2024 EMPLOYMENT LAW SYMPOSIUM

THE NEW ERA OF HR TOUR

Presented by

GENTRY LOCKE
Attorneys

04/02 Lynchburg, VA
The Virginian Hotel

04/05 Roanoke, VA
The Hotel Roanoke

★SCHEDULE★

7:45-8:30	Breakfast and Networking
8:30-9:15	**Holy Ground: When Religion Comes to a Workplace Near You**
9:15–10:00	**I Knew You Were Trouble: What You Need to Know About the EEOC, NLRB, & DOL**
10:00-10:30	**This Is for the Best: An Employer's Guide to the Fair Labor Standards Act & Virginia's Whistleblower Protection Law**
10:30-10:45	Break
10:45-11:30	**Karma Is the Employee That Brings You Down**
11:30-12:00	**Preventing the Next Great American Dynasty: The State of Non-Competes in Virginia**
12:00-1:00	Lunch
1:00-1:30	**All You Are Is Mean: The Impact of Microaggressions on Recruitment and Retention**
1:30-2:15	**Cause Baby, Now We've Got Bad Blood, so We Are Never Ever Getting Back Together, but We'll Make Sure You Go Out in Style: Navigating Employee Terminations**
2:15-2:30	Break
2:30-3:30	**Cruel Summer: DEI in the Workplace – Legal Update & Practical Advice**

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SPEAKERS

TODD LEESON

Todd Leeson is the Chair of Gentry Locke's Employment law practice group. He has over 35 years of experience representing Virginia employers in employment and labor law matters. He regularly litigates employment claims in Virginia. Todd also represents management in labor union matters. Todd 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.

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DAVID PAXTON

David Paxton is a member of the firm's Employment & Labor practice group where he 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.

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HARRISON RICHARDS

Harrison Richards is a member of the firm's Employment & Labor practice 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 is a native of Roanoke, Virginia and is licensed in Virginia as well as Washington D.C.

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SPEAKERS

PAUL KLOCKENBRINK

Paul Klockenbrink is a member of the firm's Employment & Labor practice group. Paul advises and represents employers throughout Virginia regarding employment law issues, as well as the litigation of noncompete 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, noncompetition, defamation, malicious prosecution, premises liability and commercial motor vehicle accidents, among others. Paul is consistently noted as a Virginia Super Lawyer in Employment and Labor Law, and since 2009 he has earned a spot on the Best Lawyers in America list in Employment Law – Management.

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RYAN STARKS

Ryan Starks is a member of the firm's Commercial Litigation practice group, where he assists clients with complex business and civil disputes in state and federal courts throughout Virginia. Ryan has wide-ranging experience in courts extending from the Eastern Shore to the southwest corner of the state, including in construction, contract, employment, fair housing, family law, healthcare, insurance, intellectual property, land use, landlord-tenant, and solar energy disputes. Ryan has worked with a broad range of large and small U.S. and international clients to achieve successful outcomes throughout the Commonwealth.

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PATRICE LEWIS

Patrice Lewis is a member of the firm's Government & Regulatory Affairs practice group, using data and strategy to help clients achieve their legal, policy, and communications goals. Patrice's eclectic background fuses law with policy and communications. She also serves as a Government Affairs Director with Gentry Locke Consulting. Patrice recently served as a Strategic Marketing and Communications Consultant for Senior Advisor for SIR, Inc. located in Richmond, Virginia. Prior to her time at SIR, she worked as an outreach representative for Senator Mark R. Warner, serving Central and South Central Virginia, and as the legislative assistant to former Delegate Onzlee Ware. Patrice is a native of Roanoke, Virginia.

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SPEAKERS

CATE JACKSON

Cate Jackson is a member of the firm's Employment & Labor, Insurance, and Workers' Compensation practice groups and has litigated in federal and state courts throughout Virginia. Cate defends employers against discrimination and workplace claims and advises businesses in the restaurant and hospitality industry on employment issues. Cate has been named a Rising Star by "Virginia Super Lawyers" since 2015 and was honored as a "Legal Elite" by Virginia Business Magazine.

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CARLOS HOPKINS

Carlos Hopkins is a member of the firm's Criminal & Government Investigations and Government & Regulatory Affairs practice groups. Carlos also works as a partner with Gentry Locke Consulting. 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.

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★TOPICS★

Holy Ground: When Religion Comes to a Workplace Near You
David Paxton
This session will review the Supreme Court's recent Groff decision on accommodating religious beliefs, the Virginia Supreme Court's Vlaming decision reinstating a lawsuit by a teacher who was allegedly fired for refusing to use preferred pronouns, and several other recent court decisions, and will provide practical guidance for employers to navigate the issues in this highly charged area.

I Knew You Were Trouble: What You Need to Know About the EEOC, NLRB, & DOL
Todd Leeson
In this session, Todd Leeson will update attendees on the latest trends, pronouncements, and developments regarding the Federal EEOC, NLRB, and DOL. Attendees will learn about the Government's latest guidance and initiatives, and receive practical guidance to strengthen your policies and practices, and to minimize your legal risks.

This Is for the Best: An Employer's Guide to the Fair Labor Standards Act & Virginia's Whistleblower Protection Law
Harrison Richards
In January 2024, the Department of Labor published a final rule on how employers should analyze who is an employee or independent contract under the Fair Labor Standards Act ("FLSA"). In this session Harrison Richards will help you navigate the differences from prior DOL guidance on this topic and provide a guide so that you properly classify your workers. Harrison will also provide an update on other FLSA developments (e.g., exempt v. non-exempt, nursing mothers) as well as an update to Virginia wage-hour developments. Harrison will update attendees on the Virginia's Whistleblower Protection Law (VWPL) so that you don't "exile" an employee if and/or when they make a good faith report.

Karma Is the Employee That Brings You Down
Paul Klockenbrink
Karma can be sweet like honey or it can be that problem employee that brings you down. No matter how great you may be at managing employment law risks in the workplace, sometimes it takes a little more creativity to prevent the dreaded L word….litigation. This session will provide numerous valuable tidbits and lessons learned from the employment law battlefield. We will interactively cover a broad range of scenarios revealing some different or creative strategies. Topic areas will include correct documentation, ADA/FMLA leave, terminations, investigations and of course the threat of retaliation claims.

Preventing the Next Great American Dynasty: The State of Non-Competes in Virginia
Ryan Starks
Following a cruel summer for non-competes, employers will need to revisit the non-compete (and non-non-compete) agreements that they have come to know all too well. In this session, Ryan Starks will discuss critical changes coming for non-compete agreements in Virginia and beyond. Ryan will also highlight the key differences between traditional non-compete agreements between employers and their employees, business to business non-compete agreements, and non-poaching agreements, as well as the best practices for enforcing those agreements when former employees develop bad blood.

TOPICS

All You Are Is Mean: The Impact of Microaggressions on Recruitment and Retention

Patrice Lewis

In this session you will learn about microaggressions in the workplace and how they are subtle, usually unintentional, discriminatory actions or remarks that can negatively affect those on the receiving end. They can be derogatory and can create a hostile or unwelcoming work environment. Microaggressions can have severe consequences, including depression, anxiety, absenteeism, and impact on salary and job satisfaction. Categories of workplace microaggressions include those that appear as overt discrimination, prejudicial behavior, abuse, or harassment.

Cause Baby, Now We've Got Bad Blood, so We Are Never Ever Getting Back Together, but We'll Make Sure You Go Out in Style: Navigating Employee Terminations

Cate Jackson

While they are a necessary part of running a business, employee terminations are seldom pleasant. From deciding when to terminate and how best to deliver the bad news, to deciding what documentation may or may not be necessary, terminations can create a minefield of potential issues for employers. However, with the help of some catchy and timely Taylor Swift lyrics, we will discuss best practices for ending the employment relationship and what to do when a termination does not go according to plan. Come prepared for a lively discussion, and if you want to dance a little, that's up to you.

Cruel Summer: DEI in the Workplace - Legal Update & Practical Advice

Carlos Hopkins and Todd Leeson

Last summer, the United States Supreme Court ruled in Students for Fair Admissions v. Harvard, (sometimes now called the SFFA case), that colleges could not consider race in their admission decisions. Although the SFFA case did not arise in a workplace setting, its advocates contend that the same principles prohibit employers from making employment decisions on the basis of race (or gender or any other protected class). Employers are confronted with new challenges regarding its laudable efforts to be more diverse, equitable and/or inclusive. In this session led by Gentry Locke partner Carlos Hopkins, attendees will learn about the SFFA case, as well as the current legal landscape in the workplace. We will provide recommendations of actions employers can and should take in support of their DEI initiatives.

