2023 EMPLOYMENT LAW UPDATE

SMITH ANDERSON

expectexcellence®

Table of Contents

PROGRAM AGENDA

November 14, 2023

8:30 – 9:00 am	**<u>On-site Registration & Breakfast</u>**
9:00 – 9:05 am	**<u>Welcome and Introductions</u>** *J. Travis Hockaday*
9:05 – 10:00 am	**<u>The Supreme Court's Decision in *SFFA v. Harvard and UNC* and its Implications for DE&I in Employment and Beyond</u>** *Kerry A. Shad & Taylor M. Dewberry* In June of 2023, the Supreme Court issued a pivotal decision ending colleges' and universities' ability to consider race as a part of college admissions. While the holding of this case was limited to the education context, we are seeing legal challenges to some employer and supplier Diversity, Equity, and Inclusion ("DE&I") efforts. Explore the current state of litigation with us and learn about best practices for workplace DE&I moving forward.
10:00 – 10:20 am	**<u>What Goes Up Does Not Come Down: Wage and Hour Updates</u>** *Kevin M. Ceglowski* This presentation will cover the latest federal and state developments in wage and hour law, including salary basis test proposed changes to increase the minimum weekly salaries and new rules regarding independent contractor classifications.
10:20 – 10:40 am	**<u>Downsizing with Dignity: Reduction in Force Best Practices</u>** *Kevin M. Ceglowski* This presentation will update employers on key considerations when conducting a reduction in force, including WARN Act issues, final pay rules, and severance and release agreement provisions.
10:40 – 10:55 am	**<u>Morning Break</u>**
10:55 – 11:40 am	**<u>Navigating Rough Seas: Non-Compete Law in 2023</u>** *Isaac A. Linnartz and Shameka C. Rolla* Throughout 2023, non-compete agreements have come under increasing pressure. The FTC has proposed a nationwide ban on non-competes, the NLRB has taken the position that non-competes are unlawful, and state non-compete laws have continued to fragment and diverge. This session will cover the latest developments and what employers can do to protect their customer relationships, confidential information, and trade secrets.
11:40 – 12:25 pm	**<u>Beware: Your Common(sense) Workplace Policies and Practices May Now Be Unfair Labor Practices</u>** *Kimberly J. Korando* Recent developments in federal law and policy have limited employer rights to discipline employees for abusive conduct in certain instances, use confidentiality and non-disparagement provisions in employment agreement and policies, and engage in electronic workplace monitoring. Other developments require employers now to ***prove*** that many common workplace rules and policies advance "legitimate and substantial business interests that cannot be achieved by a more narrowly tailored rule" or be found unlawful. In this session, we will discuss how to manage the risk while still managing your workforce.
12:25 – 1:25 pm	**<u>Lunch and Panel Discussion: What's New for 2023 in Employment Law</u>**

