to resolve any disputes including release of claims
- Employer key interests: 1) no litigation; 2) confidentiality of severance amount paid to EE; and 3) person not bash Company (non-disparagement)
- NLRB concluded that confidentiality and non-disparagement terms could NOT be included in standard severance agreements


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What Steps Can/Should ER Take to Resolve Disputes?

- Importantly, decision does not extend to Supervisors or Executives
- Appears non-disclosure of “financial terms” will be upheld
- Non-disparagement is trickier. If limited to no “defamatory” comments for defined time period, should be okay. What about false or reckless public posts?
- Carefully-worded disclaimer (e.g., not limiting rights under Section 7 of NLRA) probably a good add to agreement


Reminder on Required Postings for Pregnancy/Disability

- Va. passed Pregnancy Discrimination law in 2020 & Disability Discrimination law in 2021. Both have posting/notice requirements
- *“Reasonable Accommodations for Pregnancy, Childbirth, Related Medical Conditions or Disability”*
- Required to: 1) Post, 2) include in handbook, 3) provide copy upon hire, & 4) provide another copy w/in 10 days of learning of pregnancy or disability request



“Wage Theft” Claims Remain Dangerous

- Reminder of Virginia’s wage payment laws passed in 2020
- Significant remedies for violations (including attorney’s fees)
- ERs motivated to pay EEs fairly – but continued uncertainty – independent contractor v. employee; exempt v. non-exempt


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Update: Va. “low-wage” EE non-competes law

- Remember that Va. has law that basically precludes ER from requiring “low-wage employee” to enter into non-competes agreements
- “low-wage employee” defined in obscure manner tied to state’s “average weekly wage” stats that change by quarter
- Current definition: roughly \$70,000

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Advising Virginia Employers Seeking to Protect Their Business from Unfair Competition

Status of Post-Employment “Non-Compete” Covenants in Virginia

- Non-competes are valid if narrowly drafted to restrict direct competition
- Prohibition of “non-competes” for “low-wage employee” (under \$70K)
- Non-solicitation of customer covenants
- Non-inducement of other employees to leave and compete



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Advising Virginia Employers Seeking to Protect Their Business from Unfair Competition

- Non-disclosure of Trade Secrets and Confidential Business Information
- Potential Statutory/Common Law Remedies depending on conduct:
 - Trade Secrets Act (Va. Code 59.1-336 et seq.)
 - Business Conspiracy (Va. Code 18.2-500)
 - Breach of Common Law Duty of Loyalty
 - Tortious Interference with business or contract expectancy
 - Conversion



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Federal Agency Efforts to Regulate

- Federal Trade Commission proposes Nationwide Ban on Non-Competes
- National Labor Relations Board also seeks to ban Non-Competes
- These overtures, actions will be heavily litigated

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Practical Advice for Business Owners

- Businesses must be surgical, methodical as to how to best protect their assets
- Who are key employees and what can the business do to keep them
- What can business do to protect itself if key employee leaves and intends to compete

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HOW TO HANDLE AN OSHA INSPECTION

Spencer M. Wiegard



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Preparation

- Employer Representatives
 - Appoint an employer's representative and at least one alternate
 - One trained employer representative available at worksite at all times
 - Preferable to have a team of two at all times
 - Consider including an attorney/consultant on inspection team
 - Front desk staff or on-site team members need to know all of the above



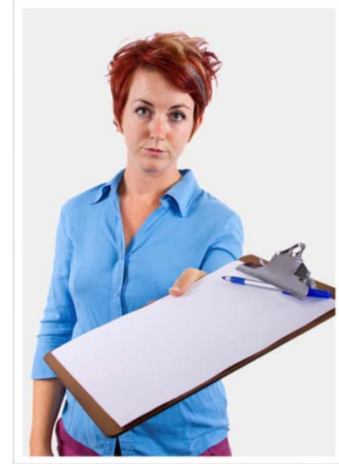
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Supplies