Holy Ground:

When Religion Comes to a Workplace Near You

Presented by

Holy Ground:

Religion Comes to the Workplace

Presented by

DAVID PAXTON

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1

Plan for Discussion

- Today's Workplace
- What are the rules – Basic rules protecting religious belief
- What changed – COVID and SCOTUS
- What to look for – Common situations
- What's an employer to do – Practical suggestions

2

Where Are We — Today's Workplace

- Anxiety levels and cultural conflict – all-time high
- Election year – likely to see increase in tension
  - Line between politics and religion is blurring
- Nonwork issues and tensions come to the job with workers
- Employers' delicate challenge when responding to cultural issues

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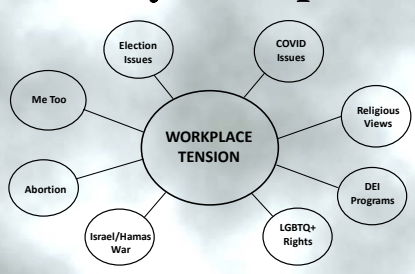
Today's Workplace



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Today's Workplace — How it will Happen

- Workers talk about news/social media issues involving protected classifications
  - January 6
  - Election Issues
  - Confederate Statues
  - Abortion
  - Pro-Palestinian Protests
  - LGBTQ+ Issues
  - DEI Training
  - Religious Issues
- How tension can arise and become HR problem
  - Attire – hats, pins, flags
  - Displays in office/cubicles
  - Car stickers/flags
  - Zoom backgrounds
  - One-on-one conversation
  - Group discussions
  - Email/Slack/Jabber disputes
  - Social media posts

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Where Are We Today?

- **EEOC** reports an increase in all charges, but an extraordinary rise in the number of claims of religious discrimination

ALL CHARGES	2021	2022
National	61,331	73,485
Virginia	4,207	5,299
RELIGION CHARGES		
National	2,111	13,814*
Virginia	69	360*

*Both nationally and in Virginia the number of religious discrimination and failure to accommodate religious beliefs claims rose by more than 500+% and a significant number of these cases came from denied accommodations to mandatory COVID vaccine policies.

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Where Are We Today?

- **EEOC** is aggressively pursuing employers of all sizes.
  - Virginia security company refused to allow a beard due to Christian belief because no letter from religious leader, and employee quit after being harassed following complaints **($110,759).**
  - Hospital in NJ refused to modify its flu vaccine policy to allow for religious accommodations to six workers **($100,000).**
  - Owner of a residential home repair service in Greensboro, NC refused to excuse a manager from daily Bible study and Christian prayer meetings, and then retaliated against him when he did not come by demoting and the firing him **($50,000).**
  - Michigan hospital rescinded a job offer to an applicant, who for religious reasons, refused to receive a flu vaccine, which was an annual requirement of the job **($50,000)**
  - Employee of Chicago security company quit when employer told him to cut his beard and he refused due to Muslim belief **($70,000).**

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Where Are We Today?

Non-profit law firms actively bringing claims for employees alleging workplace infringement of religious beliefs – **First Liberty**, **Alliance Defending Freedom**, etc.

Kennedy v Bremerton School District (2022)– praying football coach post-game prayers at 50 yd line protected speech

Brennan v Deluxe Corp (2022) – jury trial - Christian employee's refusal to complete DEI training because content conflicted with religious beliefs, and she was fired

Groff v DeJoy (2023)– new standard for religious accommodation under Title VII

303 Creative v Elenis (2023) – prohibition on compelled speech by web designer

Updegrove v Mlyares (2023) – challenge to Va law requiring photographer to offer services to same-sex weddings

Vlaming v. West Point School Board (2023) – Va Constitution protects teacher fired over refusing to comply with pronoun policy

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Where Are We Today — Final Thoughts

- **SCOTUS** has clearly signaled a new deference to religious rights and will rigorously scrutinize employer's claims of 'undue hardship'
- Va Sup. Court's *Vlaming* decision is expansive and will lead to legal claims
  - ***Calvary Road Baptist v Mlyares*** (March 18, 2024 settlement)
  - ***Figliola v Harrisonburg PS*** - pending
- Claims of religious discrimination will be on the rise
- Requests for accommodations can catch you off-guard if supervisors are not trained
- **School Boards are targets**– clash over transgender issues – pronouns used and book content concerns are current hot issues

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What Are the Rules?

Title VII – All employers with more than 15 employees and all local government agencies must not discriminate on basis of religion and must accommodate sincere religious beliefs unless undue burden.

Va. Human Rights Act – Applies anti-discrimination rules to employers with more than 5 employees

- *"Religion includes any outward expression of religious faith, including … dressing and grooming practices and the carrying of religious items or symbols."*

U.S. Constitution - Cities, counties, school boards and police departments must recognize and respect 1st Amendment (speech and religious liberty) rights of employees.

Va. Constitution - *Vlaming* decision state Constitution gives religious liberty and expression rights to all Virginia residents.

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What is Religion – Title VII

- Employers are not to inquire into validity of a belief but can judge whether the views are "religious" in nature and whether the belief is "sincerely" held.
- "Religion" includes all aspects of religious observance and practice, as well as belief. It goes well beyond traditional, organized religion, and includes new and uncommon beliefs, even if not part of a formal church or sect.
- A belief or practice can be "religious" even if the religious group the worker belongs to does not espouse or recognize the individual's belief, or if only a few – or no – other people adhere to it, *e.g. vegetarian Seventh Day Adventist*
- The belief or practice need not be acceptable, logical, consistent or comprehensible to others, *e.g. Observance of Samharin Sabbat, Wicca's New Year on October 31; EEOC v Consol (4th Cir. 2017 – "Mark of the Beast" - $586,560, not including attorney fees)*
- Determining whether a practice is religious does not depend on the *nature of the activity*, but the *motivation of the person engaging* in the behavior, e.g. *Time off to be home for the Sabbath (worship), but not to purchase ritual foods (personal preference).*

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What is Religion – Title VII (contd.)

- A "religious" belief is one that comes from an understanding that involves fundamental or ultimate ideas, often involving life, purpose, spirituality, the soul or death. [*software developer fired for refusing vaccine failed to show his refusal was tied to a larger system of religious belief – instead, it was a view based on a single moral teaching – do not defile your body - and he believed the vaccine to be unsafe*]
- Religious beliefs are different from personal preferences or views that are essentially political, sociological or philosophical. [*4th Circuit ruled KKK was not to be considered religious because of its views were principally political in nature*]
- When religion and political views overlap, Title VII still provides protection as long as the belief is part of a comprehensive religious belief system and is not an "isolated moral teaching." [*abortion rights can be religious if based on sincerely held belief*]

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What is Sincerity Held – Title VII

- Only "sincerely held" religious beliefs must be accommodated – **Sincerity of belief is generally presumed or easily established. It is largely a credibility question**.
- Employers are not, and "should not" decide whether a person holds a religious belief for a "proper" reason. So, an **employee's motive for holding the belief in the first place is not evaluated**.
- A sincere religious believer **does not forfeit his religious rights merely because he is not scrupulous in his observance**, but inconsistency in observation or practice **is a factor** to be considered in evaluating sincerity.
- If an accommodation is requested and there is an **objective reason to question** either the religious nature or sincerity of a belief or practice, HR can ask for supporting information.
- Employer cannot limit type of materials or require a formal letter from an authorized religious leader or congregant to vouch for or support employee's request, it **must accept verification from any third-party source who is knowledgeable** of the religious nature and/or the sincerity of the employee's belief

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What are the Rules Religious Accommodation (Under Title VII or VHRA)

- When an **employee advises an employer of a sincere religious belief** that conflicts with a job requirement, the employer must:
  - Engage in an **interactive process** with the employee to explore reasonable accommodations;
  - Either provide a reasonable accommodation or be able to prove you cannot do so without "***undue hardship***" to its business;
  - Avoid discriminating against the employee based on religion or retaliating against the employee for requesting an accommodation.
- From past 47 years, an "***undue hardship***" was anything that caused "***more than a de minimis***" burden on the employer – ***which was viewed as literally any cost or inconvenience*** – a very different standard that used under ADA .

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What types of Accommodations

- **Scheduling changes** (*Sabbath observances and known religious holidays*)
- **Shift swaps and unpaid leave requests**
- **Frequent and regular breaks** (***daily prayers***)
- **Change in or excused from job duties, or lateral transfer**
- **Excused from celebrations** – (***Happy Birthday gatherings***)
- **Modify work policies and procedures** (***dress/grooming standards, biometric scanner, vaccine mandates***)
- **Dietary restrictions** (***workplace cafeterias/work-related events***)
- **Display of religious messages at work** (***content and location matters***)
- **Requests to use conference room for prayer session or other religious activities**
- **Exemption from certain training sessions** (***mindfulness/mediation classes***)

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What Changed?
Groff v DeJoy

- Postal carrier's religious beliefs prohibited him from working on Sundays, and USPS had accommodated him for 5 years, at one point he transferred to a smaller office with no Sunday service required.
- USPS signs contract with Amazon to make deliveries on Sundays, and when volunteers not found, USPS requires Groff to work every other Sunday. He objects, is disciplined and eventually resigns after a year of "harassment."
- Lower courts ruled that USPS had established an undue hardship by pointing out hardship imposed on coworkers, etc.
- **SCOTUS** says use of "*de minimis*" standard has violated Title VII's promise that employees should not be forced to choose between their faith and their job.

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What Changed?
Groff v DeJoy

- **Unanimous Court**:
  - What is most important is that '**undue hardship**' in Title VII means what it says; courts should resolve ***whether a hardship would be substantial in the context of an employer's business***, by taking into account the particular accommodations at issue, and their practical impact in light of the nature, size and operating costs of an employer.
- ***The new standard for 'undue hardship.'***
  - **The employer must be able to show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business.**
  - Context will matter a great detail and each case will be fact-intensive.
  - Using the interactive process will be critical – developing good documentation of requests and rationale.

