# The Tougher Topics of Employment Law
May 6, 2021
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# THE TOUGHER TOPICS OF EMPLOYMENT LAW

May 6, 2021

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# THE TOUGHER TOPICS OF
# EMPLOYMENT LAW

## Agenda

| | |
|---|---|
| 8:30 A.M. | Registration and Login Time Open |
| 8:55 A.M. | Welcome and Course Objectives<br>*Sandra H. Perry, Program Chair* |
| 9:00 A.M. | FMLA Use and Abuse<br>*Gregory W. Guevara* |
| 9:45 A.M. | Non-Competes and Updates<br>*Scott S. Morrisson* |
| 10:30 A.M. | Coffee Break |
| 10:45 A.M. | Navigating the ADA Interactive Process and Reasonable Accommodation Requirements<br>*Tami A. Earnhart* |
| 11:30 A.M. | Wage Payment and Wage-Hour Mistakes<br>*Robert J. Hunt* |
| 12:15 P.M. | Lunch Break |
| 1:15 P.M. | Pregnancy Discrimination and Accommodation<br>*Kathleen A. DeLaney* |
| 2:00 P.M. | Diversity, Equity, Inclusion Initiatives and Legal Boundaries<br>*Shelley M. Jackson, Kate E. Trinkle* |
| 2:45 P.M. | Afternoon Break |
| 3:00 P.M. | Retaliation<br>*Nathan A. Baker* |
| 3:45 P.M. | Religious Discrimination and Accommodation<br>*Bonnie L. Martin* |
| 4:30 P.M. | Program Adjourns |

May 6, 2021

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May 6, 2021

**Sandra H. Perry**
Bose McKinney & Evans LLP, Indianapolis

*Sandra Perry* is a partner in the Labor and Employment Group, representing national, regional and local clients in labor and employment related matters and litigation. She has extensive experience counseling, training and assisting employers in all aspects of compliance with federal and state employment laws, including discharge, harassment claims and investigations, disability and reasonable accommodation issues, Family and Medical Leave Act compliance, wage and hour audits and compliance, non-compete agreements, trade secrets protection, executive compensation and severance, alternative dispute resolution, personnel policies and procedures, OSHA investigations, state law wage claims, common law claims, immigration, and other federal and state employment laws. Sandra represents employers in litigated matters in federal and state court and before federal and state administrative agencies. She also represents management in traditional labor law matters, including union avoidance, unfair labor practice investigations and litigation, and union representation proceedings. Sandra is a member of the BME Executive Committee and Diversity Committee.

While in law school, Sandra clerked for a large law firm and the National Labor Relations Board. Sandra began her legal career clerking for the Honorable John G. Baker of the Indiana Court of Appeals. Prior to pursuing her law degree, Sandra worked for several international companies in Australia, specializing in international trade and personnel recruitment. Sandra is admitted to practice in all federal and state courts in the State of Indiana.

Sandra has spoken on various employment law issues including workplace violence, harassment, recordkeeping, handbook policies, social media, FMLA/ADA, wage-hour, and workplace investigations. She has spoken on labor and employment related topics for the Indiana Chamber of Commerce, Lorman Education Services, the Indiana Manufacturers Association, Indianapolis Motorsports Association, Indiana Livestock, Forage, and Grain Forum, Indiana Bankers Association, Eastern Indiana Human Resources Association, American Public Power Association Business and Financial Forum, FlashPoint HR, CEO-Net, CFO and HR Strategy Forums, and various other industry associations. She has written several articles about labor and employment issues, including "Recent Developments Under the FMLA." (*Hoosier Banker*, 2003); "Time Out: Deciphering the Department of Labor's new regulations for white collar exemptions." (*Smart Business Indianapolis*, 2004); "Mentally Ill Employees Who Threaten Co-workers are Not Protected by the ADA," (*Indiana Manufacturers Association Newsletter*); and various articles on the FLSA published in *Hoosier Banker* and *The Indianapolis Business Journal*. She co-authored "Model Employee Policies for Indiana Employers," for the Indiana Chamber of Commerce (5th Ed., 7th

Ed., and all updates 2007-17).

Indiana University Maurer School of Law – Bloomington (J.D., *magna cum laude*, 2000)
The University of Memphis (B.A., *summa cum laude*)

*The Best Lawyers in America®* 2016-2021; *Chambers USA* top ranking in labor and employment; Staff editor for the *Indiana Law Journal*

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## Profile

Greg Guevara is a partner in the Labor and Employment Group at Bose McKinney & Evans. As a highly responsive business advisor and employment litigator, Greg helps his clients by understanding their objectives and offering practical legal advice tailored to their unique situations and desired outcomes. He provides aggressive and ethical advocacy to a broad range of clients, including privately held businesses, non-profit organizations, and national companies, as well as executives, physicians, and other professionals.

He concentrates his practice on labor and employment law and litigation, including:

- Non-competition, non-solicitation and confidentiality agreements
- Emergency injunctions
- Defense of discrimination/EEO claims
- Wage/hour compliance and litigation
- Disability/reasonable accommodation
- FMLA/leaves of absence
- Sexual harassment and workplace investigations
- Severance and executive employment agreements
- Personnel policies/employee handbooks
- Reductions-in-force
- Union avoidance, unfair labor practices and collective bargaining

Greg practices in the federal and state courts in Indiana and Ohio, federal and state agencies (EEOC, NLRB, ICRC, IOSHA, etc.), and other jurisdictions as needed.

He began his law career with Bose McKinney & Evans then practiced with the Columbus, Ohio office of Jones Day. Before returning to BME in August 2006, he spent seven years working as an executive for Reliant (formerly GCM), an international Christian mission organization based in Orlando, Florida. His experience in private practice, board governance and non-profit management gives him the ability to provide practical guidance and sound management advice to businesses dealing with a full range of employment-related issues.

## Education

University of Michigan Law School (J.D., *cum laude*, 1992)
University of Michigan (B.A. with high honors and high distinction in political science, 1989); Member, *Phi Beta Kappa*

## Honors / Awards

*Best Lawyers®* 2020 Indianapolis Litigation – Labor and Employment Lawyer of the Year*; The Best Lawyers in America®* 2011-2020; *Chambers USA* 2010-2020 (Labor and Employment-Indiana); *Indiana Super Lawyers®* 2013-2017 (Employment Litigation: Defense, 2019-2020; Employment and Labor Law, 2013-2017)

## Representative Matters

- Successfully defended three-year, multi-city union organizing campaign by national service employees union against Indianapolis-based commercial cleaning contractor (featured in *The Devil at Our Doorstep*, by David A. Bego).
- Won $3.5 million judgment on breach of contract claim on behalf of regional orthopedic device distributor.
- Secured seven-figure judgment against former CEO of credit union for fraud on a financial institution.
- Obtained preliminary injunction and six-figure monetary recovery against former employees of regional company who left to work for competitor in violation of their non-compete agreements.

- Secured permanent injunction against former account executive of national automotive manufacturing distributor for breach of non-compete agreement.
- Won non-compete/trade secret case against key employee for theft and competitive use of critical business information.
- Won preliminary injunction hearing in non-compete case on behalf of former executive of national company sued for breach of contract and unfair competition.
- Successfully defended injunction lawsuit seeking to shut down former franchisee of national home-based senior care franchise.
- Successfully opposed motion for conditional certification in FLSA collective action lawsuit filed by seven former employees of regional financial services company.
- Won summary judgment in class action wage claim under Indiana law.
- Prevailed in collective bargaining negotiations resulting in union abandoning the bargaining unit.
- Represented Indianapolis-area church in multi-fatality bus crash incident.
- Prevailed in multiple federal and state discrimination lawsuits through summary judgment.
- Represented multiple employers in defense of wage/hour audits by the U.S. Department of Labor.
- Secured dismissal of unfair labor practice case involving alleged unlawful refusal to hire 16 union “salts.”

## Appearances / Publications

Drafting Effective and Enforceable Employment Contracts

The Art of Crafting Enforceable Non-Competition Agreements

On Topic Video – Employment Non-Compete Agreements

## Appointments / Memberships

Chairman, GCC Foundation (2017-present)
Elder and Chairman of Governing Board, Grace Church (2011-2015)
Chairman and Director, Reliant (formerly Great Commission Ministries), Orlando, Florida (2007-2014)
Director, Neighborhood Christian Legal Clinic, Indianapolis, Indiana (2009-2010)
Advisory Board Member, Safe Families of Indiana, Indianapolis, Indiana (2007-2008)

## Admissions

Indiana, Ohio

# Scott S. Morrisson

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Mr. Morrisson counsels clients and litigates disputes involving a wide range of civil and commercial litigation matters. Particular areas of focus include employment law, business and contract disputes, corporate governance and shareholder disputes, banking liability, insurance coverage issues, personal and business torts, and ESOP related litigation. Mr. Morrisson has served as lead counsel in numerous jury trials, bench trials, preliminary injunction hearings, and arbitrations in state and federal courts and arbitration bodies throughout the country, including Indiana. He routinely resolves cases through motion practice and mediation as well.

In addition to litigating, Mr. Morrisson frequently represents individuals and employers in negotiating, drafting, and evaluating employment, non-compete, non-solicitation, confidentiality and trade secret, and other related agreements. Mr. Morrisson is a Board Member of the Seventh Circuit Bar Association. He has also been active in firm management, having served on the firm's Executive Committee and as the Litigation Practice Chair.

Education: Indiana University School of Law, Indianapolis, Indiana (J.D., cum laude, 1987); Hanover College, Hanover, Indiana (B.A., With Distinction, 1984)

## TAMI EARNHART

Tami Earnhart is a partner in the Labor and Employment Group and Health Care Group. She represents employers in all aspects of employment and labor law, including discrimination and other litigation, claims filed with administrative agencies, and labor arbitrations. She helps employers avoid employment disputes, when possible, and advises companies in making personnel decisions and creating policies in compliance with state and federal laws, including FMLA and affirmative action policies.

Tami frequently trains boards, human resources professionals, managers and non-management employees on issues such as discrimination, harassment, discipline and discharge, hiring practices, and FMLA compliance. She also regularly defends employers in discrimination, wage and hour, and other litigation before state and federal courts; claims filed with administrative agencies such as the Equal Employment Opportunity Commission and the Indiana Civil Rights Commission; and labor arbitrations.

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Prior to law school, Rob Hunt worked various jobs in the areas of retail, banking, manufacturing, manual labor, restaurant, and retail. For his entire legal career, Rob Hunt has practiced almost exclusively in the area of wage and hour law. Through individual, collective and class action lawsuits, Rob has represented tens of thousands of employees and recovered millions of dollars in unpaid wages for those employees.

Rob graduated from the Indiana University Robert H. McKinney School of Law and was admitted to the Indiana Bar in 2012 and to the Kentucky Bar in 2015. Rob is admitted to practice in the United States District Courts for the Southern and Northern Districts of Indiana, the Northern District of Ohio, the Western District of Kentucky, and the United States Court of Appeals for the Seventh Circuit. From January 2014 to February 2017, Rob was an attorney with Gibbons Legal Group, P.C. where his practice focused exclusively on employment wage and hour cases. In February 2017, Declarant opened his own firm, The Law Office of Robert J. Hunt, LLC.

Rob's father, Robert F. Hunt, joined his practice in 2019. Rob lives in Carmel with his wife Meghan and their two children, Robby and Eleanor.

**Kathleen A. DeLaney** is the Managing Partner of DeLaney & DeLaney LLC, an Indianapolis firm handling civil litigation, contract negotiation, and employment-related matters. Kathleen started the firm in January 2002 with her mother, Ann, and has since earned a strong record of success representing individuals who face discriminatory treatment in the workplace. Best Lawyers and Indiana Super Lawyers have repeatedly recognized Kathleen and DeLaney & DeLaney LLC for their work in employment litigation. Kathleen is also a member of the American Law Institute and the Board of Visitors of the Indiana University Maurer School of Law. Outside of work, Kathleen enjoys spending time with her three children, playing tennis, and the daily New York Times crossword puzzle.

Kathleen is a member of the Bars of the Supreme Court of the United States, United States Court of Appeals for the Seventh Circuit, United States District Court Northern District of Indiana, United States District Court Southern District of Indiana, State of Indiana, and State of Illinois. She holds a Bachelor of Science in Foreign Service from Georgetown University and a Juris Doctor from the Indiana University Maurer School of Law-Bloomington. Kathleen served as a Foreign Service Officer for the U.S. Department of state from 1991 to 1993, and after law school, she clerked for U.S. District Judge David F. Hamilton of the Southern District of Indiana, now a Circuit Judge on the U.S. Court of Appeals for the Seventh Circuit.

**Emma DeLaney Strenski** is a Law Clerk at DeLaney & DeLaney LLC and a rising second-year law student at the Indiana University Maurer School of Law. Emma is a joint degree student and is also pursuing a Master of Arts in Russian and Eastern European Area Studies. Emma is an associate on the Indiana Journal of Global and Legal Studies and participated in the Sherman Minton Moot Court Competition in the fall of 2020. Emma earned a Bachelor's Degree in History and International Studies (Global Security Track) and a Certificate in European Studies from the University of Wisconsin-Madison. Before law school, she also lived and worked in Sarajevo, Bosnia and Herzegovina, on a Fulbright U.S. Student Research Grant in 2018-2019. In her free time, she likes to scrapbook and craft, and play all kinds of sports.

**Shelley M. Jackson**

Shelley M. Jackson is a partner in Krieg DeVault LLP's Health Care and Labor and Employment practice groups. She concentrates her practice in the areas of pharmaceutical regulatory compliance, health care professional license defense, data privacy and security, and employment law on behalf of employers of all sizes. Shelley brings a diverse set of professional experiences to her work, including time spent in both a law firm setting and in-house as an assistant general counsel and chief privacy officer for a multi-national corporation.

Whether providing day-to-day compliance advice, navigating disputes, or representing clients in high-stakes legal or regulatory matters, Shelley strives to combine broad substantive expertise with cost-effective, practical strategies. She routinely advises clients on regulatory compliance matters involving various state and federal regulatory frameworks and administrative bodies, including the Indiana Professional Licensing Agency, U.S. Department of Labor, U.S. Office of the Inspector General, and U.S. Drug Enforcement Administration. She is also a seasoned litigator with more than a decade of risk management and litigation experience.

**Kate E. Trinkle**

Kate Trinkle is an Associate in the firm's Labor and Employment Practice Group. Ms. Trinkle devotes her practice to defending employers of all sizes against employment-related matters such as discrimination and retaliation, wage and hour, harassment, family and medical leave, and restrictive covenants. Ms. Trinkle advises clients on various complex human resource issues and conducts harassment and management training sessions. Ms. Trinkle also drafts and revises employment agreements, independent contractor agreements, severance agreements, non-compete and non-solicitation agreements, employee handbooks, and policies and procedures.

Ms. Trinkle serves the firm's clients across diverse industries, including health care, financial institutions, and business services. Ms. Trinkle also assists clients with emerging employment law issues, including COVID-19 and legislative developments with hemp, cannabis, and marijuana.

**Nathan A. Baker**
Barnes & Thornburg LLP, Indianapolis

*Nathan Baker* represents employers in virtually every aspect of employment law, with a focus on employment litigation, day-to-day counseling and traditional labor issues. Regardless of the matter at hand, Nathan seeks to protect his client's primary concerns and bottom line by providing solutions that streamline utilitarian approaches to problem solving.

Nathan has litigated cases in multiple jurisdictions covering the gamut of federal and state employment issues, including wage and hour investigations and audits, matters before the EEOC and state civil rights agencies, court actions alleging discrimination, harassment and wrongful termination, as well as matters involving the ADA, ADEA, FMLA and ERISA. Given the ever-changing landscape of employment law, Nathan emphasizes proactive, prevention-driven counseling designed to mitigate and avoid potential problems before they arise. He is sensitive to his client's specific needs when helping them navigate the often murky waters of managing a workforce.

Nathan works together with his clients to chart effective and efficient strategies unique to their situations in all types of labor relations challenges. His experience includes representing management in union-free training, arbitration hearings, unfair labor practice charges before the National Labor Relations Board (NLRB), and navigating clients through strikes and lockouts. Nathan also represents employers in collective bargaining negotiations and in resisting union organizing attempts.

Moreover, Nathan has also trained many employers with regard to their practices, policies and general handling of workforce relations. He has drafted and edited employee handbooks and employment agreements, and is a regular speaker at events and seminars hosted by clients, human resource, business and other professional groups and associations.

Nathan takes significant pride in his role as counselor. His dedication is manifest in a personal commitment to being responsive and ensuring his client's goals drive the legal agenda — as opposed to vice versa. Nathan works closely with clients to ensure they have the necessary tools to address the legal challenges they face from an operational standpoint and business perspective.

Nathan was born and raised in the Midwest; however, his practice allows him the

opportunity to serve clients from coast to coast and many points in between. He has represented employers from a wide variety of industries and professional sectors such as manufacturing, automotive, financial and banking, retail, utilities and medical, as well as foreign clients with U.S. facilities. He also works with public employers and has assisted towns, cities and counties with their labor and employment matters.

Honors:

- Indiana Super Lawyers Rising Star, twice
- The Best Lawyers in America, 2018-2021
- Martindale-Hubbell, AV Preeminent

**Bonnie L. Martin**
Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Indianapolis

Over the last 20 years, *Bonnie Martin* has represented clients throughout the country in areas of employment law, as well as both general and employment litigation. She regularly trains and counsels management in both the public and private sector, and is a go-to resource for conducting workplace investigations throughout Indiana. She also represents employers before local, state, and federal agencies through investigation, on-site interviews, mediation, and conciliation. Bonnie routinely defends employers against claims related to breach of contract, ADA and FMLA compliance, background checks under FCRA, equal pay, FLSA, harassment, discrimination, and retaliation in state and federal courts, and consistently ranks among the attorneys with the most appearances on behalf of employers in Indiana's federal courts. Bonnie has also extensively litigated Indiana wage and hour claims, helping to set employer-friendly precedent on some of the most frequently raised wage issues.

In addition to her work in employment law, Ms. Martin also defends against single plaintiff claims under the Fair Credit Reporting Act, Fair Debt Collection Practices Act, and a variety of federal and state law causes of action, brought against student loan servicing entities.

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# Section One

# Managing Leave of Absence Under the Family and Medical Leave Act

**Gregory W. Guevara**
Bose McKinney & Evans LLP
Indianapolis, Indiana

## Section One

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Form WH-380-E – Certification of Health Care Provider for Employee's Serious Health Condition under the Family and Medical Leave Act

# Managing Leave of Absence Under the Family and Medical Leave Act

May 6, 2021

Presented by Greg Guevara
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# FMLA Coverage (29 CFR §§ 825.104-825.109)

- Is the employer covered by the FMLA?
  - Covers private sector employers of 50 or more employees
  - Covers all public agencies/schools
  - Coverage may be established under “joint employment” or “integrated employer” tests

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# Employee Eligibility (29 CFR §§ 825.110-825.111)

- Is the employee eligible for job-protected leave?
  - To be eligible, employee must:
    - Have worked for a covered employer at least 12 months;
    - Have worked at least 1,250 hours in previous 12-month period; and
    - Currently work at a worksite with 50 or more employees within 75 miles of that worksite

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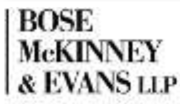


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# Types of FMLA Leave (29 CFR §§ 825.112-825.127)

- Is the leave request covered?
  - Up to 12 weeks of unpaid leave:
    - Because of employee's own serious health condition that renders employee unable to perform essential job functions;
    - To care for spouse, child, or parent with a serious health condition;
    - To care for a newborn or newly adopted child; or
    - Because of a "qualifying exigency" due to the employee's spouse, child, or parent being called to active duty in support of a contingency operation

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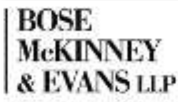


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# Types of FMLA Leave (29 CFR §§ 825.112-825.127)

- Is the leave request covered?
  - Up to 26 weeks of unpaid leave:
    - To care for a covered service member with a serious injury or illness if the employee is the spouse, child, parent, or next of kin of the service member

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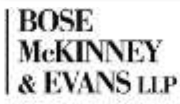

# Serious Health Condition (29 CFR §§ 825.113-825.115)

- What is a "serious health condition"?
  - An illness, injury, impairment, or physical or mental condition that involves either:
    - Inpatient care (at least one night stay) in a health care facility, or
    - Continuing treatment by a health care provider
  - Continuing treatment includes:
    - Incapacity of more than three consecutive days with treatment by a health care provider
    - Pregnancy/prenatal care
    - Chronic or long-term/permanent conditions

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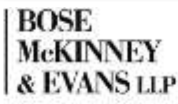


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# Leave Year Determination (29 CFR § 825.200)

- How is the 12-month leave year determined?
  - Employer has four options:
    - Calendar year
    - Fixed 12-month leave year (e.g., fiscal year, employment anniversary date, etc.)
    - 12-month period starting when leave begins
    - "Rolling" 12-month period looking backwards 12 months
  - Employer must select leave year in advance in writing; otherwise, most favorable leave year for employee applies

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# Intermittent/Reduced Schedule Leave (29 CFR § § 825.202-825.205)

- Is intermittent or reduced schedule leave available?
  - Intermittent leave is taken periodically in separate blocks of time due to a single qualifying reason (e.g., dialysis, chronic migraines, etc.)
  - Reduced schedule leave is a reduction in the employee's regular work schedule to accommodate medical needs
  - May only be taken for an employee's or family member's medical leave when such leave is "medically necessary"
  - Employee must try to schedule leave so as to minimize work disruptions

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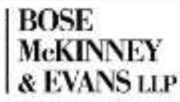


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# Substitution of Paid Leave (29 CFR § 825.207)

- May employee substitute available paid time off?
  - If the employer has a paid time off benefit, such as PTO, vacation, or sick days, the employee may elect to substitute such paid time off for unpaid FMLA leave
  - Alternatively, the employer may require the employee to use available PTO benefits
  - If the employee is entitled to short term disability or worker's compensation leave, then the leave substitution provisions do not apply
  - Paid time still counts toward employee's 12-week leave entitlement

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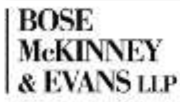


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# Employee Benefits (29 CFR §§ 825.209-825.213)

- What happens to employee benefits during FMLA leave?
  - During FMLA leave, employer is required to maintain coverage under any group health plan on the same basis as if employee had not taken leave
  - Employer may require employee to pay usual premiums, as well as employer's portion of premiums during leave
  - Employer may terminate coverage if premiums are more than 30 days later after 15-days' written notice
  - Employer must still reinstate coverage upon reinstatement from leave

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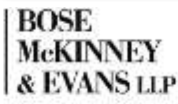


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# Employee Reinstatement (29 CFR §§ 825.214-825.216)

- What are an employee's rights to reinstatement?
  - At the end of FMLA leave, the employee must be reinstated to the same position he or she held when leave began, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment
  - Employee has no greater rights to reinstatement than if he or she had not taken leave

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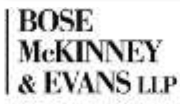


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# Key Employees (29 CFR §§ 825.217-825.219)

- Who are “key” employees?
  - A “key” employee is a salaried employee who is among the highest paid 10 percent of workers within a 75-mile radius
  - Reinstatement may be denied to a key employee if the employer determines that it would cause “substantial and grievous economic injury” to the employer’s operations
  - Employer cannot deny FMLA leave, but must give employee notice in writing immediately upon determining that reinstatement will be denied

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# Employer Notice (29 CFR §§ 825.300-825.301)

- What are the employer's notice requirements?
  - FMLA-covered employers must include a written FMLA policy in their employee handbook, manual, or written employment policies
  - Within five days of receiving an employee's request for leave, employer must notify employee in writing whether leave is qualifying or not
  - If so, then leave must be designated as FMLA-qualifying, or, if subject to additional requirements (such as health care provider certification), the leave must be provisionally designated as FMLA leave

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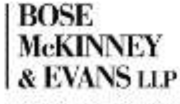


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# Employee Notice (29 CFR §§ 825.302-825.304)

- What notice is an employee required to give?
  - If the need for leave is foreseeable, the employee must give at least 30 days' advance notice to the employer
  - If not foreseeable, then notice must be given "as soon as practicable" (i.e., as soon as reasonably possible)
  - Notice is sufficient if it provides the employer with sufficient information to determine that leave may be needed under FMLA; the employee need not expressly assert FMLA rights
  - If the employee does not give required notice, FMLA leave may be delayed by the period that notice was delayed

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# Health Care Provider Certification (29 CFR §§ 825.305-825.313)

- What are the requirements for health care provider certification?
  - Within five days of employee's leave request, employer should notify employee of any certification requirements
  - Employee must be given at least 15 calendar days to return the completed certification form
  - Leave may be denied or delayed until employee meets the certification requirements
  - If leave begins prior to the certification due date, then leave should be provisionally designated as FMLA-qualifying until notice is returned

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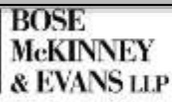


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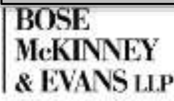
# Health Care Provider Certification (29 CFR §§ 825.305-825.313)

- What are the requirements for health care provider certification?
  - If certification is deficient or incomplete, employee must be given the opportunity to cure the deficiencies
  - If not cured, employer may seek clarification directly from the health care provider
  - FMLA certification form developed by U.S. Department of Labor includes all the information employers may require, including information concerning the medical necessity of leave and, if applicable, intermittent or reduced schedule leave



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# Health Care Provider Certification (29 CFR §§ 825.305-825.313)

- What are the requirements for health care provider certification?
  - If employer has reason to doubt the validity of the certification, the employer may designate another health care provider to render an opinion
  - If the second provider's opinion differs, then the employer and employee may designate a third provider to render an opinion, and that provider's opinion will be binding
  - FMLA leave should be provisionally granted throughout this period

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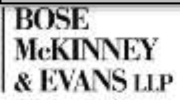

# Fitness-for-Duty Certification (29 CFR § 825.312)

- May an employer require certification of fitness-for-duty?
  - An employer may condition job reinstatement on the employee providing a health care provider fitness-for-duty certification stating the employee is able to perform the essential functions of the job
  - No fitness-for-duty certification is permitted in cases of intermittent or reduced schedule leave, unless reasonable safety concerns exist, in which case such certification may be required not more than once every 30 days
  - If employee cannot return at conclusion of FMLA leave, employer should still evaluate possible reasonable accommodation obligations under the ADA

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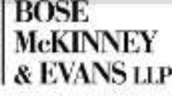


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# Helpful FMLA Links

- U.S. Department of Labor FMLA Page (https://www.dol.gov/agencies/whd/fmla)
- FMLA Forms (https://www.dol.gov/agencies/whd/fmla/forms)
- FMLA Law and Regulations (https://www.dol.gov/agencies/whd/fmla/laws-and-regulations)

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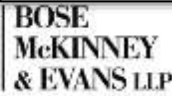


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# Questions???

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**U.S. Department of Labor**
**Wage and Hour Division**

**DO NOT SEND TO THE DEPARTMENT OF LABOR.**
**PROVIDE TO EMPLOYEE.**

OMB Control Number: 1235-0003
Expires: 6/30/2023

In general, to be eligible to take leave under the Family and Medical Leave Act (FMLA), an employee must have worked for an employer for at least 12 months, meet the hours of service requirement in the 12 months preceding the leave, and work at a site with at least 50 employees within 75 miles. While use of this form is optional, a fully completed Form WH-381 provides employees with the information required by 29 C.F.R. §§ 825.300(b), (c) which must be provided within five business days of the employee notifying the employer of the need for FMLA leave. Information about the FMLA may be found on the WHD website at www.dol.gov/agencies/whd/fmla.

Date: ___________________________ *(mm/dd/yyyy)*

From: ___________________________________ *(Employer)* To: ______________________________________ *(Employee)*

On __________________ *(mm/dd/yyyy)*, we learned that you need leave *(beginning on)* _____________________ *(mm/dd/yyyy)* for one of the following reasons: *(Select as appropriate)*

☐ The birth of a child, or placement of a child with you for adoption or foster care, and to bond with the newborn or newly-placed child

☐ Your own serious health condition

☐ You are needed to care for your family member due to a serious health condition. Your family member is your:

☐ Spouse ☐ Parent ☐ Child under age 18 ☐ Child 18 years or older and incapable of self-care because of a mental or physical disability

☐ A qualifying exigency arising out of the fact that your family member is on covered active duty or has been notified of an impending call or order to covered active duty status. Your family member on covered active duty is your:

☐ Spouse ☐ Parent ☐ Child of any age

☐ You are needed to care for your family member who is a covered servicemember with a serious injury or illness. You are the servicemember's:

☐ Spouse ☐ Parent ☐ Child ☐ Next of kin

Spouse means a husband or wife as defined or recognized in the state where the individual was married, including in a common law marriage or same-sex marriage. The terms "child" and "parent" include *in loco parentis* relationships in which a person assumes the obligations of a parent to a child. An employee may take FMLA leave to care for an individual who assumed the obligations of a parent to the employee when the employee was a child. An employee may also take FMLA leave to care for a child for whom the employee has assumed the obligations of a parent. No legal or biological relationship is necessary.

## SECTION I – NOTICE OF ELIGIBILITY

**This Notice is to inform you that you are:**

☐ **Eligible** for FMLA leave. *(See Section II for any Additional Information Needed and Section III for information on your Rights and Responsibilities.)*

☐ **Not eligible** for FMLA leave because: *(Only one reason need be checked)*

☐ You have not met the FMLA's 12-month length of service requirement. As of the first date of requested leave, you will have worked approximately: __________ *(months)* towards this requirement.

☐ You have not met the FMLA's 1,250 hours of service requirement. As of the first date of requested leave, you will have worked approximately: _______________ *(hours of service)* towards this requirement.

**Employee Name:** ______________________________________________________________

- ☐ You are an airline flight crew employee and you have not met the special hours of service eligibility requirements for airline flight crew employees as of the first date of requested leave (i.e., worked or been paid for at least 60% of your applicable monthly guarantee, and worked or been paid for at least 504 duty hours.)
- ☐ You do not work at and/or report to a site with 50 or more employees within 75-miles as of the date of your request.

If you have any questions, please contact: ________________________________ *(Name of employer representative)*

at ______________________________________________________________ *(Contact information).*

## SECTION II – ADDITIONAL INFORMATION NEEDED

As explained in Section I, you meet the eligibility requirements for taking FMLA leave. Please review the information below to determine if additional information is needed in order for us to determine whether your absence qualifies as FMLA leave. Once we obtain any additional information specified below we will inform you, **within 5 business days**, whether your leave will be designated as FMLA leave and count towards the FMLA leave you have available. **If complete and sufficient information is not provided in a timely manner, your leave may be denied.**

*(Select as appropriate)*

☐ No additional information requested. If no additional information requested, go to Section III.

☐ We request that the leave be supported by a certification, as identified below.

| | |
|---|---|
| ☐ Health Care Provider for the Employee | ☐ Health Care Provider for the Employee's Family Member |
| ☐ Qualifying Exigency | ☐ Serious Illness or Injury *(Military Caregiver Leave)* |

Selected certification form is ☐ attached / ☐ not attached.

If requested, medical certification must be returned by ____________________ *(mm/dd/yyyy) (Must allow at least 15 calendar days from the date the employer requested the employee to provide certification, unless it is not feasible despite the employee's diligent, good faith efforts.)*

☐ We request that you provide reasonable documentation or a statement to establish the relationship between you and your family member, including *in loco parentis* relationships (as explained on page one). The information requested must be returned to us by __________________ *(mm/dd/yyyy).* You may choose to provide a simple statement of the relationship or provide documentation such as a child's birth certificate, a court document, or documents regarding foster care or adoption-related activities. Official documents submitted for this purpose will be returned to you after examination.

☐ Other information needed *(e.g. documentation for military family leave)*: ____________________________.

The information requested must be returned to us by ___________________ *(mm/dd/yyyy)*.

If you have any questions, please contact: ________________________________ *(Name of employer representative)*

at ______________________________________________________________ *(Contact information).*

## SECTION III – NOTICE OF RIGHTS AND RESPONSIBILITIES

### Part A: FMLA Leave Entitlement

You have a right under the FMLA to take unpaid, job-protected FMLA leave in a 12-month period for certain family and medical reasons, including up to **12 weeks** of unpaid leave in a 12-month period for the birth of a child or placement of a child for adoption or foster care, for leave related to your own or a family member's serious health condition, or for certain qualifying exigencies related to the deployment of a military member to covered active duty. You also have a right

under the FMLA to take up to **26 weeks** of unpaid, job-protected FMLA leave in a single 12-month period to care for a covered servicemember with a serious injury or illness (*Military Caregiver Leave*).

The 12-month period for FMLA leave is calculated as: *(Select as appropriate)*

- ☐ The calendar year (January 1st - December 31st)
- ☐ A fixed leave year based on ____________________________________________________
  *(e.g., a fiscal year beginning on July 1 and ending on June 30)*
- ☐ The 12-month period measured forward from the date of your first FMLA leave usage.
- ☐ A "rolling" 12-month period measured backward from the date of any FMLA leave usage. *(Each time an employee takes FMLA leave, the remaining leave is the balance of the 12 weeks not used during the 12 months immediately before the FMLA leave is to start.)*

If applicable, the single 12-month period for *Military Caregiver Leave* started on ______________________ *(mm/dd/yyyy)*.