- Copy of Inspection Policy
- Notebook/pen/pencil
- Camera/Video Recorder (can use a cellphone)
- Test Equipment
- Sample storage
- PPE



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Required Records

- All records/documents required to be posted must be kept in continuous compliance
- Hazard Communication Plan
- Safety Data Sheets? (SDS)
- OSHA Poster
- OSHA Form 300A
- OSHA Forms 300 for previous five years signed and available
- Other policies, procedures, manuals
 - LOTO, PPE, fall protection/lifts, confined space



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Policy on Demanding Search Warrants



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Policy on Demanding Search Warrants

- You have the right to demand a warrant
- Establish default policy about warrants
- Some always do, Most never do
 - Gives time to prep for inspection (NEVER use this time to destroy evidence)
 - If expected, Compliance Officer will probably arrive with warrant
 - Can't delay inspection but can limit it to warrant parameters

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Scope of the Inspection

- Opportunity to negotiate limits on inspection scope
- Try to limit an unprogrammed inspection to scope of the matter concerned (fatality, complaint, imminent danger)
- If programmed inspection, likely whole site will be inspected. Unlikely inspector will agree to limits
- NEVER physically prevent Compliance Officer from doing what he or she wants to do.



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When the Inspector Arrives



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When the Inspector Arrives

- Call your lawyer, EHS and HR
- Compliance Officers carry official ID
- If legitimacy of the credentials are in doubt
 - Request 2nd ID
 - Call regional DOLI office
- Immediately notify employer representatives
- Meet & greet
- Record credentials/all inspection details

Opening Conference

- Discuss type and scope of inspection
- Read warrant carefully (if one exists)
- As for a copy of the Complaint(s)
- If programmed inspection, ask why you?
- Discuss parameters for employee interviews
- Listen, be nice
- Discuss PPE and safety equipment requirements for the inspection
- Discuss protection of trade secrets

Record Review

- Facility's Health and Safety Records
- Ask the Compliance Officer to define standard/regulation, make sure it's applicable
- Try to delay review of records that Officer may not have right to review until end of inspection
- Original records may not be removed
- Stamp "Trade Secret/Confidential" on all copies provided



Walk-Through

- Accompany Compliance Officer AT ALL TIMES
- Do not volunteer information, NEVER admit violation
- Visit those areas agreed to or authorized by warrant
- Carefully choose path of travel
- Photograph/audio tape/video tape
- Makes notes of all inspector/employee/employee rep statements
- Take samples from the same source/location as the Compliance Officer does

Employee Interviews

- Attempt to have employer representative present with company supervisors
- Compliance officers allowed to privately interview
- Write down the name of each employee interviewed
- Debrief employees interviewed (CAREFULLY)
- NEVER discriminate or retaliate against employees concerning complaints or inspection participation

Closing Conference

- Obtain as much info as possible
- Take detailed notes
- Do not agree about a violation or volunteer information on safety problems
- NEVER agree to or admit the necessity of corrective measures

After the Inspection

- Consult with legal counsel
- Immediately correct issues
- Investigate further?
- Citation
- Informal conference
- Negotiate
- Notice of Contest
- Litigation



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Questions?



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Recent Federal Decisions & Impact on SOVA

When Supreme Court & 4th Circuit Speak – Businesses Need to Listen

Carlos L. Hopkins & W. David Paxton



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Key Topics & Take Aways

- Affirmative Action Decision & Impact on Employers
 - 4th Circuit will it uphold \$10 million jury award
- Religion in the Workplace
- Gender Identity/Transgender Issues
- Whistleblower claims



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Affirmative Action Decision and Impact on Employers

- ***Students for Fair Admissions, Inc. v. President and Fellows of Harvard College***, 600 U.S. ____, 2023 U.S. LEXIS 2791 (2023), https://www.supremecourt.gov/opinions/22pdf/20-1199_hgdj.pdf (June 29, 2023)
- **Holding:** Court held that the admissions programs of Harvard and UNC violate the Equal Protection Clause (UNC) of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 (Harvard) by inappropriately considering race in their selection criteria.
 - *SFFA* was decided under the Equal Protection Clause and Title VI of the Civil Rights Act of 1964. The decision applies to institutions of higher education and other entities that receive federal funding. Harvard is a private institution while UNC is a public (state) institution.
 - Majority decision was authored by Chief Justice John Roberts and decided 6-3 and 6-2 as Justice Ketanji Jackson did not take part in the Harvard decision. Justices Thomas, Gorsuch and Kavanaugh all wrote concurring opinions, while Justices Jacksons and Sotomayor wrote dissents.