1:25 – 2:05 pm	**<u>The Intersection of Employee Health and the Workplace: Successfully Managing Obligations Under the ADA, the FMLA, and State Laws</u>** *Rosemary Gill Kenyon* Despite the ADA having just passed its 33rd anniversary and the FMLA its 30th, employers continue to unnecessarily trip over fundamental issues and requirements. During this session, we will review recent court cases and agency action and provide practical guidance to help employers navigate these challenging waters.
2:05 – 2:15 pm	**<u>Transition to Breakout Sessions</u>**
2:15 – 3:00 pm	**<u>Breakout Sessions</u>**
Session A	**<u>Using AI in HR 2.0 and ChatGPT Too!</u>** *Kimberly J. Korando and Tommy Postek* Join us for an encore featuring the highlights of last year's plenary session, Using AI in HR: Best Practices, Avoiding Traps for the Unwary updated for developments of the past year, along with an overview of the current, developing, and anticipated issues and challenges of ChatGPT and other generative AI programs.
Session B	**<u>SECURE 2.0 – Major Changes to Employer Retirement Plan Landscape</u>** *Kara Brunk* Another acronym! What is SECURE 2.0, what does it mean for your retirement plan, and what issues should you be addressing with your providers? We'll break it down during this session, highlighting the provisions that plan sponsors will care the most about.
Session C	**<u>OSHA Hot Topics and Trends: 2023 and Beyond</u>** *Stephen T. Parascandola* The top 10 most commonly cited violations; dealing with the increase in "whistleblower" complaints; OSHA penalties on the rise again; overlapping OSHA liability with subcontractors and temps; best ways to conduct post-incident drug testing; and a new law governing indoor workplace heat stress. These and other hot OSHA topics will be discussed during this session.
3:00 – 3:10 pm	**<u>Transition from Breakout Sessions and Break</u>**
3:10 – 3:50 pm	**<u>Accommodations Galore! Employer's Guide to Understanding Obligations to Accommodate Disability, Pregnancy and Religion</u>** *J. Travis Hockaday* 2023 has been a big year in the accommodation space. In June, the Pregnant Workers Fairness Act (PWFA) took effect, requiring employers of 15 or more employees to provide reasonable accommodations to employees and applicants with limitations arising from pregnancy, childbirth and related medical conditions, and the EEOC subsequently proposed regulations. Also in June, the Supreme Court "clarified" (meaning changed and heightened) the 46-year old standard for considering religious accommodation requests under Title VII. And, EEOC updated its COVID-related FAQs to address accommodations for Long COVID. In this session, we will explore these notable developments in the law, and provide practical guidance for navigating the standards by which you will need to analyze accommodation requests for disability, pregnancy and religion.
3:50 – 4:30 pm	**<u>EEO Update</u>** *Zebulon D. Anderson* A discussion of EEOC enforcement trends and plans, as well as select cases representative of recent trends in EEO litigation.
4:30 – 6:00 pm	**<u>Reception</u>**

WHO WE ARE

WHO WE ARE

PRACTICE GROUPS

EMPLOYMENT, LABOR AND HUMAN RESOURCES

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

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

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

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

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

Services:

- Wage and hour compliance
- Internal investigations

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

Wage and Hour Compliance

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

Internal Investigations

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

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

Protecting Employers: Relationships and Confidential Information

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

Government Investigations, Audits and Administrative Proceedings

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

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

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

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

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

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

Executive Employment and Severance Agreements

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

Workplace Harassment, Training and Investigations

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

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

Human Resources Audits and Risk Management

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

Affirmative Action Plans and OFCCP Audits/Corporate Diversity

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

Recruiting, Hiring and Employee Selection

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

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

Human Resources Policies and Employee Handbooks

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

Workplace Violence

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

Union Avoidance

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

Temps, Agency Staffing, Independent Contractors, Telework Programs

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

Human Resources and Manager Training

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

EMPLOYEE BENEFITS AND COMPENSATION

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

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

Primary Services:

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

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

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

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

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

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

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

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

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

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

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

EMPLOYMENT LITIGATION

Employment litigation is an unfortunate yet unavoidable part of doing business today. Our firm is experienced and well-equipped to help your company through the challenges and complexities of these cases. We are effective problem solvers and adept at risk management through early case assessment a nd use of alternative dispute resolution. At the same time, we are aggressive advocates who regularly de fend our clients in matters litigated in state and federal courts across the country.

Whether in individual, class or collective actions, we offer our clients experience, value, efficiency and kn owledge of their business and its objectives. We provide a high level of skill, responsiveness and partner i nvolvement, all focused on efficiently achieving defined business and litigation objectives. We offer well-informed legal answers and practical solutions.

Our firm represents companies doing business in North Carolina, as well as North Carolina-based companies doing business in other states; our work stretches coast-to-coast, from New York to California and from Florida to Minnesota. We also partner as local counsel with national law firms who need North Carolina lawyers with in-state connections and experience.

NON-COMPETE & TRADE SECRETS

Proprietary information and business relationships are critical business assets, and our attorneys can help employers protect them. From drafting employment agreements and restrictive covenants to managing high-stakes litigation involving injunctions and emergency relief, our non-compete and trade secrets practice offers wide-ranging experience in matters concerning trade secret misappropriation, confidentiality and non-disclosure agreements, covenants not to compete, unfair competition, employee raiding and other issues concerning the protection of confidential information and business relationships.