***You (☐ are / ☐ are not) considered a key employee*** as defined under the FMLA. Your FMLA leave cannot be denied for this reason; however, we may not restore you to employment following FMLA leave if such restoration will cause substantial and grievous economic injury to us.

We (☐ have / ☐ have not) determined that restoring you to employment at the conclusion of FMLA leave will cause substantial and grievous economic harm to us. Additional information will be provided separately concerning your status as key employee and restoration.

## Part B: Substitution of Paid Leave – When Paid Leave is Used at the Same Time as FMLA Leave

You have a right under the FMLA to request that your accrued paid leave be substituted for your FMLA leave. This means that you can request that your accrued paid leave run concurrently with some or all of your unpaid FMLA leave, provided you meet any applicable requirements of our leave policy. Concurrent leave use means the absence will count against both the designated paid leave and unpaid FMLA leave at the same time. If you do not meet the requirements for taking paid leave, you remain entitled to take available unpaid FMLA leave in the applicable 12-month period. Even if you do not request it, the FMLA allows us to require you to use your available sick, vacation, or other paid leave during your FMLA absence.

*(Check all that apply)*

- ☐ **Some or all of your FMLA leave will not be paid.** Any unpaid FMLA leave taken will be designated as FMLA leave and counted against the amount of FMLA leave you have available to use in the applicable 12-month period.
- ☐ **You have requested to use some or all of your available paid leave** *(e.g., sick, vacation, PTO)* during your FMLA leave. Any paid leave taken for this reason will also be designated as FMLA leave and counted against the amount of FMLA leave you have available to use in the applicable 12-month period.
- ☐ **We are requiring you to use some or all of your available paid leave** *(e.g., sick, vacation, PTO)* during your FMLA leave. Any paid leave taken for this reason will also be designated as FMLA leave and counted against the amount of FMLA leave you have available to use in the applicable 12-month period.
- ☐ **Other:** *(e.g., short- or long-term disability, workers' compensation, state medical leave law, etc.)*________________________
  Any time taken for this reason will also be designated as FMLA leave and counted against the amount of FMLA leave you have available to use in the applicable 12-month period.

The applicable conditions for use of paid leave include: ______________________________________________________.

For more information about conditions applicable to sick/vacation/other paid leave usage please refer to _____________

___________________________________________ available at: ____________________________________________.

**Employee Name:** ________________________________________________________________

**Part C: Maintain Health Benefits**

Your health benefits must be maintained during any period of FMLA leave under the same conditions as if you continued to work. During any paid portion of FMLA leave, your share of any premiums will be paid by the method normally used during any paid leave. During any unpaid portion of FMLA leave, you must continue to make any normal contributions to the cost of the health insurance premiums. To make arrangements to continue to make your share of the premium payments on your health insurance while you are on any unpaid FMLA leave, contact ____________________________ at ______________________________________.

You have a minimum grace period of (☐ 30-days or ☐ _____________ *indicate longer period, if applicable)* in which to make premium payments. If payment is not made timely, your group health insurance may be cancelled, provided we notify you in writing at least 15 days before the date that your health coverage will lapse, or, at our option, we may pay your share of the premiums during FMLA leave, and recover these payments from you upon your return to work.

You may be required to reimburse us for our share of health insurance premiums paid on your behalf during your FMLA leave if you do not return to work following **unpaid** FMLA leave for a reason other than: the continuation, recurrence, or onset of your or your family member's serious health condition which would entitle you to FMLA leave; or the continuation, recurrence, or onset of a covered servicemember' s serious injury or illness which would entitle you to FMLA leave; or other circumstances beyond your control.

**Part D: Other Employee Benefits**

Upon your return from FMLA leave, your other employee benefits, such as pensions or life insurance, must be resumed in the same manner and at the same levels as provided when your FMLA leave began. To make arrangements to continue your employee benefits while you are on FMLA leave, contact ________________________________________________ at ___________________________________________________.

**Part E: Return-to-Work Requirements**

You must be reinstated to the same or an equivalent job with the same pay, benefits, and terms and conditions of employment on your return from FMLA-protected leave. An equivalent position is one that is virtually identical to your former position in terms of pay, benefits, and working conditions. At the end of your FMLA leave, all benefits must also be resumed in the same manner and at the same level provided when the leave began. You do not have return-to-work rights under the FMLA if you need leave beyond the amount of FMLA leave you have available to use.

**Part F: Other Requirements While on FMLA Leave**

While on leave you (☐ will be / ☐ will not be) required to furnish us with periodic reports of your status and intent to return to work every ________________________________________________________________.

*(Indicate interval of periodic reports, as appropriate for the FMLA leave situation).*

**If the circumstances of your leave change and you are able to return to work earlier than expected, you will be required to notify us at least two workdays prior to the date you intend to report for work.**

**PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT**

It is mandatory for employers to provide employees with notice of their eligibility for FMLA protection and their rights and responsibilities. 29 U.S.C. § 2617; 29 C.F.R. § 825.300(b), (c). It is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 10 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

**DO NOT SEND THE COMPLETED FORM TO THE DEPARTMENT OF LABOR. EMPLOYEE INFORMATION.**

**Designation Notice**
**under the Family and Medical Leave Act**

**U.S. Department of Labor**
**Wage and Hour Division**

**DO NOT SEND TO THE DEPARTMENT OF LABOR.**
**PROVIDE TO EMPLOYEE.**

OMB Control Number: 1235-0003
Expires: 6/30/2023

Leave covered under the Family and Medical Leave Act (FMLA) must be designated as FMLA-protected and the employer must inform the employee of the amount of leave that will be counted against the employee's FMLA leave entitlement. In order to determine whether leave is covered under the FMLA, the employer may request that the leave be supported by a certification. If the certification is incomplete or insufficient, the employer must state in writing what additional information is necessary to make the certification complete and sufficient. While use of this form is optional, a fully completed Form WH-382 provides employees with the information required by 29 C.F.R. §§ 825.300(d), 825.301, and 825.305(c), which must be provided within five business days of the employer having enough information to determine whether the leave is for an FMLA-qualifying reason. Information about the FMLA may be found on the WHD website at www.dol.gov/agencies/whd/fmla.

## SECTION I - EMPLOYER

The employer is responsible in **all** circumstances for designating leave as FMLA-qualifying and giving notice to the employee. Once an eligible employee communicates a need to take leave for an FMLA-qualifying reason, an employer may not delay designating such leave as FMLA leave, and neither the employee nor the employer may decline FMLA protection for that leave.

Date: ____________________________ *(mm/dd/yyyy)*

From: ________________________________________ *(Employer)* To: ________________________________________ *(Employee)*

On ______________________ *(mm/dd/yyyy)* we received your most recent information to support your need for leave due to:
*(Select as appropriate)*

- ☐ The birth of a child, or placement of a child with you for adoption or foster care, and to bond with the newborn or newly-placed child
- ☐ Your own serious health condition
- ☐ The serious health condition of your spouse, child, or parent
- ☐ A qualifying exigency arising out of the fact that your spouse, child, or parent is on covered active duty or has been notified of an impending call or order to covered active duty with the Armed Forces
- ☐ A serious injury or illness of a covered servicemember where you are the servicemember's spouse, child, parent, or next of kin *(Military Caregiver Leave)*

**We have reviewed information related to your need for leave under the FMLA along with any supporting documentation provided and decided that your FMLA leave request is:** *(Select as appropriate)*

☐ **Approved.** All leave taken for this reason will be designated as FMLA leave. Go to Section III for more information.

☐ **Not Approved**: *(Select as appropriate)*
- ☐ The FMLA does not apply to your leave request.
- ☐ As of the date the leave is to start, you do not have any FMLA leave available to use.
- ☐ Other ______________________________________________________________

☐ **Additional information** is needed to determine if your leave request qualifies as FMLA leave. *(Go to Section II for the specific information needed. If your FMLA leave request is approved and no additional information is needed, go to Section III.)*

## SECTION II – ADDITIONAL INFORMATION NEEDED

We need additional information to determine whether your leave request qualifies under the FMLA. Once we obtain the additional information requested, we will inform you **within 5 business days** if your leave will or will not be designated as FMLA leave and count towards the amount of FMLA leave you have available. **Failure to provide the additional information as requested may result in a denial of your FMLA leave request**.

If you have any questions, please contact: ________________________________________ at ________________________________________
*(Name of employer FMLA representative)* *(Contact information)*

**Incomplete or Insufficient Certification**

The certification you have provided is incomplete and/or insufficient to determine whether the FMLA applies to your leave request.
*(Select as applicable)*

☐ The certification provided is incomplete and we are unable to determine whether the FMLA applies to your leave request. *"Incomplete" means one or more of the applicable entries on the certification have not been completed.*

**Employee Name:** ______________________________________________________________________

☐ The certification provided is insufficient to determine whether the FMLA applies to your leave request. *"Insufficient" means the information provided is vague, unclear, ambiguous or non-responsive.*

***Specify the information needed to make the certification complete and/or sufficient:*** ______________________________________

______________________________________________________________________

You must provide the requested information no later than *(provide at least 7 calendar days)* ____________________ *(mm/dd/yyyy),* unless it is not practicable under the particular circumstances despite your diligent good faith efforts, or your leave may be denied.

**Second and Third Opinions**

☐ We request that you obtain a (☐ second / ☐ third opinion) medical certification at our expense, and we will provide further details at a later time. *Note: The employee or the employee's family member may be requested to authorize the health care provider to release information pertaining only to the serious health condition at issue.*

## SECTION III – FMLA LEAVE APPROVED

As explained in Section I, your FMLA leave request is approved. All leave taken for this reason will be designated as FMLA leave and will count against the amount of FMLA leave you have available to use in the applicable 12-month period. The FMLA requires that you notify us as soon as practicable if the dates of scheduled leave change, are extended, or were initially unknown. Based on the information you have provided to date, we are providing the following information about the amount of time that will be counted against the total **amount of FMLA leave** you have available to use in the applicable 12-month period: *(Select as appropriate)*

☐ Provided there is no change from your **anticipated FMLA leave schedule**, the following number of hours, days, or weeks will be counted against your leave entitlement: ____________________________________________.

☐ Because the leave you will need will be **unscheduled**, it is not possible to provide the hours, days, or weeks that will be counted against your FMLA entitlement at this time. You have the right to request this information once in a 30-day period (if leave was taken in the 30-day period).

Please be advised: *(check all that apply)*

☐ **Some or all of your FMLA leave will not be paid.** Any unpaid FMLA leave taken will be designated as FMLA leave and counted against the amount of FMLA leave you have available to use in the applicable 12-month period.

☐ **Based on your request, some or all of your available paid leave** *(e.g., sick, vacation, PTO)* **will be used during your FMLA leave.** Any paid leave taken for this reason will also be designated as FMLA leave and counted against the amount of FMLA leave you have available to use in the applicable 12-month period.

☐ **We are requiring you to use some or all of your available paid leave** *(e.g., sick, vacation, PTO)* **during your FMLA leave.** Any paid leave taken for this reason will also be designated as FMLA leave and counted against the amount of FMLA leave you have available to use in the applicable 12-month period.

☐ **Other:** ______________________________________________________________
*(e.g., Short- or long-term disability, workers' compensation, state medical leave law, etc.)* Any time taken for this reason will also be designated as FMLA leave and counted against the amount of FMLA leave you have available to use in the applicable 12-month period.

**Return-to-work requirements.** To be restored to work after taking FMLA leave, you (☐ will be / ☐ will not be) required to provide a certification from your health care provider (fitness-for-duty certification) that you are able to resume work. This request for a fitness-for-duty certification is *only* with regard to the particular serious health condition that caused your need for FMLA leave. **If such certification is not timely received, your return to work may be delayed until the certification is provided.**

A list of the essential functions of your position (☐ is / ☐ is not) attached. If attached, the fitness-for-duty certification must address your ability to perform the essential job functions.

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**PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT**

It is mandatory for employers to inform employees in writing whether leave requested under the FMLA has been determined to be covered under the FMLA. 29 U.S.C. § 2617; 29 C.F.R. § 825.300(d), (e). It is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 10 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

**DO NOT SEND THE COMPLETED FORM TO THE DEPARTMENT OF LABOR. EMPLOYEE INFORMATION.**

**Certification of Health Care Provider for Employee's Serious Health Condition under the Family and Medical Leave Act**

**U.S. Department of Labor**
**Wage and Hour Division**

**DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR.**
**RETURN TO THE PATIENT.**

OMB Control Number: 1235-0003
Expires: 6/30/2023

The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA protections because of a need for leave due to a serious health condition to submit a medical certification issued by the employee's health care provider. 29 U.S.C. §§ 2613, 2614(c)(3); 29 C.F.R. § 825.305. The employer must give the employee **at least 15 calendar days** to provide the certification. If the employee fails to provide complete and sufficient medical certification, his or her FMLA leave request may be denied. 29 C.F.R. § 825.313. Information about the FMLA may be found on the WHD website at www.dol.gov/agencies/whd/fmla.

## SECTION I – EMPLOYER

Either the employee or the employer may complete Section I. While use of this form is optional, this form asks the health care provider for the information necessary for a complete and sufficient medical certification, which is set out at 29 C.F.R. § 825.306. **You may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308.** Additionally, you **may not** request a certification for FMLA leave to bond with a healthy newborn child or a child placed for adoption or foster care.

Employers must generally maintain records and documents relating to medical information, medical certifications, recertifications, or medical histories of employees created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies, and in accordance with 29 C.F.R. § 1635.9, if the Genetic Information Nondiscrimination Act applies.

(1) Employee name: ____________________________________________
*First* *Middle* *Last*

(2) Employer name: ______________________________ Date: ______________ *(mm/dd/yyyy)*
*(List date certification requested)*

(3) The medical certification must be returned by ______________________________ *(mm/dd/yyyy)*
*(Must allow at least 15 calendar days from the date requested, unless it is not feasible despite the employee's diligent, good faith efforts.)*

(4) Employee's job title: ______________________________ Job description (☐ is / ☐ is not) attached.
Employee's regular work schedule: ______________________________
Statement of the employee's essential job functions: ______________________________
______________________________
*(The essential functions of the employee's position are determined with reference to the position the employee held at the time the employee notified the employer of the need for leave or the leave started, whichever is earlier.)*

## SECTION II - HEALTH CARE PROVIDER

Please provide your contact information, complete all relevant parts of this Section, and sign the form. Your patient has requested leave under the FMLA. The FMLA allows an employer to require that the employee submit a timely, complete, and sufficient medical certification to support a request for FMLA leave due to the serious health condition of the employee. For FMLA purposes, a "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves *inpatient care* or *continuing treatment by a health care provider*. For more information about the definitions of a serious health condition under the FMLA, see the chart on page 4.

You may, but are **not required** to, provide other appropriate medical facts including symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment. Please note that some state or local laws may not allow disclosure of private medical information about the patient's serious health condition, such as providing the diagnosis and/or course of treatment.

**Employee Name:** ________________________________________

Health Care Provider's name: *(Print)* ________________________________________

Health Care Provider's business address: ________________________________________

Type of practice / Medical specialty: ________________________________________

Telephone: (___) ______________ Fax: (___) ______________ E-mail: ________________________

## PART A: Medical Information

Limit your response to the medical condition(s) for which the employee is seeking FMLA leave. Your answers should be your **best estimate** based upon your medical knowledge, experience, and examination of the patient. **After completing Part A, complete Part B to provide information about the amount of leave needed.** Note: For FMLA purposes, "incapacity" means the inability to work, attend school, or perform regular daily activities due to the condition, treatment of the condition, or recovery from the condition. Do not provide information about genetic tests, as defined in 29 C.F.R. § 1635.3(f), genetic services, as defined in 29 C.F.R. § 1635.3(e), or the manifestation of disease or disorder in the employee's family members, 29 C.F.R. § 1635.3(b).

(1) State the approximate date the condition started or will start: ________________________ *(mm/dd/yyyy)*

(2) Provide your **best estimate** of how long the condition lasted or will last: ________________________

(3) Check the box(es) for the questions below, as applicable. For all box(es) checked, the amount of leave needed must be provided in Part B.

- ☐ **Inpatient Care**: The patient (☐ has been / ☐ is expected to be) admitted for an overnight stay in a hospital, hospice, or residential medical care facility on the following date(s): ________________________

- ☐ **Incapacity plus Treatment**: *(e.g. outpatient surgery, strep throat)*
  Due to the condition, the patient (☐ has been / ☐ is expected to be) incapacitated for *more than* three consecutive, full calendar days from ______________ *(mm/dd/yyyy)* to ______________ *(mm/dd/yyyy)*.

  The patient (☐ was / ☐ will be) seen on the following date(s): ________________________
  ________________________________________

  The condition (☐ has / ☐ has not) also resulted in a course of continuing treatment under the supervision of a health care provider *(e.g. prescription medication (other than over-the-counter) or therapy requiring special equipment)*

- ☐ **Pregnancy**: The condition is pregnancy. List the expected delivery date: ______________ *(mm/dd/yyyy)*.

- ☐ **Chronic Conditions**: *(e.g. asthma, migraine headaches)* Due to the condition, it is medically necessary for the patient to have treatment visits at least twice per year.

- ☐ **Permanent or Long Term Conditions**: *(e.g. Alzheimer's, terminal stages of cancer)* Due to the condition, incapacity is permanent or long term and requires the continuing supervision of a health care provider (even if active treatment is not being provided).

- ☐ **Conditions requiring Multiple Treatments**: (*e.g. chemotherapy treatments, restorative surgery)* Due to the condition, it is medically necessary for the patient to receive multiple treatments.

- ☐ **None of the above**: If none of the above condition(s) were checked, (i.e., inpatient care, pregnancy) no additional information is needed. Go to page 4 to sign and date the form.

**Employee Name:** ______________________________

(4) If needed, briefly describe other appropriate medical facts related to the condition(s) for which the employee seeks FMLA leave. *(e.g., use of nebulizer, dialysis)* ______________________________

______________________________

## PART B: Amount of Leave Needed

For the medical condition(s) checked in Part A, complete all that apply. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your **best estimate** based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage.

(5) Due to the condition, the patient (☐ had / ☐ will have) **planned medical treatment(s)** (scheduled medical visits) *(e.g. psychotherapy, prenatal appointments)* on the following date(s): ______________________________

______________________________

(6) Due to the condition, the patient (☐ was / ☐ will be) **referred to other health care provider(s)** for evaluation or treatment(s).

State the nature of such treatments: *(e.g. cardiologist, physical therapy)* ______________________________

Provide your **best estimate** of the beginning date ________________ *(mm/dd/yyyy)* and end date ________________ *(mm/dd/yyyy)* for the treatment(s).

Provide your **best estimate** of the duration of the treatment(s), including any period(s) of recovery *(e.g. 3 days/week)*

______________________________

(7) Due to the condition, it is medically necessary for the employee to work a **reduced schedule**.

Provide your **best estimate** of the reduced schedule the employee is able to work. From ____________________ *(mm/dd/yyyy)* to __________________ *(mm/dd/yyyy)* the employee is able to work: *(e.g., 5 hours/day, up to 25 hours a week)*

______________________________

(8) Due to the condition, the patient (☐ was / ☐ will be) **incapacitated for a continuous period of time**, including any time for treatment(s) and/or recovery.

Provide your **best estimate** of the beginning date ____________________ *(mm/dd/yyyy)* and end date ________________ *(mm/dd/yyyy)* for the period of incapacity.

(9) Due to the condition, it (☐ was / ☐ is / ☐ will be) medically necessary for the employee to be absent from work on an **intermittent basis** (periodically), including for any episodes of incapacity i.e., episodic flare-ups. Provide your **best estimate** of how often (frequency) and how long (duration) the episodes of incapacity will likely last.

Over the next 6 months, episodes of incapacity are estimated to occur ____________________________ times per (☐ day / ☐ week / ☐ month) and are likely to last approximately ______________ (☐ hours / ☐ days) per episode.

**Employee Name:** ___________________________________________________________________________

## PART C: Essential Job Functions

If provided, the information in Section I question #4 may be used to answer this question. If the employer fails to provide a statement of the employee's essential functions or a job description, answer these questions based upon the employee's own description of the essential job functions. An employee who must be absent from work to receive medical treatment(s), such as scheduled medical visits, for a serious health condition is considered to be *not able* to perform the essential job functions of the position during the absence for treatment(s).

(10) Due to the condition, the employee (☐ was not able / ☐ is not able / ☐ will not be able) to perform *one or more* of the essential job function(s). Identify at least one essential job function the employee is not able to perform:

_____________________________________________________________________________________

_____________________________________________________________________________________

**Signature of**
**Health Care Provider** ____________________________________ **Date** _______________ *(mm/dd/yyyy)*

| **Definitions of a Serious Health Condition** *(See 29 C.F.R. §§ 825.113-.115)* |
|---|
| **Inpatient Care** |
| • An overnight stay in a hospital, hospice, or residential medical care facility.<br>• Inpatient care includes any period of incapacity or any subsequent treatment in connection with the overnight stay. |
| **Continuing Treatment by a Health Care Provider (any one or more of the following)** |
| **Incapacity Plus Treatment:** A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves either:<br>○ Two or more in-person visits to a health care provider for treatment within 30 days of the first day of incapacity unless extenuating circumstances exist. The first visit must be within seven days of the first day of incapacity; or,<br>○ At least one in-person visit to a health care provider for treatment within seven days of the first day of incapacity, which results in a regimen of continuing treatment under the supervision of the health care provider. For example, the health provider might prescribe a course of prescription medication or therapy requiring special equipment. |
| **Pregnancy:** Any period of incapacity due to pregnancy or for prenatal care. |
| **Chronic Conditions:** Any period of incapacity due to or treatment for a chronic serious health condition, such as diabetes, asthma, migraine headaches. A chronic serious health condition is one which requires visits to a health care provider (or nurse supervised by the provider) at least twice a year and recurs over an extended period of time. A chronic condition may cause episodic rather than a continuing period of incapacity. |
| **Permanent or Long-term Conditions:** A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective, but which requires the continuing supervision of a health care provider, such as Alzheimer's disease or the terminal stages of cancer. |
| **Conditions Requiring Multiple Treatments:** Restorative surgery after an accident or other injury; or, a condition that would likely result in a period of incapacity of more than three consecutive, full calendar days if the patient did not receive the treatment. |

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# Section Two

# Non-Compete Essentials and Beyond

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## Section Two

## Non-Compete Essentials and Beyond……………….. Scott S. Morrisson

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Affidavit of *******

# NON-COMPETE ESSENTIALS AND BEYOND

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## INTRODUCTION

Non-compete agreements remain enforceable in Indiana.[1] Yet for those of us in the trenches it seems the courts are taking a harder look at them. Non-competes are becoming more challenging to enforce. This article will touch on the essential issues, explore the more advanced nuanced issues in non-compete drafting and litigation, and provide an update to these issues.

## A. PROTECTIBLE INTEREST

We are well aware that in Indiana a non-compete agreement will be enforced if it is "reasonable" as to 1) time, 2) geography, and 3) activity. *Cent. Ind. Podiatry P.C. v. Krueger*, 882 N.E.2d 723 (Ind. 2008). Yet, the first question that always needs to be addressed, and which courts are giving more attention, is whether the party seeking to enforce the non-compete agreement has a "protectible interest" to enforce a non-compete to begin with. *Cent. Ind. Podiatry,* 882 N.E.2d at 729.

To have a "protectible interest" the employer must be able to show "why it would be unfair to allow the employee to compete with the former employer." *Pathfinder Corp. v. Macy*, 795 N.E.2d 1103, 1110 (Ind. Ct. App. 2003). Indiana also says that in order to have a protectible interest the employer must show that it has a "legitimate business interest" in having a non-

[1] "Non-compete" is somewhat a misnomer. A true non-compete seeks to prevent an employee from working for a competitor. Yet there are other forms of "non-competes," most notably agreements prohibiting solicitation of customers and employees. In many regards such non-compete agreements are more effective and sensible than a true non-compete, and easier to enforce.

compete with that employee. *Clark Sales and Service, Inc. v. Smith*, 4 N.E.3d 772 (Ind. Ct. App. 2014). "In determining the reasonableness of a covenant not to compete, [the court] examines at the outset whether the employer has asserted a legitimate interest that may be protected by a covenant." *Unger v. FFW Corp.*, 771 N.E.2d 1240, 1244 (Ind. Ct. App. 2002). An employer may not forbid all employees from subsequently operating or joining a similar business unless it has a recognized protectible interest. *Norlund v. Faust*, 675 N.E.2d 1142, 1154 (Ind. App. 1997), *trans denied*. The courts will generally find a protectible interest to warrant a covenant not to compete if it can be shown that there is something that needs to be protected, *i.e.* goodwill, customer relationships, confidential information, trade secret information, etc. *Gleason v. Preferred Source Income LLC*, 883 N.E.2d 164, 173 (Ind. Ct. App. 2008). The author often thinks of it as whether you can show the employer has a true "need."

Thus, when prosecuting a non-compete agreement, or defending a non-compete, the first issue must be, -- is there a protectible interest? For instance, if the employee did not have contact with customers, did not make sales calls, did not make strategic decisions, etc., there is a real argument there is no protectible interest. And, remember, that it is the employer who bears the burden of demonstrating that the former employee has gained a unique competitive advantage or ability to harm the employer before that employer is determined to have a protectible interest. *Burk v. Heritage Food Serv. Equip., Inc.,* 737 N.E.2d 803, 811 (Ind. App. 2000); *Slisz v. Munzenreider Corp.*, 411 N.E.2d 700, 705 (Ind. Ct. App. 1980).

Indiana courts have certainly denied enforcement of a non-compete because the employer could not show a protectible interest. *Duneland Emergency Physician's Medical Group, P.C. v. Brunk*, 723 N.E.2d 963, 966 (Ind. App. 2000). In the author's experience, courts are taking a much longer look at whether there is a true protectible interest. And, in the author's experience, trial

courts are more frequently finding that there is no protectible interest over certain employees, *i.e*. copy repairman, receptionist, etc.

**B. TIME**

We are all familiar that Indiana has on multiple occasions enforced employee non-compete agreements of up to three (3) years. *Titus v. Rheitone, Inc*., 758 N.E.2d (Ind. Ct. App. 2001). Although three (3) years is generally considered the outside in Indiana, there is one old case where a non-compete of five (5) years was enforced in an employee non-compete situation. *Rawlins v. Am. State Bank*, 487 N.E.2d 842, 843-44 (Ind. Ct. App. 1986).

But, judges are no longer used to seeing non-competes of up to three (3) years in the employment context, because they are not written that much anymore. It is much more normal that non-competes are in the 1 year, 18 months, or 2 year timeframe. In the author's view, it is much easier to argue to a judge that even a questionable non-compete is enforceable if the timing is short, -- one year or 18 months. And, considering that the protective effect of a non-compete for even a one (1)-year time period is generally sufficient. Most employees live paycheck to paycheck. Thus, even a six (6)-month, or a one-year restriction, will usually require the employee to join a new line of business to avoid the non-compete, no matter what the time limit.

**C. GEOGRAPHIC AREA**

A covenant not to compete must contain a limited geographic area in order to be enforceable. *Glenn v. Dow Agrosciences*, 861 N.E.2d 1, 12-15 (Ind. Ct. App. 2007) (refusing to enforce a non-compete covenant that contained no geographic limitation). Indiana courts generally hold that a geographic restriction is reasonable if it is limited to the geographic area where the employee was formerly deployed by the employer. *Washel v. Bryant*, 770 N.E.2d 902, 904 (Ind. Ct. App. 2002). A restrictive covenant that encompasses a geographic area broader than the area

in which the employee worked for the employer is vulnerable to not being enforced. *Dicen v. New Sesco, Ind*, 839 N.E.2d 684, 689 (Ind. 2005); *Commercial Bankers Life Ins. Co. v. Smith*, 516 N.E.2d 110, 114 (Ind. Ct. App. 1987). Covenants that seek to restrict a medical provider, such as a doctor, have somewhat their own rules. Courts look to see where the patients are coming from, and from which medical office the medical provider is working from when determining whether a geographic area is reasonable. *Central Indiana Podiatry*, 882 N.E.2d 730. *See also Medical Specialists v. Sleweon*, 652 N.E.2d 517, 524 (Ind. Ct. App. 1995).

In the "old days" this analysis was simpler. If, for example, a salesperson worked only in Indiana and Illinois, and if the non-compete was limited to just those states, it was enforceable. *Coates v. Heat Wagons, Inc*., 942 N.E.2d 905, 915 (Ind. Ct. App. 2011). But this analysis is now becoming much more challenging given that people can work from their homes, from remote locations in Florida, or from any office. The lines have never been so blurry. And, now wherever the employee is located in the United States, the employee can conduct business and contact customers throughout anywhere in the country by computer, telephone, or Zoom. What if someone lived and worked outside a stated 100-mile radius, but made calls to customers inside the 100-mile radius? We are now seeing the geographic scope written much more clearly to address this very issue. This is a fertile ground for disputes. The key is more specific drafting, and further clarification by the courts.

Recognizing the global nature of today's world, some employers have been successful enforcing worldwide or nationwide geographic restrictions. Courts have recognized that a per se rule against a broad geographic restriction in today's world is "hopelessly antiquated." *National Reprographics, Inc. v. Strom*, 621 F.Supp.2d 204 (D.N.J. 2009). Courts have ruled that internet companies have no true geographic boundaries, and thus can only truly be protected by a

*worldwide* prohibition on a working for a competitor. *Life Image, Inc. v. Brown*, 2011 WL 7443924 * 8 (Mass. Dec. 22, 2011).

Another way of handling the geographic limitation, is a customer focused restriction. Indiana will enforce a customer focused restriction notwithstanding the lack of a geographical limitation, where the non-compete is limited to a particular group of customers. *Seach v. Richards, Dieterlere & Co*., 439 N.E.2d 208 (Ind. Ct. App. 1982). But the restriction must still be reasonable. It may need to be restricted to only those customers with whom the employee had personal contact. *See Clark Sales*, 4 N.E.3d at 781-82 (invalidating a customer focused restriction in part because it extended to customers with whom the employee never had any control or material communication).

**1. GEOGRAPHIC RADIUS**

One issue that comes up when in analyzing the geographic limitation is use of the word "radius" and a certain number of miles. Non-competes often prevent competition within a certain mile (*i.e*. 100 mile) "radius." Years of legal precedent universally hold that "radius" means an area determined by a direct line, *i.e*. as the crow flies, not by a traveled roadway.[2] Yet, we see

[2] Legal precedent has universally long held that "radius" means an area determined by a direct line from the specified location, not by the nearest traveled roadway. *See, e.g. Johnson v McIntyre*, 309 Pa 191, 163 A 290 (1932) ("court has no power to substitute for 'a radius of fifteen miles' the words 'fifteen miles by the nearest traveled public way or road'"); *Johnston v. Wilkins,* 830 A.2d 695 (Vt. 2003) (radius determined by straight line from clinic to the circumference of a circle rather than by way of traveled highways); *Jaracki v. Cardiology Associates*, 55 S.W.3d 799, 804 (Ark. App. 2001) (stating that a 75-mile radius does not contemplate driving distance); *BJ of Leesburg, Inc. v. Coffman*, 642 So.2d 83, 84 (Fla. Dist. Ct. App. 1994) (use of term "radius" in agreement precluding former employee from engaging in same business as employer "within a ten (10) mile radius" of former employment "is plain and unambiguous, and has nothing to do with road mileage"); *Thompson v. Allain*, 377 S.W.2d 465, 468 (Mo. Ct. App. 1964) (because it is common knowledge that roads do not extend from given place in straight line to every point on compass, term "radius of fifty (50) miles" in non-compete agreement "could not mean road miles"); *Scuitier v. Barile*, 70 A.2d 894, 895 (N.J. Super. Ct. 1950) (if area in restrictive covenant is expressed by use of word "radius," prescribed distance should be measured along direct line because radius means straight line extending from center of circle to its circumference); *Mead v. Anton,* 33 Wash.2d 741, 756, 207 P.2d 227, 235 (1949) (common and ordinary meaning of radius is measured by an air line, not along streets or sidewalks); *Harris v. Univ. Hospital of Cleveland*, 2002 Ohio App. LEXIS 1032 * 20 (March 7, 2002) (noting that case law

employees frequently argue otherwise, or attempt to argue that driving distance applies. Especially in cases where there is a certain miles-based limitation, the exact mileage can be very important. The direct line distance can be materially different from the traveled roadway distance.

### 2. HOW TO PROVIDE GEOGRAPHIC PROOF OF DISTANCE

One issue is how to prove the distance to where the employee is located and conducting business. One method is to have a witness simply testify to the distance. Employees may also admit to certain distances. Oftentimes it is not an issue in dispute. Yet, sometimes the issue is less clear. There are also several internet programs that run the exact straight-line distance from the former employer's business to the employee's new business. Attached at the end of these materials is a form Affidavit we have used proving the exact distance using such methods. We use a junior associate or paralegal for this, whom we could call as a witness as necessary. The author often files this Affidavit well before the preliminary injunction or summary judgment hearing, to see if there is any challenge. To date, this approach has not been challenged.

## D. ACTIVITY RESTRICTION

This restriction was largely ignored for a number of years, but now is front and center in any Indiana non-compete litigation. Indeed, the author recently prevailed at the preliminary injunction stage, but lost at the state court trial stage in seeking to enforce a non-compete in a medical provider context, because the trial court ruled the activity restriction was not adequately described.