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What Changed — Post-*Groff*

- **Burden is on you to prove substantial increased cost to your business**
- **Cannot simply rely to co-worker grumbling and morale problems**
- Cannot just rely on having to pay overtime to co-workers without showing substantial impact
- **Must consider voluntary shift swap – cannot put burden on worker, you must facilitate**
- If requested accommodation will not work, employer has duty to consider other possible accommodations
- **Be able to quantify how providing the accommodation will impose a substantial cost to your business**
  - *Health and safety concerns, if provable and quantifiable, may be undue burden*
- **Claims will increase (rule applies retroactively)– get your supervisors trained**
  - *Verbal request is enough*

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What Next — Post-*Groff*

- Groff's case sent back to lower court
- USPS still arguing that granting him off every Sunday imposes substantial costs on several grounds
  - Request is a *per se* undue hardship because it violates an existing collective bargaining agreement
  - This rural post office only had two carriers, and forcing the other person to work every Sunday had resulted in a prior employee to transfer
  - Using replacements from other locations to cover did not work because Groff was unwilling to cover for those who worked in his place, and hiring additional persons would be financially prohibited

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What Next — Post-*Groff*

- No local decision applying *Groff* yet, but others have – many vaccine issues
  - **5th Cir.** – applicant who lived by Nazarite vow (no cutting of hair or beard) was told he must cut hair and beard to keep job at prison based on policy.
    - Prison failed to show "any actual costs" it will face – much less "substantial costs" affecting its entire business if it grants this one request.
    - Prison tried to rely on security and safety concerns, impact on co-workers, and failed to show it considered any other alternatives.
    - Safety concern rejected as others with medical condition were allowed short cropped beard, even though a beard of any length caused safety concerns, and women allowed to have long hair for any reason.
  - **AZ court** – City refused 1.5 days unpaid leave for spiritual retreat because absence would be hardship on co-workers, but it *failed to show any concrete costs caused by* 1.5 days of unpaid leave. Negative impact on co-workers is too vague. Providing 1.5 days of unpaid leave could not be shown to impose an excess financial burden on the city.

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What Next Steps — Post-*Groff*

- Key issues to address in determining ***Undue Hardship***
  - **How long and how often will the accommodation apply**
  - What is the size of the employer – large or small
  - **What is the actual or projected financial costs** of providing the requested accommodation – **quantification of expense is critical**
  - Is there a health or safety risk at play, and how to document
  - **Are there other less costly or less risky options to the one requested and was it offered/discussed with employee**
  - What is the business impact of the accommodation
  - **Are there others who seek the same accommodation**
  - Will there be a hardship imposed on co-workers and how to quantify

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Religious Objections to DEI/EEO Training

- **Request to be excused from mandatory DEI/EEOC training or participating in Pride month celebrations**
  - "Training or participation is aimed at changing my religious beliefs" [*also may raise race concern based on content*]
  - **EEOC Guidance** (Jan. 15, 2021) – Ex. 55 – no obligation to grant request
  - **2nd Circuit** (before ***Groff***) request to be excused imposed an undue hardship because training required by state law
  - **8th Circuit** (post ***Groff***) considering issue – decision expected soon
  - **Maryland jury** (Mar. 3, 2022) decided that employee's sincerely held religious beliefs didn't conflict with mandatory training because he was not asking to change beliefs, just being informed of behaviors expected at work based on legal protections. (***Brennan v Deluxe Corp***)
  - **California case** (Mar. 21, 2024) settles religious discrimination and retaliation claims by HR employee who objected to special training and mentorship program open only for women and persons of color – went against her belief that all are equal and not discriminate on the basis of race (*Rogers v Compass Group USA*)

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Gender Identity/Transgender Protections

- **Bostock** – "sex" means and includes sexual orientation/gender identity under Title VII – no discrimination in employment, but leaves many other issues unaddressed
- **4th Circuit very active in protecting transgender rights**
  - ***Kelsa 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)
  - 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.
  - Court enjoined enforcement in twenty (20) states, *not Virginia*, case on appeal
- **EEOC Guidance** on Sexual Harassment (Sept. 29, 2023)

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Gender Identity/Transgender Issues
Mandated Use of Pronouns

The tension on this topic is real – often politically charged – one side views the rule simply affirms a person's protected identity, and the other side believes they are being asked to affirm a false view that conflicts with their sincerely held religious beliefs. *Both views find support in the law.*

Constitutional principles from **SCOTUS**

If there is any fixed star in our constitutional constellation**, it is that **no official**, high or petty, **can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion**, or **force citizens to confess by word or act therein.*

*A city **"may not compel affirmance of a belief with which the speaker disagrees."*****

Many courts are addressing this issue – with mixed results – *Virginia state courts have decisively weighed in on the side of protecting religious beliefs*

**West Virginia v Barnette (1943) (upholding refusal to cite the pledge of allegiance in school as students believed their allegiance was pledged only to God)*

*** Hurley v Irish-Am, Gay, Lesbian & Bisexual Grp. of Boston (1995) (city cold not require private citizens to include group in parade that express a message the organizers do not which to endorse)*

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Gender Identity/Transgender Issues (contd.)

- Virginia Supreme Court
  - ***Loudon Co v Cross*** (Aug. 31, 2021) upheld an injunction requiring reinstatement of public school teach who was suspended for challenging transgender policy at public meeting, and saying he would not use preferred pronouns.
  - Vlaming v New Kent (Dec. 12, 2023) ruled teacher could not be fired for refusing to use preferred pronouns with student who had recently undergone a gender transition and name change, because it compelled speech inconsistent with his deeply held religious beliefs.
- 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.

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Religious Objections to DEI/EEO Training

Factors to be considered:

- Is the training legally required?
- Carefully review content to be used in advance – does it focus on legal requirements or advocate for specific viewpoint?
- Does it question or ridicule religious beliefs?
- If outside presenter used, be sure qualified and not just advocate.
- Does it segregate attendees by category?
- Does it focus on required workplace conduct or does it advocate for LGBTQ+
- Does it require participants to agree to specific points of view?

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Final Thoughts

- **Take all requests for religious accommodations seriously no matter how unusual seeming – avoid assumptions and stereotypes**
- If you don't have a policy on religious accommodations, implement one
- **Considering using a request form, but don't make it mandatory**
- Train your front-line supervisors to understand the importance of not belittling or overacting to "silly" or "strange" requests, and or promptly forwarding requests to HR
- **Be aware of and take proactive steps to prevent backlash against those making requests**
- Determine how best to quantify the costs of accommodation and do so
- **If requested accommodation is too costly, identify other alternatives, and discuss those with requesting employees**
- Get legal advice, especially if questioning "religious nature" or "sincerity" of belief
- **Document key interactions, company's rationale for decision and decision**

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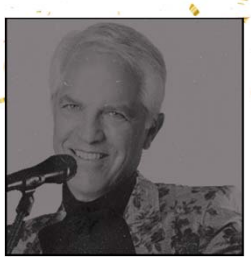
Questions?



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I Knew You Were Trouble:

What You Need to Know About the EEOC, NLRB, & DOL

Presented by

I Knew You Were Trouble

What You Need to Know About the EEOC, NLRB, & DOL

Presented by

TODD★LEESON

1

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 (over 50%)
- Disability (34%), Race (28%), Sex (27%), Age (15%)

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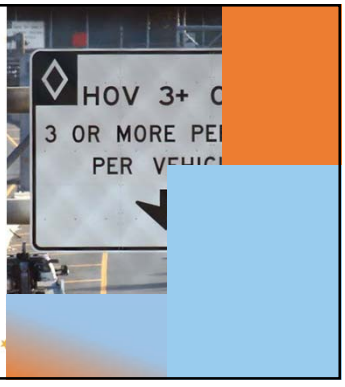
EEOC's Published Enforcement Priorities

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



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Protections for LGBTQ Employees

- Remember in 2020, U.S. Supreme Court held in *Bostock v. Clayton County* that Title VII sex discrimination includes discrimination based on "sexual orientation" or "gender identity"
- Proposed New EEOC Guidance provides helpful examples of employer conduct that constitutes harassment or discrimination
- Your business will likely confront HR questions, requests regarding transgender employees

4

EEOC Sues T.C. Wheelers in Transgender Bias Lawsuit

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

5

Microsoft Settles Fired Trans Engineer's Bias Suit

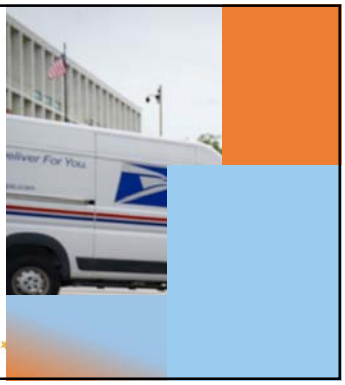
By **Grace Elletson**

Law360 (March 22, 2024, 5:22 PM EDT) -- Microsoft agreed to settle a transgender former software engineer's Washington state court suit alleging that she was fired after repeatedly raising concerns that her work was unfairly criticized by her colleagues and that she was subjected to bullying due to her gender presentation.