OSHA

OSHA enforcement is on the rise and with it the need for experienced and practical legal guidance. Smith Anderson's OSHA lawyers provide substantial resources to help clients navigate the maze of worker safety and OSHA regulations, which can critically impact operations, finances, personnel and sustainability. We assist businesses throughout North Carolina and the Southeast, ranging from start-ups to publicly-traded companies, in connection with their worker safety and OSHA-related needs. Our clients include manufacturers, pharmaceutical companies, convenience store chains, technology and biotechnology companies, health care professionals, builders, materials suppliers, developers, contractors, lenders, investors and public utilities.

MEET OUR TEAM

SMITH ANDERSON
expectexcellence®

Zebulon D. Anderson

ATTORNEY

zanderson@smithlaw.com
919.821.6735

"Zeb is a fantastic lawyer. He is consistently responsive, pragmatic and practical." ***– Client quote in Chambers USA***

OVERVIEW

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

EXPERIENCE

- Since 2000, served as lead counsel in over 100 cases in various industries involving the defense of employment-related claims, including alleged discrimination, harassment, retaliation, wrongful discharge, civil rights violations, labor standards and wage and hour violations, denial of employee benefits and workplace violence.
- Served as lead counsel in aviation industry-based class and collective action alleging violation of wage and hour laws in connection with baggage-related tip and service charge practices.
- Represented global pharmaceutical company in series of class and collective actions filed in Arizona, California and New York alleging that the company's failure to pay its pharmaceutical sales representatives overtime for hours worked in excess of 40 hours per week violated the FLSA and state law.
- Defended employer in the material handling industry that was sued in Florida state court by Fortune 100 company that claimed the employer misappropriated its trade secrets, tortiously interfered with its employee relationships and otherwise unfairly competed with it when the employer hired 19 of its at-will employees over the course of several months.
- Defended employer in the entertainment industry and a newly-hired employee who was sued in Michigan state court by a competitor who previously employed that employee and who claimed that the employee

breached and the employer tortiously interfered with a non-solicitation agreement after the employee joined the employer.

- Represented multiple insurance companies in lawsuits brought in state and federal courts in North Carolina that involved allegations of non-compete and non-solicitation agreement breach by insurance agents who left one company to join a competitor.
- Represented medical device distributor in lawsuit filed in federal court in North Carolina that sought to restrain the sales activities of former sales employees who left to join a competitor, but were bound by non-solicitation agreements.
- Represented many employers in the health care, pharmaceutical, logistics/transportation and other industries in lawsuits throughout the state and federal courts in North Carolina involving allegations of non-compete and non-solicitation agreement breach, trade secret misappropriation, tortious interference and unfair competition.
- Provided advice and counseling to employers in connection with all aspects of employment law, ranging from EEO issues to non-compete agreements and trade secret protection.
- Advised a global financial services technology company on the employment-related aspects of its acquisition of a leading provider of deal analytics and valuation technology.

CREDENTIALS

Recognition

- *Chambers USA: America's Leading Business Lawyers,* Labor & Employment (2015-2023)
- *Benchmark Litigation*, North Carolina Labor and Employment Star (2018-2021, 2023)
- Best Lawyers®
  - Litigation - Labor and Employment (2016-2024)
  - Employment Law-Management (2018-2024)
- Best Lawyers®, "Lawyer of the Year," Raleigh, Litigation - Labor and Employment (2023)
- North Carolina *Super Lawyers* (2012-2023)
- *Business North Carolina's Legal Elite,* Employment (2017, 2023)
- North Carolina *Super Lawyers*, Rising Star (2009)
- Martindale-Hubbell AV Preeminent Rated

Education

- University of Virginia, 1994

  - Editorial Board, *Virginia Law Review*, 1992-1994
  - Order of the Coif
- Duke University, B.A., *magna cum laude*, 1991

Bar & Court Admissions

- All North Carolina State Courts
- North Carolina
- Supreme Court of the United States
- U.S. Court of Appeals for the Fourth Circuit
- U.S. District Court for the District of North Carolina

SMITH ANDERSON
expectexcellence®

Kara Brunk

ATTORNEY

kbrunk@smithlaw.com
919.821.6711

"Kara is very thorough and very professional. She provides a wealth of insight and knowledge." **– Client quote in *Chambers USA***