In short, a non-compete is <u>un</u>enforceable if it prohibits an employee from working for a competitor "in any manner." The two leading cases for this holding are *Gleeson v. Preferred*

has been "historically uniform in rejecting (the driving distance) theory and holding that the correct way to measure the distance between locations is as the crow flies, or the straight line approach used by a surveyor.").

*Sourcing, LLC*, 883 N.E.2d 164, 175-76 (Ind. Ct. App. 2008); *Burke v. Heritage Food Service Equipment, Inc*., 737 N.E.2d 803 (Ind. Ct. App. 2000). *See also MacGill v. Reid*, 850 N.E.2d 926, 932 (Ind. Ct. App. 2006); *Clark Sales*, 4 N.E.3d 772. Taken together these cases state that a non-compete is unenforceable if it restricts an employee from working for an employer's competitor in <u>any</u> capacity, and possibly even from working in portions of the competitive business in which the employee <u>was never associated</u> with the prior employer.[3] *Id*. *See also Badger Daylighting Corp. v. Palmer*, 2019 WL 4572798 at * 6 (S.D. Ind. Sept. 20, 2019) ("non-compete provisions should limit their restraints to employees' future employment involving positions or services analogous to those actually performed by employee."); *see also Sharvelle v. Magnate*, 836 N.E.2d 432 (Ind. Ct. App. 2005) (attempting to prohibit an ophthalmologist from engaging in the business of "health care of every nature and kind" was held to be too broad).

This law is now well established on this point. However, there are some contrary decisions that employers can point to, most particularly *Unger v. FFW Corp*., 771 N.E.2d 1240 (Ind. Ct. App. 2002). *Gleeson*, which came after *Unger* and essentially reversed *Unger*, conceded that the decisions on this topic are "hard to reconcile." *Id*. at 175-76. And there are some earlier decisions that do broadly prohibit employees from working for a corporation in <u>any</u> capacity (although without much discussion on the issue). *See, e.g. Titus*, 758 N.E.2d at 93-94 (upholding as reasonable a non-competition agreement that prohibited a former Vice-President/Salesperson from engaging in or participating with a competitor in any capacity whatsoever); *Raymundo,* 449 N.E.2d 276 (enforcing covenant that prohibited doctor who only specialized in orthopedic surgery from engaging in the practice of medicine in total); *Medical Specialists,* 652 N.E.2d 517 (same, in part because monitoring compliance with a more specific job activity would be difficult). And, the

[3] These are two separate concepts and defenses.

author has seen employers note that the Indiana Supreme Court holds that a non-compete restriction is reasonable not just based on the language of the covenant itself, but "upon the entire contract and the situation to which it is related." *Licocci v. Cardinal Associates, Inc*., 445 N.E.2d 556, 563 (Ind. 1983). These cases can prove helpful if the employee is leaving to a competitor at the same exact job he or she had at the prior employer.

So, in drafting the activity restriction in a non-compete, the issue is balance. The more specific the activity restriction is in prohibiting exactly what position(s) an employee cannot perform for the competitor, the more likely it is to be enforced. And, the more closely related to the role the employee actually served for the employer the better. But, by doing so, it is easier for the employee to avoid the non-compete by working in a slightly different position. Consideration should be given to writing a specific and then catch-all "similar position" or like restriction.

**E. INDIANA'S BLUE PENCIL DOCTRINE**

Indiana's blue pencil law is rather unique. Other states allow the courts to completely rewrite or revise the offending provision at the court's discretion. This itself prevents some difficulties in evaluating the enforceability of an agreement because one can never know whether the court will revise the offending provision to make it enforceable.

Indiana's blue pencil doctrine is different. It does not allow a court to revise or rewrite the problematic provision. The Indiana Supreme Court very recently reaffirmed this in *Heraeus Medical, LLC v. Zimmer, Inc*., 135 N.E.3d 150 (Ind. 2019). As reiterated in *Heraeus*, Indiana's blue pencil doctrine does not allow a court to add language to an overbroad restrictive covenant. In Indiana, a court may only "excise unreasonable, divisible language from a restrictive covenant – by erasing those terms, only until reasonable portions remain." *Heraeus*, 135 N.E.3d at 153 (citing *Krueger*, 882 N.E.2d at 730). Indiana's blue pencil doctrine does not allow a court to

rewrite a non-competition agreement by adding, changing, or rearranging terms. *Id*. Significantly, *Heraeus* emphasized that the blue pencil doctrine applies to <u>all</u> restrictive covenants, not just prohibitions against working for a competitor. *Id*. (citing *Burke*, 737 N.E.2d at 814-15) (blue penciling an overbroad customer non-solicitation covenant).

Given Indiana's blue pencil doctrine, some drafters of non-compete agreements write them in easily divisible sections, starting with a very broad and then going to a very limited restriction, or vice versa. There are arguments for and against this approach. In the author's view, such methods of drafting are generally disliked. It appears as if the non-compete is being set up to fail. Caution should be used when utilizing this approach.

### F. IS THE EMPLOYEE REALLY WORKING FOR A "COMPETITOR?"

A primary line of defense that is sometimes overlooked with all the focus on the above issues, is whether the employee is even working for a competitor, as defined. Is the new employer really a "competitor" ? *Kladis v. Nick's Patio, Inc*., 735 N.E.2d 1216 (Ind. Ct. App. 2000) well recognizes this concept. In a non-compete arising in the "sale of business" context, the court in *Kladis* held that a former owner who was prohibited from working "in a similar restaurant business" was <u>not</u> violating the non-compete when he was hired by a restaurant to make interior renovations, roof repairs, and landscaping. *See also Lueth v. Gardener*, 541 N.E.2d 298 (Ind. Ct. App. 1989) (holding that a seller of an auto *repair* business was not restricted by a non-competition agreement from working for an auto *parts dealer*). A detailed conversation with your client, especially if representing the employee, is necessary to evaluate whether the employee is truly working for a competitor as defined in the non-compete agreement. Many agreements provide a detailed description of who is a competitor or what is a competitive business.

## G. MANY JURISDICTIONS ARE MOVING TO REDUCE OR ELIMINATE THE ENFORCEABILITY OF NON-COMPETE AGREEMENTS

Determining what law applies is now more important than ever. Many states, unlike Indiana, have a statute that governs the enforceability of non-competition covenants. More and more states are adding statutory restrictions to non-compete agreements, restricting enforceability to only certain situations, or restricting them from applying to certain employees, *i.e*. non-enforceable against wage earners. It is no longer just California and Louisiana. Multiple states have recently passed statutes reducing the enforceability of non-competition agreements such as Massachusetts, Virginia, and Illinois. Washington D.C. is currently discussing a law to prohibit the use of non-compete agreements for D.C. based employers except for highly paid positions (and a few other exceptions).

And, the federal government is now in the mix. The Biden administration has proposed to ban certain non-competition agreements on a national basis. Certain senators have recently from time to time introduced bills banning non-competes. Before being sworn in as President, President Biden released a "Plan for Strengthening Worker Organization, Organizing, Collective Bargaining and Unions." This Plan stated that President Biden would work with Congress to eliminate *all* non-competition agreements, except for very few necessary to protect a narrowly defined category of trade secrets, and would outright ban all non-poaching agreements. Although most commentators believe the Biden administration has its hands full in 2021 on other issues, this could be on the horizon in 2022.

## H. INDIANA HAS ENTERED THE FRAY WITH A STATUTORY RESTRICTION FOR DOCTORS

Effective July 1, 2020, Indiana passed legislation that affects *new physician* non-compete restrictions in a significant way. Pursuant to Indiana Code § 25-22.5-5.5-2, to be enforceable, a physician non-compete agreement must: (1) provide the physician with a copy of any notice that:

- Concerns the physician's departure from the employer, and
- Was sent to any patient seen or treated by the physician during the two (2)-year period preceding the termination of the physician's employment or the expiration of the physician's contract.

Employers are also required to provide the physician's last known or current contact and location information to any patient who:

- Requests contact and location information for the physician, and
- Was seen or treated by the physician during the two (2)-year period before the physician's employment ended or contract expired. [In other words, you cannot hide the doctor from patients].

Employers are further required to provide the physician with (a) access to, and (b) copies of patient records for any patient that was seen or treated by the physician during the two (2)-year period before the physician's employment ended (with patient's consent). [In other words, access to medical records must be provided].

Lastly, and most notably for today's discussion, Indiana's new statute also states that employers are required to provide the physician with the option to purchase a complete and final release from the terms of any enforceable physician non-compete agreement "at a reasonable price." Unfortunately, "a reasonable price" is not defined. The issue of what constitutes a "reasonable price" will thus be the subject of litigation. To date, there has not been any Indiana

appellate court decision on the issue. Employers would be well advised, however, to analyze the buyout price at issue, carefully determine a buy-out number, and not simply state a purchase price out of "thin air."

## I. INDIANA LAW REGARDING EMPLOYEE ANTI-SOLICITATION PROVISIONS HAS RECENTLY CHANGED

In many non-compete agreements employers also seek to prohibit employees from (1) contacting customers, or (2) soliciting co-workers/employees. Indiana's law dramatically changed in the co-worker/employee anti-solicitation area on December 3, 2019, in *Heraeus Medical, LLC v. Zimmer, Inc*., 135 N.E.3d 150 (Ind. 2019). *Heraeus* held that the non-solicitation of employee covenant was overbroad, and was thus not enforced. Prior to *Heraeus*, non-solicitation of co-worker/employee provisions were often given little analysis and readily enforced. But, *Heraeus* held that only those employees who have some special status creating a protectable interest, *i.e*. a nexus to trade secret information, knowledge of confidential information, etc. could be prohibited from being solicitated. Only those employees who "have access to or possess any knowledge that would give a competitor an unfair advantage" can be restricted as the employer has a protectable interest over such individuals. *Id*. at 155-56. The standard "any individual employed" by the former employer language is now considered overbroad and unenforceable. *Id*. Given the *Heraeus* decision, almost every prior non-compete agreement should be examined and perhaps revised.

And, when considering provisions such as this, one needs to carefully examine the language of what is prohibited. Many agreements only prohibit "solicitation or inducement" of employees to leave to join a competitor. Other agreements go further and ban any "contact" with former co-workers. The first elementary step in this analysis is thus what language is employed, and whether the employee actually "solicited" employees to leave. If it can be shown that all major steps that led to the employment of the new employee were initiated by the departing employee

herself, such as initiating contact by responding to the company's general social network employment advertising, and then meeting with the new employer without communications with the former employee in question, Indiana holds that this does not constitute soliciting an employee. *Enhanced Network Solutions Group, Inc. v. Hypersonic Technologies Corp.*, 951 N.E.2d 265, 266 (Ind. Ct. App. 2011). The word "solicit" is a word of art. *Id.*

**J. LIQUIDATED DAMAGES**

Indiana law regarding liquidated damages is well known. Liquidated damages provisions are enforceable if such a provision does not constitute a mere penalty, and has some reasonable relationship to actual damages. *See American Consulting, Inc. v. Hannum Wagle & Cline Eng., Inc.*, 136 N.E.3d 208, 211 (Ind. 2019); *Hahn v. Drees, Perugini & Co.*, 581 N.E.2d 457, 463 (Ind. Ct. App. 1991). The significant issue for non-compete agreements, however, has been whether a liquidated damages provision in a non-competition agreement negates potential injunctive relief, because injunctive relief may be unavailable if damages are calculable.[4] In the late 1990s and early 2000s this argument had some legs, and there was some case law to support it. Yet, that is no longer the case. Starting with *Washel v. Bryant*, 770 N.E.2d 902, 906 (Ind. Ct. App. 2002), the Court of Appeals rejected an either/or approach, and allowed the granting of injunctive relief in addition to an award of liquidated damages. Indiana law now recognizes that liquidated damages provisions do not preclude injunctive relief unless the agreement provides that liquidated damages are to be the exclusive remedy. *Pinnacle Health Care*, *LLC v. Sheets*, 17 N.E.3d 947, 953-55 (Ind. Ct. App. 2014) (also recognizing that liquidated damages clauses are intended "to operate in tandem with an injunction"). Thus, when drafting, enforcing, or defending, one should look for

[4] Indeed a trap for the wary is when an employee asks the employer to state its damages. Calculable damages precludes injunctive relief. *Mercho-Roushdi-Shoemaker Corp. v. Blatchford*, 742 N.E.2d 519, 524 (Ind. Ct. App. 2001).

language whether the liquidated damages provision expressly states the right to recover liquidated damages is in addition to and not in lieu of injunctive relief.

**K. FRIVOLOUS NON-COMPETE CLAIM**

While this would be true of any lawsuit, there is recent authority from the Indiana Court of Appeals that dismissal of a non-compete case on the eve of trial can subject the prosecuting party to attorney's fees pursuant to Ind. Code § 34-52-1-1. *Staff Source, LLC v. Wallace*, 143 N.E.3d 996 (Ind. Ct. App. 2020).

**L. NEW CASE ON RESTRICTING SOLICITATION OF FORMER CUSTOMERS**

Indiana has long recognized that efforts to preclude departing employees from reaching out to *former* customers of the *former* employer is unenforceable regardless of whether the employee interacted with such customers. *Clark Sales*, 4 N.E.3d at 781. *See also Seach*, 439 N.E.2d at 214. The concept is that there is no protectible interest in former customers with whom the employee had no contact. Yet, last month on March 31, 2021, in *Carroll v. Long Tail Corporation*, 20A-PL-1285, the Indiana Court of Appeals held that in light of the departing employee's consistent involvement with literally every customer of the employer throughout his employment, "we cannot say that the trial court abused its discretion" in enforcing a non-solicitation provision against even former customers. The *Carroll* decision is in conflict with some prior decisions, most notably *Clark Sales*. Yet, *Carroll* distinguished *Clark Sales*, noting that the restriction against former customers was considered too broad in *Clark Sales* in part because it included customers with whom the employee had never had contact.

**M. THE PRIOR MATERIAL BREACH DEFENSE**

One of the best defenses in Indiana non-compete law (if it is viewed that the non-compete is generally reasonable and enforceable) is the "prior material breach" defense. There is a large

body of Indiana law that recognizes with respect to any contract in general, that a party first guilty of a material breach of contract may not maintain an action against the other party or seek to enforce the contract. *E.g.*, *Licocci v. Cardinal Associates, Inc.*, 492 N.E.2d 48, 52 (Ind. Ct. App. 1986). *See also Goff v. Graham*, 306 N.E.2d 758, 765 (1974). In *Licocci,* the court also ruled that the rule applies to non-compete contracts. *Id*. The prior material defense rule in non-compete litigation then really gathered steam following *Sallee v. Mason*, 714 N.E.2d 757, 762 (Ind. Ct. App. 1999), which held that because the employer failed to provide 30 days' notice of termination of the employee's employment as required by the employment and non-compete agreement, the employer could not enforce the non-compete provision contained in the employment agreement. Since *Sallee*, there has been several other cases that have reinforced the prior material breach defense.

The issue has thus evolved into whether employers can seek to avoid the prior material breach defense by drafting a provision in the non-compete covenant that a material breach by the employer will not constitute a defense to breach of the non-compete agreement. At least one Indiana federal court case recognizes such clauses should be enforced. *Barnes Group, Inc. v. O'Brien*, 591 F.Supp. 454, 463 (N.D. Ind. 1984). But, the issue really came to the forefront following the Indiana Supreme Court's recent decision in *Central Indiana Podiatry*, which in dicta generally enforced the validity of a "no defense" provision, at least for minor employer breaches. *Id.*, 882 N.E.2d at 732. In *Central Indiana Podiatry*, the defendant argued that the employers failure to pay a car allowance constituted a breach that prevented the enforcement of a non-competition agreement. The Indiana Supreme Court, however, disagreed, first because the amount involved with the car allowance was viewed as immaterial to the overall context of the contractual relationship. *Id*. And, more significantly, the Court then further noted that the agreement had a

"no defense" provision, which expressly provided that the existence of claims by the employee against the employer shall not constitute a defense to the enforcement of a non-competition covenant. In an analysis spanning over one full page, and examining how other jurisdictions have examined the issue, *Central Indiana Podiatry* recognizes the validity of a "no defense" provision, but left the door open, cautioning that "there may be some (very material) breaches by the employer that would override such a contractual provision … " *Id*.

Many non-competition agreements do not contain a "no defense" provision. Given *Central Indiana Podiatry* and *Barnes*, there does not seem to be any good reason why it should not be included when drafting the non-compete agreement.

INDIANA COMMERCIAL COURT

| STATE OF INDIANA | ) | IN THE LAKE SUPERIOR COURT |
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| | ) SS: | |
| COUNTY OF LAKE | ) | |

| | | |
|---|---|---|
| [REDACTED] | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | |
| | ) | Cause No.: [REDACTED] |
| [REDACTED] | ) | |
| | ) | |
| Defendant. | ) | |

**AFFIDAVIT OF [REDACTED]**

I, [REDACTED], under the penalties of perjury, hereby state as follows:

1. I am over eighteen (18) years of age.

2. The facts set forth in this Affidavit are known to me to be true based upon my personal knowledge of such facts and, if called upon to testify as a witness, I am competent to testify to these facts.

3. I am admitted and licensed to practice law in the State of Indiana. I am an active member in good standing. My Indiana attorney number is 36089-49.

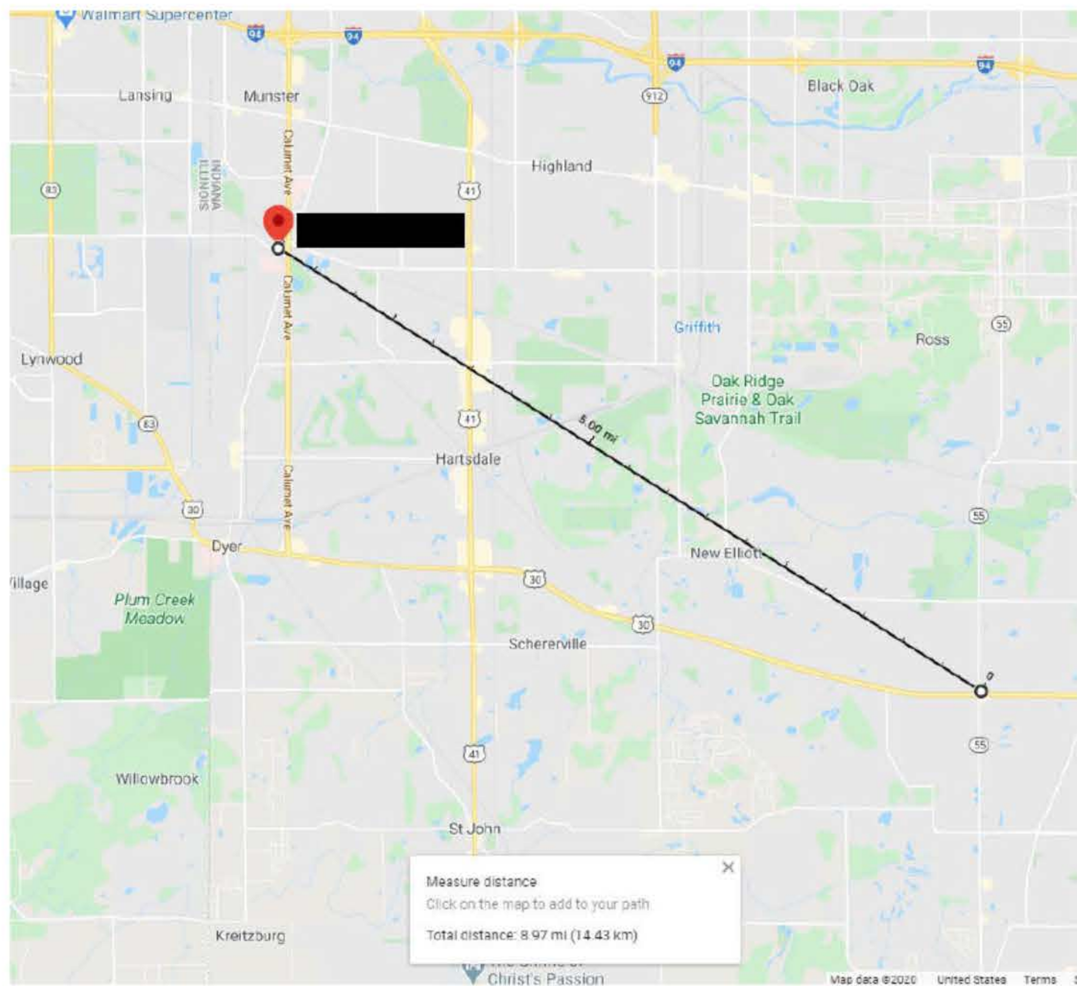
4. I am employed by Krieg DeVault, LLP, as an associate attorney in the Labor and Employment Law practice group.

5. From time to time I assist [REDACTED] [REDACTED], with employment law work, including the cease and desist letter to [REDACTED] concerning his new employment and his continuing obligations to [REDACTED]. As a part of the cease and desist communications with [REDACTED] and his counsel, I helped determine the distance between [REDACTED] former employer, and his new employer, [REDACTED]

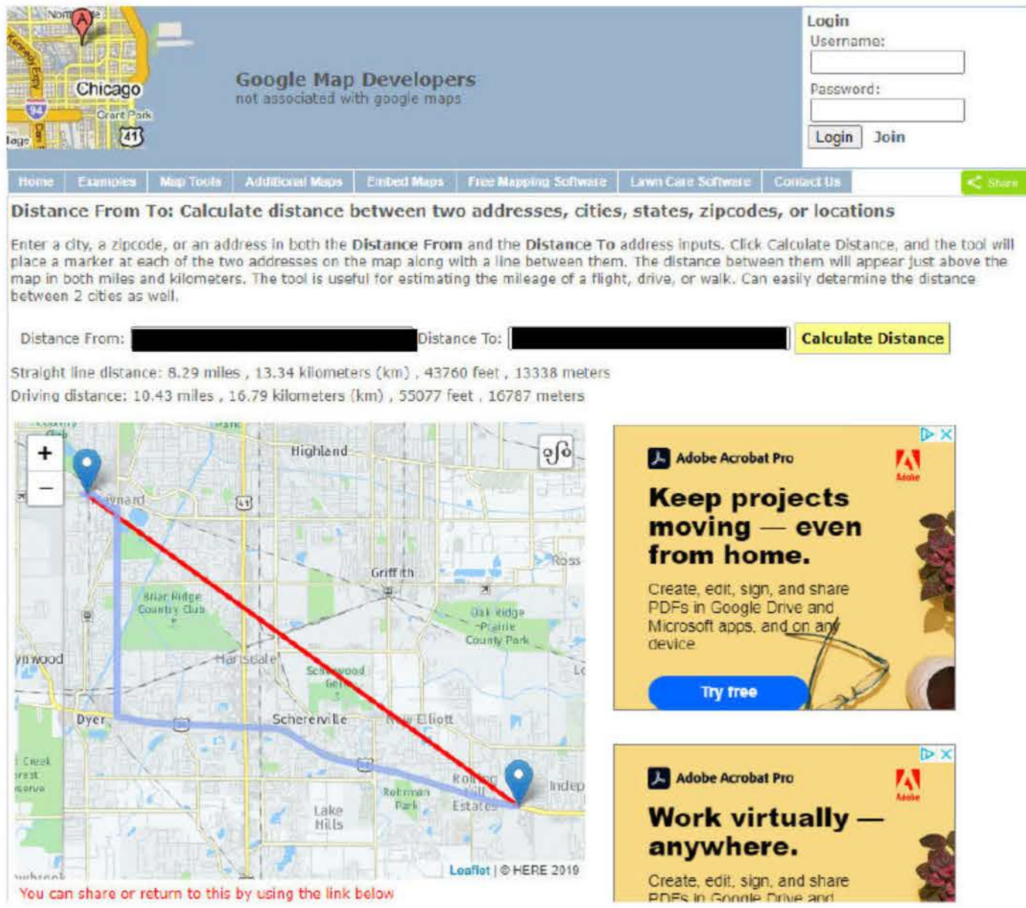
. is located at ,

. is located at , .

6. To measure the straight line distance between these two locations, I input into Google Maps and then selected the "Measure Distance" function. I then added in the address for and drew the straight line distance between the two locations. I then verified that the two points were accurately placed over each location, and then erred on the side of caution by moving the two end points to cover a slightly larger distance. Using this function, the distance between these two locations came out to 8.97 miles, as shown in the image below, a true and accurate copy of which is shown below. I performed this function in both June and July and achieved the same results each time.



7. On July 20, 2020, I used another online distance calculator to verify the Google results referenced in paragraph 6 above. With this tool, the straight line distance between [redacted] came out to 8.29 miles, as shown below. The website is located here: https://www.mapdevelopers.com/distance_from_to.php. A true and accurate copy is shown below.




**I AFFIRM UNDER THE PENALTIES OF PERJURY THAT THE FOREGOING STATEMENTS ARE TRUE AND CORRECT.**

Date: July 21, 2020

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served electronically upon all counsel of record through the Indiana E-Filing System (IEFS) on July 21, 2020:

KD_(10927278.2).docx

# Section Three

# The Tougher Topics of Employment Law:

# Complex Reasonable Accommodation Issues under the ADA

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**May 6, 2021**
**ICLEF Seminar**

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# Section Three

## The Tougher Topics of Employment Law: Complex Reasonable Accommodation Issues under the ADA……………………………………...Tami A. Earnhart


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## INTRODUCTION

## I. Introduction

The Americans with Disabilities Act (the "ADA") prohibits employers from discriminating in all aspects of employment against qualified individuals because of a disability and requires employers to reasonably accommodate individuals with a disability if they can do so without undue hardship. One of the more challenging aspects of the ADA, for employees, employers and their respective advisers, has proven to be the requirement to provide a reasonable accommodation. This paper is not intended to cover the basics of the reasonable accommodation requirements or process. Rather, the focus of this article is recent examples of some of the more complex aspects of the reasonable accommodation analysis. Part II of this paper will examine several areas of interest in recent reasonable accommodation law and practice. Part III of this paper reviews some recent COVID-19 related litigation related to reasonable accommodations.

## II. Examples of Complex Reasonable Accommodations Issues

### a. Essential Functions

As will be highlighted in the cases described below, the determination of whether an accommodation is reasonable focuses on the fundamental question of: What is an essential function? Under the ADA, an accommodation is reasonable only if it allows a qualified individual to perform the essential functions of their position.[1] This question is extremely fact-based and nuanced. A decision maker may consider a number of factors, including: the reason the job exists; the number of individuals employed who do the same kind of work; the degree of specialization the job requires; the employer's judgment about what is required; the consequence of not requiring an employee to satisfy that function; and the amount of time spent on a function (although some functions may be essential even though they do not take a great deal of time).[2]

One recent case demonstrates a situation when a function, although infrequent, can still be essential to the role. In *Kotaska v. Federal Express Corporation*,[3] the employee worked as a package carrier who lifted and sorted packages with an average weight of 15lbs. After sustaining a shoulder injury, her doctor restricted her to overhead lifting of no more than 5lbs, or 15lbs occasionally if using both hands. The carrier job description required lifting up to 75lbs and did not specify whether the lifting was overhead or how high. Following her injury, the company notified the employee that she had 90 days to request an accommodation or apply to another position. She applied to a handler position but was denied because that position also had a 75lb lifting requirement. The company then terminated the employee's employment.

More than a year later, the employee's former supervisor asked her to return to work as a handler because someone reliable was needed. When the human resources department became

[1] 42 U.S.C. §§ 12111(8) and 12112; *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476, 481 (7th Cir. 2017).
[2] 42 U.S.C. §§ 12111(8); *Felix v. Wisconsin Dept. of Transportation*, 828 F.3d 560, 568 (7th Cir. 2016); *Hooper v. Proctor Health Care Inc.*, 804 F.3d 846, 852-53 (7th Cir. 2015); *Bunn v. Khoury Enters., Inc.*, 753 F.3d 676, 683 (7th Cir. 2014).
[3] 966 F.3d 624 (7th Cir. 2020).

aware that the employee returned, the company requested medical documentation to determine whether the previous restrictions had been lifted. When human resources learned that the restrictions remained in effect, the company again informed the employee that she had 90 days to request accommodation or apply for another position. The employee did not request accommodation, but the employer evaluated whether it could accommodate her anyway, ultimately determining that it could not. The company again ended the employee's employment.

In response to the employer's motion for summary judgment, the employee first argued that the average package weight was 15lbs, not 75lbs, but the court emphasized that even the capacity to respond to rare events can be an essential function.[4] The court went on to note that because the employee was the only employee in her role at that facility, and the core function of her job was to lift packages weighing up to 75lbs,[5] having a second employee to assist when the work exceeded her capabilities was not a reasonable accommodation as a matter of law.[6]

Cases in the following sections will further highlight the importance of determine whether a duty is essential to the role.

**b. What is Reasonable?**

**i. Job Coach/Assistance from Other Employees**

A recent case from the Western District of Wisconsin briefly looked at whether a full-time job coach assisting a profoundly disabled employee, as compared to, for example, permitting other employees to assist the qualified individual at work, is a reasonable accommodation. In *Equal Employment Opportunity Commission v. Wal-Mart Stores, Inc.*, [7] the employee worked as a shopping cart attendant with the daily assistance of a job coach for seventeen years. When a new manager was hired, the employee was asked to provide an accommodation medical questionnaire from the employee's physician attesting to the employee's current condition.[8] The form was timely returned, but the employee was never scheduled for work again.[9]

After a jury verdict, Walmart asked for judgment as a matter of law. In considering the motion, and noting that, for a variety of reasons, Walmart had forfeited the argument that a job coach cannot be a reasonable accommodation, the court determined that (even if the argument was not forfeited) a job coach can be a reasonable accommodation, finding the jury verdict to be based on legally sufficient evidence. The court noted that the issue of whether a job coach can be a reasonable accommodation "turns not on the distinction between permanent and temporary job

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[4] *Id.*
[5] *See Williams v. Eastside Lumberyard & Supply Co.*, 190 F. Supp. 2d 1104 (S.D. Ill. 2001) ("employee who was not able to perform essential job function of heavy lifting, with or without reasonable accommodations, was not "qualified individual," as required for prima facie case of failure to accommodate under the ADA."). *See also Vargas v. DeJoy*, 980 F.3d 1184 (7th Cir. 2020) (being able to carry bundles of mail weighing more than 15 pounds, which was the mail carrier's limit, was an essential function of his job for purposes of his Rehabilitation Act claim.).
[6] *Id.*
[7] No. 17-CV-739-JDP, 2020 A.D. Cases 460, 2020 WL 6938208 (W.D. Wis. Nov. 25, 2020).
[8] The employee requested to continue the job coach in addition to requesting several other accommodations.
[9] The decision does not address why the employee was not scheduled again, although the EEOC brought both failure to accommodate and discrimination claims under the ADA based on the termination.

coaching, but rather on the type and amount of assistance provided by the job coach and the abilities of the employee in question,"[10] which was a factual question determined by the jury. The court ultimately reaffirmed the well-settled legal standards and definitions regarding reasonable accommodations, including that a job coach would not be a reasonable accommodation where the coach is required to perform any of the essential functions of the job on the employee's behalf.[11] However, in this case, while the job coach drove a motorized cart back to the store while the individual with a disability walked alongside, the coach only did so once or twice a month. The court found that, based on the infrequency of the task and the testimony that the task could be performed by someone else when necessary, a reasonable jury could conclude that the task was marginal, not essential.[12]

The finding in Walmart above is arguably consistent with some of the Seventh Circuit's more recent decisions related to whether an employer must provide another employee to assist a disabled individual in completing their work. For example, in *Kotaska v. Fed. Express Corp.*,[13] the court held that that having a second employee assist when the work exceeded the plaintiff's capabilities was not a reasonable accommodation. The court reached a similar conclusion in *Majors v. Gen. Elec. Co.*,[14] in which the court stated, "[t]o have another employee perform a position's essential function, and to a certain extent perform the job for the employee, is not a reasonable accommodation."

Again, the question of what an essential function is paramount in these cases. Notably, in some circumstances, the Seventh Circuit has held that having another employee perform the job duties can a reasonable accommodation, such as when there is evidence that the normal practice was for the workers to determine who performs what task based on their abilities.[15]

### ii. Leave as a Reasonable Accommodation

The courts continue to address whether leave can be a reasonable accommodation under the ADA. Often, the analysis turns on the nature (e.g., predictable, or unpredictable) and length of the requested leave.

For example, in *Torres v. Children's Hospital and Health System, Inc.*,[16] the employee, a medical assistant responsible for "rooming" patients after they checked in, was prescribed several medications that caused her to oversleep and made her extremely drowsy and sedated. Her condition also caused her to experience flare-ups at work which, in turn, caused severe anxiety and depression, often resulting in her leaving work abruptly for the remainder of the day or missing work entirely. The employer spoke with the employee about a plan to accommodate her medical

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[10] *Id.* at *8.
[11] *Id.*
[12] Id. at *4. The court also examined other alleged "essential job functions," such as steering a line of carts and providing customer service, and came to similar conclusions based on how the job coach assisted and alternative methods of performing the job duties.
[13] 966 F.3d 624 (7th Cir. 2020).
[14] 714 F.3d 527, 534 (7th Cir. 2013)
[15] See, e.g., *Miller v. Ill. Dep't of Transp.*, 643 F.3d 190, 199–200 (7th Cir. 2011).
[16] No. 19-C-1491, 2020 WL 7029483 (E.D. Wis. Nov. 30, 2020).

condition and agreed to try an intermittent leave program for five months that allowed the employee to miss eight shifts per month without them counting against her for the purposes of the attendance program. The employee was required to call ahead one hour before her shift, but she rarely did so. The employer also had moved the employee's scheduled start time to assist the employee.