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Affirmative Action Decision and Impact on Employers

- Majority walks through precedent involving race in higher education highlighting the limited use of race in admissions
 - *Brown v. Board of Education*, 347 U.S. 483 (1954)
 - Overruling *Plessy v. Ferguson* and ruling separate but equal is inherently unconstitutional
 - *Regents of Univ. of Cal. V. Bakke*, 438 U.S. 265 (1978)
 - Plurality opinion serving as foundation for later decision in *Grutter*.
 - *Grutter v. Bollinger*, 539 U.S. 306 (2003)
 - Use of racial classification must further compelling governmental interests
 - *Fisher v. University of Tex. at Austin*, 570 U.S. 297 (2013)
 - Government's use of race must be narrowly tailored (necessary) to achieve compelling interest



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Affirmative Action Decision and Impact on Employers

- Schools' admissions policies failed for 3 key reasons:
 - (1) Policies fail to operate in a manner that is "sufficiently measurable to permit judicial [review] under the rubric of strict scrutiny." *SFFA* at 22-23.
 - Interests listed as compelling cannot be subjected to meaningful judicial review
 - Programs fail to articulate a meaningful connection between the means they employ and the goals they pursue.
 - (2) Programs fail to comply with Equal Protection's twin commands that "race may never be used as a "negative" and that it may not operate as a stereotype.
 - (3) Programs lacked a logical end point as *Grutter* required.

Affirmative Action Decision and Impact on Employers—What Comes Next?

- Immediately in the wake of the decision, politicians began to weigh in on the impact of the decision.
- GOP Senator Tom Cotton of Arkansas sent a warning letter to several large law firms warning them of potential investigations and congressional scrutiny for their DEI programs and advising their clients about DEI matters
- Several GOP State Attorneys General sent a letter to Fortune 100 Companies on July 15, 2023 warning them of potential litigation involving their DEI programs and hiring and recruitment policies.

Affirmative Action Decision and Impact on Employers—What Comes Next?

- President Joe Biden and most Democrats issued statements condemning the decision accusing the Court of reversing decades of progress and hampering efforts to promote fairness.
- White House issued a Fact Sheet—“President Biden Announces Actions to Promote Educational Opportunity and Diversity in Colleges and Universities” (June 29, 2023).
- Dept. of Justice and the Dept. of Education issue joint a joint Questions and Answers memo to assist colleges and universities in responding to the SCOTUS decision
- American Alliance for Equal Rights brought lawsuits against Morrison Foerster LLP and Perkins Coie LLP in August challenging certain hiring practices at the firms aimed at increasing the firms’ diversity.
 - After the firms changed the selection criteria for their programs, the lawsuits were dropped.

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Affirmative Action Decision and Impact on Employers—What Comes Next?

- EEOC affirmative action guidance in CM-607
 - Provides guidelines to companies who want to implement affirmative action policies in accordance with the decision in *Steelworkers*.
 - Describes the different types of affirmative action plans
- Presidential Executive Order 11246
 - Mandates affirmative action at federal level for qualifying government contractors
 - Originally signed by President Lyndon Johnson in 1964
 - Likely not impacted by *SFFA* analysis based on its history and language
- Presidential Executive Order 14035—establishes federal DEI program

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Affirmative Action Decision and Impact on Employers—What Comes Next?