OVERVIEW

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

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

EXPERIENCE

- Advised a multistate skilled nursing, home care, and I/DD company with employee benefits-related matters in its definitive agreement to acquire the largest home care company in Rhode Island.
- Represented a North Carolina bank and its parent with respect to the employee benefits aspects of an approximately $220 million merger with another bank.
- Advised a life sciences company with employee benefits-related matters in its acquisition of a clinical manufacturing facility for an undisclosed amount.
- Advised a private equity fund and its contract research solutions portfolio company in employee benefits matters related to their acquisition of a statistical programming, consulting, and data management company.
- Advised a life sciences company on its acquisition of a clinical manufacturing facility for an undisclosed amount.
- Advised a company specializing in video game and software development on employee benefits matters related to the definitive agreement to acquire a company that developed a presence-based social networking platform connecting users online through live video on mobile and desktop apps.

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

CREDENTIALS

Recognition

- *Chambers USA: America's Leading Lawyers for Business*, Employee Benefits & Executive Compensation (2021-2023)
- *Best Lawyers: Ones to Watch®,* Employee Benefits (ERISA) Law (2021-2024)
- North Carolina *Super Lawyers*, Rising Stars (2020-2023)
- Staff Member and Contributing Editor, *North Carolina Law Review*, 2010-2012

Education

- University of North Carolina School of Law, *high honors*, J.D., 2012
  - Order of the Coif
- University of North Carolina at Chapel Hill, *with distinction*, B.A. in Political Science, 2009
  - Phi Beta Kappa

Bar & Court Admissions

North Carolina

SMITH ANDERSON
expectexcellence®

Kevin M. Ceglowski

ATTORNEY

kceglowski@smithlaw.com
919.821.6698

OVERVIEW

Kevin Ceglowski is a partner with Smith Anderson's Workplace Law team with deep experience in advising, representing and defending employers in state and federal courts. His extensive experience includes defending discrimination charges, counseling and advice, drafting employee handbooks and policies, providing employment-related support on mergers and acquisitions, executive compensation, litigation avoidance counseling, administrative employment law, drafting restrictive covenants and litigating restrictive covenant matters, and general employment litigation.

Kevin speaks regularly on employment matters and has been recognized by *Best Lawyers*® (Employment Law), *Chambers USA: America's Leading Lawyers for Business* (Labor & Employment) and *Super Lawyers* (Employment & Labor). Prior to joining Smith Anderson, Kevin worked at a North Carolina law firm, where he advised employers in many areas of employment law.

Kevin enjoys spending time with his family and is an avid reader who buys five books for every one that he finishes reading.

CREDENTIALS

Recognition

- *Chambers USA: America's Leading Business Lawyers*, Labor & Employment (2017-2023)
- Best Lawyers®, Employment Law - Management (2023-2024)
- *Benchmark Litigation*, North Carolina Litigation Star (2023)
- *Business North Carolina* Legal Elite: Employment (2015-2017, 2019-2022)
- North Carolina *Super Lawyers* Rising Star: Employment & Labor (2012-2016)

Education

- Campbell University School of Law, J.D., 2006

- Executive Editor, *Campbell Law Review*

- North Carolina State University, B.S. Business Administration, 2001

SMITH ANDERSON
expectexcellence®

Lauren E. Davis
ATTORNEY

ldavis@smithlaw.com
919.821.6648

OVERVIEW

Lauren Davis joined Smith Anderson in 2021. She is an associate in Smith Anderson's Employment, Labor and Human Resources practice group.

Lauren enjoys Michigan State University basketball and football, dancing, travel and musicals.

CREDENTIALS

Education

- UNC Chapel Hill School of Law, J.D., with honors, 2021
  - Institute Editor, *North Carolina Banking Institute Journal*
  - Certified Student Practitioner, *Startup NC Law Clinic*
  - Dean's Fellow
  - Vice President, Carolina Teen Court Assistance Program
  - Vice President, Carolina Law Ambassadors
  - Mentor Coordinator, Women in Law
- Michigan State University, B.A., Finance, with honors, 2018