The employee missed many more shifts than permitted under the intermittent leave accommodation and failed to provide the required advance notice of her absences, which resulted in the employer questioning whether the accommodation could be continued. Within a short time after the official end date of the initial intermittent leave program, the employee exceeded the number of allowable excused absences under the employer's attendance program (without counting the allowable absences under the intermittent leave program), yet the company still did not terminate her employment. Instead, the company gave her a warning in lieu of termination.

The company subsequently provided modified intermittent leave programs for a period of time. When the employee requested another renewal, of her accommodation, the employer, through its third-party administrator, asked for a medical certification, which the employee did not provide in a timely manner, resulting in a denial of her request. Almost a year after the initial intermittent leave program started, the employee once again exceeded the number of absences permitted under the employer's attendance program and the company terminated her employment.

The court noted that the Seventh Circuit repeatedly recognized that regular attendance is an essential function of most positions, as is punctuality. The court then helpfully examined the reasonableness of several proposed accommodations, including sporadic attendance, later start times, half-day work assignments, afternoons-only scheduling, transfer, and extensions of time to submit requisite medical certifications. The court engaged in a lengthy analysis of each, finding that none of them were reasonable, highlighting that plaintiff sought leave that was frequent, sporadic and unpredictable. In ruling in favor of the employer, the court also applied long-standing Seventh Circuit precedent: an employer who tolerates certain behavior or "bends over backwards" to accommodate an employee, going further than the law requires, should not be punished by being deemed to have conceded the reasonableness of a far-reaching accommodation.[17]

In looking at continuous leaves, the Seventh Circuit recently reaffirmed its holding in *Severson v. Heartland Woodcraft, Inc.*, that a long-term leave of absence cannot be a reasonable accommodation under the ADA.[18] In *McAllister v. Innovation Ventures, LLC*,[19] the Seventh Circuit Court of Appeals emphasized that an employee who was not cleared to work in any position or capacity is foreclosed from establishing that she is a qualified individual with a disability under the ADA and from arguing that a continuing leave was a reasonable accommodation. The employee suffered serious injuries in a car accident and, as a result, her physicians repeatedly advised her and her employer that she could not return to work. Specifically, the employee was

[17] *Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538, 545 (7th Cir.1995).
[18] 872 F.3d 476, 481 (7th Cir. 2017) ("A multimonth leave of absence is beyond the scope of a reasonable accommodation under the ADA."). In contrast, shorter leaves, such as a request for two to four weeks of leave shortly after taking two weeks of leave and working two weeks with a reduced schedule, may be reasonable. *Haschmann v. Time Warner Entertainment Co.*, 151 F.3d 591 (7th Cir. 1998)
[19] 983 F.3d 963 (7th Cir. 2020).

restricted from performing "any and all work." The employer provided her with 6 months of medical leave and disability benefits while she healed. The employee then asked for an additional, multi-month extension of her leave. At the time of the additional leave request, the employee's doctors still had not cleared her to work. The District Court granted the employer's motion for summary judgment. On appeal, the Seventh Circuit held that the employee was not a qualified individual under the ADA because she could not perform any work at all, let alone the role which she previously performed. The court went on to note that it would "defy common sense" to demand that the employer disregard the amply documented medical opinions of the employee's physicians and allow employees to prematurely return to work as a reasonable accommodation. The court further held that, under *Severson*, the additional leave requested by the employee was not reasonable.

**iii. Light Duty/Creation of Role**

The Seventh Circuit's long-standing precedent holds that while reassignment to a different position can be a reasonable accommodation, the duty to reassign extends only to vacant positions—an employer generally is not required to create a new position or move someone out of their position to create an opening.[20] As with other accommodations, in analyzing whether placement of the employee in a different role is reasonable, courts will look at the employer's practices in creating roles for others.

One question that often arises is whether an employer must create a light-duty position for an individual with a disability. In *Jenkins v. Chicago Transit Authority*,[21] the employee suffered a toe injury eight days prior to her start date as a part-time temporary customer service assistant. She began wearing a supportive orthopedic boot to protect her injury. However, the orthopedic boot did not comport with her employer's requirement that employees wear safety footwear to training. Thus, when the employee attended training for her new role wearing the boot, rather than the requisite safety shoes, she was precluded from certain exercises on the train rails that can be dangerous without compliant footwear. This incident prompted the instruction manager to inquire about the employee's injury. When the employee responded that she had not yet seen a doctor, the employer requested that she do so. After this conversation, the employee did not attend the remainder of her training. Eventually, the employee's physician determined that she had fractured her toe and that she should limit her walking and continue wearing the boot until her toe had healed in approximately six to eight weeks. Following a series of interactions between the employer and the employee regarding an offer for re-hire if the employee resigned, she was ultimately administratively separated. Two days after the separation, the employee went to the employer's office and requested various accommodations, including that her job be put on hold until her injury healed; that she be placed in a different department or that she be treated analogously to a bus driver with a suspended license and put temporarily into another area. The employer declined to grant these requests.

In granting the employer's motion for summary judgment, the court emphasized an important rule: employers are not obligated to create a light-duty position for a non-occupationally

[20] *See, e.g.*, *Dunderdale v. United Airlines, Inc.*, 807 F.3d 849, 856 (7th Cir. 2015).
[21] No. 15 C 08415, 2020 WL 868535 (N.D. Ill. Feb. 20, 2020).

injured employee with a disability. However, if the employer has a policy of creating light-duty positions for employees who are occupationally injured, then the same benefit typically must be extended to an employee with a disability who is not occupationally injured unless the company can show undue hardship.[22]

**c. The Interactive Process**

The interactive process is vital to determining whether an accommodation is reasonable. When an accommodation is requested/needed, an employee and employer should engage in an informal "interactive process" to "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."[23] "If a disabled employee shows that her disability was not reasonably accommodated, the employer will be liable only if it bears responsibility for the breakdown of the interactive process."[24] While the failure of an employer to engage in the interactive process is not an independent claim,[25] the recent case of *Stipe v. Southern Illinois University of Edwardsville*[26] provides helpful instruction regarding the roles that both the employer and the employee must play in the interactive process, and how the failure to participate in good faith may affect the outcome of the case.

According to the plaintiff's version of events, her employer arbitrarily decided to move her workstation after adequately accommodating her needs for three years. When the plaintiff challenged the move and advised that the new space was not appropriate, the interactive process was initiated. However, the employer's suggestions were not acceptable to the plaintiff and she refused to move into what she perceived to be a non-accommodating workspace. When she failed to move, the employer issued two disciplinary actions against the plaintiff for her failure to follow a management directive, report to her assigned work station, and perform her duties. The employer placed her on leave without pay. After a disciplinary hearing on the first disciplinary action, the plaintiff returned to work, but still raised concerns related to her new set-up. After the second disciplinary hearing, additional modifications were made to the workspace. The plaintiff was not satisfied with the changes. After additional exchanges and another disciplinary hearing, the employer ultimately terminated the plaintiff's employment.

The court granted summary judgment to the employer on all claims except the plaintiff's failure to accommodate claim, noting that, although the employee may have refused to participate and withheld essential information, the employer did not take an "active, good-faith role in the interactive process" by initiating the disciplinary proceedings during the interactive process.

## III. ACCOMMODATIONS RELATED TO COVID-19

The global COVID-19 pandemic has impacted nearly every conceivable aspect of life, and issues for employers, employees and their advisors arising under the ADA are no exception. With

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[22] *Id.* (quoting *Severson* at 482).
[23] 29 C.F.R. § 1630.2(o)(3); *E.E.O.C. v. Sears, Roebuck & Co.*, 417 F.3d 789, 797 (7th Cir. 2005).
[24] Id. at 802 (citing *Beck v. Univ. of Wisc. Bd. of Regents*, 75 F.3d 1130, 1137 (7th Cir. 1996)).
[25] *Basden v. Prof'l Transp., Inc.*, 714 F.3d 1034, 1039 (7th Cir. 2013).
[26] No. 18-CV-1010-SMY, 2021 WL 391232 (S.D. Ill. Feb. 4, 2021). The plaintiff was acting *pro se* and did not respond to the defendant's motion for summary judgment.

over a year of pandemic life behind us, there is now a growing mass of litigation that is focused on reasonable accommodations related to COVID-19  What is a reasonable accommodation for an employee who has tested positive for COVID-19 (assuming COVID-19 is a disability)? What is a reasonable accommodation for an employee who belongs to a high-risk group? What about employees who are particularly fearful and wish to exercise as much caution as possible? The plaintiffs below, and thousands of others, have brought lawsuits challenging decisions by their employers that will serve to answer these questions.

***Amanda Fisher v. Norwalk Public Schools,*** **2020 WL 6332409 (D.Conn.).** The plaintiff, a physical education and health teacher, alleged that the defendant unlawfully denied her request for a reasonable accommodation. The plaintiff suffers from asthma, which she alleges substantially impairs her breathing and puts her at high risk of serious illness or death if she were to contract COVID-19. In March, the governor of Connecticut declared a state of emergency and issued an executive order cancelling classes at all public schools effective March 17 through June 2020. The plaintiff continued to teach physical education and health remotely. On June 25, the governor announced that schools planned to reopen for in-person learning on Sept. 8. The plaintiff requested a telework accommodation due to her increased risk and included a letter from her physician stating that she "is unable to use any face covering due to her asthma." The defendant denied this request because creating a virtual position for the plaintiff's role would require a substitute teacher to supervise the in-person classroom, which would create an undue hardship for the defendant due to the substitute staffing shortage throughout Connecticut. The plaintiff provided a second letter from her physician requesting that the plaintiff be granted a remote teaching accommodation due to ongoing COVID-19 concerns. The defendant denied the second request for a remote teaching position and instead offered a one-year, unpaid, special extended leave.[27] The plaintiff sent a third request to the defendant on Aug. 18, which went unanswered. Six weeks after her third request, the plaintiff applied for FMLA leave, which the defendant approved. The plaintiff alleges that the defendant's refusal to provide reasonable accommodation to telework violated the Rehabilitation Act of 1973 and has caused her to suffer a loss of wages and emotional distress.

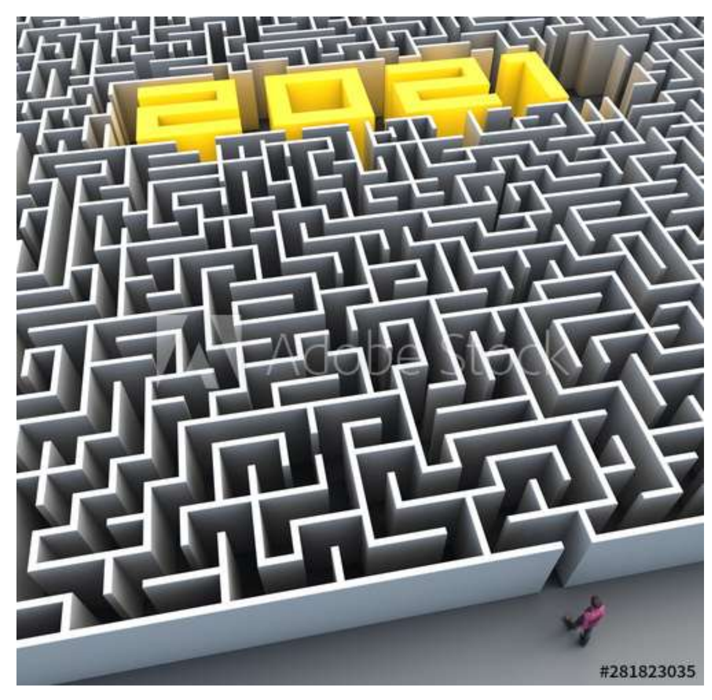
***Nyabogah v. Star Industries, LLC dba Star Building Services et al.*** **(Monmouth County, New Jersey).** The plaintiff, a 63-year-old African American male, worked as a janitor for the defendants. He alleged that he was discriminated against and wrongfully terminated because of his age and race. The plaintiff claims he had concerns about contracting COVID-19 from using public transportation to commute to work each day, and that he was concerned about becoming seriously ill if he did contract the virus, given his age. Due to his concerns, he requested and was approved to take three weeks of unpaid leave from work. The day before his scheduled leave, his supervisor requested that he train a new employee, a "Hispanic man in his early twenties." The plaintiff alleges that beginning on April 18, he made multiple attempts to contact his supervisor about returning to work, but she was unresponsive. His supervisor called him on April 27, "out of

[27] *See E.E.O.C. v. Yellow Freight Sys., Inc.*, 253 F.3d 943, 951 (7th Cir. 2001) (quoting *Gile v. United Airlines, Inc.*, 95 F.3d 492, 499 (7th Cir.1996)) ("[a]n employer is not obligated to provide an employee the accommodation he requests or prefers, the employer need only provide some reasonable accommodation."))

nowhere and with no prior warning," and informed him that he was terminated. The plaintiff alleges that his supervisor first told him that the board of directors made the decision to terminate him, but that she later changed her proffered reason for the termination, stating it was based on performance issues. The plaintiff claims that he had never received feedback regarding his job performance prior to that conversation. The plaintiff alleged that his termination was motivated exclusively by his age and race, and that he was replaced by a "young Hispanic man." His lawsuit alleges discrimination, wrongful termination, and retaliation for seeking a reasonable accommodation.

***Elina Kugel v. Queens Nassau Nursing Home Inc.,*** **2020 WL 6694025 (E.D.N.Y.).** The plaintiff, the director of neuropsychology at a nursing home, alleges that on March 9, she advised her supervisors that she "had concerns about her exposure to COVID-19" at the workplace because she "suffered from an underlying medical condition making her immune-compromised and thus placing her at an increased lethal risk should she contract COVID-19." The plaintiff alleges that she requested to have "interactive discussions regarding a reasonable accommodation of working remotely from home, given her own health issues." The plaintiff's supervisor allegedly responded by stating that the plaintiff would need to provide a doctor's note, and that the facility "does not normally let the staff work from home." The plaintiff alleges that two days later, she forwarded her supervisors a doctor's note indicating that the plaintiff suffers from idiopathic thrombocytopenic purpura, which suppresses the immune system and makes the plaintiff at higher risk for contracting COVID-19. The plaintiff claims that the next day, she received a letter from her supervisor refusing to accommodate her request to work remotely. The plaintiff alleges that her supervisors denied her several repeated requests, stating that they did "not believe that [the plaintiff] can perform [her] work responsibilities from home," and suggested that the plaintiff "made a decision to not work due to her health issues." The plaintiff alleges that she was taken off the payroll and terminated. She alleges, among other things, disability discrimination, failure to engage in the interactive process, failure to accommodate, and retaliation, in violation of the ADA and state law.

# Complex Reasonable Accommodation Issues under the ADA





**May 6, 2021**

**Tami A. Earnhart**

**Ice Miller LLP**

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- Does the employee have a disability?
- Is the employee qualified?
- Is the accommodation reasonable?
- Does the accommodation create an undue hardship?

- Does the employee have a disability?
- Is the employee qualified?
- Is the accommodation reasonable?
- Does the accommodation create an undue hardship?

# What is an essential function?

- To be reasonable, must allow qualified individual to perform the essential functions
  - reason the job exists
  - number of individuals employed who do the same kind of work
  - degree of specialization the job requires
  - employer's judgment about what is required
  - consequence of not requiring an employee to satisfy that function
  - amount of time spent on a function

## *Kotaska v. Fed. Express Corp.* (7th Cir. 2020)

- EE was a package carrier, lifting and sorting packages with avg. weight of 15lbs
- Restricted from overhead lifting over 5lbs or 15lbs occasionally with both hands
- Carrier job description required up to 75lbs
- Company notified employee that had 90 days to request an accommodation or apply to another position
- Applied to material handler position; but denied because same 75lb requirement
- Terminated employment

## *Kotaska v. Fed. Express Corp.* (7th Cir. 2020)

- Year later was asked to return as a handler by former supervisor
- HR repeated the same request as before: 90 days to request accommodation or apply for a different position
- EE again terminated
- EE argued that average weight was 15lbs, not 75lbs

## *Kotaska v. Fed. Express Corp.* (7th Cir. 2020)

- **Holding:** Summary Judgment grated to ER
- 7th Circuit emphasized: even the capacity to respond to rare events can be an essential function

*Equal Emp. Opportunity Comm'n v. Wal-Mart Stores, Inc.*, (W.D. Wis. Nov. 25, 2020).

- EE worked as a cart pusher for 17 years with help of full-time job coach
- New manager requested ADA medical questionnaire
- Form returned, but EE never put on the schedule again, ultimately fired

*Equal Emp. Opportunity Comm'n v. Wal-Mart Stores, Inc.*, (W.D. Wis. Nov. 25, 2020).

**Procedural Posture:** Jury verdict; Motion for Judgment as a Matter of Law

**Holding:** Jury could reasonably find that request to allow assistance provided by job coach was reasonable; no undue hardship; intentional discrimination.

"The issue … turns on the type and amount of assistance provided by the job coach and the abilities of the employee in question."

*Equal Emp. Opportunity Comm'n v. Wal-Mart Stores, Inc.*, (W.D. Wis. Nov. 25, 2020).

"The issue … turns on the type and amount of assistance provided by the job coach and the abilities of the employee in question."

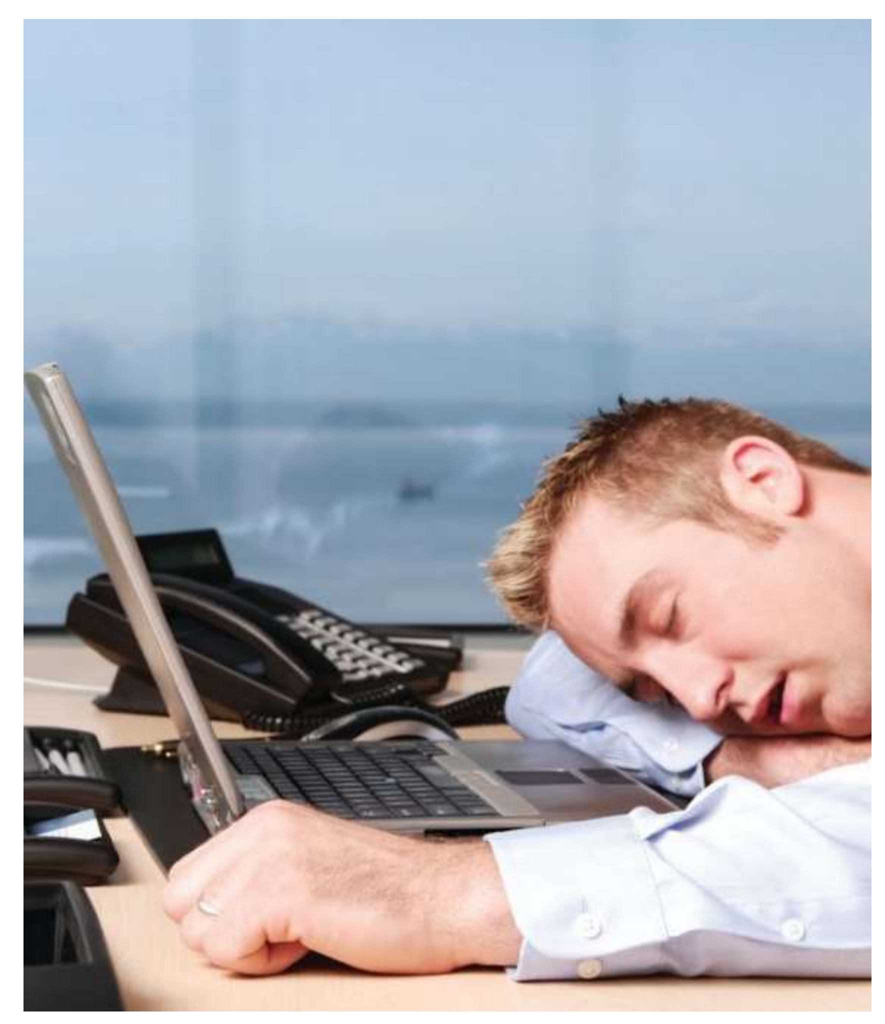
**Not reasonable** if required to perform essential functions for employee (same as if another employee asked to assist)

**Reasonable** if only performing marginal or non-essential functions

# Leave as a Reasonable Accommodation

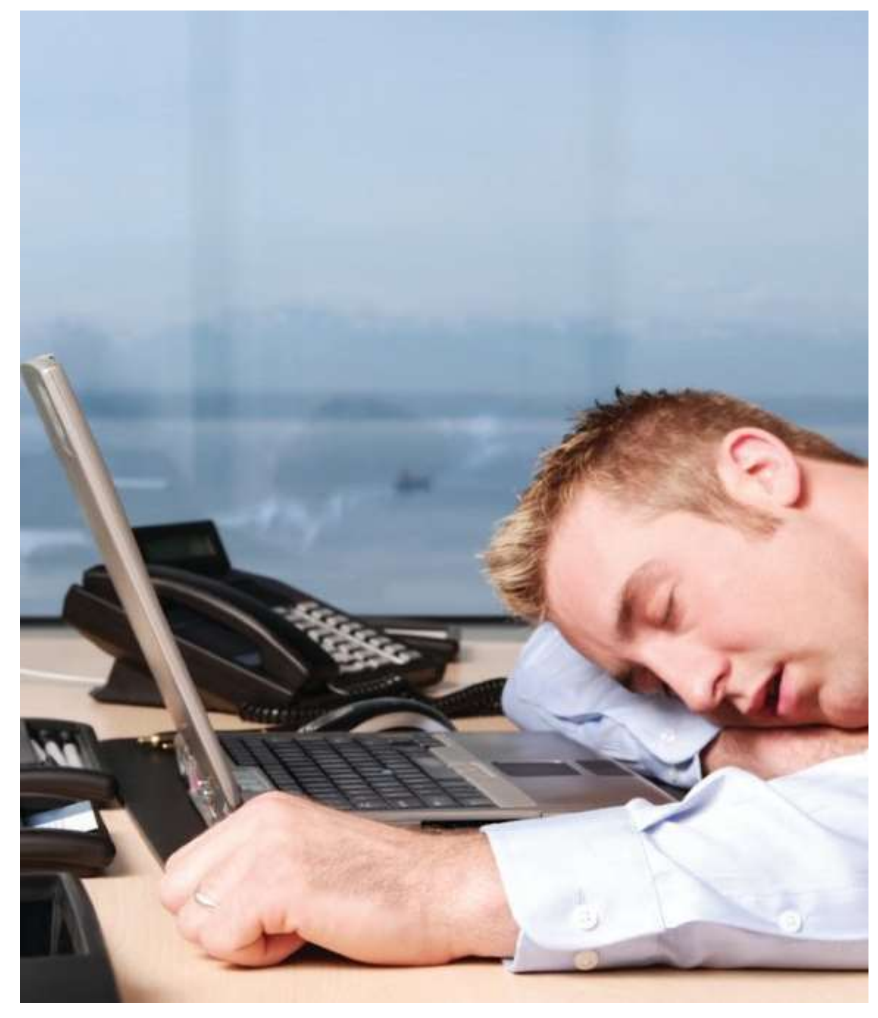
# *Torres v. Children's Hosp. & Health Sys., Inc.* (E.D. Wis. Nov. 30, 2020)

- Medical Assistant
- Took medications that caused drowsiness, sedation, anxiety, depression.
- Employer agrees to and allowed intermittent leave for 5 months – up to 8 absences per month – required to call in – moved shift start time
- Exceeded allowable absences under attendance policy, excluding permitted absences
- Issued warning – allowed a modified intermittent leave program



# *Torres v. Children's Hosp. & Health Sys., Inc.* (E.D. Wis. Nov. 30, 2020)

- EE requested:
  - Sporadic attendance
  - Later start times
  - Half-day work assignments
  - Afternoons-only scheduling
  - Transfer
  - Extensions of time to submit medical certifications
- Asked for medical certification after request for additional intermittent leave, not provided
- About a year after initial intermittent leave - EE again exceeded the number of allowable unexcused absences and was terminated



# *Torres v. Children's Hosp. & Health Sys., Inc* (E.D. Wis. Nov. 30, 2020)

- **Holding:** Summary Judgment granted to ER
- Followed 7th Circuit precedent – if employer tolerates certain behavior or bends over backwards to accommodate an employee, going further than the law requires, it must not be punished by being deemed to have conceded the reasonableness of a far-reaching accommodation.
- Leave was sporadic, frequent and unpredictable

## *McAllister v. Innovation Ventures, LLC* (7th Cir. 2020)

- EE seriously injured in car accident
- Physician restricted her from “any and all work”
- After exhaustion of FMLA, EE requested additional leave, totaling 6 months of leave.
- After 6 months, still not cleared to work.

## *McAllister v. Innovation Ventures, LLC* (7th Cir. 2020)

- **Holding:** Affirmed district court's grant of summary judgment to ER
- EE was not a qualified individual because she could not perform ANY work
- A long-term leave of absence cannot be a reasonable accommodation
- Attendance is an essential function

# Light Duty/Creation of Role

# *Jenkins v. Chicago Transit Auth.* (N.D. Ill. Feb. 20, 2020)

- EE injured toe 8 days before start date
- Wore an orthopedic boot to training which did not conform to safety shoe rules; could not complete training
- ER offered option to resign with future re-hire when healed
- EE refused to resign; then requested:
  - Job put on hold
  - Temporary reassignment
- ER declined

# *Jenkins v. Chicago Transit Auth.* (N.D. Ill. Feb. 20, 2020)

- **Holding:** Summary Judgment grated for ER
- Emphasized an important rule:
  - ERs are not obligated to create a light-duty position for a non-occupationally injured EE with a disability.
  - If ER has a policy of creating light-duty positions for EEs who are occupationally injured, then the same benefit typically must be extended to an EE with a disability who is not occupationally injured unless the company can show undue hardship.

# The Interactive Process

# The Interactive Process

- Employee and employer should engage to “identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.”
- Employer will be liable only if it bears responsibility for the breakdown of the interactive process.
- Failure of an employer to engage in the interactive process is not an independent claim

## *Stipe v. S. Illinois Univ. of Edwardsville* (S.D. Ill. Feb. 4, 2021)

- EE alleged that ER arbitrarily moved her workstation after accommodating for 3 years
- EE protested, and interactive process began
- Suggestions offered by ER were not acceptable to EE and she refused to relocate
- ER then issued two disciplinary actions in rapid succession for her failure to move/follow directives/etc., resulting in forced leave without pay
- Disciplinary hearings; employer terminated employment

## *Stipe v. S. Illinois Univ. of Edwardsville* (S.D. Ill. Feb. 4, 2021)

- **Holding:** Summary Judgment granted to ER on all claims except plaintiff's failure to accommodate claim, noting that although the EE may have refused to participate, the ER did not take an "active, good-faith role in the interactive process" by initiating the disciplinary proceedings

# COVID-19 and Reasonable Accommodations

# *Amanda Fisher v. Norwalk Public Schools* (D.Conn. 2020)

- Plaintiff's Allegations;
  - P suffers from asthma which impairs breather and puts her at high-risk of death due to COVID-19
  - During the statewide stay-at-home order, P continued to teach P.E. and Health remotely
  - When schools reopened, P requested a telework arrangement due to her increased risk and presented a letter from her doctor regarding the same
  - ER denied the request due to a substitute teacher staffing shortage
  - P requested again and was denied, but ER offered a one-year, unpaid, special extended leave
  - P requested again; no response.
  - P applied for FMLA leave which was approved
- Claims:
  - Unlawful refusal to provide reasonable accommodation to telework violated the Rehabilitation Act of 1973 and caused her to suffer a loss of wages and emotional distress

## *Nyabogah v. Star Industries, LLC dba Star Building Services et al.* (Monmouth County, New Jersey).

- Plaintiff's Allegations:
  - 63 year-old AA male worked as a janitor for ER
  - Concerned about contracting COVID-19 from his daily public transportation commute
  - P requested and was approved for 3 weeks unpaid leave
  - Before his leave, P's supervisor requested that he train a new employee ("Hispanic man in his early 20's")
  - P made multiple attempts to contact ER about returning to work
  - ER eventually made contact and advised P that he was terminated
  - ER first said the reason for termination was made by the Board of Directors, but later said it was based on performance issues. P had never received feedback about job performance
- Claims:
  - Age, race, and disability discrimination
  - Wrongful termination
  - Retaliation for seeking a reasonable accommodation

# *Elina Kugel v. Queens Nassau Nursing Home Inc.* (E.D.N.Y. 2020)

- Plaintiff's Allegations:
  - P, director of neuropsychology, advised supervisors that she was immunocompromised and concerned about COVID-19 risks
  - P requested to have interactive discussions regarding working from home as a reasonable accommodation due to her health issues
  - P provided a doctor's note as to her diagnosis
  - P received a letter the next day refusing the accommodation and suggested that P "made a decision not to work"; P made several additional requests
  - ER removed P from payroll and terminated her
- Claims:
  - Disability discrimination
  - Failure to engage in the interactive process
  - Failure to accommodate
  - Retaliation

# THANK YOU!

# Section Four

# Wage Payment Mistakes

Robert J. Hunt
The Law Office of Robert J. Hunt, LLC
Carmel, Indiana

## Section Four

**Wage Payment Mistakes……………………………………..….Robert J. Hunt**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## I. Wage Laws Covering Indiana Employers

- Unpaid Wage Laws
- Overtime Laws
- Minimum Wage Laws

Wage and hour laws are not especially complicated or difficult to follow. Nevertheless, violations are so common that I have been able to make a career of pursuing wage and hour claims almost exclusively. These violations are often intentional, but sometimes they are the result of an employer failing to research their obligations to employees.

Employers are often unaware of the severe consequences that can result from violation of state and federal wage and hour laws. It is important to keep in mind that while individual damages per employee may be low, the availability of liquidated damages, the fee shifting aspect of these wage statutes, and the class and collective action mechanisms can make these cases extremely costly for employers.

### A. Indiana Wage Statutes

The starting point to determine an Indiana employer's wage payment obligations is Indiana codified law. Indiana has three predominant statutes that govern the payment of wages and that commonly give rise to litigation for violations.

#### 1. The Indiana Wage Payment Statute

The first is the Indiana "Wage Payment Statute", which states as follows:

(a) Every person, firm, corporation, limited liability company, or association, their trustees, lessees, or receivers appointed by any court, doing business in Indiana, shall pay each employee at least semimonthly or biweekly, if requested, the amount due the employee. The payment shall be made in lawful money of the United States, by negotiable check, draft, or money order, or by electronic transfer to the financial institution designated by the employee. Any contract in violation of this subsection is void.

(b) Payment shall be made for all wages earned to a date not more than ten (10) business days prior to the date of payment. However, this subsection does not prevent payments being made at shorter intervals than specified in this subsection, nor repeal any law providing for payments at shorter intervals. However, if an employee voluntarily leaves employment, either permanently or temporarily, the employer shall not be required to pay the employee an amount due the employee until the next usual and regular day for payment of wages, as established by the employer. If an employee leaves employment voluntarily, and without the employee's whereabouts or address being known to the employer, the employer is not subject to section 2 of this chapter until:

(1) ten (10) business days have elapsed after the employee has made a demand for the wages due the employee; or

(2) the employee has furnished the employer with the employee's address where the wages may be sent or forwarded.

Ind. Code Ann. § 22-2-5-1

**2. The Indiana Wage Claims Statute**

The second statute is the Indiana "Wage Claims Statute" states as follows:

"Sec. 2. (a) Whenever any employer separates any employee from the pay-roll, the unpaid wages or compensation of such employee shall become due and payable at regular pay day for pay period in which separation occurred: Provided, however, That this provision shall not apply to railroads in the payment by them to their employees."

Ind. Code Ann. § 22-2-9-2(a)

Indiana is somewhat peculiar in that, while the two statutes essentially impose the same basic obligations on employers, each governs a different category of employee. The Wage Payment Statute covers current employees and those who voluntarily left their employment. The Wage Claims Statute applies only to employees who were involuntarily terminated. The Wage Claims Statute imposes an extra administrative step before filing a lawsuit:

> Again, plaintiffs who proceed under the Wage Claims Statute may not file a complaint with the trial court but rather must first submit a claim to the DOL. *Lemon v. Wishard Health Servs.,* 902 N.E.2d 297, 300 (Ind.Ct.App.2009), *trans. denied.* Once a claim has been submitted to the DOL, the DOL's responsibility is described as follows:
>
> (a) It shall be the duty of the commissioner of labor to enforce and to insure compliance with the provisions of this chapter, to investigate any violations of any of the provisions of this chapter, and to institute or cause to be instituted actions for penalties and forfeitures provided under this chapter. The commissioner of labor may hold hearings to satisfy himself as to the justice of any claim, and he shall cooperate with any employee in the enforcement of any claim against his employer in any case whenever, in his opinion, the claim is just and valid.
>
> (b) *The commissioner of labor may refer claims for wages under this chapter to the attorney general, and the attorney general may initiate civil actions on behalf of the [plaintiff] or may refer the claim to any attorney admitted to the practice of law in Indiana.* The provisions of IC 22–25–2 apply to civil actions initiated under this subsection by the attorney general or his designee. *Id.* (quoting

> Ind.Code § 22–2–9–4) (emphasis in original). "It is evident that the Wage Claims Act contemplates that a [plaintiff] must approach the DOL before he or she is entitled to file a lawsuit in court to seek unpaid wages or penalties." *Id.* "The DOL is then entitled to investigate the claim and refer the claim to the Attorney General, who may either institute an action on the [plaintiff's] behalf or refer the claim to an attorney.