Judge Josephine Wiggs officially **dismissed** the suit with prejudice Thursday after Cassandra Granade and Microsoft **notified** the court that they had reached a deal to shutter the complaint alleging discrimination, hostile work environment and retaliation claims under Washington state law.

6

Groff v. DeJoy: New Test- Religious Accommodations



- USPS had contract to deliver Amazon on Sunday
- Groff is Christian who believes no work on Sunday
- USPS denied Groff request—"undue hardship" (morale issues, having to provide premium pay due to shortfall, impact productivity)
- Sup. Ct.: New test—ER must show that burden to accommodate is "substantial in overall context of employer's business" (higher burden than before)

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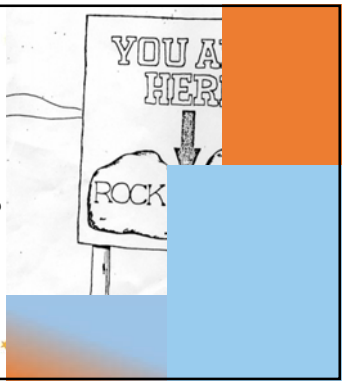
What About Religious Supervisor Unwilling to Refer to Transgender EE by Preferred Pronouns



- EE transitions to female and requests that she be referred to by new name and by using certain pronouns (she/her). Manager refuses contending that this would violate his religious beliefs.
- Challenging, fact-specific cases (e.g., *Vlaming v. W. Point Sch. Bd.*)
- What's an Employer to do???
  - Deny manager's religious accommodation request, fire him for not complying with policy, and get sued; OR
  - Deny transgender employee's request and get sued for condoning harassment.

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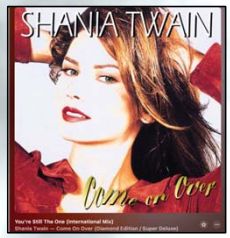
EEOC Proposes Updated Harassment Guidance

- First new formal guidance from EEOC on topic since 1998! (Remember Shania?)
- Published Sept. 29, 2023—100 pages of EEOC's current opinions, tips, case discussions (www.EEOC.com/newsroom)
- Treasure trove of Super Useful info!



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U.S. Equal Employment Opportunity Commission

PROPOSED Enforcement Guidance on Harassment in the Workplace

SUBJECT:	PROPOSED Enforcement Guidance on Harassment in the Workplace
PURPOSE:	This transmittal issues for public input the Commission's proposed guidance on harassment in the workplace under EEOC-enforced laws.

10

EEOC Proposed Harassment Guidance
(Sept. 2023)

- Excellent, updated explanations of what needs to be included in a Harassment policy to be effective (see next slide)
- Helpful discussion of what needs to be included in a Complaint Process to be effective
- Vital discussion of what Employers need to cover during their EEO training to be effective

11

For an anti-harassment *policy* to be effective, it should generally have the following features, at a minimum:

- the policy defines what conduct is prohibited;
- the policy is widely disseminated;[237]
- the policy is comprehensible to workers,[238] including those who the employer has reason to believe might have barriers to comprehension, such as employees with limited literacy skills or limited proficiency in English;[239]
- the policy requires that supervisors report harassment when they are aware of it;[240]
- the policy offers multiple avenues for reporting harassment, thereby, allowing employees to contact someone other than their harassers;[241]
- the policy clearly identifies accessible[242] points of contact to whom reports of harassment should be made and includes contact information;[243] and
- the policy explains the employer's complaint process, including the process's anti-retaliation and confidentiality protections.

12

Example 29 of Guidance (p. 71)

- Aisha was subjected to sexual harassment by Pax, assistant manager
- Aisha reported conduct to Mallory, another assistant manager
- Employer policy: supervisors required to report all complaints to HR
- Mallory did not report because she did not think conduct was that bad
- 2 weeks later & when Pax persisted, Aisha reported to HR.
- HR immediately suspended Pax, promptly investigated, and fired Pax

Question: If Aisha files an EEOC harassment charge, will the Employer avoid liability because HR promptly responded and fired Pax?

13

EEOC Answer: NO! Employer May be Liable

- Mallory was Supervisor. As result, she was responsible for reporting and addressing potential harassment.
- Mallory's failure to act means that Employer response was not sufficient. Per EEOC, Employer did not act w/ reasonable care to prevent and correct harassment.
- Mallory was "weak link." Shows importance of training.

14

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
- Protections already exist under Va. law (for ERs w/ at least 5 EEs)
- New Regulations from EEOC on PWFA are coming! (past due!)

15

NLRB's Aggressive Actions to Rewrite Laws

- 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, pro-EE world view
- To date, she has issued dozens of guidance memos reflecting her mission to overturn well-settled decisions in place for decades

16

NLRB Stericycle Case: Handbook Alert!

- Remember that Section 7 of National Labor Relations Act protects employees who engage in "protected, concerted activity" (PCA) regarding their terms of employment for their mutual aid and protection.
- *Stericycle*: if Employee could reasonably interpret a work rule (handbook policy) as limiting or chilling his/her right to engage in PCA, the work rule is presumptively unlawful
- ER must show work rule advances a "legitimate and substantial business interest" and that rule is narrowly tailored.

17

Bloomberg Law Report 3/25/24: Post Stericycle NLRB ALJ Decisions

Robert Iafolla: A recent National Labor Relations Board judge's decision against an ExxonMobil Corp. subsidiary marked the **12th time in 13 cases** that an agency jurist found that a company violated the board's new legal test for work rules, a Bloomberg Law analysis found.

ExxonMobil Global Services Co.'s rule protecting corporate information was one of the 26 employer rules or policies that administrative law judges said ran afoul of the NLRB's standard from its August 2023 decision in *Stericycle, Inc.*

Overall, ALJs have **found fault with two-thirds of the rules that they've analyzed under the Stericycle framework**. The board itself hasn't yet applied that standard, instead remanding disputes over work rules back to agency judges.

18

Practical Advice on Policies to Review

- Civility
- Confidentiality
- Restrictions on social media use
- No criticism, disparagement of Employer
- Prohibiting comments to media
- Insubordination
- No discussion of investigation

ER: Is the rule necessary? Why? Can it be drafted more narrowly?

19

McLaren Macomb NLRB Decision: Oh My!

- Assume scenario in which Employer wishes to offer severance pay to departing EE (reasonable/necessary depending on facts, context)
- ER key interests: 1) EE agree no personal lawsuits; 2) confidentiality of amount paid to EE; 3) agree not to bash Company (non-disparagement); and 4) agree not to apply in future.
- NLRB concluded that confidentiality and non-disparagement terms could NOT be included in standard severance agreements

20

SpaceX's Severance Agreement Is Illegal, NLRB Attys Say

By **Beverly Banks**

Law360 (March 21, 2024, 10:17 PM EDT) -- The National Labor Relations Board's Seattle office claimed SpaceX's severance agreement included confidentiality and non-disparagement clauses that violate federal labor law, according to a complaint copy obtained by Law360 on Thursday, with board prosecutors asking for a recorded notice reading scheduled for workers across the country to attend.

21

What Steps Can/Should ER Take if Seek to enter into Severance Agreement w/ Departing Employee

- Importantly, decision does not extend to Supervisors or Executives
- Appears narrow non-disclosure of "financial terms" is permitted
- Non-disparagement: If limited to no "defamatory" comments for defined time period, should be okay. Can prohibit false or reckless public posts
- Carefully-worded disclaimer (e.g., not limiting rights under Section 7 of NLRA) probably a good add
- **Danger alert: Do Not Rely on Older Severance Agreements!**

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NLRB GC Overreach: No Mandatory ER Meetings to Discuss Unions

- For almost 75 years, ERs have right to schedule internal 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
- Current landscape—confusion and litigation!

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DOL New Employee-Friendly Independent Contractor Rule

- Public policy debate continues (ex: Are UBER drivers Independent Contractors free to work whenever or are they Employees?)
- Answer has enormous economic consequences. Ex: ICs do not receive benefits; No payroll taxes to Government.
- DOL New Rule to determine IC v. EE under FLSA. Rule took effect March 11, 2024.

25

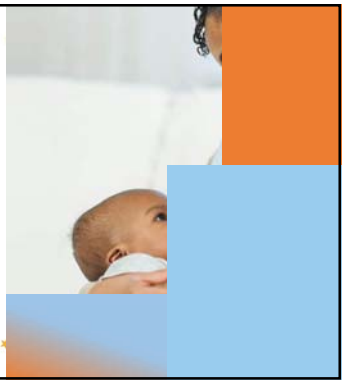
Status of DOL Proposed New Overtime Rule

- Remember that in August 2023, DOL Wage & Hour Division (WHD) published proposed new Overtime rules.
- Salary Basis to be exempt would increase from current $35,568 to approx. $55,000. (And formula to increase every 3 years)
- Will WHD announce Final Rule in 2024??? (More importantly, what should Employers do now, if anything?)

26

Federal 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 Resources

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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Virginia Employers: Reminder on Required Postings, Notices 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

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Questions and Answers!