Bar & Court Admissions

North Carolina

SMITH ANDERSON
expectexcellence®

Taylor M. Dewberry

ATTORNEY
Chief Diversity Officer

tdewberry@smithlaw.com
919.821.6729

OVERVIEW

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

EXPERIENCE

- Advised a Nasdaq-listed pharmaceutical development company in the acquisition of a specialty dermatology company for up to $51 million in up-front and contingent consideration.
- Advised a global contract research organization and drug development services company in a transaction to acquire a provider of mobile-connected self-service platform solutions for decentralized clinical trials that included cross-border employment issues for employees and contractors located in Europe and India.
- Advised a life sciences company on its acquisition of a clinical manufacturing facility for an undisclosed amount.
- Advised a specialty pharmaceutical company in its acquisition of a private pharmaceutical company focusing on pediatric medications.
- Advised a leading contract research organization on the employment law aspects of a definitive agreement to acquire a provider of contract research, clinical and regulatory and other consulting services.
- Defended employers against claims involving discrimination, wrongful discharge, retaliation, harassment, wage and hour, and civil rights claims.
- Represented clients in investigations conducted by the Equal Employment Opportunity Commission.
- Presented on workplace issues, such as recruiting, onboarding and sexual harassment law.
- Conducted an internal investigation into workplace harassment.

CREDENTIALS

Recognition

- *Best Lawyers: Ones to Watch®,* Labor and Employment Law – Management (2022-2024)
- The National Black Lawyers Top 100, Top 40 Under 40 (2020)
- Executive Notes Editor, *Washington University Journal of Law and Policy*

Clerkships

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

Education

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

Bar & Court Admissions

North Carolina

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

SMITH ANDERSON
expectexcellence®

Dani B. Dobosz
ATTORNEY

ddobosz@smithlaw.com
919.821.6798

OVERVIEW

Dani Dobosz is an attorney with Smith Anderson's Litigation practice, serving clients on a wide range of business disputes, including contract and business tort claims, employment litigation and non-compete and trade secrets.

While in law school, Dani completed an externship for the Honorable Judge James A. Wynn of the United States Court of Appeals for the Fourth Circuit.

In her free time, Dani enjoys international cooking, hiking and exploring North Carolina's many waterfalls.

CREDENTIALS

Education

- University of North Carolina School of Law, J.D., with high honors, 2022
  - Class Rank: 2nd
- Yale University, B.A., magna cum laude, 2016

Bar & Court Admissions

North Carolina

SMITH ANDERSON
expectexcellence®

Sarah W. Fox

ATTORNEY

sfox@smithlaw.com
919.821.6784

OVERVIEW

Sarah Fox has more than 35 years' experience in employment and labor law, coupled with commercial litigation. Sarah clerked with the Honorable Robert D. Potter, Chief Judge for the U.S. District Court for the Western District of North Carolina and is a member of the Fourth Circuit Judicial Conference. She is a recipient of the *Triangle Business Journal's* Women in Business Award, has been honored as one of the Top 50 Female *Super Lawyers* by North Carolina *Super Lawyers and* is listed in *Best Lawyers®*. Sarah is active in community organizations including having served on multiple boards and as Chair of the Foundation of Hope, President of The Badger Iredell Foundation, Inc., President of Capital Area Preservation, President of The Junior League of Raleigh, and served on the Executive Committees of the NC Museum of History Associates and SAFEchild.

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

Sarah has been a guest lecturer in employment law at North Carolina State University in the Masters in Accounting Program, conducted human resource training, led diversity initiatives and training and is a frequent speaker and author on employment matters. She has substantial experience in conducting workplace investigations and successfully litigating federal and state claims, including discrimination claims, non-competition and employee misappropriation claims and executive shareholder claims.

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

EXPERIENCE

- Represented Global 100, Fortune 500 and private employers in defense of federal and state employment claims.
- Represented U.S. Congressman in contested election.

- Represented shareholder executive in obtaining multimillion dollar bench and jury awards.
- Conducted internal workplace investigations and human resource training.
- Represented employers and executives in noncompetion, confidentiality and fiduciary disputes.
- Represented employers in OSHA industrial fatality accidents.
- Represented employers and executives in connection with employment arrangements.