*Bragg v. Kittle's Home Furnishings, Inc.*, 52 N.E.3d 908, 915–16 (Ind. Ct. App. 2016)

**3. The Indiana Wage Assignment Statute**

Finally, the third predominant statute governing the wages of Indiana employees is the Indiana "Wage Assignment Statute":

Sec. 2. (a) Any assignment of the wages of an employee is valid only if all

of the following conditions are satisfied:

(1) The assignment is:

(A) in writing;

(B) signed by the employee personally;

(C) by its terms revocable at any time by the employee upon written notice to the employer; and

(D) agreed to in writing by the employer.

(2) An executed copy of the assignment is delivered to the employer within ten (10) days after its execution.

(3) The assignment is made for a purpose described in subsection (b).

(b) A wage assignment under this section may be made for the purpose of paying any of the following:

(1) Premium on a policy of insurance obtained for the employee by the employer.

(2) Pledge or contribution of the employee to a charitable or nonprofit organization.

(3) Purchase price of bonds or securities, issued or guaranteed by the United States.

(4) Purchase price of shares of stock, or fractional interests in shares of stock, of the employing company, or of a company owning the majority of the issued and outstanding stock of the employing company, whether purchased from such company, in the open

market or otherwise. However, if such shares are to be purchased on installments pursuant to a written purchase agreement, the employee has the right under the purchase agreement at any time before completing purchase of such shares to cancel said agreement and to have repaid promptly the amount of all installment payments which theretofore have been made.

(5) Dues to become owing by the employee to a labor organization of which the employee is a member.

(6) Purchase price of merchandise, goods, or food offered by the employer and sold to the employee, for the employee's benefit, use, or consumption, at the written request of the employee.

(7) Amount of a loan made to the employee by the employer and evidenced by a written instrument executed by the employee subject to the amount limits set forth in section 4(c) of this chapter.

(8) Contributions, assessments, or dues of the employee to a hospital service or a surgical or medical expense plan or to an employees' association, trust, or plan existing for the purpose of paying pensions or other benefits to said employee or to others designated by the employee.

(9) Payment to any credit union, nonprofit organizations, or associations of employees of such employer organized under any law of this state or of the United States.

(10) Payment to any person or organization regulated under the Uniform Consumer Credit Code (IC 24-4.5) for deposit or credit to the employee's account by electronic transfer or as otherwise designated by the employee.

(11) Premiums on policies of insurance and annuities purchased by the employee on the employee's life.

(12) The purchase price of shares or fractional interest in shares in one (1) or more mutual funds.

(13) A judgment owed by the employee if the payment:

(A) is made in accordance with an agreement between the employee and the creditor; and

(B) is not a garnishment under IC 34-25-3.

(14) The purchase, rental, or use of uniforms, shirts, pants, or other job-related clothing at an amount not to exceed the direct cost paid by an employer to an external vendor for those items.

(15) The purchase of equipment or tools necessary to fulfill the duties of employment at an amount not to exceed the direct cost paid by an employer to an external vendor for those items.

(16) Reimbursement for education or employee skills training. However, a wage assignment may not be made if the education or employee skills training benefits were provided, in whole or in part, through an economic development incentive from any federal, state, or local program.

(17) An advance for:

(A) payroll; or

(B) vacation; pay.

(18) The employee's drug education and addiction treatment services under IC 12-23-23.

(c) The interest rate charged on amounts loaned or advanced to an employee and repaid under subsection (b) may not exceed the bank prime loan interest rate as reported by the Board of Governors of the Federal Reserve System or any successor rate, plus four percent (4%).

(d) The total amount of wages subject to assignment under subsection (b)(14) and (b)(15) may not exceed the lesser of:

(1) two thousand five hundred dollars ($2,500) per year; or

(2) five percent (5%) of the employee's weekly disposable earnings (as defined in IC 24-4.5-5-105(1)(a)).

(e) Except as provided under 29 CFR Parts 1910, 1915, 1917, 1918, and 1926, an employee shall not be charged or subject to a wage assignment under subsection (b)(14) or (b)(15) for protective equipment including personal protective equipment identified under 29 CFR Parts 1910, 1915, 1917, 1918, and 1926.

Ind. Code Ann. § 22-2-6-2

## B. The Fair Labor Standards Act

The federal Fair Labor Standards Act ("FLSA"), 29 U.S.C. §201 *et seq*. may give employees a cause of action against employers for failure to comply with its overtime and minimum wage provisions. Typically, unless exempt from the provisions of the FLSA, an Indiana employee must be paid at least $7.25 an hour for all hours worked and must be paid one and one-half their regular rate of pay for all hours worked in excess of forty (40) in a single workweek.

In addition to unpaid wages, an employee can recover (and almost certainly will), liquidated damages in an amount equal to their unpaid wages plus her attorney's fees and costs.

## C. Common Violations of the FLSA's Overtime Provisions

### 1. Misclassifying workers as "exempt" from overtime

To be "exempt", an employee must generally be an executive, administrative, or professional employee. Companies will often try to fit employees into these categories even where the law does not allow for it. There are numerous exemptions, but generally speaking, most hourly employees do not fall within one of those exemptions.

### 2. Making employees work off the clock

Employers may tell workers to clock out and then finish their work. They may say something like "Well you have to stay until it gets done, but I'm not paying you for it. You should have gotten finished with it during your shift."

### 3. Time Clock Rounding

Time clock rounding is the practice of adjusting time for pay purposes, rather than paying employees based on their actual raw time punches. The FLSA requires that rounding policies be neutral and that they average out so that the time worked by the employee is properly counted and the employee is fully compensated for all the time he or she works. Time clock rounding policies are not legal if they favor the employer the majority of the time.

### 4. Only Paying for Scheduled Shifts

This is similar to Time Clock Rounding, where employers do not pay for all clocked hours. Rather, employers only pay for scheduled shift time even though the employee spends additional time doing compensable activities. A common example is unpaid time spent changing in and out of personal protective equipment.

### 5. Denying an employee overtime because it wasn't "approved" in advance

Employers often tell employees that they can't work overtime unless it is approved. They also tell them that they won't pay them for the hours they do work unless it is approved in advance. The law says if the employer knows an employee is working, or reasonably should know, the employee is entitled to the pay.

### 6. Paying an employee "straight time" rates for overtime work

If an employee makes $10 per hour, he should get paid $15 per hour for overtime hours. Some employers only pay employees their straight time rate ($10 in the example) for the overtime hours they work.

**7. Failing to count all hours an employee works**

Employers often fail to give 30 minutes free from duty for lunch breaks. They also fail to count travel time (including the continuous workday) or they don't count short breaks as paid time (breaks of 20 minutes or less).

**8. Assistant Managers / Shift Supervisors**

Many employees with job titles such as "assistant manager" or "shift supervisor" believe they are not eligible to receive overtime as they are supervising others. Assistant managers or shift supervisors who do not regularly supervise two or more employees, do not have the authority to hire or fire employees, or spend the majority of their time performing the same duties as the employees they supervise may be eligible for overtime pay.

**9. Independent Contractors**

Employers often improperly classify their employees as "independent contractors" in order to avoid paying these employees minimum wage or overtime compensation. The employer's use of a Form 1099 does not automatically make an individual an independent contractor in the sense relevant to overtime and minimum wage laws. Several important factors may be considered in determining whether you have been improperly classified as an independent contractor. These factors include: (1) whether the person or entity to whom you are providing services has control or the right to control your work or the manner in which you perform you work; (2) the permanence of the working relationship; (3) the degree of skill required to perform the work; and (4) the degree to which your services are an integral part of the principal's business.

**10. Automated Time Clock Systems**

An increasing number of employers are using computerized timekeeping systems to track their employees' work hours. Many such systems are set to automatically clock employees in and out at certain times or to automatically record a lunch of a set duration. However, many employees arrive at work early, stay late, or take short lunch breaks. Automatic time clock systems frequently do not record this extra work time, and employees do not receive the wages they are owed.

**11. Regular Rate Violations**

Overtime must be paid at time and one-half the "regular rate" of pay for all hours worked over forty in a workweek. The employee's regular rate is calculated by dividing the *total pay* for employment (except statutory exclusions) in the workweek by the total hours worked in that workweek. Total pay includes "all remuneration for employment paid to, or on behalf of, the employee." 29 USC § 207(e) provides a list of payments that may be excluded from total pay when calculating the regular rate for overtime purposes.

### 12. Tip Credit Overtime Violations

If an employer takes the tip credit, overtime is calculated on the full minimum wage, not the lower cash payment of $2.13 per hour. Restaurants and other employers of tipped employees often assume they can satisfy overtime requirements by paying $3.20 per hour($2.13 x 1.5) to tipped employees for hours per week in excess of 40. The correct calculation is as follows:

- Federal Minimum Wage $7.25
- Rate for Hours in excess of 40 x 1.5
- Less "tip credit"
- ($7.25 less $2.13 per hour) ($5.12)
- Required wage for hours over 40 $5.76

## D. Common Minimum Wage Violations

### 1. Shifting Business Expenses to Employees

Shifting business expenses to employees (whether these amounts are taken out of a paycheck or not) can result in both minimum wage and overtime violations if the expenses reduce the employees wages at all in an overtime week or below the required minimum wage in an non-overtime week. The most common examples now include delivery driver cases: employers require delivery drivers to use their own vehicle to make deliveries but do not sufficiently reimburse them for mileage.

### 2. Cash Register Shortage Reimbursements

Cashiers in retail stores can be subject to illegal reimbursement deduction policies for cash register shortages. Employers are not permitted to make payroll deductions that result in the payment of less than the state or federal minimum wage.

### 3. Restaurant Walk-Out / Shortage Reimbursements

Servers and other restaurant employees can be subject to illegal reimbursement policies when they are forced to pay for customers who do not pay their bills or when they are required to make up shortages. Employers are not permitted to make payroll deductions that result in the payment of less than the state or federal minimum wage.

### 4. Uniform Cost and Maintenance

If an employer requires an employee to bear the costs associated with purchasing and maintaining uniforms, those costs cannot result in reducing the employee's pay below the applicable minimum wage.

### 5. Tips/Commission Only Jobs

If an employee's commissions or tips do not amount to at least the minimum wage, the employer typically must make up the difference.

### 6. Tip Credit Minimum Wage Violations

- If an employee does not receive sufficient tips to make up the difference between the hourly rate paid by the employer (which must be at least $2.13 per hour) and the federal minimum wage (which is $7.25 per hour), the employer must make up the difference.
- If an employee receives tips only and is paid no wages by the employer, the employer must pay at least the minimum wage.
- Wage deductions for walk-outs, breakage, or cash register shortages cannot reduce the employee's wages below the minimum wage. Where a tipped employee is paid $2.13 per hour in wages and the employer claims the maximum tip credit of $5.12 per hour, the employer is prohibited from making deductions. State laws, including those in Indiana, may also prohibit wage deductions for walk-outs, breakage and shortages.
- If a tipped employee is required to contribute to a tip pool that includes employees who do not customarily receive tips, the employee is owed all tips he or she contributed to the pool and the full $7.25 minimum wage.

## E. Common Indiana Wage Violations

### 1. The Vindictive Employer

Employers often get upset with employees for various reasons. Many, acting in a vindictive manner, simply withhold an employee's final paycheck out of spite. These employers often end up learning an expensive lesson.

### 2. The Employer Engaging in Self-Help

Employers frequently delay issuing an employee's final paycheck. Some insist on a face-to-face apology from the employee, some want the employee to sign a release, and some want the return of a uniform or company equipment. Whatever the reason, they are violating either the Indiana Wage Payment or Wage Claims Statute with their withholding of payment.

### 3. Unlawful Deductions

As set out above in the Indiana Wage Assignment Statute, an employer may only make certain types of deductions and must comply with certain procedural requirements. Not complying with the wage assignment form requirements, making impermissible deductions, or taking too much via a deduction often result in violations of the Indiana Wage Payment and Wage Claims Statutes.

It is important to note that, even though a deduction is lawful under Indiana law, that same deduction may violate the FLSA's overtime and/or minimum wage provisions.

## F. Common Litigation Mistakes

### 1. The Mandatory Arbitration/Class Action Waiver Mistake

Mandatory arbitration can be advantageous to employers. Compared to federal litigation, arbitration is private and quick. However, it is expensive for an employer. In almost all employment contexts, the employer bears the costs of the arbitration. While this is not typically an issue in "one-off", it presents a serious problem when the potential violation of the law applied to a large number of employees. This is often the case in wage and hour context.

To provide an example, one of my recent class/collective actions was against a large employer. Some employees were required to sign arbitration agreements. This left us with a pending federal class/collective lawsuit for tens of thousand of employees, and individual arbitrations for anyone who signed the agreement.

Our initial round of arbitration filings with the American Arbitration Association included claims for 39 individuals. As you can imagine, the employer wanted to arbitrate them all together. However, the employer got what it bargained for with the class action waiver and was forced to arbitrate all claims individually. At the time, the employer's share of the filing fee was either $1,900 or $2,200. So before an arbitrator was even selected in those 39 cases with modest damages, the employer was hit with the filing fee bill of more than $80,000.00

We eventually filed over 100 arbitrations. As a result, the cost to the employer for filing fees alone exceeded $200,000. The typical cost to an employer for a two-day arbitration ranges from $20,000 to $30,000.

Further, while arbitration proceedings often remain private, because prior arbitrations are relevant to questions of good faith and willfulness, I have had arbitrators order employers to turn over pleadings and evidence from all previous wage and hour arbitrations.

Given all this, Plaintiff's wage and hour attorneys should embrace arbitration, while defense counsel should consider whether it is a wise move for larger employers.

### 2. The "Good Faith" Defense

Almost every defendant makes the affirmative good faith despite. Almost every defendant has no basis for doing so. Further, it will likely cause the employer to waive attorney-client privilege, opening up those communications to scrutiny.

### 3. Failing to Raise Settlement Discussions Early On

Plaintiff and Defense counsel should always discuss the possibility of settlement early on in a wage and hour case. These cases have the propensity to become burdened by attorney's fees from both sides if they are litigated extensively. It can be a bad look for both sides either in mediation or in attorney's fee petition if neither side attempted to resolve the case early.

### 4. Being Difficult in Discovery

Being obstructive in discovery is a huge mistake in wage and hour cases that will be largely dictated by attorney's fees. The "I'm going to make this as painful as possible" strategy will only be a disservice to your client.

### 5. The "Undocumented Worker" Defense

You don't have to be a citizen to have these wage rights.

### 6. The "Plaintiff was a Terrible Employee" Defense

Also known as the "I'm going to make this about everything but wages" defense. Employers have to pay people for working regardless of how well they do their job. Employers also cannot escape liability simply because an employee has a criminal record, etc.

### 7. The "If You're Going to Sue Me, I'm Going to Sue You" Defense

Cornered employers often try to bring frivolous counterclaims. In most instances, the counterclaims are treated as retaliation or not treated seriously and only run up attorney's fees from both sides.

### 8. Failing to Understand the Nature and Benefit of Collective/Class Actions

A defendant will likely lose conditional certification of a collective action. Challenging that motion results in significant fees from both sides. Stipulating to conditional certification gives an employer far more say in the notice process. Also, seeking to limit participation will most likely lead to additional lawsuits, sometimes many of them. An employer with foresight can use a collective and/or class action to obtain a release from their workforce, audit their policies, and start fresh.

### 9. The "Twombly/Iqbal" Defense

Did I mention these are attorney's fees cases?

**10. The "FLSA Doesn't Apply to Us" Defense**

It probably does, but if not, we still have The Indiana Minimum Wage Law of 1965 (sometimes referred to as "Indiana's little FLSA").

**11. The "Send a Demand Letter Before Suing" Strategy**

Not a good idea, as it has the potential to cost your client liquidated damages and attorney's fees if the employer simply sends a check for the unpaid wages.

**12. Making the Wrong Assumptions on Liquidated Damages, Attorney's Fees and the Statute of Limitations.**

In the FLSA context, a successful plaintiff will be awarded his attorney's fees, will almost certainly be awarded liquidated damages, and will most likely be limited to the two year statute of limitations.

# Section Five

# Pregnancy Discrimination and Accommodation

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## Section Five

**Pregnancy Discrimination and Accommodation**……………………………….. **Kathleen A. DeLaney**
**Emma DeLaney Strenski**

PowerPoint Presentation

# Pregnancy Discrimination and Accommodation

## Tougher Topics in Employment Law

Kathleen A. DeLaney

# Pregnancy Discrimination

## Federal anti-discrimination laws

| The Pregnancy Discrimination Act of 1978 | Title VII of the Civil Rights Act of 1964 |
|---|---|

# Title VII – Sex Discrimination

**Title VII of the Civil Rights Act of 1964**

"It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

42 U.S.C. § 2000e-2(a)(1)

# Pregnancy Discrimination Act of 1978 (“PDA”)

The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. . . .

42 U.S.C. § 2000e(k).

The PDA “made clear that, for all Title VII purposes, discrimination based on a woman’s pregnancy is, on its face, discrimination because of her sex.”

*Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983).

# Pregnancy Discrimination

- Includes discrimination on the basis of pregnancy and potential pregnancy.
- "Women who are either pregnant or potentially pregnant must be treated like others 'similar in their ability . . . to work.'"
  - "[W]omen as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job."
  - "Congress in the PDA prohibited discrimination on the basis of a woman's ability to become pregnant."
  - "Courts do not decide whether a woman's reproductive role is more important to herself and her family than her economic role – Congress has left this choice up to the woman as hers to make."

*Int'l Union v. Johnson Controls,* 499 U.S. 187 (1991).

# Discrimination on the Basis of Childbirth

- Women who are temporarily unable to work due to pregnancy, childbirth, and related medical conditions (such as morning sickness, threatened miscarriage, or complications arising from childbirth), often lose their jobs because of the inadequacy of their employers' leave policies.

- Congress concluded "Many pregnant women have been fired when their employer refused to provide an adequate leave of absence". *Coleman v. Court of Appeals*, 566 U.S. 30 (2012).

- According to the Census Bureau, in 2020, for mothers who continue to work after giving birth, earnings fall by an average of $1,861 in the first quarter after they give birth.

- The PDA and surrounding caselaw attempt to rectify these disparities.

https://www.census.gov/library/stories/2020/06/cost-of-motherhood-on-womens-employment-and-earnings.html

# Discrimination of the Basis of Related Medical Conditions

- If a woman is temporarily unable to perform her job due to a medical condition related to pregnancy or childbirth, the employer or other covered entity must treat her in the same way as it treats any other temporarily disabled employee.
- Employees terminated for taking time off to undergo IVF--just like those terminated for taking time off to give birth or receive other pregnancy-related care--will always be women.
  - IVF is one of several assisted reproductive technologies that involves a surgical impregnation procedure.
  - Generally, the termination of women for undergoing infertility treatment violates Title VII.

*Hall v. Nalco Co.*, 534 F.3d 644 (7th Cir. 2008).

https://www.eeoc.gov/pregnancy-discrimination

# Proving Pregnancy Discrimination

- A plaintiff must prove that:
  1) she was pregnant, and her employer knew she was pregnant;
  2) she was performing her duties satisfactorily;
  3) she was fired (or suffered other adverse employment action); and
  4) similarly situated employees not in the protected class were treated more favorably.

- There are circumstances under which a pregnancy discrimination claim might be based on an adverse employment action taken against a woman who is not currently pregnant; for example, the PDA protects women from discrimination based on their capacity to become pregnant.

*Griffin v. Sisters of St. Francis, Inc.*, 489 F.3d 838, 844 (7th Cir. 2007).

# Proving Pregnancy Discrimination

- The Seventh Circuit no longer distinguishes between "direct" and "indirect" evidence, but instead asks "simply whether the evidence would permit a reasonable factfinder to conclude that the plaintiff's race, ethnicity, sex, religion, or other proscribed factor caused the discharge or other adverse employment action." *Ortiz v. Werner Enters., Inc.*, 834 F.3d 760, 765 (7th Cir. 2016).

- While courts "may use the familiar burden-shifting approach articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), as 'a means of organizing, presenting, and assessing circumstantial evidence in frequently recurring factual patterns found in discrimination cases,' it is 'not the only way to assess circumstantial evidence of discrimination.'" *Abrego v. Wilkie*, 907 F.3d 1004, 1012 (7th Cir. 2018) (quoting *David v. Bd. of Trs. of Cmty. Coll. Dist. No. 508*, 846 F.3d 216, 224 (7th Cir. 2017)).

# Adverse Employment Actions

- The Pregnancy Discrimination Act forbids discrimination based on pregnancy when it comes to any aspect of employment, including:
  - hiring,
  - firing,
  - pay,
  - job assignments,
  - promotions,
  - layoff,
  - training,
  - fringe benefits, such as leave and health insurance, and
  - any other term or condition of employment.

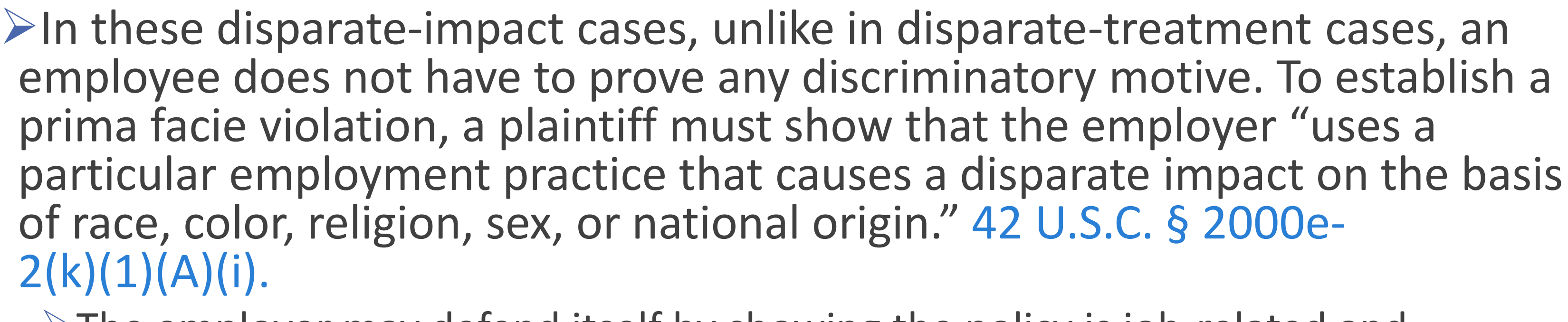
https://www.eeoc.gov/pregnancy-discrimination

# Examples of Pregnancy Discrimination

- Firing a pregnant employee
- Harassing an employee for becoming pregnant
- Refusing to hire someone because they are pregnant
- Not providing reasonable accommodations
- Firing an employee for pumping breast milk
- Harassment for trying to become pregnant or taking time off for fertility treatment
- Forcing an employee to take time off, change jobs, change locations, unfairly changing their job situations as compared to other employees, or not considering them for a promotion following pregnancy/childbirth
- Restricting pregnancy-related medical leave
- Retaliating against an employee who complains about pregnancy discrimination

# Discriminatory Policies

- The PDA "requires courts to consider the extent to which an employer's policy treats pregnant workers less favorably than it treats nonpregnant workers similar in their ability or inability to work." *Young v. UPS*, 575 U.S. 206, 210 (2015).
  - Employers should be careful to treat employees who are temporarily disabled due to a pregnancy-related condition in the same way it would the same way it would treat any other employee who has a temporary disability.



- In these disparate-impact cases, unlike in disparate-treatment cases, an employee does not have to prove any discriminatory motive. To establish a prima facie violation, a plaintiff must show that the employer "uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(k)(1)(A)(i).
  - The employer may defend itself by showing the policy is job-related and consistent with business needs.
  - The employee still may prevail by showing there is an alternative practice that meets the same need with a less discriminatory effect, which the employer failed to institute.

# Title VII –Harassment Claims

- It is unlawful to harass a woman because of pregnancy, childbirth, or a medical conduction related to pregnancy or childbirth.
- **Hostile Work Environment – Severe and Pervasive**
  - For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment."
    - *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982))
  - [W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.
    - *Harris v. Forklift Sys*., 510 U.S. 17, 23 (1993)

# Title VII – Retaliation Claims

A Title VII retaliation claim has three elements:

1) **protected activity**: participation in an EEO process or opposition to discrimination;
2) **materially adverse action** taken by the employer; and
3) **causal connection** between the protected activity and the materially adverse action

In a retaliation case, the Plaintiff need not prove that the underlying acts complained of were unlawful discrimination – only a good faith belief.

# Other Pregnancy-Related Protections

- AMERICANS WITH DISABILITIES ACT (ADA)
- FAMILY AND MEDICAL LEAVE ACT (FMLA)
- FAIR LABOR STANDARDS ACT (FLSA)
- EQUAL PAY ACT (EPA)

# Accommodations & the ADA

- Impairments resulting from pregnancy may be considered a disability under the Americans with Disabilities Act (ADA).
- If a woman is temporarily unable to perform her job due to a medical condition related to pregnancy or childbirth, the employer or other covered entity must treat her in the same way as it treats any other temporarily disabled employee.
  - For example, the employer may have to provide light duty, alternative assignments, disability leave, or unpaid leave to pregnant employees if it does so for other temporarily disabled employees.
- Under the PDA, an employer that allows temporarily disabled employees to take disability leave or leave without pay, must allow an employee who is temporarily disabled due to pregnancy to do the same.

ADA
Americans with Disabilities Act

https://www.eeoc.gov/pregnancy-discrimination

# Family and Medical Leave Act (FMLA)

- Covered employers include:
  - Private-sector employers with 50+ employees in 20 or more workweeks in the current or preceding calendar year;
  - Public agencies (including local, state, or Federal government agencies), regardless of the number of employees; and
  - Public or private elementary or secondary schools, regardless of the number of employees.
- Eligible employees must have:
  - Worked for a covered employer for at least 12 months;
  - Worked at least 1,250 hours during the 12-month period immediately preceding the leave; and
  - Work at a location where the employer has 50+ employees within 75 miles.
- Eligible employees may take up to **12 workweeks of unpaid, job-protected leave** in a 12-month period for:
  - The birth of a child, or placement of a child with the employee for adoption or foster care
  - A serious health condition that makes the employee unable to perform the essential functions of her job
- Employees may choose, or employers may require employees, to "substitute" (run concurrently) accrued paid leave with FMLA leave
- Note: An employer could be covered by the PDA and ADA (15+ employees), but not the FMLA (50+ employees).

https://www.dol.gov/agencies/whd/fact-sheets/28-fmla

# Nursing Mothers & the FLSA

- Under Section 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. § 207), employers are required to provide nursing mothers reasonable break time to express breast milk for one year after the birth of her child.

- Employers must provide a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.
  - Can be a temporarily designated space, or a space with multiple uses, so long as it is available when needed for the nursing mother's use.

- Employers with fewer than 50 employees are not subject to the FLSA break time requirement if compliance with the provision would impose an undue hardship.

- Employers are not required under the FLSA to compensate nursing mothers for breaks taken for the purpose of expressing milk. However, where employers already provide compensated breaks, an employee who uses that break time to express milk must be compensated in the same way that other employees are compensated for break time.

- Section 15(a)(3) of the FLSA provides anti-retaliation protection, making it unlawful to "discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act. . . ."

https://www.dol.gov/agencies/whd/fact-sheets/73-flsa-break-time-nursing-mothers

FLSA
Fair Labor Standards Act

# The Equal Pay Act (EPA)

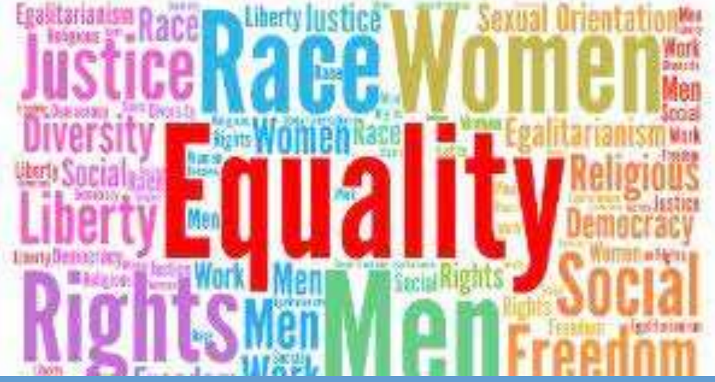
- The EPA applies to virtually all employers, regardless of number of employees.
- A prima facie case of discrimination is established under the EPA by showing: "(i) the employer pays different wages to employees of the opposite sex; (ii) the employees perform equal work on jobs requiring equal skill, effort, and responsibility; and (iii) the jobs are performed under similar working conditions."
  - The burden then shifts to the employer to prove that the disparity "is justified by one of the affirmative defenses provided under the Act".
  - The plaintiff may then demonstrate that the defenses put forth by the defendant are really just a pretext for sex discrimination.
- The EPA requires no proof of intent to discriminate.
- Applies not just to base salary, but also overtime pay, bonuses, vacation and holiday pay, stock options, profit sharing, and other fringe benefits.

PREGNANCY DISCRIMINATION

# Filing a Title VII Lawsuit

# Title VII – Covered Employers

- Covered Employers under the PDA include:
  - Private employers with 15 or more employees who worked for the employer for at least twenty calendar weeks (in the current year or previous year).
  - State and local government employers with 15 or more employees who worked for the employer for at least twenty calendar weeks (in the current year or previous year).
  - Federal government agencies (regardless of number of employees).
  - Employment agencies (such as a temporary staffing agencies or a recruitment companies) that regularly refer employees to employers (regardless of whether employment agency receives payment for this service, and regardless of the number of employees).
  - Labor organizations that either operate a hiring hall or have at least 15 members.



# Administrative Pre-Filing Requirements

- Before filing a lawsuit under Title VII, an employee must first file a Charge with the EEOC within **180 days** of the alleged unlawful employment practice.
  - Where state or local law also prohibits the conduct (including Indiana), the filing deadline is extended to **300 days.**
  - The EEOC is allowed at least 180 days to investigate the Charge and determine whether there is probable cause to believe that discrimination occurred.
  - The employee must request a "Notice of Right to Sue," either after the EEOC has made its determination, or after 180 days have passed since filing the Charge if no determination has been made, before the employee is allowed to proceed to court.
- A private lawsuit must be filed within **90 days** after the employee has received the Notice of Right to Sue issued by the EEOC.

# Exhaustion of Remedies

- The failure include a covered claim in an EEOC Charge is fatal to that claim. All claims of discrimination are cognizable that are "like or reasonably related to the allegations of the charge and growing out of such allegations." *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 864 (7th Cir. 1985).

| EEOC Enforces | EEOC Does Not Enforce |
|---|---|
| Title VII / Pregnancy Discrimination Act (PDA) | Family and Medical Leave Act (FMLA) |
| Americans with Disabilities Act (ADA, Title I) | Fair Labor Standards Act (FLSA) |
| Equal Pay Act (EPA)* | |

*Although the EEOC enforces the Equal Pay Act, there is no administrative pre-filing requirement under the EPA.

- Be sure to include all potential PDA and ADA claims in an EEOC Charge.
- A federal lawsuit can be immediately initiated under the FMLA, FLSA, and/or EPA, and later amended to add PDA and/or ADA claims following receipt of the Notice of Right to Sue.

# Title VII: Available Damages

| Recoverable Damages for Discrimination/Harassment/Retaliation | |
|---|---|
| Back Pay | Up to 2 years before filing a Charge |
| Punitive/Liquidated Damages Cap (including Emotional Distress) | Cap based on employer size<br>• $50,000 for 15 to 100 employees<br>• $100,000 for 101 to 200 employees<br>• $200,000 for 201 to 500 employees<br>• $300,000 for 501 or more employees |
| Front Pay | Recoverable |
| Attorney's Fees | Recoverable |

# Emotional Distress Damages

- Claiming emotional distress damages can have significant consequences in the lawsuit
  - Defendants may ask probing questions at Plaintiff's deposition about other stressors in the Plaintiff's life
  - Medical treatment records may be discoverable
  - Claiming emotional distress damages beyond the normal, "garden variety" may waive doctor-patient privilege
  - Discuss this with the client before claiming emotional distress damages
- Experts can be used to prove emotional distress damages
  - Treating experts can testify about observations of emotional distress, and assessment of how work experience may have impacted fertility/pregnancy outcomes
  - Retained experts can review medical records and/or evaluate the Plaintiff and opine about causation

# Mitigation of Damages

- If a plaintiff fails to seek out or take advantage of a business or employment opportunity that was reasonably available to him/her under the circumstances, then the amount of damages awarded may be reduced by the amount he could have reasonably realized if he had taken advantage of such opportunity.
- Title VII does require mitigation of damages with respect to back pay, because it provides that "interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable."
  - *Doe v. Oberweis Dairy*, 456 F.3d 704, 714 (7th Cir. 2006); 42 U.S.C. § 2000e-5(g)(1).
- Failure to mitigate is an affirmative defense. The employer bears the burden of persuasion, and must show that the plaintiff was not reasonably diligent in seeking other employment and that there was a reasonable chance that plaintiff might have found a comparable position.
  - *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1048-49 (7th Cir. 1999).