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This Is for the Best:

An Employer's Guide to the Fair Labor Standards Act & Virginia's Whistleblower Protection Law

Presented by

HARRISON★RICHARDS

This Is for the Best:

An Employer's Guide to the Fair Labor Standards Act & Virginia's Whistleblower Protection Law

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1

Fair Labor Standards Act (FLSA)

- Provides protection for employees.
  - Guaranteed minimum wage for hours worked
  - Overtime pay 1 ½ the regular rate of pay for hours > 40
  - Retention of employee records
- Independent contractors are <u>not</u> afforded these protections under the FLSA.

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Blank Space

- How does the FLSA distinguish an employee from an independent contractor?

- It doesn't . . . the FLSA has a "blank space" when it comes to determining a worker's status

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Call It What You Want

- Until 2021, the DOL had not issued regulations establishing specific criteria for determining a worker's status under the FLSA.
  - Criteria had been developed through case law and informal guidance
  - Focused on the **"economic reality"** of the relationship
  - Six non-exhaustive factors:
    1. Worker's opportunity for profit or loss depending on managerial skill;
    2. Investments by the worker and potential employer;
    3. Degree of permanence of the work relationship;
    4. Nature and degree of control;
    5. Extent to which the work performed is an integral part of the potential employer's business; and
    6. Skill and initiative to perform the work.

4

2021 Was a Fairytale

- DOL adopted a formal independent contractor rule in Jan. 2021
  - Core Factors & Non-Core Factors
    - Two Core Factors
      - Worker's opportunity for profit or loss and the nature
      - Degree of control
    - Three Non-Core Factors
      - Skill required for the work
      - Whether work is part of an integrated unit of production
      - Degree of permanence of the work relationship.
    - Two factors were designated as "core factors" and carried greater weight
    - If the two "core factors" pointed toward the same classification, then the worker should be classified that way.
    - If the two "core factors" pointed in different directions, then the three "non-core factors" should be considered to determine a worker's classification. The 2021 IC Rule made clear, however, that it was highly unlikely that the "non-core factors" could outweigh the probative value of the two "core factors."

5

Core Factors v. Non-Core Factors

- The two core factors carried greater weight
  - If the two "core factors" pointed toward the same classification, then the worker should be classified that way.
  - If the two "core factors" pointed in different directions, then the three "non-core factors" should be considered to determine a worker's classification.
- The 2021 IC Rule made clear, however, that it was highly unlikely that the "non-core factors" could outweigh the probative value of the two "core factors."

6

Time To "Begin Again"

- Jan. 2024 - DOL issued a new rule that seeks to bring a return to the totality of the circumstances approach of the "economic reality" test The DOL's New Independent Contractor Rule
- Six Factor Test
- Became effective on March 11, 2024

7

1. Opportunity for Profit or Loss

- Opportunities for profit or loss based on managerial skill that affect economic success or failure in performing the work.
- Relevant considerations for this factor:
  - Determining or negotiating the charge/pay for the work provided;
  - Ability to accept or decline jobs or choose the order and/or time in which the jobs are performed;
  - Engaging in marketing/advertising to expand the business or secure more work; and
  - Making decisions to hire others, purchase materials and equipment, and/or rent space.
- If a worker has no opportunity for a profit or loss, then this factor suggests that the worker is an employee.

8

1. Opportunity for Profit or Loss (cont.)

- Some decisions that impact pay will not indicate the exercise of managerial skill necessary for independent contractor status.
  - Not Exercising Managerial Skill
    - Deciding to work more hours or take more jobs when the worker is paid at a fixed hourly rate or fixed rate per job because they are simply earning more by working more.
  - Exercising Managerial Skill
    - Worker has the ability to accept or decline certain jobs and the worker is responsible for determining which jobs to pursue and how to allocate their resources and time amongst jobs

9

2. Investments by the Worker & Potential Employer

- Investments that are capital or entrepreneurial in nature
- Capital or Entrepreneurial Investments
  - Investments which generally support an independent business and serve a business-like function, such as increasing the worker's ability to do different types of or more work, reducing costs, or extending market reach.
- Non-Capital or Entrepreneurial Investments
  - Expenditures to perform a job such as costs for tools and equipment necessary for the job and costs unilaterally imposed by an employer on a worker)

10

3. Degree of Permanence of the Work Relationship

- Duration, continuity, and exclusivity of the relationship
- Factor weighs in favor of the worker being an employee
  - Relationship is indefinite in duration, continuous, or exclusive of work for other employers
- Factor weighs in favor of the worker being an independent contractor
  - Relationship is definite in duration, non-exclusive, project based or sporadic due to the worker being in business for themselves and marketing their labor or services to multiple entities

11

4. Nature and Degree of Control

- Potential for the employer's control
- Relevant considerations include whether the potential employer:
  - sets the worker's schedule
  - supervises the performance of the work
  - uses technological means to supervise the performance of the work
  - reserves the right to supervise and/or discipline workers (even if not used)
  - limits the worker's ability to work for others.
- Ability to control prices/rates for services and marketing of services/products provided by the worker are considered indicators of an employment relationship.
- Certain actions taken by a potential employer to ensure compliance with specific laws and regulations do not indicate employer control

12

5. Extent to Which the Work is an Integral Part of the Company's Business

- Focus on whether the potential employer could function without the service performed by the workers.
- When the work performed is critical, necessary, or central to the potential employer's principal business, then this factor weighs in favor of the worker being an employee.

13

6. Skill and Initiative

- Focus on whether the worker uses specialized skills to perform the work and whether those skills contribute to a business-like initiative.
- When a worker depends on potential employer training or does not use specialized skills, then this factor weighs in favor of the worker being an employee.
- Bringing specialized skills to a job alone is not enough to make a worker an independent contractor

14

Additional Factors

- The new rule specifically states that the six factors are not exhaustive
- The DOL suggests that there may be additional factors relevant in determining whether the worker is an employee or independent contractor for purposes of the FLSA, but mentions none specifically.

15

Key Takeaways

- The New IC Rule only impacts the employee v. independent contractor analysis under the FLSA
  - No impact on other federal or state laws under which independent contractor status may be assessed.
- This is now the controlling standard for determining worker classifications under the FLSA
- Employers should:
  - Familiarize themselves with the new rule
  - Consider an audit or privileged review of current independent contractor relationships
  - Handle reclassification of workers delicately

16

Not "Everything Has Changed"

- Minimum Wage & Overtime Pay Requirement
  - The FLSA requires employers to pay non-exempt employees minimum wage and overtime pay of at 1 ½ times their regular pay for hours worked > 40 hours
- Recordkeeping Requirement
  - Every employer with employees subject to the FLSA's minimum wage provisions must post an FLSA poster in a conspicuous place explaining the Act.
  - Certain records must be kept for all non-exempt employees for a minimum of 3 years (DOL outlines records that must be kept)
- Child Labor Restrictions
  - Restrictions on the hours children can work and the type of environment they are allowed to work in
  - Children are not to work during school hours and can't perform hazardous jobs.

17

Exempt v. Non-Exempt

- Exempt Employee
  - Exempt from overtime provisions under the FLSA
  - Meet criteria to be classified as executive, professional, administrative, or outside sales employee because he or she is classified as an executive, professional, administrative, highly compensated, computer or outside sales employee, and meets the specific criteria for the exemption.
  - With some limited exceptions, exempt employees must be paid on a salary basis.
    - Minimum salary of $684 per week or $35,568 annually,
- Non-Exempt Employee
  - Subject to overtime provisions under the FLSA
  - Entitled to overtime pay for all hours worked > 40 in a workweek (as well as any state overtime provisions).
  - May be paid on a salary, hourly or other basis.

18

You Should Know These Exemptions "All Too Well"

- Executive Exemption
  - Primary duty is managing the enterprise or a customarily recognized department or subdivision of the enterprise
  - Regularly direct the work of at least two full-time employees
  - Authority to hire or fire other employees or recommendation is given particular weight
- Administrative Exemption
  - Primary duty is performance of office or nonmanual work directly related to the management or general business operations
  - Exercise of discretion and independent judgment with respect to matters of significance.

19

You Should Know These Exemptions "All Too Well"

- Professional Exemption
  - Learned Professional
    - Primary duty is the performance of work requiring advanced knowledge
      - Work that is intellectual in character and requires the consistent exercise of discretion and judgment.
    - Advanced knowledge must be in a field of science or learning and customarily acquired by a prolonged course of specialized intellectual instruction
  - Creative Professional
    - Primary duty is the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor

20

You Should Know These Exemptions "All Too Well"

- Computer Employee Exemption
  - Primary duty consists of higher-level system-analyst techniques and procedures, higher-level design or testing of systems, higher-level design or testing for operating systems, or some combination of the three
  - Meant for positions such as network analyst, developer and software engineer
  - Not meant for lower-level computer support roles.
  - Must be compensated on a salary basis of not less than the minimum salary requirement or at least $27.63 per hour.

21

You Should Know These Exemptions "All Too Well"

- Highly Compensated Employee Exemption
  - Must be paid a total annual compensation of at least $107,432 on a salary basis.
  - Regularly performs any one or more of the exempt duties of an executive, administrative or professional employee.
- Outside Sales Employee Exemption
  - Primary duty of making sales or obtaining orders for contracts for services or for the use of facilities
  - Salesperson regularly engaged away from the employer's place of business
  - Minimum salary and salary basis requirements do not apply to exempt outside sales employees.