- When discussing the use of race in the employment context, we look to Title VII of the Civil Rights Act of 1964.
- *SFFA* will bring into question the Supreme Court's previous ruling in *United Steelworkers v. Weber*, 443 U.S. 193 (1979). In *Steelworkers*, SCOTUS held that Title VII's prohibition against racial discrimination did not condemn all private, voluntary, race-conscious affirmative action plans.
 - No state action involved
 - Purposes of the plan mirrored the purposes of Title VII
 - Plan did not unnecessarily trammel the interests of the white employees—no firings and replacement with minority employee
 - Plan was a temporary measure
- Justice Gorsuch's concurring opinion in *SFFA*, joined by Justice Thomas, describes the parallels between the language in Title VI and the language in Title VII. Distinguishes Equal Protection Clause from Title VI in their respective applications.



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Affirmative Action Decision and Impact on Employers—What Comes Next?

Reverse Discrimination

- *Duvall v. Novant Health Inc.*, 2022 U.S. Dist. LEXIS 143209 (W.D.N.C. Aug. 11, 2023) (Appeal filed in 4th Cir. November 7, 2022)
- Plaintiff David Duvall was terminated by Novant Health, Inc. on July 30, 2018. He then filed suit against Novant alleging reverse discrimination alleging violations of Title VII of the Civil Rights Act of 1964 and certain public policy provisions of North Carolina law. He also brought an ERISA interference claim.
- Duvall argued he was terminated because of his race and gender as Novant moved to increase diversity hires and implement its new Diversity & Inclusion Program. The goal of the program was to remake the company's workforce to look like the community it served. Duvall never alleged a hostile work environment or that his senior manager acted from racial animus.
- The District Court declined to overturn the jury's verdict awarding Duvall judgment in the amount of \$10 million dollars finding that there was sufficient evidence to support the verdict.



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Key Takeaways for Employers

- Be prepared for increased litigation over hiring and termination decisions.
 - Close relationship between the arguments used in Title VII employment discrimination cases and Title VI
- Carefully review any company hiring policies that propose to hire certain numbers of minorities or genders
 - Policies should be “sufficiently coherent for purposes of strict scrutiny”
 - Policies should avoid the broad justifications for racial preferences advanced by Harvard and UNC–“promoting the robust exchange of ideas; fostering innovation and problem solving; breaking down stereotypes.”

Key Takeaways for Employers

- Consider expanding eligibility criteria for DEI programs by focusing on factors such as unique life experiences and diversity not connected to race.
- Communications to employees about DEI efforts should focus on “inclusion”, not “exclusion”.
 - Avoid using any form of quotas or metrics around race or gender-based hiring or promotion decisions.
 - Provide every employee the opportunity to be heard.
- Make sure your DEI coordinator works closely with your HR Director and Legal Counsel
 - Consider issues of attorney-client and work product privilege
 - Track important legal changes

Religion in the Workplace

- Basic Rule – Must reasonably accommodate sincere religious beliefs unless undue hardship is proven.
 - Requests for sabbath observation, prayer breaks and religious dress
 - Vaccine issues
- Supreme Court – postal delivery person asked to work on Sundays
 - Unanimous – the old rule – “any cost” is out
 - Accommodation must result in “substantial increased costs” to this business.
 - Not exactly same as ADA, but must use interactive process
 - Individual decisions key & context will really matter



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Religion in the Workplace *p.2*

- Types of Accommodation
 - Scheduling changes (flexible work breaks, optional holidays, etc.)
 - Shift swaps
 - Change in job duties or lateral transfer (no singing Happy Birthday, Jehovah W)
 - Modify work policies and procedures (dress/grooming standards, biometric scanner, vaccine mandates)
 - Display of Religious Messages at work (context and location matters)
 - Requests to use conference room for prayer session
 - Exemption from certain training sessions (mindfulness/mediation classes)



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Religion in the Workplace p. 3

- Take-Aways from Supreme Court
 - Claims will increase – get your supervisors trained and get legal advice
 - Verbal request is enough
 - Burden to prove substantial increased cost to business is on company
 - Cannot simply rely to co-worker morale problems
 - Cannot just rely on having to pay overtime to co-workers
 - Consider voluntary swap a must – cannot put burden on worker, you must facilitate
 - Health and safety concerns, if provable and quantifiable, will be undue burden
 - Be able to explain why providing the accommodation will impose a sustainable cost to your business