# Thank you!

# Section Six

# Diversity, Equity, and Inclusion Initiatives and Legal Boundaries

The Tougher Topics of Employment Law
Indiana Continuing Legal Education Forum
May 6, 2021

Presented by:

Shelley M. Jackson and Kate E. Trinkle
Krieg DeVault LLP

Notice: The contents of this presentation should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only.

## Section Six

**Diversity, Equity, and Inclusion Initiatives and Legal Boundaries……………………....Shelley M. Jackson**
**Kate E. Trinkle**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"My Daddy changed the world!" – Gianna Floyd

## I. Introduction and Framework

The moments that we are currently living could not be more relevant to the topic of diversity, equity, and inclusion ("DEI") in the workplace. Whether a small, private employer, a government entity, or a massive, publicly traded global conglomerate, discussions and decisions surrounding DEI efforts are occurring daily. Many organizations express a desire to move beyond persistent inertia and explore innovative ways to develop and implement DEI programs and activities. At the same time, legal and risk management considerations must remain at the forefront of such exploration, as missteps can result in significant liability, loss of reputation, and loss of employee morale.

For an organization evaluating its DEI footprint and managing legal risk within this space, the most critical consideration is, perhaps, first understanding the space itself, which is vast and, in many respects, subjective. For purposes of this discussion, we offer the following definitions.

Diversity "includes but is not limited to race, color, ethnicity, nationality, religion, socioeconomic status, veteran status, education, marital status, language, age, gender, gender expression, gender identity, sexual orientation, mental or physical ability, genetic information, and learning styles." Karen Armstrong, National Association of Colleges and Employers, *What Exactly is Diversity, Equity, and Inclusion?* ... (June 25, 2019), *available at* https://community.naceweb.org/blogs/karen-armstrong1/2019/06/25/what-exactly-is-diversity-equity-and-inclusion.

Equity means "guarantee of fair treatment, access, opportunity, and advancement for all while striving to identify and eliminate barriers that have prevented the full participation of some groups." *Id.*

Inclusion means "[a]uthentically bringing traditionally excluded individuals and/or groups into processes, activities, and decision/policy making in a way that shares power and ensures equal access to opportunities and resources." *Id*.

A DEI initiative, then, is any activity which is designed to further develop one or more of these concepts within the workplace, though each organization's definitions of these concepts may vary. The core component of our presentation is to understand, from a risk management perspective, the framework that surrounds an organization's efforts with respect to its DEI activities.

## II. Setting the Stage: The Legal and Regulatory Landscape

Nearly all organizations are covered by one or more laws governing employees' individual and collective rights, including Title VII of the Civil Rights Act of 1964 ("Title VII"), the Americans with Disabilities Act ("ADA"), the Age Discrimination in Employment Act ("ADEA"), the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), and/or the National Labor Relations Act ("NLRA"), or their state-law counterparts. Government employers will have state and federal constitutional issues to consider. Employers may also have specific DEI-related training obligations, such as state or local requirements for periodic sexual harassment prevention training.

Certain organizations, such as those with programs and activities receiving federal financial assistance or federal contractors and subcontractors, are required to comply with formal federal equal employment opportunity ("EEO") or affirmative action requirements. Some covered organizations must establish an "approved" affirmative action plan, while others may elect to participate by establishing a "voluntary" or "unapproved" plan.

Still others may be obligated to adopt certain DEI-related principles or activities pursuant to private or public contractual agreements, including collective bargaining agreements, or in accordance with applicable professional responsibility or credentialing standards. A properly developed and implemented DEI initiative, fashioned in accordance with applicable anti-discrimination, anti-harassment, EEO, and/or affirmative action obligations, is a critically important risk management tool for employers.

## III. Setting the Stage: Our Current Environment

A key consideration when evaluating and managing risk with respect to DEI related activities is our society's current environment in which such activities will occur. As illustrated in this section, this environment is almost always evolving.

### A. *Our Environment Evolves*

The number of timely discussion points and key legal developments surrounding equal employment opportunity and civil rights is staggering. Even when such developments do not directly impact the regulation of the employment relationship, they create opportunities for dialogue, reflection, and discussion within the workplace and fertile ground for DEI related programming to facilitate such activities. Consider the following examples.

On April 28, the EEOC will host (hosted) a public hearing exploring the civil rights implications of COVID-19. EEOC, *EEOC to Hold Public Hearing on April 28 to Examine Civil Rights Implications of the COVID-19 Pandemic in the Workplace* (April 21, 2021), *available at* https://www.eeoc.gov/newsroom/eeoc-hold-public-hearing-april-28-examine-civil-rights-implications-covid-19-pandemic. The EEOC has published extensive technical guidance on COVID-19 related employment matters. EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (last updated on December 16, 2020), *available at* https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

On April 20, 2021, a jury convicted Derek Chauvin on all counts in the murder of George Floyd in May 2020. The White House, *Verdict in the Derek Chauvin Trial for the Death of George Floyd* (April 20, 2021), *available at* https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/04/20/remarks-by-president-biden-on-the-verdict-in-the-derek-chauvin-trial-for-the-death-of-george-floyd/.

Recent attacks on Asian Americans have prompted numerous organizations, including the EEOC, to issue statements condemning such violence. U.S. Equal Employment Opportunity Commission, *EEOC Condemns Violence Against Asian Americans and Pacific Islanders in the United States* (March 22, 2021), *available at* https://www.eeoc.gov/newsroom/eeoc-condemns-violence-against-asian-americans-and-pacific-islanders-united-states.

In January 2021, the EEOC revised its religious discrimination enforcement guidance, which was the first major update since 2008. EEOC, *Section 12: Religious Discrimination* (January 15, 2021), *available at* https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination. The new revisions "include important updates to the discussion of protections for employees from religious discrimination in the context of reasonable accommodations and harassment. It also expands the discussion of defenses that may be available to religious employers." EEOC, Commission Approves Revised Enforcement Guidance on Religious Discrimination (January 15, 2021), *available at* https://www.eeoc.gov/newsroom/commission-approves-revised-enforcement-guidance-religious-discrimination.

In July 2020, the U.S. Supreme Court authoritatively ended years of conflicting legal authority with respect to the rights of gay and transgender employees:

> In each of these cases [before the U.S. Supreme Court], an employer allegedly fired a long-time employee simply for being homosexual or transgender. Clayton County, Georgia, fired Gerald Bostock for conduct "unbecoming" a county employee shortly after he began participating in a gay recreational softball league. Altitude Express fired Donald Zarda days after he mentioned being gay. And R. G. & G. R. Harris Funeral Homes fired Aimee Stephens, who presented as a male when she was hired, after she informed her employer that she planned to "live and work full-time as a woman." Each employee sued, alleging sex discrimination under Title VII of the Civil Rights Act of 1964. The Eleventh Circuit held that Title VII does not prohibit employers from firing employees for being gay and so Mr. Bostock's suit could be dismissed as a matter of law. The Second and Sixth Circuits, however, allowed the claims of Mr. Zarda and Ms. Stephens, respectively, to proceed.
>
> Held: An employer who fires an individual merely for being gay or transgender violates Title VII [of the Civil Rights Act of 1964 ("Title VII")].

*Bostock v. Clayton County*, Georgia, 140 S. Ct. 1731 (2020).

Around the same time, the National Labor Relations Board ("NLRB") issued a decision in *General Motors LLC*, 14-CA-197985 369 NLRB No. 127 (2020), which modified the standard to determine "whether employees have been lawfully disciplined or discharged after making abusive or offensive statements – including profane, racist, and sexually unacceptable remarks – in the course of activity otherwise protected under the National Labor Relations Act [("NLRA")]." National Labor Relations Board Office of Public Affairs, *NLRB Modifies Standard for Addressing Offensive Outbursts in the Course of Protected Activity* (July 21, 2020), *available at* https://www.nlrb.gov/news-outreach/news-story/nlrb-modifies-standard-for-addressing-offensive-outbursts-in-the-course-of. The *Wright Line* standard sets forth the following burden-shifting inquiry in cases where an employee engages in protected activity under the NLRA and also engages in abusive or offensive statements:

> [T]he General Counsel [of the NLRB] must first prove that the employee's protected activity was a motivating factor in the discipline. If that burden is met, the employer must then prove it would have taken the same action even in the absence of the protected activity, for example, by showing consistent discipline of other employees who engaged in similar abusive or offensive conduct.

*Id*.

While the above-referenced topics may seem wildly disparate, they all are part of the broad range of considerations and factors relevant to an organization's employees, whether in connection with available rights and remedies or issues of great importance and relevance within our society. Either way, such developments have the potential to influence DEI initiatives and must remain at the forefront of an employer's mind when evaluating obligations and risk with respect to new or evolving DEI initiatives.

### B. *Shifting Administration Priorities*

A transition to a new presidential administration almost always brings with it a shift in priorities, which is another important consideration in managing risk. These priorities do not unseat the regulatory authority otherwise granted to oversight agencies; however, the issuance of executive orders, for example, can dramatically impact the focus of the regulatory and enforcement environment. At the same time, such executive action occurs without the formal process and public input of the traditional rule-making process, creating a whiplash effect for employers that are attempting to maintain compliance.

With respect to DEI programming and racial equity in particular, the priority shift between the prior and current administrations could not be more dramatic. The shift has had a direct, substantive impact on the DEI initiatives of certain organizations and provides important risk management reminders for all organizations.

On September 22, 2020, President Trump issued Executive Order 13950 (the "Trump EO") on Combating Race and Sex Stereotyping. Federal Register, Combating Race and Sex Stereotyping (September 22, 2020), *available at* https://www.federalregister.gov/documents/2020/09/28/2020-21534/combating-race-and-sex-stereotyping. It generally applied to federal departments and agencies, the military, certain federal contractors and subcontractors, and certain federal grantees.

The Trump EO prohibited covered employers from providing training on certain "divisive concepts," defined as race or sex stereotyping[1] and race or sex scapegoating,[2] as well as on the following topics:

- One race or sex is inherently superior to another race or sex;
- An individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;
- An individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex;
- Members of one race or sex cannot and should not attempt to treat others without respect to race or sex;
- An individual's moral character is necessarily determined by his or her race or sex;
- An individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex;
- Any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or
- Meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race.

*Id*.

The Trump EO also established a hotline to report violations and instructed that requests for information be published in the Federal Register seeking "copies of any training, workshop, or similar programming having to do with diversity and inclusion as well as information about the duration, frequency, and expense of such activities." *Id*. Potential penalties for violations included federal contract cancellation, termination, or suspension and declaration of ineligibility for further federal contracts. *Id*.

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[1] Race or sex stereotyping means "ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or sex, or to an individual because of his or her race or sex." *Id*.

[2] Race or sex scapegoating means "assigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex. It similarly encompasses any claim that, consciously or unconsciously, and by virtue of his or her race or sex, members of any race are inherently racist or are inherently inclined to oppress others, or that members of a sex are inherently sexist or inclined to oppress others." *Id.*

Private employers that were not subject to the above provisions of the Trump EO nonetheless found themselves subject to heightened scrutiny:

> The Attorney General should continue to assess the extent to which workplace training that teaches the divisive concepts set forth in section 2(a) of this order may contribute to a hostile work environment and give rise to potential liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. If appropriate, the Attorney General and the Equal Employment Opportunity Commission shall issue publicly available guidance to assist employers in better promoting diversity and inclusive workplaces consistent with Title VII.

*Id*.

A number of parties filed suit, alleging constitutional violations. On December 22, 2020, the U.S. District Court for the Northern District of California entered a preliminary injunction which resulted in the Office of Federal Contract Compliance Programs ("OFCCP") ending its hotline and requests for information, and declining to enforce certain provisions of the Trump EO. Office of Federal Contract Compliance Programs, *Notice Regarding Executive Order 13950*, *available at* https://www.dol.gov/agencies/ofccp/executive-order-13950/preliminary-injunction.

On January 20, 2021, in his first official act, President Biden revoked the Trump EO and signed Executive Order 13985 (the "Biden EO") on Advancing Racial Equity and Support for Underserved Communities through the Federal Government. The White House, *Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government* (January 20, 2021), *available at* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/. The Biden EO sets forth the following priorities:

- Affirmatively advance equity, civil rights, social justice, and equal opportunity for all through policy of the Biden Administration;
- Evaluate and dismantle programs and policies that perpetuate systemic barriers to opportunities for underserved communities; and
- Pursue a comprehensive approach to advancing equity across the Federal Government and create opportunities for communities that have historically been underserved.

*Id.*

The Biden EO implements the following actions of the federal government with respect to advancing racial equity and supporting underserved communities:

- Coordinate efforts to embed equity principles, policies, and approaches across the Federal Government and to remove systemic barriers to opportunities;
- Identify methods to assess equity across the Federal Government;
- Conduct an equity assessment within Federal agencies, with findings reported by the head of each agency to the Assistant to the President for Domestic Policy;
- Allocate Federal resources to advance fairness and opportunity and address the historic failure to invest equally in underserved communities;
- Promote equitable delivery of Government benefits and opportunities to all eligible individuals, including benefits and services in Federal programs and agency procurement and contracting opportunities;
- Engage with members of underserved and underrepresented communities, and evaluate opportunities to increase coordination and communication with community-based and civil rights organizations;
- Establish an equitable data working group and promote equity in Government collection of data to inform the efforts of advancing equity; and
- Revoke Executive Order 13950 (Combating Race and Sex Stereotyping), which banned diversity and inclusion training for federal employees and contractors, and revoke Executive Order 13958 (Establishing the President's Advisory 1776 Commission).

*Id.*

The dramatically different approaches of the Trump EO and Biden EO, signed only months apart from each other, underscore the strong influence a presidential administration can and does have on DEI related priorities and enforcement. Aside from their practical implications, these two documents serve as key risk management guideposts when considering varying legal theories relating to DEI initiatives. We will next consider two ways in which legal risk manifests in connection with specific DEI related activities.

## IV. Two Common Manifestations of Risk

DEI initiatives cover a plethora of activities within organizations, and an extensive discussion on all potential aspects of such initiatives would take far longer than is available in this presentation. For purposes of this discussion, we will focus on common manifestations of risk within two distinct DEI activities: hiring practices and employer-sanctioned affinity groups.

### *A. Hiring Practices*

Hiring policies and practices are frequent targets of both DEI-related aspirational goalsetting and government enforcement activity, but a carefully crafted and executed plan or program will withstand such scrutiny. An example of such skillful maneuvering while engaging in bold action emerged last year in a public back-and-forth exchange that occurred between corporate giants Wells Fargo and Microsoft, on the one hand, and OFCCP on the other.

In June 2020, against a backdrop of discussion surrounding historical ineffectiveness of corporate DEI initiatives in achieving workplace diversity in certain areas, including with respect to Black employees in leadership roles, both companies announced aggressive, revised DEI initiatives which now include specific race-based hiring goals. Wells Fargo announced its initiative designed to further diversify its workforce across all levels of the company, including “doubling

Black leadership over the next five years." Wells Fargo, *Wells Fargo CEO: 'A Watershed Moment'* (June 19, 2020), *available at* https://stories.wf.com/wells-fargo-ceo-a-watershed-moment. Microsoft unveiled its plan to invest $150 million into diversity and inclusion activities and expressed its intention to "double the number of Black and African American people managers, senior individual contributors, and senior leaders in the United States by 2025." Microsoft, *Addressing Racial Injustice: Email from Microsoft CEO Satya Nadella to Microsoft Employees* (June 23, 2020), available at https://blogs.microsoft.com/blog/2020/06/23/addressing-racial-injustice/.

In October 2020, both companies confirmed that they had received letters of inquiry from the OFCCP. Dina Bass, Josh Eidelson, and Hannah Levitt, Bloomberg, *Microsoft, Wells Fargo Diversity Plans Draw U.S. Labor Inquiry* (October 6, 2020), available at https://www.bloomberg.com/news/articles/2020-10-06/microsoft-plan-to-add-black-executives-draws-u-s-labor-inquiry. The focus of the inquiry: each company's stated intention to increase Black executive leadership within a specific time period. Microsoft described OFCCP's investigation as:

> [F]ocusing on whether Microsoft's commitment to double the number of Black and African American people managers, senior individual contributors and senior leaders in our U.S. workforce by 2025 could constitute unlawful discrimination on the basis of race, which would violate Title VII of the Civil Rights Act.

Microsoft, *Microsoft Statement on Inquiry from OFCCP* (October 6, 2020), available at https://blogs.microsoft.com/on-the-issues/2020/10/06/ofccp-diversity-employment-laws/.

Microsoft remained undeterred, stating:

> In the letter we received last week, the OFCCP suggested that this initiative "appears to imply that employment action may be taken on the basis of race." The letter asked us to prove that the actions we

> are taking to improve opportunities are not illegal race-based decisions. Emphatically, they are not.

*Id.*

In March 2021, it was announced that the inquiries into both Wells Fargo and Microsoft had ended in October 2020 after the companies "responded to the inquiries with in-depth descriptions, materials, and data. OFCCP was satisfied with the response, and the inquiries are closed." Amara Omeokwe, The Wall Street Journal, *Microsoft, Wells Fargo Satisfied Trump Labor Department on Hiring More Black Employees* (March 6, 2021), *available at* https://www.wsj.com/articles/microsoft-wells-fargo-satisfied-trump-labor-department-on-hiring-more-black-employees-11615035602?reflink=desktopwebshare_permalink. While the closing of the OFCCP investigation does not ensure that there will be no further scrutiny from other sources or at other times, it illustrates that companies can and do take bold action to achieve DEI objectives while also focusing on compliance and managing other risks that may arise.

Race-conscious hiring plans[3] are not necessarily unlawful as part of a DEI initiative, though they must be carefully constructed to ensure compliance with Title VII. As noted by the Seventh Circuit Court of Appeals in *Rudin v. Lincoln Land Community College*:

> Although Title VII does not outlaw all private, voluntary, race-conscious affirmative action plans, *United Steelworkers of America v. Weber*, 443 U.S. 193, 208, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), the existence of an affirmative action plan may be "relevant to a key issue in a disparate treatment discrimination case: discriminatory intent." *Whalen v. Rubin*, 91 F.3d 1041, 1045 (7th Cir.1996). Alone, "[t]he mere existence of an affirmative action policy is, however, insufficient to prove that the [employer] actually intentionally discriminated against [the employee]." Id. A Title VII plaintiff "must establish a link between the [employer's affirmative action] policies and its actions toward [her]" in order to show intentional. discrimination. *Id.*

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[3] As noted previously in this presentation, affirmative action plans for private employers may be mandatory or voluntary, depending on whether the employer is, for example, a government contractor.

420 F.3d 712, 722 (7th Cir. 2005).

Indeed, when not thoughtfully executed with an eye toward compliance, hiring practices provide fertile ground for potential EEO violations, legal action, and liability. In *EEOC v. Helados La Tapatia, Inc., et al.*, for example, U.S. District Court for the Eastern District of California, Case No. 1:20-cv-00722-DAD-HBK, an employer settled a lawsuit filed by the EEOC based upon alleged race and national origin discrimination:

> [T]he Fresno-based ice cream company favored Hispanic job applicants over others, including black, white and Asian applicants, for such entry-level positions as warehouse worker and route sales driver. The EEOC further contends that Helados not only failed to hire, but also discouraged and deterred non-Hispanic applicants from applying for positions. Finally, the EEOC alleged that Helados fired its sole non-Hispanic driver in Fresno one week after he was hired because of his race and national origin.

EEOC, *Helados La Tapatia to Pay $200,000 to Settle Suit with EEOC for Hispanic-Preference Hiring* (April 12, 2021), available at https://www.eeoc.gov/newsroom/helados-la-tapatia-pay-200000-settle-suit-eeoc-hispanic-preference-hiring.

In settling the suit, the employer agreed to pay $200,000 and implement certain "injunctive remedies including hiring an external equal employment opportunity consultant; ensuring an open hiring process regardless of race and national origin; implementing a recruitment plan that includes hiring goals to address past discriminatory practices; training for employees and managers, and reporting requirements." *Id.* In addition, the employer agreed to "maintain a centralized tracking system for all complaints of discrimination and the application and hiring of personnel," as well as the continuing jurisdiction of the court. *Id.* This settlement illustrates remedial activities the EEOC views as helpful to address problematic hiring practices, although it certainly is far better to avoid the EEOC's scrutiny in the first place.

In short, organizations can and routinely do take bold action with respect to achieving their DEI objectives; however, such activities must be undertaken with a careful assessment of the relevant legal and regulatory landscape and with an eye toward both effecting change and appropriately managing risk.

*B. Workplace Affinity Groups*

At a basic level, all employers have an obligation to understand their legal and regulatory environment and implement policies in accordance with applicable law. This may include anti-harassment policies and training, as well as other activities. Depending on the organization, such obligations may vary dramatically. Many employers also make a focused effort to incorporate workplace activities designed to enhance employee engagement. Such activities as part of a DEI initiative may include educational programming, facilitated discussions, community service opportunities, affinity groups, and a number of other activities, both formal and informal.

Whether legally mandated or voluntary, employers must carefully consider their legal obligations and the most effective way to manage risk. One common activity is establishing employer-sanctioned affinity groups around principles of common interest or identity.

As a primary consideration with respect to affinity groups, it is incumbent on employers to adopt policies and practices that provide a meaningful and non-retaliatory opportunity for employees to opt out of certain activities. For example, in *EEOC v. Tim Shepherd M.D., P.A. and Bridges Healthcare, P.A.*, Civil Action No.4:20-cv-60-SDJ, a final judgment was entered against a Texas medical practice in connection with its treatment of 10 employees, including a Buddhist employee, whose experience was described as follows:

> [Employer] conducted mandatory meetings each morning that involved prayer and a reading of Biblical verses, including discussion of how those principles applied to the employees' personal lives. An employee in the call center, who followed the

> principles of Buddhism, asked several times to be excused from attending the religious portion of the mandatory daily staff meeting as a religious accommodation. Her requests for accommodation were denied, and she was fired just one day after she had renewed her request to be excused from the Bible meetings.

EEOC, *Flower Mound Medical Practice to Pay $375,000 After Judgment in EEOC Title VII Lawsuit* (March 12, 2021), *available at* https://www.eeoc.gov/newsroom/flower-mound-medical-practice-pay-375000-after-judgment-eeoc-title-vii-lawsuit. The medical practice entered into a post-judgment settlement which involved payment of $375,000 and other relief. (Incidentally, the owner of the practice attempted to file bankruptcy and create a new corporate entity; however, "EEOC continued its prosecution of the action because the agency's statutory authority to enforce Title VII is not subject to the automatic stay provision of the bankruptcy code," and EEOC also promptly named the new entity as a defendant under a successor liability theory. *Id*.)

While the *Tim Shepherd* case provides an egregious example of decidedly non-inclusive and non-voluntary (and ultimately unlawful) affinity-based activities, it also illustrates the power that employers can potentially wield over employees. As such, employers must be certain that affinity-based activities which specifically implicate a protected classification (such as race, religious beliefs, gender, sexual orientation or identity, veteran, or disability status) are thoughtfully designed to ensure compliance with applicable law.

Indeed, a well-designed affinity group program should withstand legal scrutiny. In *Moranski v. General Motors Corporation*, 433 F.3d 537 (7th Cir. 2005), an employee filed suit under Title VII alleging religious discrimination following his private employer's denial of his proposal to start a workplace affinity group. The employer had adopted a formal affinity group program to "make diverse constituencies feel more welcomed and valued at GM, remove barriers to productivity for all employees, and increase market share and customer enthusiasm in diverse

market segments." *Id.* at 538. Approved affinity groups were "eligible to receive resources including the use of company facilities and equipment for group activities and funds to support the group's mission." *Id.* Affinity groups were required to comply with certain guidelines and could only be formed after application and an approval from the employer. *Id.* Certain types of affinity groups were not permitted under the guidelines, including those organized solely around a common interest or activity or groups "promot[ing] or advocat[ing] particular religious or political positions." *Id.* at 538-9.

Plaintiff filed suit after the employer's denial of his application to form an affinity group called "GM Christian Employee Network," which was to have been non-denominational and not promote any specific church or group. *Id.* at 539. The court upheld dismissal of the employee's claim, stating:

> Although General Motors currently recognizes nine Affinity Groups, Moranski acknowledges that the company has never approved an Affinity Group based on any other religion, nor would the Guidelines allow it to do so. Instead, Moranski argues that General Motors's refusal to grant Affinity Group status to any group that promotes or advocates a religious position means that it treats "nonreligious" employees more favorably than religious employees. General Motors, however, has never recognized an Affinity Group that promotes or advocates any religious position, even one of religious indifference or opposition to religion. Nor, as Moranski acknowledges, would the Guidelines allow it to do so. The Guidelines preclude recognition of Affinity Groups based on any religious "position," including agnosticism, atheism, and secular humanism. The Guidelines also prohibit General Motors from recognizing, in Moranski's terms, a group organized on the basis of "nonreligion." Simply stated, General Motors's Affinity Group policy treats all religious positions alike-it excludes them all from serving as the basis of a company-recognized Affinity Group. The company's decision to treat all religious positions alike in its Affinity Group program does not constitute impermissible "discrimination" under Title VII.

*Id.* at 540-1. (Emphasis added.)

Such determinations are highly fact-intensive and driven by the legal and regulatory environment of the employer. For example, the *Moranski* decision contains a footnote stating that the employer is not a government entity, which would have been a critical distinction:

> Under the First Amendment to the United States Constitution, a government body may not be able to open a forum for private speech and exclude from that forum speech regarding the entire subject matter of religion. *See, e.g., Grossbaum v. Indianapolis–Marion County Bldg. Auth.*, 63 F.3d 581, 592 (7th Cir.1995).

*Id*. at 542, FN 3.

## V. Conclusion

The topic of diversity, equity, and inclusion within workplaces is a vast one that touches on critically important issues of identity and belonging, as well as on legally conferred rights. And yet, in the complexity of this space there are a few simple, overarching principles illuminated in the foregoing examples.

First, fully explore and understand your organization's legal and regulatory landscape, as well as other aspects of current societal discussions which may impact employees' needs, rights, and attitudes. Check authoritative sources in areas that are rapidly changing or where there is a recent or anticipated transition in enforcement priorities. Know what you *must* do as an organization, versus what you *could* do, and understand the technical compliance standards that must be met for specific activities (e.g., how may an employer regulate employer-sanctioned affinity groups).

Second, approach DEI related initiatives from a proactive and thoughtful perspective. DEI related activities should not be an afterthought or carelessly constructed because they bring a variety of risks, including liability, government oversight and enforcement, loss of reputation, and

loss of employee morale. When appropriate, consult experts and professionals who can help implement quality programming and navigate attendant risks.

Third, be deliberate in choosing the appropriate nature and scope of DEI-related activities for your organization. Start by focusing on activities which are required by law and build additional activities over time.

Fourth, include DEI-related considerations as part of your organization's enterprise-level risk management plan and understand how these considerations relate to other priorities and issues within your organization (rather than treating as a standalone human resource issue).

Finally, understand that innovation and change entail risk. While organizations cannot entirely eliminate all risk in connection with implementing a new or evolving DEI initiative, they can and should think strategically about maintaining legal compliance and minimizing risk. Decision-makers at all levels of an organization must be informed on and have an opportunity to thoughtfully chart the course of the organization as it, and as our nation, moves forward.

# Diversity, Equity, Inclusion Initiatives and Legal Boundaries

Presented by:

**Shelley M. Jackson & Kate E. Trinkle**

Thursday, May 6, 2021 – 2:00 pm – 2:45 pm

ICLEF Seminar: The Tougher Topics of Employment Law

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Whether providing day-to-day compliance advice, navigating disputes, or representing clients in high-stakes legal or regulatory matters, Shelley strives to combine broad substantive expertise with cost-effective, practical strategies. She routinely advises clients on regulatory compliance matters involving various state and federal regulatory frameworks and administrative bodies, including the Indiana Professional Licensing Agency, U.S. Department of Labor, U.S. Office of the Inspector General, and U.S. Drug Enforcement Administration. She is also a seasoned litigator with more than a decade of risk management and litigation experience.

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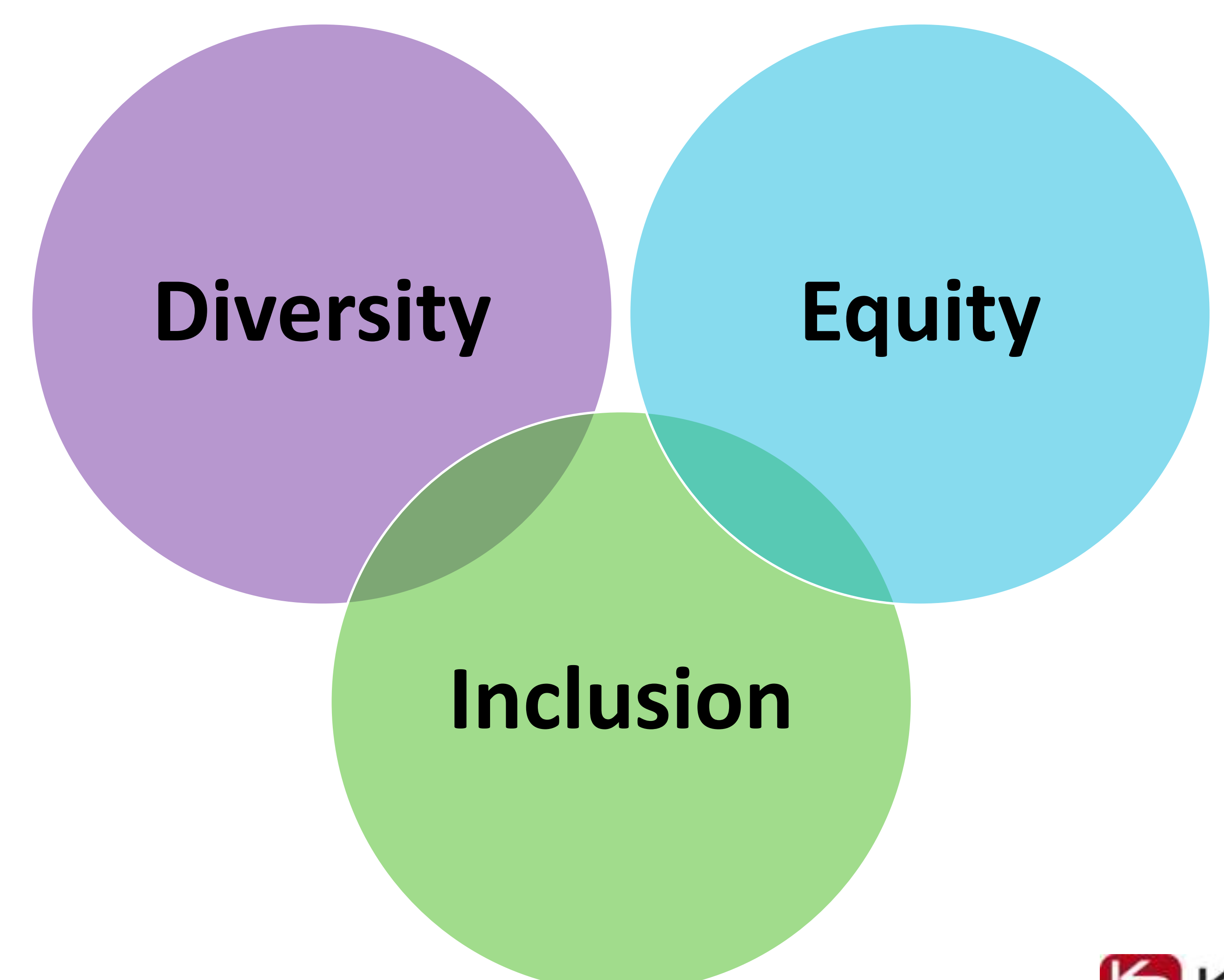
Ms. Trinkle serves the firm's clients across diverse industries, including health care, financial institutions, and business services. Ms. Trinkle also assists clients with emerging employment law issues, including COVID-19 and legislative developments with hemp, cannabis, and marijuana.