22

"Sparks Fly" When You Misclassify

- Misclassification of non-exempt employees can lead to individual lawsuits, class action lawsuits, and audits by the IRS
- The FLSA provides significant penalties for employers who violate the law, including back pay for unpaid overtime, liquidated damages, and attorney's fees.

23

Virginia's Overtime Law

- Virginia's overtime obligations and exemptions align with those under the FLSA
- Differences between Virginia's Overtime Law and the FLSA
  - Damages for overtime violations in Virginia are not limited to those available under the FLSA.
    - The heightened damages and penalties authorized under the Wage Payment Act remain viable for overtime violations in Virginia, including:
      - Automatic liquidated damages equal to the amount of unpaid wages
      - Pre-judgment interest at 8% per year
      - Possibility of civil penalties of $1,000 for each violation
      - Treble damages for "knowing" violations.
  - Unpaid overtime claims pursued under the Virginia Wage Payment Act can be commenced within three years as opposed to the normal two years under the FLSA (except in the case of a "willful" violation, where the FLSA similarly provides a three-year limitations period).

24

Questions?

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25

Karma Is the Employee That Brings You Down

Presented by

Karma Is the Employee That Brings You Down

Presented by

PAUL★KLOCKENBRINK

1

Drug-Testing

Spider-boy, king of thieves
weave your little webs of opacity

- Keep it simple and remember marijuana is still illegal under federal law

2

Timely Internal Documentation

And I keep my side of the street clean
You wouldn't know what I mean

- Creating timely critical documentation can avoid bad karma

3

Don't Abuse the Process

Trick me once and trick me twice
Don't you know cash ain't the only price?
It's coming back around

- Employers don't get to be the judge, jury and executioner

4

Severance Agreement?

Karma is the breeze in my hair on the weekend
Karma's a relaxing thought

- How much time is enough time for the review of the agreement?

5

Supervisor Training

You're terrified to look down. cause if you dare. you'll see the glare of everyone you burned just to get there. it's coming back at you

- No training = bad optics and potential liability

6

Investigation Follow-up

Karma's on your scent like a bounty hunter
Karma's gonna track you down
Step by step from town to town

- The easiest and cheapest insurance you will ever buy

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Investigations

Sweet like justice, karma is a queen

- Investigation Miscues
  - Its all in the name
  - The facts matter
  - Retaliation
    - The timing really does matter

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8

FMLA / ADA and Karma Vibe Like That

- When does FMLA really end?

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9

What Are Final Paychecks

Cause karma is the thunder
Rattling your ground

- Sacrosanct

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10

Questions?

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11

Preventing the Next Great American Dynasty:

The State of Non-Competes in Virginia

Presented by

RYAN★STARKS

Preventing the Next Great American Dynasty:

The State of Non-Competes in Virginia

Presented by

RYAN★STARKS

1

What you're thinking . . .

- "Why should I care about non-compete clauses?"
- "When should I care about a non-compete clause?"
- "Stop it with all of these rules . . . I just want to protect my organization when an employee leaves."

2

3

The Federal Proposal – A Broad Ban

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4

The Federal Proposal – A Broad Ban

§ 910.2 Unfair methods of competition.

(a) *Unfair methods of competition.* It is an unfair method of competition for an employer to enter into or attempt to enter into a non-compete clause with a worker; maintain with a worker a non-compete clause; or represent to a worker that the worker is subject to a non-compete clause where the employer has no good faith basis to believe that the worker is subject to an enforceable non-compete clause.

(b) *Existing non-compete clauses.*

(1) *Rescission requirement.* To comply with paragraph (a) of this section, which states that it is an unfair method of competition for an employer to maintain with a worker a non-compete clause, an employer that entered into a non-compete clause with a worker prior to the compliance date must rescind the non-compete clause no later than the compliance date.

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The Federal Proposal – A Broad Ban

(b) *Non-compete clause,* as used in this part:

(1) *Means* a contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer.

with the employer. For example, the following types of contractual terms, among others, may be *de facto* non-compete clauses:

(i) A non-disclosure agreement between an employer and a worker that is written so broadly that it effectively precludes the worker from working in the same field after the conclusion of the worker's employment with the employer.

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6

Lots of chatter . . . but no action

- Federal Trade Commission's non-compete ban remains unfinalized.
- For now, a patchwork of rules and regulations:
  - Threshold Question: To whom does the restriction apply?

7

"Non-Compete" is a Broad Term

- The term "non-compete" is used frequently.
- But we need to distinguish between different kinds of "non-competes"
  - Covenants not to compete between businesses.
    - I sell you my repair shop and enter into a contract that prohibits me from opening a repair shop across the street.
  - No poaching agreements.
    - I sell you my repair shop and enter into a contract that prohibits me from hiring my former mechanics to come work for me across the street.
  - Restrictions between employers and employees (our focus).
    - I enter into a contract with my mechanics that prohibits them from working at a different repair shop.

8

"Non-Compete" is a Broad Term

- As a general rule, "the more restrictive legal standard governing employer-employee non-compete clauses does not apply where a covenant binds two business entities." *Lumber Liquidators, Inc. v. Cabinets To Go, LLC*, 415 F. Supp. 3d 703, 715 (E.D. Va. 2019).

9

When Non-Competes are a Non-Starter

"Low Wage" Employees – the **$73,320** question (as of January 16, 2024)

10

When Non-Competes are a Non-Starter

- Avoid non-competes that are overbroad or overbearing – the same as it ever was.
- A non-compete that reasonably restricts the former employee from engaging in a similar job **function**, within a defined **geographic area**, and for a designated **period of time**, is likely to be upheld and enforced by Virginia courts.

11

When Non-Competes are a Non-Starter

- Avoid non-competes that are overbroad or overbearing – the same as it ever was.
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12

Back to Basics: Why the Need?

> As noted above, the most commonly cited justifications for non-compete clauses are that they increase an employer's incentive to make productive investments—such as investing in trade secrets or other confidential information, sharing this information with its workers, or training its workers—because employers may be more likely to make such investments if they know workers are not going to depart for or establish a competing firm.

13

A Balancing Act

- Historically companies have relied on non-competes to protect institutional knowledge and confidential information.
- Given that non-competes are now under siege how can your organization protect confidential information?
- What practical steps can your organization take to protect some of its most valuable assets and information?

14

A Balancing Act

- Employees will knowingly or unknowingly leave your organization with your confidential data still in their possession.
- Surveys have found a third of employees admit to taking data when leaving their employer.
- USB storage devices and personal cloud accounts continue to be the most common methods for taking information.
- Lax enforcement and boilerplate policies can be used to show that the employer failed to protect certain information.

15

A Balancing Act

- Employment & NDA Agreements
  - NDAs that are unusually broad in scope may function as *de facto* non-compete clauses.
  - NDAs may prevent workers from disclosing or using certain information, but should not prevent workers from working for a competitor or starting their own business altogether.
- Restrict use of cloud services.
- Separate work and "play."

16

Questions?

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17

All You Are Is Mean:

The Impact of Microaggressions on Recruitment and Retention

Presented by

All You Are Is Mean:

The Impact of Microaggressions on Recruitment and Retention

Presented by

PATRICE LEWIS

1

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Table of Contents

- What is a Microaggresion?
- Types of Microaggresions
- Microaggression Classifications
- Name that Microaggression
- Impacts of Microaggressions on the Workplace
- How to Address Microaggresions

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3

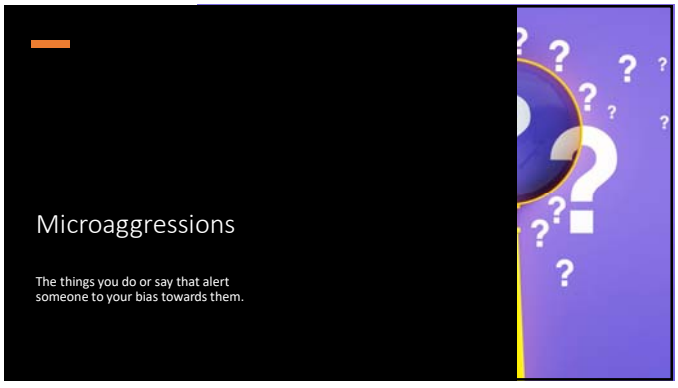
What is a Microaggression

4

What is a Microaggression?

Verbal, behavioral or environmental slights, whether intentional or unintentional, that communicate hostile, derogatory or negative attitudes toward certain groups of people based on their status.

5



Microaggressions

The things you do or say that alert someone to your bias towards them.

6

Types of Microaggresions

7

Types of Microaggressions

Verbal

Behavioral

Environmental

8

Types of Microaggressions

Verbal: A verbal microaggression is a comment or question that is hurtful or stigmatizing to a marginalized group or person. For example, saying, "You're so smart for a woman."

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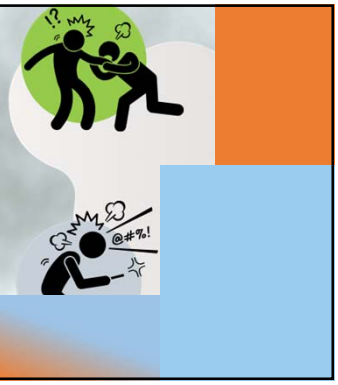
9

Types of Microaggressions

Behavioral: This involves behaving in a way that is discriminatory or otherwise hurtful to a marginalized person or group. For example, when a waiter or bartender ignores a transgender person and instead serves a cisgender person, someone whose biological sex matches their gender identity.