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Religion in the Workplace p.4

- Challenging sincerity of religious belief - very difficult
- EEOC's new Strategic Plan emphasizes addressing religious discrimination – tangible actions
 - Two lawsuits filed against companies who refused religious accommodation to a COVID vaccine mandate – **significant change**
 - NC company (8/02) paid \$50,000 to settle claim by employee who objected to daily prayer meeting lead by owner
 - WV company (9/29) paid \$215,000 to settle claim by Black Muslim who had objects thrown at him while praying at work and received overt threats
 - Security services company sued (9/26) for requiring Muslim to shave beard because of clean shaven policy
 - *EEOC v Consol* (4th Cir. 2017) - \$586,860 upheld – employee retired rather than use new biometric hand scanner – voiced religious objections, but allow others to type number rather use scanner

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Religion in the Workplace

- Request to be excused from mandatory DEI/EEOC training
 - “training is aimed at changing my religious beliefs”
 - EEOC Guidance (Jan. 15, 2021) – Ex. 55 - no obligation to grant request
 - New York federal court – request to be excused imposed an undue hardship,
 - Is the training legally required?
 - Does it ridicule religious beliefs?
 - Does it segregate attendees by category?
 - Does it focus on required workplace conduct or does it advocate for LGBTQ

Gender Identity/Transgender Issues

- **Bostock** – “sex” means and includes sexual orientation/gender identity under Title VII
- **4th Circuit** very active in protecting transgender rights
 - *Keisa v Williams* - ruled ADA’s exclusion for gender identity disorders not same as “gender dysphoria,” thus, transgender is not a disability – prisoner wrongly denied right to stay with women because housing assigned based on genitalia
 - *Grimm v Portsmouth* - required public school to allow transgender student to use bathroom of gender identity
- EEOC Guidance on Sexual Orientation/Gender Identity (June 15, 2021)
 - Tenn. trial court enjoined enforcement in twenty (20) states, *not Virginia*, case on appeal
 - Intentional and repeated misuse of wrong name or pronouns can be hostile environment
 - While separate bathrooms are permitted by sex, must allow all men (including transgender) to use men facilities and must allow all women (including transgender) to do the same.
- EEOC Proposed Guidance on Sexual Harassment (Sept. 29, 2023)

Gender Identity/Transgender Issues

- Virginia Supreme Court
 - (Aug. 2021) upheld an injunction requiring reinstatement of public school teacher who was suspended for challenging transgender policy at public meeting, and saying he would not use preferred pronouns;
 - (Nov. 2022) heard argument on whether teacher can be fired for refusing to use preferred pronouns because of deeply held religious beliefs. *No decision yet.*
- These and other cases so far involve government employers, not private employers
 - Employees who work for cities, counties, and state government have “**right of free speech**” but those who work for non-government entities do not.
- These cases against private employers will be religious accommodation cases
 - Highly fact specific – employer obligated to provide a safe work environment and not allow unlawful discrimination – significant interest in preventing discrimination/harassment

Whistleblower Decisions

- ***SuperValu*** – SCOTUS rules knowledge of wrongdoing by defendant is enough, even if you can later try to justify action
- ***Murray v UBS*** – SCOTUS argument suggests that retaliation need only be a “contributing cause,” not that employer acted with retaliatory intent – *decision in 2024*
- ***Greatwide Dedicated Transport*** – *4th Circuit* – allowed an employee to use evidence from surreptitiously recorded conversations in a common area at work and documents secretly taken from a lockbox, copied and returned to support claims that there were safety violations (unsafe driving assignments)
- ***NC Farm Bureau*** – *4th Circuit* – struck down NC law that prohibited employees from engaging in undercover investigations by gathering information of potential unlawful activity in non-public areas of the company, including planting a camera or other device to record images and data – violation of First Amendment

Questions?



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