# Overview

- Introduction and Framework
- Setting the Stage: The Legal and Regulatory Landscape
- Setting the Stage: Our Current Environment
  - Ever Evolving Environment
  - Shifting Priorities
- Two Common Manifestations of Risk
  - Hiring Practices
  - Affinity Groups
- DEI Program Development Tips

# Introduction and Framework




KRIEG DEVAULT

# Defining Diversity

Sexual Orientation

Age

Ethnicity

Marital Status

Race

Gender

Gender Identity

Religion

Socioeconomic Status

**Diversity**

Mental or Physical Ability

Color

Nationality

Veteran Status

Language

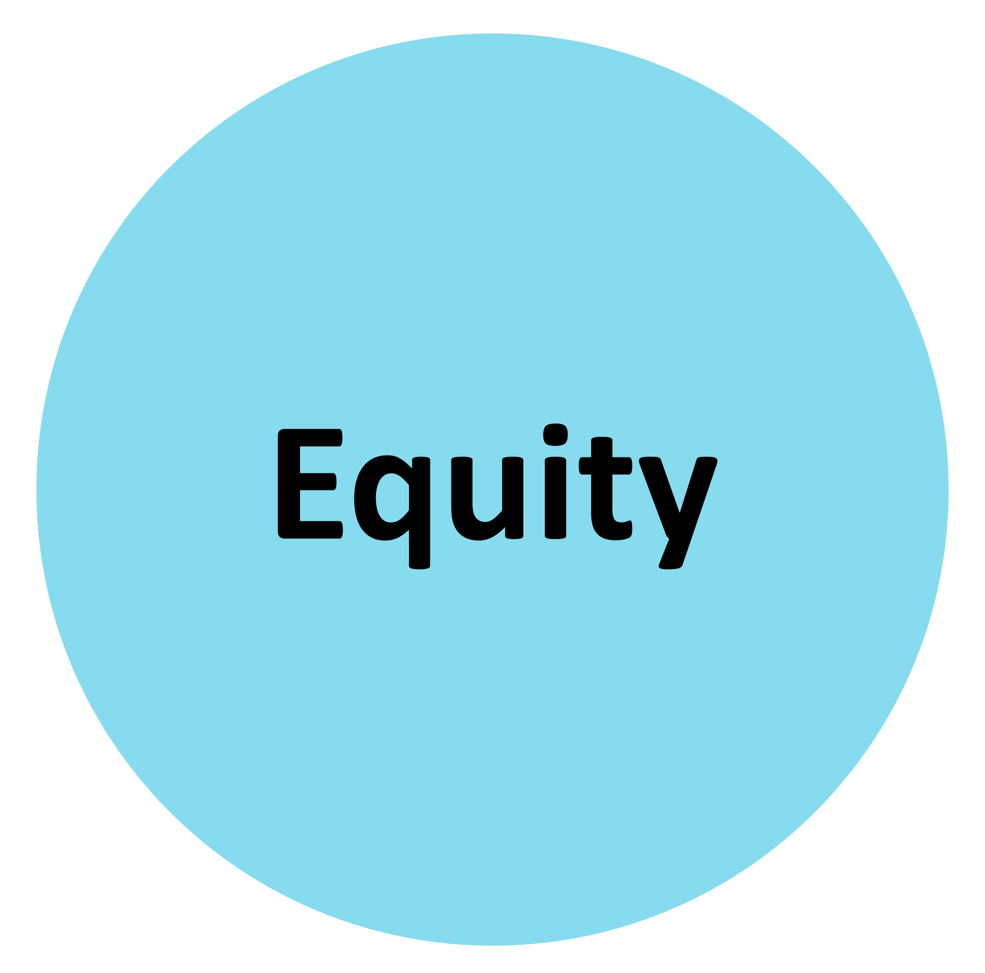
Genetic Information

Gender Expression

Learning Styles

Education

# Defining Equity



Source: https://www.rwjf.org/en/library/infographics/visualizing-health-equity.html

# Defining Inclusion

Source: https://news.montgomeryschoolsmd.org/staff-bulletin/all-in-diversity-inclusion-and-equity-in-education/

# DEI Activity

Diversity

Equity

Inclusion

# Setting the Stage: the Legal and Regulatory Landscape

Federal Law

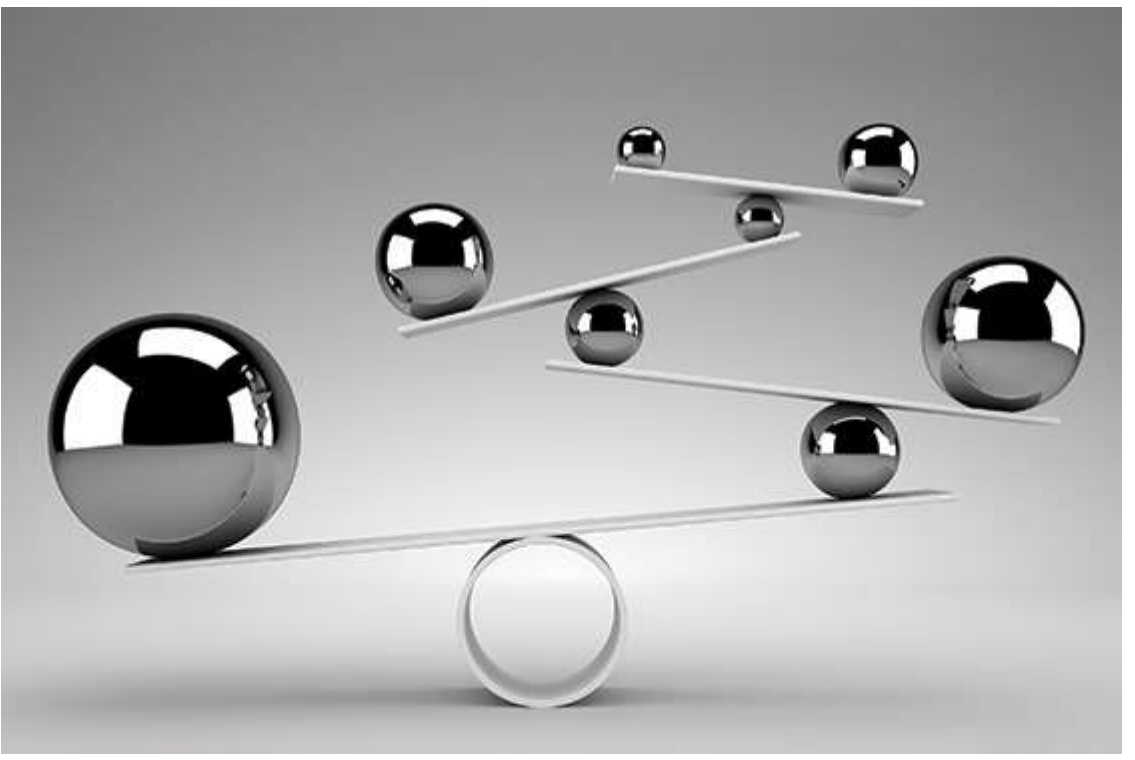
Federal Contractor / Subcontractor

State Law Counterparts

Other Requirements

# Setting the Stage: Our Current Environment

- Balancing Act
  - Constant Evolution
  - Shifting Administrative Priorities



Source: https://www.businessnhmagazine.com/article/hramp39s-delicate-balancing-act

# Ever Evolving Environment

EEOC to Hold Public Hearing on April 28

To Examine Civil Rights Implications of the COVID-19 Pandemic in the Workplace

Source: https://www.eeoc.gov/

Labor and Employment

U.S. Supreme Court Issues Ruling on Title VII Protections for Sexual Orientation and Transgender Status

June 15, 2020

Source: https://nypost.com/2021/04/20/derek-chauvin-jury-reaches-verdict-in-george-floyd-case/

Source: https://www.eeoc.gov/newsroom/eeoc-condemns-violence-against-asian-americans-and-pacific-islanders-united-states

Section 12: Religious Discrimination

EEOC Condemns Violence Against Asian Americans and Pacific Islanders in the United States

NLRB Modifies Standard for Addressing Offensive Outbursts in the Course of Protected Activity

Source: https://www.eeoc.gov/newsroom/eeoc-condemns-violence-against-asian-americans-and-pacific-islanders-united-states

Source: https://www.nlrb.gov/news-outreach/news-story/nlrb-modifies-standard-for-addressing-offensive-outbursts-in-the-course-of

# Shifting Priorities

**President Trump's Executive Order**

Prohibited covered employers from providing training on certain "divisive concepts," defined as race or sex stereotyping and race or sex scapegoating, as well as a list of topics.

**Executive Order 13950 of September 22, 2020**

**Combating Race and Sex Stereotyping**

Source: https://www.govinfo.gov/content/pkg/FR-2020-09-28/pdf/2020-21534.pdf

**President Biden's Executive Order**

Revoked President Trump's Executive Order and established new priorities for advancing equity, dismantling existing systemic barriers, and supporting underserved communities.

Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government

Source: https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/

# Common Manifestations of Risk

- Hiring Practices
  - Office of Federal Contract Compliance Programs v. Microsoft; Wells Fargo
  - Cautionary Tales of EEOC Enforcement
- Workplace Affinity Groups
  - The Non-Inclusive Way: The *Tim Shepherd* Example
  - The Right Way: The *General Motors* Example

# Hiring Practices

## Wells Fargo CEO: 'A watershed moment'

Charlie Scharf announces specific commitments to advance diversity efforts across all levels of the company.

Source: http://www.thestaffingstream.com/2017/10/26/not-in-the-job-description-why-modern-hiring-practices-require-a-human-touch

Addressing racial injustice

Source: https://stories.wf.com/wells-fargo-ceo-a-watershed-moment
Source: https://blogs.microsoft.com/blog/2020/06/23/addressing-racial-injustice/

# Hiring Practices Challenged by OFCCP

**Microsoft, Wells Fargo Diversity Plans Draw U.S. Labor Inquiry**

OFCCP challenged the DEI hiring initiatives set forth by Microsoft and Wells Fargo

Focus: whether each company's stated commitment to increase Black executive leadership in a stated timeframe constituted unlawful racial discrimination in violation of Title VII.

**Microsoft, Wells Fargo Satisfied Trump Labor Department on Hiring More Black Employees**

Outcome: the inquiry ended after each company provided in-depth descriptions, materials, and data.

Source: https://www.bloomberg.com/news/articles/2020-10-06/microsoft-plan-to-add-black-executives-draws-u-s-labor-inquiry

Source: https://www.wsj.com/articles/microsoft-wells-fargo-satisfied-trump-labor-department-on-hiring-more-black-employees-11615035602?reflink=desktopwebshare_permalink

# Hiring Practices and Cautionary Tales

- *Rudin v. Lincoln Land Community College*
  - Cautioning organizations that “the existence of an affirmative action plan may be relevant to a key issue in a disparate treatment discrimination case,” specifically when paired with actions that indicate discriminatory intent.
- *EEOC v. Helados La Tapatia, Inc., et al.*
  - Example of what the Seventh Circuit Court of Appeals cautioned against in *Rudin.*

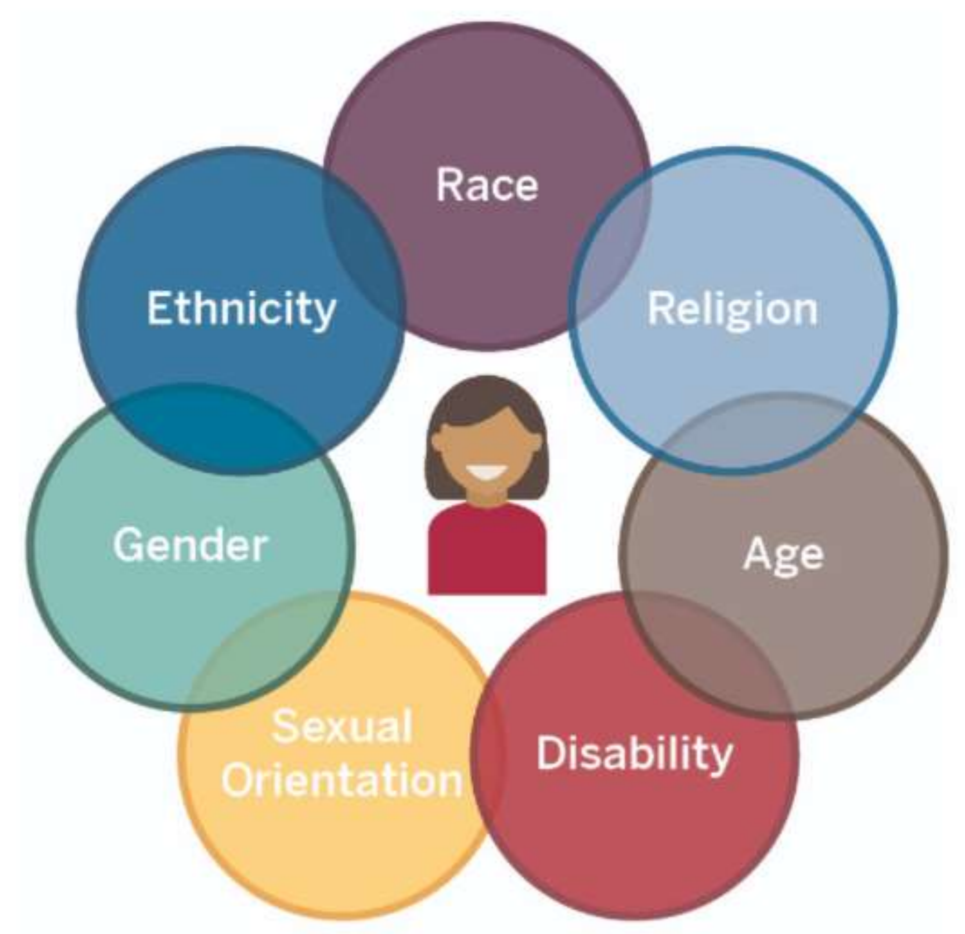
# Managing Risk: DEI Hiring Practices

Organizations can take bold action with respect to developing DEI initiatives to achieve DEI objectives. To mitigate potential risk, organizations should carefully assess the relevant legal and regulatory landscape when developing, implementing, and effectuating DEI actions and initiatives.

Source: https://www.esf.edu/ide/

# Common Manifestation of Risk: Affinity Groups

- Affinity groups, aka employee resource groups, are intended to bring employees with similar backgrounds, interests, or other characteristics together.




Source: https://cdc.indiana.edu/resources/affinity-groups.html

# Common Manifestation of Risk: Affinity Groups

- The Non-Inclusive Way: *EEOC v. Tim Shepherd M.D., P.A. and Bridges Healthcare, P.A*
  - Mandatory meetings each morning involving prayer, Bible reading, and discussion of how the Bible verses applied to the employees' personal lives.
  - Prohibited employees from opting out of the affinity group activity, including one employee who followed Buddhist principles.
  - Clear Title VII violation.

## Common Manifestation of Risk: Affinity Groups

- The Right Way: *Moranski v. General Motors Corporation*, 433 F.3d 537 (7th Cir. 2005)
  - Created affinity group program wherein employees could submit requests for certain affinity groups to be established following approval from the company.
    - Specifically prohibited affinity groups organized solely around a common interest or activity or groups promoting or advocating particular religious or political positions.
  - Approved affinity groups were provided with guidelines and resources.
  - Court held employer appropriately denied employee's request to establish "GM Christian Employee Network."

# Managing Risk: DEI Affinity Groups

Affinity groups can be powerful tools to facilitate DEI initiatives. To manage the risk associated with such groups, employers should:

- Make participation optional;
- Ensure affinity groups implicating a protected class comply with relevant laws and regulations; and
- Consider allowing employees to initiate the affinity groups of interest to them and in accordance with set guidelines / procedures.

Source: https://betterlesson.com/about-us/diversity-equity-and-inclusion/

## DEI Program Development Tips

1) Fully understand the legal and regulatory landscape applicable to your organization.
2) Approach the planning process for DEI programs and initiatives in a thoughtful manner and with appropriate expert assistance, considering the relevant legal and regulatory landscape.
3) Strategically implement and effectuate DEI actions, beginning with what is required and expanding to address additional objectives.
4) Incorporate DEI-related initiatives, objectives, and programs into your organization's enterprise-level risk management plan.
5) Understand that change and innovation inherently involve risk and decide the risks worth mitigating to maximize results.

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# Section Seven

# Retaliation

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## Section Seven

**Retaliation…………………………………………………...……Nathan A. Baker**

PowerPoint Presentation

# RETALIATION

"But if we didn't discriminate how could we have retaliated"

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# Rising Tide….

- The EEOC reports the number of retaliation charges it receives annually has nearly tripled over the past two decades, increasing from 13,814 in fiscal year 1993 to 39,110 in fiscal year 2019.

- See Charge Statistics FY 1997 Through FY 2019 US Equal Emp't Opportunity Commission and Charge Statistics FY 1992 Through FY 1996 US Equal Emp't Opportunity Commission

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- And there is no end in sight
- 53.8% of the total charges of discrimination filed with the EEOC, up sharply from mid-teens in the early 1990s.
- Since fiscal year 2009, retaliation has been the most common claim alleged with the EEOC



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# A nuance most employers miss

- Whether or not the underlying allegation/claim/complaint is found to be valid or supported is of no moment in a retaliation case
- The only thing that matters is that the employee raised the issue/participated in the matter.

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- Not uncommon for a court to dismiss the underlying discrimination/harassment claim but find merit to retaliation claim
- Critical issue – clients have much more say in the post-complaint relationship with their employees.
- If handle complaints properly, the extra layer of HR/legal counsel should help provide further protection against successful retaliation claims.

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# How is that possible?

- Courts all over the country have held that the statutory retaliation provisions protect anyone who:
  - opposes or complains of discrimination/ harassment;
  - anyone who participates in a related investigation/proceeding; or
  - anyone who is associated with or related to an individual who has opposed or complained of unlawful practices.

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# 3rd Party Retaliation

- Target of retaliation is not always the employee who filed a complaint.
- Can be employee's family or friends.
- The EEOC has long taken the position that such acts of reprisal are actionable.
- Many courts agree.
- Accordingly, third party can sometimes have standing to bring a retaliation claim.

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# Nuts and Bolts of Retaliation Claims

- Statutes vary but the core rules/requirements are similar
- Most require agency exhaustion (some exceptions – FMLA, EPA)
- Familiar analysis for those in the labor and employment world

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# Smoking Gun – not likely

- Determining if there is direct evidence of retaliation is the first step in the analysis but is not very common

- Admission or close to it

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# Circumstantial Evidence

- Old reliable - McDonnell Douglas burden-shifting framework
- Employee must establish a prima facie case: (1) engaged in a protected activity; (2) the employer subjected employee to an adverse employment action; and (3) a causal link between the protected activity and the employer's action.

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# Protected Activity

- Generally requires:
  - Opposing an unlawful practice; OR
  - Filing, charging, testifying, assisting or participating in an investigation proceeding



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# Courts take broad view…

- **Can be oral or written** - Kasten v. St. Gobain 131 S.Ct. 1325 (2011)
- BUT….
  - – Must give fair notice that employee is asserting a protected right
  - – Analysis comes up when internal complaint is raised

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# Opposition Clause

Good explanation of clause:

- Lord v. High Voltage Software, Inc. 839 F.3d 556 (7th Cir 2016)
- Struthers v. City of Laurel  895 F.3d 317 (4th Cir. 2018)
- Gogel v. Kia Motors 967 F.3d 1121 (11th Cir.)

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# Participation Clause

- Courts view very broadly…
- Includes supporters and "me too" witnesses
- EEOC's outline of wide scope
  - 2016 EEOC Retaliation Guidance § II(A(1)

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# Even if different entities/employers

- Another nuance - retaliation by a different or future employer
- According to the statutes, it is prohibited. “An individual is protected against retaliation for participation in employment discrimination proceedings even if those proceedings involved a different entity
- McMenemy v. City of Rochester 241 F.3d 279 (2d Cir. 2001)

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# Adverse Action

- Source of considerable angst..
- Then came Burlington Northern
  - Anti-retaliation provisions go beyond the workplace and traditional employment actions
  - Determination of whether action is adverse judged on reasonable person standard
  - Burlington Northern & Santa Fe Railway Co. V. White, 548 U.S. 53 (2006)
  - Angst continues….


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# Causal Connection – often key piece

- Temporal proximity (either way)
  - Donley v. Stryker 906 F.3d 635 (7th Cir. 2018)
  - Drielak v. Pruitt 890 F.3d 297 (D.C. Cir. 2018)
- Proof of prior misconduct
- Decisionmaker's knowledge of protected activity

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# Cat's Paw Liability

Theory holds employer liable for retaliatory animus of manager who did not make ultimate employment decision

Staub v. Proctor Hosp. 131 S. Ct. 1186 (2011)

Essentially focuses on the taint of the biased influence of the manager

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# Opportunities for Employers

- Document, Document, Document
- Best defense against retaliation claims
- Retaliation cases often hinge on the employer's ability to demonstrate the existence of issues/problems pre-dating the alleged protected conduct.
- Evidence of a employee's poor work performance can help show that the employer did not have a retaliatory motive


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- The purpose of the 30-day follow-up is to make certain that the problems have been corrected and that the employee has no further complaints.
  - *Under-utilized strategy; very few employers do this.*



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# Bottom Line

**Never do nothing!**

- Always bring in HR and investigate immediately.
- Always get back to the complaining employee.

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# *Questions?*



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# Section Eight

# Religious Discrimination and Accommodation

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## Section Eight

**Religious Discrimination and Accommodation……………………………………..Bonnie L. Martin**
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PowerPoint Presentation

# THE TOUGHER TOPICS OF EMPLOYMENT LAW

## Religious Discrimination and Accommodation

**Bonnie L. Martin**
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This spring, the Gallup polling organization reported that Americans identifying themselves as members of a church, synagogue, or mosque were in the minority (47%), for the first time since Gallup began polling on the topic.[1] By comparison, in 1937, U.S. church membership was at 73%.[2] Gallup reported the decline as "primarily a function of the increasing number of Americans who express no religious preference."[3] As those who consider themselves "religious" or "church members" find themselves newly in the minority, employers can expect disputes about religious discrimination and accommodation to increase. This white paper will address the current state of federal and Indiana law on religious discrimination and accommodation, as well as trending issues.

### I. Overview of Title VII Religious Discrimination Law

#### A. Title VII Requirements and Prohibitions

Title VII of the Civil Rights Act of 1964 ("Title VII")[4] prohibits employers from "engaging in disparate treatment and from maintaining policies or practices that result in unjustified disparate impact based on the employee's religion."[5] Conduct violative of Title VII's religious discrimination prohibitions includes: (1) adverse actions based on an applicant or employee's religious beliefs, observances or practices in any aspect of employment; (2) taking adverse action to avoid accommodating an employee's religious belief, observance or practice that could have been provided without undue hardship; (3) denying an accommodation for an employee's religious belief, observance or practice that would not impose an undue hardship on the conduct of the business; (4) intentionally limiting, segregating or classifying employees based on religious beliefs (or absence of the same) or enforcing a neutral rule that does so without business necessity (5) subjecting employees to harassment because of religious beliefs, observances or practices (either a hostile environment, or requiring or coercing an employee to abandon, alter or adopt a religious practice); or (6) retaliating against an employee or applicant because of protected activity in seeking an accommodation, opposing discrimination, or participating in an investigation, proceeding or hearing regarding religious discrimination.[6]

#### B. Exceptions to Title VII Religious Discrimination Requirements

Title VII does, however, include an exception for religious educational institutions and religious organizations (i.e., organizations with a primarily religious character and purpose), and allows such entities to assert a defense to a Title VII claim, stating it made the employment decision at issue on the basis of religion.[7] Pursuant to guidance issued by the U.S. Equal Employment Opportunity Commission ("EEOC"), a determination of whether the purpose and character of an organization is "primarily religious" depends upon a fact-specific analysis, including weighing the

[1] https://news.gallup.com/poll/341963/church-membership-falls-below-majority-first-time.aspx (Specifically, Gallup asked: "Do you happen to be a member of a church, synagogue or mosque?")
[2] *Id.*
[3] *Id.*
[4] 42 U.S.C. § 2000e et seq.
[5] *Enforcement Guidance on Religious Discrimination*, EEOC, Section 12-I, https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination.
[6] *Id.*
[7] 42 U.S.C. §§ 2000e-1(a); 2000e-2(e)(2).

religious and secular characteristics of the organization.[8] The religious organization exemption is not limited to jobs involved in the "specifically religious" activities of the religious organization, but allows religious organizations to prefer to employ individuals who share the organization's religious observances, practices, and beliefs.[9] In addition, courts have recognized a "ministerial exception" to Title VII, based on the First Amendment principles in favor of the free exercise of religion, and in opposition to the establishment of religion, which operates as an affirmative defense to a Title VII claim.[10] The Supreme Court of the United States ("Supreme Court") created a fact-intensive analysis considering the "formal title" given by the church; the substance reflected in the title; the employee's use of the title; and the "important religious functions" the employee performs for the church,[11] but has since emphasized that courts are to "take all relevant circumstances into account and to determine whether each particular position implicated the fundamental purpose of the exception."[12] The EEOC describes the judicially-recognized ministerial exception as applying "only to employees who perform essentially religious functions, namely those whose primary duties consist of engaging in church governance, supervising a religious order, or conducting religious ritual, worship, or instruction."[13] Unlike the statutory exemption for religious organizations, the judicial ministerial exception applies regardless of whether the employment decision at issue was for "religious reasons."[14] Title VII also permits employers to hire and employ employees on the basis of religion if religion is a "bona fide occupational qualification ("BFOQ") reasonably necessary to the normal operation of that particular business or enterprise."[15] As a practical matter, however, employers outside of religious organizations have a difficult time establishing such a defense, and thus it is rarely used.

### C. Definition of "Religion"

The scope of "religion" under Title VII extends far beyond the more organized and common religious faiths (*e.g.,* Christianity, Hinduism, Islam, Judaism, Sikhism, etc.). In fact, Title VII defines "religion" quite broadly to include "all aspects of religious observance and practice."[16] Religious practices include any "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."[17] The mere fact "that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee."[18] It is therefore theoretically possible under Title VII that an employer might be required to accommodate an entirely new or unique religious belief held by *only* the requesting employee.

Courts considering whether an employee's nontraditional belief is religious under Title VII often ask the following question, first posed in a Supreme Court conscientious objector case during the Vietnam War: "[D]oes the claimed belief occupy the same place in the life of the [employee]

---

[8] *Enforcement Guidance on Religious Discrimination*, EEOC, https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination.
[9] EEOC, *supra* note 8; 42 U.S.C. § 2000e(j).
[10] *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 565 U.S. 171 (2012); *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655 (7th Cir. 2018).
[11] *Hosanna-Tabor*, 565 U.S. at 192; *Grussgott*, 882 F.3d at 658.
[12] *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, __ U.S. __, 140 S. Ct. 2049, 2067 (2020).
[13] EEOC, *supra* note 8.
[14] EEOC, *supra* note 8.
[15] 42 U.S.C. § 2000e-2(e)(1).
[16] *Equal Opportunity Employment Comm'n v. United Health Programs of Amer., Inc.*, 213 F. Supp. 3d 377, 393 (E.D.N.Y. 2016) (citing 42 U.S.C. § 2000e(j)).
[17] *Id.* (citing 29 C.F.R. § 1605.1).
[18] *Id.*

as an orthodox belief in God holds in the life of one clearly qualified for exemption?[19] Under this standard, courts differentiate between those beliefs which are "religious in nature" and those which are "essentially political, sociological, or philosophical."[20] It is not necessary that the employee actually believes in a God or divine beings such as angels or demons, and even nontheistic beliefs can be essentially religious in nature.[21]

To be entitled to accommodation, an employee's belief must be "sincerely held." However, an employee's belief or degree of adherence may change over time, and "sincerity" is not usually in dispute. An employer may request more information about the employee's religious belief only if it has an objective basis to question the employee's sincerity.

The United States Court of Appeals for the Seventh Circuit has noted that Title VII provides a "broad and intentionally hands-off definition of religion," which would include a "genuinely held belief that involves matters of the afterlife, spirituality, or the soul, among other possibilities…."[22] What is noticeably absent from all proposed definitions, however, is any requirement that the religion "make sense." As the Supreme Court has repeated, it is not the place of courts to inquire into the validity or plausibility of an individual's religious beliefs; instead, the task of a court is "to decide whether the beliefs professed [...] are sincerely held and whether they are, in [the believer's] own scheme of things, religious."

### D. Title VII Religious Discrimination Claims

Like other claims under Title VII, religious discrimination claims must first be presented to the EEOC. Upon receipt of a Notice of Dismissal and Right to Sue, an employee may proceed with a private lawsuit, or the EEOC may decide to file suit on behalf of the employee. In order to establish a *prima facie* case of religious discrimination under Title VII, the employee must show that: (1) he held a sincere religious belief that conflicted with a job requirement; (2) he informed his employer of the conflict; and (3) he was disciplined or subject to an adverse employment action for failing to comply with the conflicting requirement.[23] If the plaintiff establishes a *prima facie* case, the burden then shifts to the employer to show that it offered a reasonable accommodation or, alternatively, that offering an accommodation would have resulted in undue hardship.[24] An accommodation would constitute an "undue hardship" if it would impose more than a *de minimis* cost on the employer.[25] This analysis considers both economic costs (*e.g.,* lost business, having to hire additional employees, diminishing efficiency, etc.) and noneconomic costs (*e.g.,* compromising the integrity of a seniority system,[26] infringing on other employees' rights and benefits, impairing workplace safety, or causing co-workers to bear the employee's share of hazardous or burdensome work).[27] Neither co-worker disgruntlement nor customer preference constitutes an undue hardship.[28] The employer may deny the accommodation only after it has determined that each alternative accommodation would impose an undue hardship; if multiple alternatives are available, the employer must offer the alternative that least disadvantages the employee's employment opportunities.[29]

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[19] *See, e.g.*, *Fallon v. Mercy Catholic Medical Center of Southeastern Pennsylvania*, 877 F.3d 487, 490 (3d Cir. 2017) (citing *United States v. Seeger*, 380 U.S. 163, 184 (1965)).
[20] *Id.*
[21] *Id.* (citing *Welsh v. United States*, 398 U.S. 333, 340 (1970)).
[22] *Adeyeye v. Heartland Sweeteners, LLC,* 721 F.3d 444, 448 (7th Cir 2013).
[23] *See Shelton v. Univ. of Med. & Dentistry of N.J.*, 223 F.3d 220, 224 (3d Cir. 2000).
[24] *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 133 (1st Cir. 2004).
[25] *Id.* (citing *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977)).
[26] 29 C.F.R. § 1605.2(e)(2).
[27] *Id.* (citations omitted); https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination.
[28] https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination.
[29] 29 C.F.R. § 1605.2(c); (c)(2)(ii).

### E. Religious Discrimination Prohibitions Applicable to Federal Contractors

In addition to Title VII, the Office of Federal Contract Compliance Programs ("OFCCP") enforces Executive Order 11246, which applies to federal contractors and subcontractors.[30] The Order prohibits religious discrimination by contractors against applicants and employees, including the failure to provide a reasonable religious accommodation absent a showing of undue hardship.[31] However, the Order specifically exempts any contractor or subcontractor that is a religious corporation, association, educational institution, or society from the equal opportunity clause.[32] The OFCCP issued guidance regarding its final rule on January 8, 2021, stating that they would enforce the Order, as well as the agency's rule regarding equal opportunities in employment regardless of religion or national origin.[33] In January 2021, a group of states challenged the OFCCP rule, but the action is on pause.[34] Employers should look out for changes to the federal contractor exemptions in the near future.

## II. Religious Discrimination Under Indiana Law

The Indiana Civil Rights Law ("ICRL") prohibits employers with six or more employees from discriminating on the basis of religion.[35] "Religion" is not defined by the ICRL or by Indiana courts as it relates to the ICRL. While the ICRL applies to employers with six or more employees, it specifically excludes from coverage: (1) any nonprofit corporation or association organized exclusively for fraternal or religious purposes; (2) any school, educational or charitable religious institution owned or conducted by or affiliated with a church or religious institution; or (3) any exclusively social club, corporation, or association that is not organized for profit.[36] Indiana courts have interpreted these exclusions on a limited basis, but have stated that organizations that fundraise for the purpose of supporting their own programs, such as the Salvation Army, are considered to be charitable, religious, or non-profit institutions.[37]

## III. Religious Freedom Restoration Act

### A. Federal

In 1993, Congress passed the Religious Freedom Restoration Act ("RFRA").[38] The RFRA provides that the government may only substantially burden the free exercise of religion of a person if it has a compelling interest to do so and, even then, must use the least restrictive means possible to further such interest (the "strict scrutiny" test).[39] The RFRA may be used as a claim or defense.

### B. Indiana

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[30] Exec. Order 11246; *see also* Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, RIN 1250-AA09 (to be codified at 41 C.F.R. § 60-1).
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *New York v. DOL*, S.D.N.Y., No. 1:21-cv-00536.
[35] IND. CODE § 22-9-1-2.
[36] IND. CODE § 22-9-1-3(h).
[37] *Indiana Civil Rights Com'n v. Salvation Army Adult Rehabilitation Center*, 685 N.E.2d 487 (Ind. Ct. App. 1997).
[38] 42 U.S.C. § 2000bb et seq.
[39] *Id.*

Indiana's version of the RFRA, enacted and amended in 2015, prohibits governmental entities from substantially burdening a person's exercise of religion, even if the burden results from a rule of general applicability, unless the governmental entity can demonstrate that the burden (1) is in the furtherance of a compelling governmental interest and (2) is the least restrictive means of furthering the compelling governmental interest.[40] RFRA also includes protections for private employers. It states that it "is not intended to, and shall not be construed or interpreted to, create a claim or private cause of action against any private employer by any applicant, employee, or former employee."[41]

## IV. Workplace Drug Policies

Employers may encounter requests for exemption from workplace drug policies for ceremonial or religious use of certain Schedule I drugs. Use of peyote, for example, is legal under federal law if used in a bona fide religious ceremony of the Native American Church.[42] Religious use of peyote is also explicitly made legal by state statute in New Mexico and Colorado.[43] The Tenth Circuit Court of Appeals held that an employer trucking company violated Title VII when it refused to hire a Native American applicant for a truck driver position who admitted using peyote in religious ceremonies twice per year, even though reasonable accommodations were available and would not cause an undue hardship (*i.e.*, requiring the employee to take a day off after each ceremony so that the peyote could dissipate safely from his system).[44] The court did not address whether its analysis would have differed if, for example, the employee had engaged in peyote use on a much more frequent basis.