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Types of Microaggressions

Environmental: An environmental microaggression is when a subtle discrimination occurs within society, for example, when a group excludes certain religious groups from an activity.

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11

Microaggressions

Deliberate → Unconscious

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12

Common Microaggressions

- Where are you from? No, really, where are you (your people) from?
- You're always changing your hair! I never know what you are going to look like!
- This is just a phase; you aren't really gay.
- You're so articulate!
- Racism doesn't exist. We live in a colorblind society.
- You're prettier when you smile!
- Okay, Boomer!

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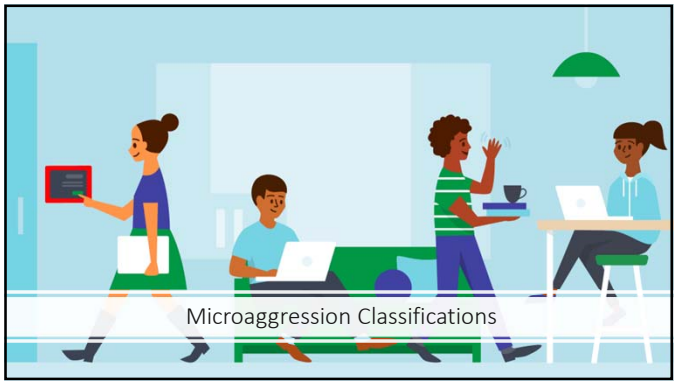

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Microaggression Classifications

Microassaults

Microinsult

Microinvalidation

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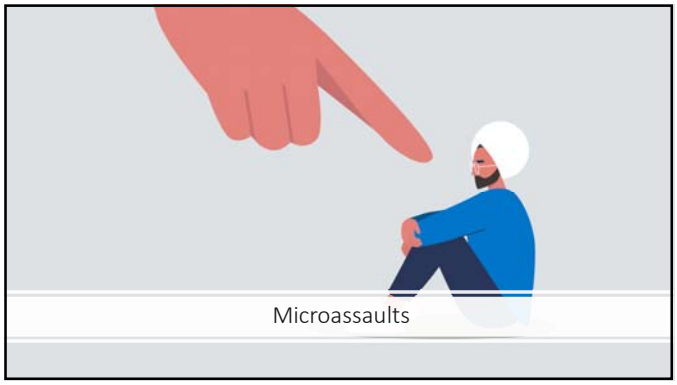

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Microassault

A microassault is explicit derogations characterized primarily by verbal or nonverbal attacks meant to hurt the intended victim:

- Name calling
- Avoidant behavior
- Purposeful discrimination

17

18

Microinsult

Communications that convey rudeness and insensitivity meant to demean a person's heritage or identity.

- Subtle snubs that clearly convey a hidden insult or message.
- Can be deliberate or unconscious.

19

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Microinvalidation

Communications that exclude, negate, or nullify the psychological thoughts, feelings, or experiences of another.

21

22

Example 1

James Bond, an associate at a prestigious law firm, is quickly moving up the ranks and getting noticed for his hard work and dedication. James and his wife Tracy do not have any children, but quickly James learns that Tracy is pregnant with their first child. James is excited to take on the role of "father," and he excitedly tells his colleagues and his mentor, Kevin Bacon.

Tracy eventually gives birth to a healthy baby boy, James, Jr. James lets the firm know and also tells them he will be taking three weeks off from work for paternal leave. Kevin, his mentor, calls James and cautions him about taking three weeks off. He tells James to make sure he doesn't let his work lapse, stating that "when I was a new father, I took off three days of work and then got right back to it." He also mentions how James' is being considered for partner and how "you don't want time off to hinder your chances."

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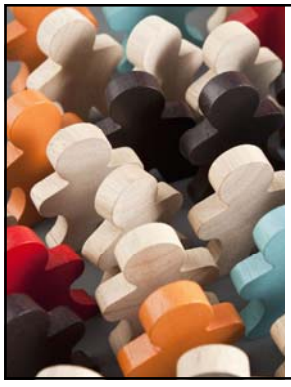

Microinsult

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24

Example 2

Salma Hayek, a woman of Hispanic descent, graduated Summa Cum Laude from Harvard with a degree in economics while also excelling in track as a sprinter. She applied to several different companies, and ended up landing her dream job at AECOM where she is the direct report to Miranda Priestly, Chief Strategy Officer.

On Salma's first day, Miranda mentions to Salma how she works her associates hard and doesn't believe in "diversity hires" but that people should be hired based on "merit." As Salma works for Miranda, Miranda constantly butchers Salma's name, and causally mentions in conversation the need to "protect our borders" and "everyone should learn how to speak English" when they are in the United States. Salma notices that Miranda always comments on how good Salma's English is and how she seems to be the "exception from the others." Miranda comments to Salma in passing that Miranda thinks one of her colleagues, Esperanza, "is here illegally," and Miranda asked Esperanza for her birth certificate.

25

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- Purposeful discrimination

27

Example 3

Justine is hired by this company as a manager where she oversees several different employees, many of whom are older than her. One employee in particular, Archie Bunker, gives her a hard time at work, often refusing to listen to her direction, commenting how long he has been at the office and how seasoned he is at doing his job.

Justine tries to assert her authority. However, Archie often refuses to listen to her direction unless George Jefferson, her superior, tells Archie what to do. Justine complains to George that she believes she is being treated unfairly by Archie. George comments to Justine that this is "just who Archie is," and that he "means no harm," that "he's a product of his generation," and that it's "not a big deal."

28

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A microassault is explicit derogations characterized primarily by verbal or nonverbal attacks meant to hurt the intended victim:

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Impacts of Microaggressions on the Workplace

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Impacts of Microaggressions

Work Morale

Work Performance

Employee's Health

Workplace Environment

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Impact on Work Morale
A Harvard Business Review study found that just 3% of Black professionals reported feeling ready to return to in-person work as compared to 21% of their white peers, one reason being that they did not want to endure microaggresions they typically face in the work setting.
Research: The Real-Time Impact of Microaggressions (hbr.org)
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Impact on Work Performance
While microaggressions are seemingly small and insignificant, they often cause victims to feel like they are not valued and respected at work. Therefore, their productivity and creativity decrease, and their performance plummets.

35


Impact on Employee Health
Studies have shown that microaggessions have a significant impact on employee's mental, motional and physical health. Overtime, employees create increased risk for the onset of traumatic stress symptoms, increased rates of depression, physical concerns like headaches, high blood pressure, and difficulties with sleep.
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Impact on Workplace Environment

Microaggressions can negatively impact careers as they are related to increased burnout and less job satisfaction and require significant cognitive and emotional resources to recover from them.

This can cause increased tension at work and difficultly in recruiting and retaining talented individuals if they continue to go unaddressed. In fact, in another Harvard Business Review study, they found that 7 in 10 workers said they would be upset by a microaggression, and half said the action would make them consider leaving their job.

Recognizing and Responding to Microaggressions at Work (hbr.org)

37

How do you address microaggressions?

38

Being More Aware of Microaggressions

39

Addressing Microaggressions

1. Figure out when is the right time to respond.
2. Speak up in a non-confrontational manner.
3. Base business decisions on facts and minimize unconscious bias in the decision-making process.
4. Listen, and avoid being defensive when someone states that your actions or comments are construed as microaggressions.
5. Create an inclusive workplace environment that promotes positive company culture, respectful behavior, and conscious and careful articulation of thoughts.

40

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Questions?

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42

Cause Baby, Now We've Got Bad Blood, so We Are Never Ever Getting Back Together, but We'll Make Sure You Go Out in Style:

Navigating Employee Terminations

Presented by

Cause Baby, Now We've Got Bad Blood, so We Are Never Ever Getting Back Together, but We'll Make Sure You Go Out in Style:

Navigating Employee Terminations

Presented by

CATE★JACKSON

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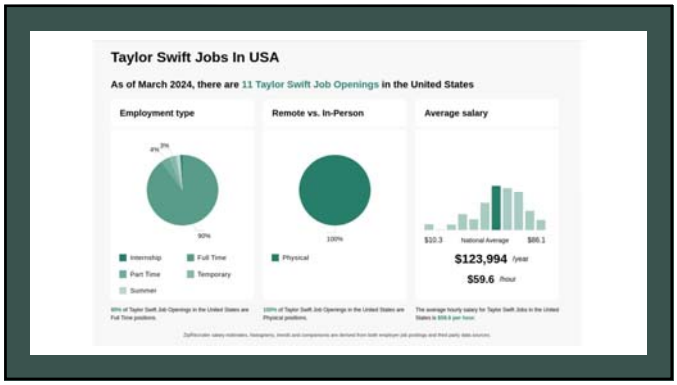

2

SETLIST

- Before you've got Bad Blood– handling employee issues before termination is necessary
- We Are Never Ever Getting Back Together– termination best practices
- Let them go out in Style – post-termination considerations and pay laws

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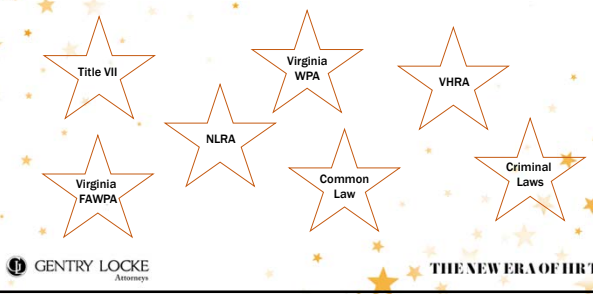
Why are terminations *Delicate*?



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4

Before You've Got *Bad Blood*

- Good hiring practices are key.
- If it's not a good fit, terminate earlier rather than later.
- Give employees their best opportunity to succeed.

Maybe instead of the Eras Tour, this presentation should be called the RESPECT Tour…

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5

Before You've Got *Bad Blood*

- Set clear expectations for employees
- Follow your own policies and be consistent
- Provide regular feedback, both positive and negative
  - A termination is never the first time an employee should hear about performance issues.

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Before You've Got *Bad Blood*

- Performance Improvement Plans
  - Be thoughtful
  - Document and sign
  - Include:
    - General concerns
    - Specific ways employee is failing to meet expectations
    - Good/positive feedback
    - Inform employee their job is in jeopardy
    - Specific actions to include
    - Timeframe for improvement
  - Allow employee the time and tools to improve
- Demotions or reassignment
- Voluntary resignation

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7

We Are Never Ever Getting Back Together

- Consider:
  - Severance and separation agreements
  - Is the individual eligible for rehire?
  - Are you going to provide a reference? What type?
  - When is the individual expected to leave and how?
  - Manage security concerns – passwords, computer and equipment access, keys to secure areas, etc.
  - Who will take on the individual's work product in the short-term?
  - Any violence concerns?

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We Are Never Ever Getting Back Together

- Face the music – try to have an in-person conversation
- Consider a script
- What is the best day/time of day for your company to terminate?
- Who should be present?
- What if an employee tries to record the conversation?

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9


We Are Never Ever Getting Back Together – Immediate Termination
Violence
Putting Others at Risk
Violating the Law
Damaging the company's reputation
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10


Going out in *Style*
• How do you tell co-workers? Should you?
• Reflect and conduct a post-mortem
• Any additional documentation?
• Maintain employee records for seven years
NOT A LOT GOING ON

11

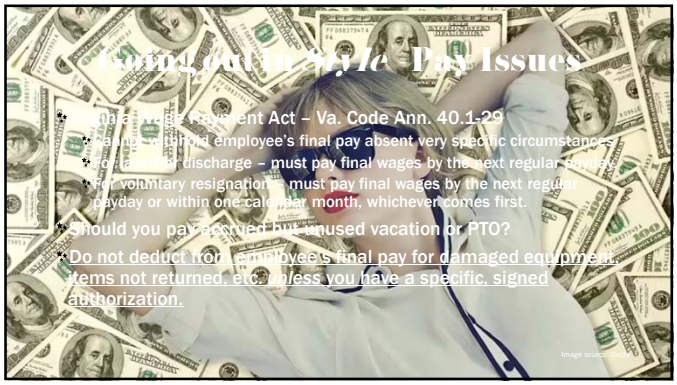

A word about documentation…
"I've got a blank space, baby…and I'll write your name."
Signature
Date

12

Documentation: Focus on Behavior

- "BAD ATTITUDE" – What did the employee say or do?
- "DISRESPECTFUL" – What action?
- "SARCASTIC TONE" – What was said?
- "POOR PERFORMANCE" – What exactly was inadequate? Be specific about failure to meet specific goals or expectations and tie the comment to job requirements.
- Avoid labels:
  - "Too emotional" vs. lost control and yelled at co-workers
  - "Rigid" or "Resists Change"

13



Going Out in Style - Pay Issues

- Virginia Wage Payment Act – Va. Code Ann. 40.1-29
  - Cannot withhold employee's final pay absent very specific circumstances
  - For termination or discharge – must pay final wages by the next regular payday
  - For voluntary resignation – must pay final wages by the next regular payday or within one calendar month, whichever comes first.
- Should you pay accrued but unused vacation or PTO?
- Do not deduct from employee's final pay for damaged equipment, items not returned, etc. *unless* you have a specific, signed authorization.

14

"Look what you made me do."

-Taylor Swift (also, your former employee who is disgruntled and posts negative comments about the company online)

What should you do?

A. Do nothing.
B. Respond on the same platform.
C. Send a cease and desist letter.
D. Sue them for defamation.
E. Write a song about them with scathing lyrics that would rival Taylor's songs about her old boyfriends.
F. It depends.

15

Questions?

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16

Cruel Summer:

DEI in the Workplace

Legal Update & Practical Advice

Presented by

Cruel Summer:

DEI in the Workplace – Legal Update & Practical Advice

Presented by

CARLOS★HOPKINS
TODD★LEESON

1

Key Topics & Take Aways

- Affirmative Action Decision & Impact on Employers
- Fallout from the Decision
- Legal Challenges Facing Employers
- Key Takeaways

2

Affirmative Action Decision-Background

- ***Students for Fair Admissions, Inc. v. President and Fellows of Harvard College***, 600 U.S. 181, 143 S.Ct. 2141, 216 L.Ed. 857 (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.

3

Affirmative Action Decision-Background

- 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

4

Affirmative Action Decision-Background

- 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.

5

Affirmative Action Decision—Immediate Fallout

- 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.

6

Affirmative Action Decision—Immediate Fallout

- 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 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 2023 challenging certain hiring practices at the firms aimed at increasing the firms' diversity.

7

LEGAL CHALLENGES FOR EMPLOYERS IN A POST-*SFFA* WORLD

8

SFFA Decision and Its Impact on Employers

- When discussing the use of race in the employment context, we look to Title VII of the Civil Rights Act of 1964.
- Currently, the *SFFA* decision has remained primarily tailored to higher education. HOWEVER,
- 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.

9

SFFA Decision and Its Impact on Employers

- *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. Steelworkers noted the following about the proposed plan:
  - 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

10

SFFA Decision and Its Impact on Employers

- 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

11

SFFA Decision and Its Impact on Employers

- The *SFFA* decision has spurred a number of challenges across the country to numerous programs designed to assist underrepresented groups.
- Proponents of the challenges have taken the rationale from SFFA and begun applying it to the employment context, challenging government benefit programs, private company benefit programs for minorities and company DEI initiatives.

12

SFFA Decision and Its Impact on Employers

- **Federal Benefits Programs**
  - *Nuziard v. Minority Bus. Dev. Agency*, 2024 U.S. Dist. LEXIS 38050 (U.S.D.C. for the Northern Distr. Of Texas, March 5, 2024)—Court sided with White plaintiffs in ordering the agency's programs open to all races.

Private Funds Programs

- *Am. All. For Equal Rts. v. Fearless Fund Mgmt., LLC*, 2023 U.S. App. LEXIS 26854 (11th Cir., September 30, 2023)—Court granted injunction pending appeal against private company which operated a small business grant program open only to Black women.

13

SFFA Decision and Its Impact on Employers

Reverse Discrimination and DEI Initiatives

- *Duvall v. Novant Health Inc.*, 2024 U.S. App. LEXIS 5868 (4th Cir. March 12, 2024)
  - 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.

14

SFFA Decision and Its Impact on Employers

***Duvall*, (cont.)**

- 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.
- The 4th Circuit upheld the District Court's rulings as to discrimination and damages for back pay and front pay, but vacated and remanded the punitive damages award.

15

SFFA Decision and Its Impact on Employers

- **Forced Lateral Transfers**
  - On June 30, 2023, the U.S. Supreme Court granted certiorari to consider the question: "Does Title VII prohibit discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage?" –*Muldrow v. City of St. Louis*, 2023 U.S. LEXIS 2826
  - The case from the 8th Circuit would resolve a split among the Circuits but could have broader implications impacting day-to-day decisions of employers such as performance, discipline and work assignments among others.

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Employer Takeaways

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Key Takeaways for Employers

- DEI programs are still legal. Neither the SFFA decision nor any other court decision has banned DEI initiatives. However, these programs will continue to face intense scrutiny and employers must carefully review the language used in adopting their programs.
- Be prepared for increased litigation over hiring and termination decisions.
  - There is a close relationship between the arguments used in Title VII employment discrimination cases and Title VI (Remember J. Gorsuch's concurrence)

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Key Takeaways for Employers

- 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."
  - Avoid practices that propose preferences (or exclusions) based on protected classes.

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Key Takeaways for Employers

- Communications to employees about DEI efforts should focus on "inclusion", not "exclusion".
  - Provide every employee the opportunity to be heard.
  - Promote the value-add to your organization of DEI efforts
  - Avoid tying compensation to diversity metrics
- Make sure your DEI coordinator works closely with your HR Director and Legal Counsel
  - Consider issues of attorney-client and work product privilege in conducting an assessment of existing programs
  - Track important legal changes
  - Reviews of all public documents for compliance

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Questions?

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THANK YOU FOR ATTENDING!

Reach out to us if we can be of assistance.

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