The situation is quite different for marijuana, which remains illegal under federal law. Although the issue is less commonly raised in the employment context, multiple older criminal cases found that an individual's beliefs in the so-called "Church of Marijuana" were not sufficiently comprehensive to constitute a religion because such beliefs were most often focused on the growth, use, possession, and distribution of marijuana for personal therapeutic effect, rather than to attain a state of religious, spiritual, or revelatory awareness.[45]

More recently, new organizations such as the International Church of Cannabis—an organization with several hundred members located in Denver—have proliferated following the legalization of marijuana under certain state laws. The International Church of Cannabis presents itself as a religious organization and requires its members to engage in ritual use of cannabis as a "sacrament," but claims no divine law or dogma other than the "Golden Rule." There appear to be no Title VII cases involving members of this or similar organizations. In Indiana, because marijuana use remains illegal under federal and state law, employers can argue that—even if such use of marijuana was religious under Title VII— accommodation of such a practice would be an undue hardship because it would require violating federal and state law.

## V. Wellness Programs

[40] IND. CODE § 34-13-9-8.
[41] IND. CODE § 34-13-9-11.
[42] 21 C.F.R. § 1307.31.
[43] *See* N.M. Stat. Ann. § 30-31-6(D); Colo. Rev. Stat. § 12-22-317(3).
[44] *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481 (10th Cir. 1989).
[45] *See, e.g.*, *U.S. v. Meyers*, 906 F. Supp. 1494 (D. Wyo. 1995) (holding that defendant's belief in Church of Marijuana was not a religion).

Title VII does not prohibit employers from integrating the employer's own religious beliefs into the workplace.[46] However, employers who do so must accommodate employees who seek to be excused for religious reasons (even the absence of religion), absent undue hardship. One recent federal reverse religious discrimination case alleged that a mandatory employee wellness initiative crossed the line from advocating employee health and wellness to advocating spirituality[47]. As an initial matter, because Title VII defines religion broadly, employers should be careful to ensure that their policies—including employee health and wellness initiatives—do not mandate participation in activities that could be broadly interpreted as religious in nature.

On April 26, 2018, a jury awarded $5.1 million in compensatory and punitive damages to a group of plaintiffs after finding that an employer had hired a consultant to implement an allegedly secular conflict resolution and wellness program (colorfully titled "Onionhead") requiring employees to participate in prayer, chanting, and workplace cleansing rituals.[48] The program further encouraged employees to engage in discussions of spirituality, divine destinies, God, and the soul as part of an alleged method to transform negative thinking. When one employee refused to participate in the program, she was let go. The fact that this was an allegedly "secular" program and not part of any established religion did not matter. As the district court noted in its decision denying the employer's motion for summary judgment on reverse religious discrimination, Title VII defines "religion" broadly to include "all aspects of religious observance and practice."[49] Religious practice, in turn, includes any "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views," and "[t]he fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee."[50] The prayers, chanting, cleansing rituals, and spirituality discussions mandated by the employer to combat employees' negative thinking fell within this broad definition, and the employer violated the law by discriminating against employees who declined to participate.

## VI. Weapons

Employers must also consider how to accommodate religious beliefs that require the carrying of knives and/or ceremonial weapons. This issue frequently arises, for example, for employees whose Sikh religion requires them to carry a kirpan—a small sword or dagger—at all times as an article of faith. Kirpans are frequently made of steel or iron, have a single cutting edge that may be either blunt or sharp, and are most often between 3 and 9 inches long.

Most cases involving kirpans and other symbolic religious weapons have arisen so far in the school context, rather than the workplace. For example, the Ninth Circuit has held that Sikh students in public school have a right to wear a kirpan,[51] and the New York Board of Education currently permits students to wear religious knives as long as they are secured within sheaths with adhesives that make the knives impossible to draw.

[46] EEOC, *supra* note 8.
[47] *Equal Emp't Opportunity Comm'n v. United Health Programs of Amer., Inc.*, 350 F. Supp. 3d 199 (E.D.N.Y. 2018).
[48] *Equal Opportunity Employment Comm'n v. United Health Programs of Amer., Inc.*, 213 F. Supp. 3d 377, 393 (E.D.N.Y. 2016).
[49] *Id.* at 393 (citing 42 U.S.C. § 2000e(j)).
[50] *Id.* at 393 (citing 29 C.F.R. § 1605.1).
[51] *Rajinder Singh Cheema, et al. v. Harold H. Thompson*, 36 F.3d 1102 (9th Cir. 1994).

The Fifth Circuit Court of Appeals first considered the kirpan issue in the employment context where an IRS public employee was prohibited from wearing her 9-inch (and later a 3-inch) kirpan to work under a federal statute prohibiting weapons with blades exceeding 2.5 inches in certain federal buildings.[52] The employee suggested three potential accommodations, which the IRS refused to accept: (1) wearing a dulled kirpan; (2) working from home; or (3) working from a different federal building with lower security requirements.[38] The court held that the IRS did not fail to accommodate the employee under Title VII, even assuming her religious beliefs required her to carry a kirpan longer than 2.5 inches, because the proposed accommodations would impose an undue hardship on the IRS.[53] In particular, the IRS could potentially be required to break a federal statute and take time each day to ascertain whether her kirpan was dull or sharp. The agency also determined that she could not effectively perform her duties from a different location. Given these facts, the court found that the employer was not required to accommodate the employee.

Most circuits, however, have not yet considered this issue in the employment context, and it remains an unsettled area of law. The EEOC's website lists symbolic weapons as examples of potential accommodations that employers might be required to provide.[54] The agency recently settled a claim against a hospital for prohibiting a Sikh dietary aide from wearing her 6-inch kirpan to work, even though the blade had been dulled and was worn sheathed under her clothing.[55]

Given the uncertainty surrounding this issue, employers facing similar requests for accommodations should at least consider whether potential accommodations are feasible or whether they would impose an undue hardship given the nature of the employee's job. Ideas for accommodations might include: (1) requiring that the blade be short and/or dulled; (2) requiring that the blade be fastened in a sheath with adhesive or via other means; (3) requiring that the blade be kept out of sight or under clothing in a manner not easily accessible; or (4) permitting the employee to telecommute if the employee could effectively work from home.

## VII. Dress Code and Appearance Policies

Religious garb and grooming requirements also prompt requests for accommodations or exemptions from company dress codes and look policies. The key, as always, is whether the employer would suffer an undue hardship by providing the accommodation.

A garb or grooming accommodation will generally be an undue hardship when, for example, the accommodation could result in potential safety issues or result in serious impairment of an employer's valid mission or purpose. For example, a private prison employer was not required to provide a female Muslim employee with an exemption to the employer's prohibition against head coverings where the employee's head scarf could pose a serious safety risk were a prisoner to grab it.[56] Similarly, a city was not required to permit police officers to wear religious clothing or ornamentation over their uniforms because the police department's religious neutrality was vital in both dealing with the public and working together cooperatively.[57]

Employers may, and should, be creative when considering possible accommodations or exemptions to dress codes. In *Cloutier v. Costco Wholesale Corp.*, a former cashier sued the store for religious discrimination after she was discharged for wearing facial jewelry in violation of her

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[52] *Tagore v. U.S.*, 735 F.3d 324 (5th Cir. 2013).
[53] *Id.*
[54] *See* EEOC, *supra* note 8.
[55] *See* EEOC, *supra* note 8.
[56] *EEOC v. GEO Group, Inc.*, 616 F.3d 265 (3d Cir. 2010).
[57] *Webb v. City of Philadelphia*, 562 F.3d 256 (3d Cir. 2009).

religious beliefs as a member of the Church of Body Modification.[58] At the time, Costco's employee dress code included a blanket prohibition of all facial jewelry except for earrings. Nevertheless, Costco offered the employee at least two potential accommodations: she could cover her facial piercing with a band-aid while at work, or she could replace it with a clear retainer that would be less noticeable to customers. The court found that, by offering these reasonable alternatives, Costco had fulfilled its obligations under Title VII. It would have been an undue hardship to require Costco to abandon its general policy requiring "professional attire." On the other hand, there are also cases finding in favor of the employee on dress code issues—most frequently, where the requested accommodation would have little to no effect on the employer's business or where the employer treated religious employees differently than non-religious employees. For example, the district court in *Muhammad v. New York City Transit Authority* denied the defendant employer's motion for summary judgment where the employer transferred all employees with religious objections to its head covering policy out of passenger service, but did not transfer any employees who had objected to the same policy on secular grounds.[59]

## VIII. Diversity Initiatives

One area of law rapidly developing is the intersection of religious discrimination law with diversity initiatives, particularly LGBTQ+ initiatives. In June 2020, the Supreme Court held in *Bostock v. Clayton County* that Title VII's protections against discrimination or harassment because of sex extend to protect discrimination based on sexual orientation and gender identity.[60] The Court in *Bostock* did not address whether or not an employer's religious beliefs will shield them from this protection.[61] However, in one of *Bostock's* sister cases, *EEOC v. R.G. & G.R. Harris Funeral Homes*, the Sixth Circuit determined that a Christian-funeral home owner discriminated against a transitioning employee, Stephens, when he fired the employee for refusing to "abide by her employer's stereotypical conception of her sex."[62] After telling her boss and funeral home owner that she had plans to transition to a woman and requested to wear a woman's uniform, Stephens' employment was terminated.[63] The owner of the funeral home argued that employing Stephens would "constitute an unjustified substantial burden upon [his] sincerely held religious beliefs" in violation of the RFRA.[64] The court determined that continuing to employ Stephens "would not, as a matter of law, substantially burden the employer's religious exercise, and even if it did, the EEOC has shown that enforcing Title VII here is the least restrictive means of furthering its compelling interest in combating and eradicating sex discrimination."[65]

Thus, *Harris Funeral Homes* establishes that the federal RFRA will not create a protection for employers to discriminate against employees on the basis of sexual orientation or gender identity, even in the context of religion, absent undue hardship.

### A. EEOC Guidance

Under the EEOC's updated Religious Discrimination guidance, employers are expressly prohibited from excusing an employee from diversity training based on their religious beliefs, absent undue hardship.[66] Absent undue hardship, an employer is required to excuse an employee

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[58] *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004).
[59] *Muhammad v. New York City Trans. Auth.*, 52 F. Supp. 3d 468 (E.D.N.Y. 2014).
[60] *Bostock v. Clayton County*, __ U.S. __, 140 S. Ct. 1731 (2020).
[61] *See id.*
[62] *Equal Emp't Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 600 (6th Cir. 2018).
[63] *Id.*
[64] *Id.* at 567.
[65] *Id.*
[66] *See EEOC Enforcement Guidance on Religious Discrimination,* EEOC, https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination.

from compulsory personal or professional development training or participation in an initiative or celebration where it conflicts with the employee's sincerely held religious beliefs, observances, or practices.[67] However, the EEOC recognizes there may be cases where an employer can show that it would pose an undue hardship to provide an alternative training or to excuse an employee from any part of a particular training, even when the employee asserts it is contrary to their religious beliefs.[68] For example, if a mandatory EEO or internal anti-discrimination policy exists that includes a prohibition on sexual orientation discrimination, an employee will be required to attend a training based on this policy because employers need to ensure employees are trained to comply with these laws and rules.[69]

### B. Legislation to Watch

Creating additional public discourse about the intersection between sexual orientation/gender identity issues and religion, on February 25, 2021, the House of Representatives again passed the Equality Act.[70] The Equality Act amends Title VII to expressly prohibit discrimination based on sexual orientation, and gender identity in areas including education, federal funding, and employment. (As noted above, the Supreme Court judicially expanded Title VII to define "sex" as including sexual orientation and gender identity in the *Bostock* decision in 2020.) Specifically, the bill defines and includes sexual orientation, and gender identity among the protected categories of discrimination or segregation.[71] The bill allows the Department of Justice to intervene in equal protection actions in federal court on account of sexual orientation or gender identity. Notably, the bill does not provide for a religious exemption.[72] Therefore, religious organizations currently exempt from Title VII's religious discrimination requirements and whose religious beliefs conflict with an employee's sexual orientation or gender identity would lose such exemption, along with the ability to select employees and take actions consistent with the organization's religious character and purpose. The Equality Act would also expressly prohibit the use of the RFRA as a defense against the enforcement of Title VII, but would not impact the court-created ministerial exception.

## IX. COVID-19 Considerations - Vaccines

COVID-19 reprises the existing issue involving whether an employee's anti-vaccination beliefs are a "religion" under Title VII. Employee opposition to vaccines is not a new concept, but COVID-19 reintroduces the topic, particularly in light of the Emergency Use Authorization ("EUA") given by the federal Food and Drug Administration ("FDA") to the COVID-19 vaccines currently available. While the decision to require COVID-19 vaccines, or any vaccines for that matter, is up to the employer and has several legal implications that follow, employees may be exempt from these vaccines requirements altogether if they have sincere religious beliefs opposing the vaccines, unless the employer can demonstrate an undue hardship.[73]

In the realm of COVID-19, employees may have religious oppositions to getting the vaccine due to its manufacturing. A substantial controversy exists amongst Catholics and Christians

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[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] The Equality Act, H.R. 5, 117th Congress (2021).
[71] *Id.*
[72] *Id.*
[73] This paper will not address the legal implications that arise when an employer decides to mandate a vaccine in the workplace.

pertaining to scientists' use of fetal stem cells in its creation and/or testing.[74] While there has not been much case law surrounding an employee's religious opposition to a mandatory COVID-19 vaccination policy, a line of case law exists determining whether or not an employee's opposition to other vaccination policies actually qualifies as a religious exemption.

For example, if an employee's reason for opposing vaccination is merely a belief that vaccination may be harmful to his or her health, this will typically not be sufficient to establish a "religion" under Title VII. In *Fallon v. Mercy Catholic Medical Center of Southeastern Pennsylvania*, an employee requested an exception from his hospital employer's flu vaccine policy because he "worrie[d] about the health effects of the flu vaccine, disbelieve[d] the scientifically accepted view that it is harmless to most people, and wishe[d] to avoid this vaccine."[75] The court explained that "his concern that the flu vaccine may do more harm than good—is a medical belief, not a religious one."[76] Even if the employee's beliefs were restated as a moral or ethical maxim (*i.e.*, "Do not harm your own body"), the court found this this one moral commandment would be an isolated moral teaching, rather than a comprehensive system of beliefs about deep, fundamental, or ultimate matters.[77] The employee was therefore not entitled to an exemption under Title VII. Notably, however, this decision did *not* hold that no employees could ever be exempt from flu vaccine requirements under Title VII, and in fact stated that Christian Scientists might qualify under Title VII for exemptions from vaccination requirements to the extent their objections stemmed from truly religious beliefs.[78]

Another increasingly common reason for employees to request exemptions from flu vaccines is veganism, since many vaccines are created from or contain animal byproducts. At least one district court denied a hospital's motion to dismiss a terminated worker's Title VII religious discrimination claim and held that the worker should be given the opportunity to show that her vegan beliefs were religious.[79] Other courts have avoided directly addressing whether veganism is a philosophical belief or a religious one.[80]

Over time, the EEOC has continued to aggressively oppose mandatory flu shot policies for employees, on the grounds that such blanket policies might infringe on employees' religious beliefs and practices. As described in a 2018 article in The New England Journal of Medicine entitled "Vaccination without Litigation – Addressing Religious Objections to Hospital Influenza-Vaccination Mandates,"[81] the EEOC has routinely sued hospitals that deny employee requests for religious exemptions to vaccination requirements. The article focused on 14 religious discrimination cases filed since 2011. Results of the cases have been mixed, indicating that this is far from a settled issue. However, in the context of COVID-19, the EEOC has clearly stated that employers may mandate a COVID-19 vaccine, as long as appropriate carveouts for Title VII and the Americans with Disabilities Act ("ADA") are provided.[82]

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[74] Monique Deal Barlow, *Christian Nationalism is a Barrier to Mass Vaccination Against COVID-19*, RELIGION NEWS SERVICE, https://religionnews.com/2021/04/01/christian-nationalism-is-a-barrier-to-mass-vaccination-against-covid-19/, April 1, 2021.
[75] *See, e.g.*, *Fallon v. Mercy Catholic Medical Center of Southeastern Pennsylvania*, 877 F.3d 487, 490 (3d Cir. 2017) (citing *United States v. Seeger*, 380 U.S. 163, 184 (1965)).
[76] *Id.*
[77] *Id.*
[78] *Id.* (citing *Boone v. Boozman*, 2127 F. Supp. 2d 938, 947 n. 20 (E.D. Ark. 2002); *Kolbeck v. Kramer*, 202 A.2d 889, 891 (1964)).
[79] *Chenzira v. Cincinnati Children's Hospital Medical Center*, No. 1:11-cv-00917, 2012 WL 6721098, at *4 (S.D. Ohio Dec. 27, 2012).
[80] *See, e.g.*, *Robinson v. Children's Hospital Boston*, 2016 WL 1337255 (D. Mass. Apr. 5, 2016).
[81] N. Engl. J. Med. 2018; 378:785-788 (March 1, 2018), available at https://www.nejm.org/doi/full/10.1056/NEJMp1716147.
[82] *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, EEOC, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

Thus, employers faced with requests for exemptions from vaccine requirements should meet with the employee regarding the underlying reason for his or her request. If the employee is requesting an exemption merely because of a medical belief that vaccines are dangerous or may cause harm, that belief is likely not a protected religion under Title VII, and the potential legal risk associated with denying the employee's request should be relatively low.

However, if the belief is rooted in veganism, Christian Science, or any other *potentially* religious belief, the employer should consider first whether any potential accommodations would be feasible or whether the exemption would pose an undue hardship. For example, is the employee an office worker (*e.g.,* accountant, HR personnel, etc.) or someone engaging in frequent contact with sick or at-risk individuals (*e.g.,* doctor, nurse, social worker, etc.)? Is there any way to safely mitigate the risk (*e.g.,* by requiring the employee to wear a face mask, transfer to a different location, frequently wash hands, etc.), or do the nature of the employee's job duties mean that the potential risk would be unacceptably high even with such accommodations (*e.g.,* the employee is a pediatric nurse working with immunocompromised patients)? Particularly in the healthcare environment, employers may be able to argue that accommodating a religious employee's request for vaccine exemption would be an undue hardship imposing more than a *de minimis* cost.[83]

In the COVID-19 context, employees may also oppose wearing masks due to sincerely held beliefs of body integrity or other concerns. While we have yet to see this issue reach the courts, employers should continue to consider the need for religious accommodations to the extent employees cite a religious basis for their objections.

## X. Workplace Comments, Supervisor Bias, and Other Trending Issues

Another trending religious discrimination issue relates to the intersection between an employee's religious beliefs and the employee's job duties—whether applicable to the employee who alleges an offensive work environment based on his or her religion, or to the employer who finds the employee's religious beliefs offensive and/or disqualifying. The EEOC's recent guidance underscores that "discussion of religion in the workplace is not illegal," and cautions employers against preemptively banning all religious communications in the workplace, or discriminating against employees with unpopular religious views.[84]

Highlighting the above-described intersection, in one case recently filed and still in the early stages of litigation, the plaintiff claimed her religious beliefs were a motivating factor in her termination after she opposed participating in a LGBTQIA awareness program.[85] An intern at the company asked several employees to write about ways they could personally support the LGBTQIA community at the workplace. The plaintiff told the intern she would not participate because of her religious beliefs, but stated that she supports fair treatment of LGBTQIA members in the workplace.[86] Plaintiff's supervisor reprimanded her for her comment, and she was eventually terminated.[87]

In a recent case, the United States District Court for the Southern District of Indiana recently granted summary judgment for an employer who terminated an employee because he could not

[83] *See, e.g.*, *Robinson v. Children's Hospital Boston*, 2016 WL 1337255 (D. Mass. Apr. 5, 2016) (finding that it would be an undue hardship for employer hospital to exempt a vegan employee from flu shot requirement where the employee worked in emergency patient care area and was required to touch and sit in close proximity to very ill patients).
[84] *EEOC Enforcement Guidance on Religious Discrimination*, EEOC, https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination.
[85] *Rupnik v. The Bank of New York Mellon Corp.*, No. 2:21-cv-00037 (W.D. Penn. January 8, 2021).
[86] *Id.*
[87] *Id.*

complete his job duties based on his religious beliefs.[88] The plaintiff-employee worked as a counselor for the employer and also served as a Christian minster in his free time. The plaintiff expressed concern to his supervisor that he would not be able to counsel a same-sex couple due to this religious beliefs, but did not refuse out-right to counsel them. His supervisor did not allow him to counsel the couple, decided he should no longer counsel any same-sex couples, and eventually notified the employee of his termination.[89] The plaintiff alleged violations of his First Amendment rights and alleged Section 1983 violations, but the Court found he did not engage in speech within the scope of his job duties and the employer was justified in terminating him.[90]

Some employees may take offense to comments promoting certain religions. In *Ramirez v. Kingman Hospital, Inc.*, an employee filed suit against his employer for making a comment that if he had his way, he would "hire all Mormons."[91] The employee, a non-Mormon, felt his supervisor was bias against individuals who were not Mormon and sued his employer for religious discrimination under Title VII. The court granted summary judgment for the employer, finding that an isolated remark was not enough to prove the employer's alleged discriminatory animus against the employee.[92]

As demonstrated herein, employers can expect increased focus on religious discrimination issues, and should be prepared to train supervisors on how to identify and evaluate the issues that arise.

[88] *Wade v. Stignon*, No. 118-cv-02475, 2020 WL 7263289 (S.D. Ind. Dec. 10, 2020).
[89] *Id.*
[90] *Id.*
[91] *Ramirez v. Kingman Hosp. Inc.*, 374 F. Supp. 3d 832, 847 (D. Ariz. 2019).
[92] *Id.*

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# Religious Discrimination and Accommodation Issues

Presented By: Bonnie L. Martin

# Agenda

- Overview of Title VII
- Indiana Law
- RFRA
- Common Issues:  Drugs, wellness, weapons, garb & grooming,
- Emerging Issues:  DE&I, COVID-19, pending legislation, employee beliefs

# Title VII Prohibitions

- Adverse actions because of religious beliefs or to avoid accommodations
- Limiting, segregating, or classifying by religious beliefs
- Failure to accommodate, with no undue hardship
- Harassment
- Retaliation

# What is a *religion* under Title VII?

- All aspects of religious observance and practice
- May include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views

# Does the religious belief have to make sense?

- The Supreme Court has said that it is not the task of the courts to decide whether the beliefs professed are sincerely held and whether they are in the believer's own scheme of things, religious.

# Religion of one?

- The mere fact that no religious group espouses such beliefs or the fact that religious groups to which the individual professes to belong may not accept such a belief will not determine whether the belief is a religious belief of the employee or prospective employee.
- Per Seventh Circuit: “Hands off”!

# Exceptions

- Limited exceptions to coverage under Title VII:
  - Ministerial – Judicially-created exemption
    - Religious organizations have the right to select those who will "personify its beliefs," "shape its own faith and mission," or "minister to the faithful" – only certain employees
  - BFOQ – Part of Title VII (seldom used)
  - Religious organizations – Part of Title VII
    - An organization with a primarily religious character or purpose
    - Defense to taking action based on religion, applies to all employees

# Reasonable Accommodation

- Lower standard than ADA
- An employer need not accommodate an employee in exactly the way they would like to be accommodated BUT must select alternative that least disadvantages the employee's employment opportunity
- ***Does the accommodation create an undue hardship for the employer?***
    - Does it impose more than a *de minimis* cost?

# Reasonable Accommodation

- More than *de minimis*:
  - Violating other employees' rights under bona fide seniority system
  - Any cost in terms of efficiency of wage expenditure
  - Any loss in production that results from a worker being unavailable due to religious conflict
  - Any accommodation that places imposition on other employees

# Common Accommodations

- Shift swapping
  - Unpaid leave
  - Extended or scheduled breaks
- Flexible scheduling and leave policies
- Lateral transfers/voluntary demotions
- Exceptions to mandatory dress policies
- Alternative safety gear

# Standard for Claim When Employee Conduct Because of Religion

- 1) Employee has a sincerely held religious belief that conflicts with a job requirements;
- 2) Employee has informed employer of the conflict; and
- 3) Employee was disciplined or subject to adverse employment action for failing to comply with the conflicting requirement.

# Indiana Law and Religion

- Indiana Civil Rights Law
  - Prohibits discrimination based on religion
    - "Religion" is not defined
  - Excludes:
    - (1) any nonprofit corporation or association organized exclusively for fraternal or religious purposes;
    - (2) any school, educational, or charitable religious institution owned or conducted by or affiliated with a church or religious institution; or
    - (3) any exclusively social club, corporation, or association that is not organized for profit.

# Religious Freedom Restoration Act

- *Strict scrutiny* applies
  - Prohibits substantial burden on religious exercise, unless compelling state interest/least restrictive means
  - Indiana law

# Federal Contractors and Executive Order 11246

- EO 11246 includes prohibition of religious discrimination by federal contractors
- “Contractors have a duty to provide equal employment opportunities to individuals of different religious faiths or no religious faiths.”

# Potential Violations of EO 11246

- If applicant/employee suffers from adverse employment action because:
  - Employer assumes they have values that other may find offensive. For example, they attended religious private school, attend an Orthodox synagogue with sex-segregated seating, or wears a hijab.
  - Employee is a member of a religion that has taken public policy positions that other employees may find offensive, such as abortion or same-sex marriage.
  - During an interview or before reporting to work, employee informs employer about religious requirement that necessitates accommodation.

# EEOC Trends 2020

- 2,404 religious charges filed
  - About 300 less than 2019
- 103 with cause

# Workplace Drug Policies

- Native American Church
  - Peyote
  - State law may allow (New Mexico, Colorado)
- International Church of Cannabis
  - Marijuana
  - Remains illegal under federal law

# Wellness Programs

- Employers should ensure that employee health and wellness initiatives do not mandate participation in activities that could be broadly interpreted as religious in nature, without allowing accommodation:
  - Program requiring prayer, chanting, and workplace cleansing rituals
  - Program encouraging employees to discuss spirituality, divine destinies, God, and the soul
  - Intended to combat negative thinking

# Weapons

- Employer may be required to consider how to accommodate religious beliefs that require the carrying of knives and/or ceremonial weapons
- Kirpan – a small sword or dagger

# Dress Code and Appearance Policies

- Undue Hardship?
  - Safety issues
  - The Church of Body Modification?

# Complicated Considerations in 2021

# Diversity Initiatives and Religion

- Crossroads between promoting diversity initiatives and discriminating against employees based on their religion
- An employer is required to excuse employees from certain programs or initiatives if they have sincere, religious objections

# Diversity Initiatives and Religion

- Question:  Is this an undue hardship?
- As part of its effort to promote employee health and productivity, the new president of a company institutes weekly mandatory on-site meditation classes led by a local spiritualist.  Angelina explains to her supervisor that the meditation conflicts with her sincerely held religious beliefs and asks to be excused from participating.

# Diversity Initiatives and Religion

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- As part of its effort to promote employee health and productivity, the new president of a company institutes weekly mandatory on-site meditation classes led by a local spiritualist.  Angelina explains to her supervisor that the meditation conflicts with her sincerely held religious beliefs and asks to be excused from participating.
- NO! Employer must excuse Angelina even if the employer and other employees do not believe this conflicts with religious beliefs.

# Diversity Initiatives and Religion

- Is this an undue hardship?
- Employer XYZ holds an annual training for employees on a variety of personnel matters, including compliance with EEO laws and also XYZ's own internal anti-discrimination policy, which includes a prohibition on sexual orientation discrimination. Lucille, based on her sincere religious beliefs, asks to be excused because the presentation conflicts with her beliefs.

# Diversity Initiatives and Religion

- Is this an undue hardship?
- Employer XYZ holds an annual training for employees on a variety of personnel matters, including compliance with EEO laws and also XYZ's own internal anti-discrimination policy, which includes a prohibition on sexual orientation discrimination. Lucille, based on her sincere religious beliefs, asks to be excused because the presentation conflicts with her beliefs.
- YES! Because an employer needs to make sure that its employees know about and comply with such laws and workplace rules, it would be an undue hardship for XYZ to excuse Lucille from the training.

# Equality Act – On the Horizon

- Would amend Title VII to prohibit discrimination based on sexual orientation, and gender identity in areas including education, federal funding, and employment. Specifically, the bill defines and includes sexual orientation, and gender identity among the prohibited categories of discrimination or segregation.
  - Interpreted as covered under Title VII under *Bostock*
- The bill allows the Department of Justice to intervene in equal protection actions in federal court on account of sexual orientation or gender identity.
- The bill does not provide for a religious exemption.

# Equality Act – Potential Crossroads?

**Equality Act caught in crosshairs at Nashville shelter for abused women, children**

The Washington Post

*Democracy Dies in Darkness*

**Dozens of LGBTQ students at Christian colleges sue the U.S. Education Dept., hoping to pressure Equality Act negotiations**

NATIONAL

Equality Act Would Extend Civil Rights Laws To LGBTQ People Throughout U.S.

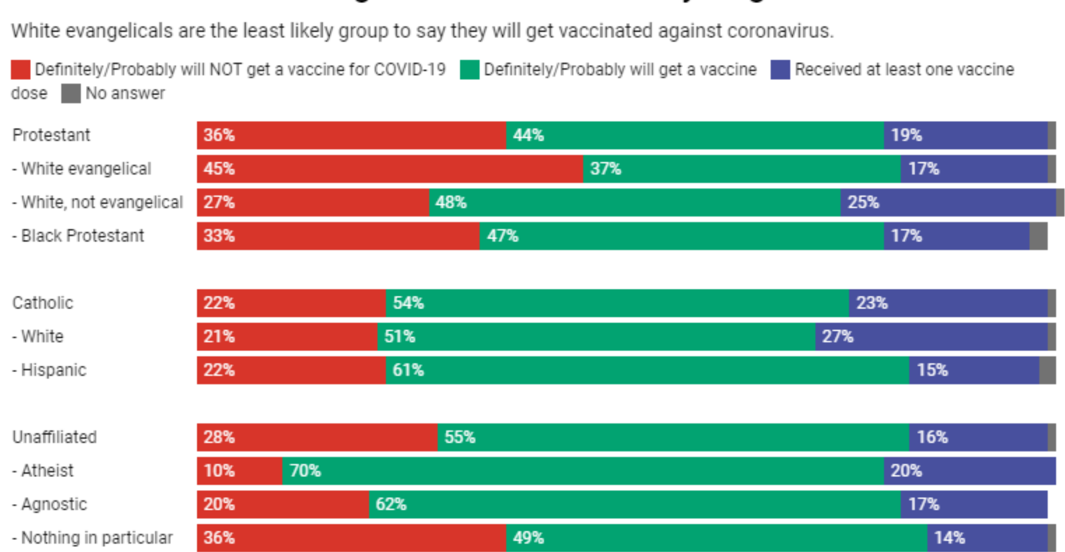
"In certain instances the government interest is so important that it outweighs the right to religious liberty," she says

If the Equality Act were to become law, one question courts would certainly be asked is whether the federal government has a compelling interest to protect LGBTQ individuals from discrimination in ways that make some conservative people of faith uncomfortable.

# COVID-19 Considerations - Vaccines

- Employees may be exempt from vaccination requirements based on their religious beliefs
- Problem becomes: should employers *mandate* the COVID vaccine?

# COVID-19 Considerations –Vaccines and Religious Objections



# COVID-19 Considerations – Vaccines and Health Concerns

- Health concerns DO NOT equal religious beliefs
  - *Fallon v. Mercy Catholic Med. Ctr. Of Se. Penn.*, 877 F.3d 487 (3rd Cir. 2017)
  - Court held employee's opposition to vaccine was due to personal belief, not religion; no coverage under Title VII.

# COVID Considerations – Vaccines and Veganism?

- Veganism *may* equate to traditional religious views
  - *Chenzira v. Cincinnati Children's Hosp. Med. Ctr.*, 2011 WL 6721098 (S.D. Ohio Dec. 27, 2012)
  - Court held it was plausible veganism could equate to traditional religious views.

# Developing Issues and Supervisor Bias

- A new area of case law developing surrounding religious beliefs at the workplace:
  - Can indirect comments equate to religious discrimination?
  - Can religious beliefs regarding diversity and inclusion initiatives constitute a basis for termination?

- *Rupnik v. The Bank of New York Mellon Corp.* (W.D. Penn. Jan. 8, 2021).
  - LGBTQIA workplace requirements
- *Wade v. Stignon*, (S.D. Ind. Dec. 10, 2020).
  - Employee concerns regarding same-sex couples

- *Ramirez v. Kingman Hosp. Inc.*, (D. Ariz. 2019)
  - Employer comment expressing preference to “hire all Mormons”

# What Would You Do?

- Company has been given an opportunity to pitch its services to Big Fish for possibly its largest account ever. Company expects its VP of Sales, Pete Pious, to head up the pitch along with your top sales person in that product line, Sally Seller. This will require the two to work together to prepare the proposal and to travel to Big Fish to pitch the work.
- Pete tells you that it is unacceptable in his religion to work one-on-one with a woman to prepare the pitch and certainly against his beliefs to travel with Sally.

- A) Ask for a statement from Pete’s religious leader
- B) Ask Pete to prove his beliefs
- C) Tell Sally she has to prepare another sales rep on all aspects of the product so that he can go on the pitch with Pete
- D) Consider the situation and the burden it may place on the Company and consider other accommodations

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- B) Ask Pete to prove his beliefs
- C) Tell Sally she has to prepare another sales rep on all aspects of the product so that he can go on the pitch with Pete
- D) Consider the situation and the burden it may place on the Company and consider other accommodations
- If “D” – Then what?

Questions?