CREDENTIALS

Recognition

- Best Lawyers®
  - Employee Benefits (ERISA) Law (2013-2024)
  - Litigation - Labor & Employment (2021-2024)
  - Employment Law - Management (2023-2024)
- Best Lawyers®, "Lawyer of the Year," Raleigh, Employee Benefits (ERISA) Law (2021)
- *Business North Carolina* Legal Elite
- Martindale-Hubbell AV Preeminent Rated
- North Carolina *Super Lawyers*, Top 50 Female Super Lawyers
- *Triangle Business Journal,* Women in Business Award

Clerkships

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

Education

- Wake Forest University, J.D., *cum laude*, 1983
  - Wilson Academic Scholar, Wake Forest University School of Law
- Tulane University, B.A., 1977

Bar & Court Admissions

Supreme Court of the United States

U.S. Court of Appeals for the Fourth Circuit

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

All North Carolina State Courts

SMITH ANDERSON
expectexcellence®

Hope C. Garber

ATTORNEY

hgarber@smithlaw.com
919.821.6724

OVERVIEW

Hope Garber is a member of Smith Anderson's litigation team, where she works to defend the contractual rights and intellectual property of clients from a diverse set of industries, including the agricultural, aviation and pharmaceutical sectors. She has experience with cases involving breach of contract, copyright and trademark infringement, unfair trade practices, non-compete clauses and business torts.

Hope also serves on Smith Anderson's Recruiting Committee.

Before joining Smith Anderson, Hope practiced with a New England law firm, focusing on class action defense and complex commercial litigation. She enjoys spending time outside with her husband and their two daughters.

CREDENTIALS

Clerkships

- Law Clerk to the Honorable Don R. Willett, U.S. Court of Appeals for the Fifth Circuit
- Law Clerk to the Honorable Donald W. Molloy, U.S. District Court for the District of Montana

Education

- Duke University School of Law, J.D., magna cum laude, 2018
  - Order of the Coif
  - National Order of Scribes
  - Co-Director, Veterans Assistance Project (2016–2017)
  - Managing Editor, *Alaska Law Review* (2017–2018)
- Bates College, magna cum laude B.A, 2012
  - Phi Beta Kappa

Bar & Court Admissions

- Maine
- Massachusetts
- North Carolina

SMITH ANDERSON
expectexcellence®

Jamison H. Hinkle

ATTORNEY

jhinkle@smithlaw.com
919.821.6686

OVERVIEW

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

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

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

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

EXPERIENCE

- Advised numerous employers on 401(k) plan and design changes and regulatory amendments in response to COVID-19 concerns.
- Coordinated company-wide stock option repricing and exchange program for underwater stock options.
- Advised a Nasdaq-listed medical device company in the acquisition of a global leader in neuromodulation and rehabilitation medical devices for up $110 million in up-front and contingent consideration.
- Advised a Nasdaq-listed pharmaceutical development company in the acquisition of a specialty dermatology company for up to $51 million in up-front and contingent consideration.

- Advised a leading provider of patient support services on employee benefit issues in a definitive agreement to acquire a provider of mobile-based solutions.
- Designed and drafted equity compensation and bonus plans for various start-up companies.
- Represented employer in overhauling existing equity compensation awards for C-Suite officers.
- Prepared and filed corrective Top Hat Plan filings under DOL's Delinquent Filer Voluntary Compliance Program (DFVCP) for Fortune 100 company.
- Advised a leading pharmaceutical and biotech contract development and manufacturing organization (CDMO) on benefits and compensation issues in a definitive agreement to acquire a preferred provider of cGMP Biostorage and pharma support services for an undisclosed amount.
- Coordinated benefit plan corrections arising in sale of major pharmaceutical company.
- Advised terminating Multiple Employer Welfare Arrangement (MEWA) and Voluntary Employees' Beneficiary Association (VEBA) on IRS and DOL compliance issues and distribution of surplus assets.
- Advised insolvent client and officers and directors on potential criminal law violations associated with improper benefit plan terminations.
- Represented employer on 401(k) plan coverage and participation issues in connection with IRS contractor misclassification audit.
- Designed and drafted bespoke nonqualified deferred compensation retention plan for key executives of venture-backed start-up.
- Advised public pharmaceutical company on cash-out of target's stock options, coordination of severance benefits, and post-closing benefits integration.
- Represented a global biopharmaceutical and outsourcing services company in favorably resolving DOL audit of 401(k) Plan reporting failures.
- Coordinated revisions to major pharmaceutical company's self-insured health plan to comply with health care reform rules.
- Designed Section 409A-compliant staggered severance benefits plan for departing executives of publicly-traded pharmaceutical company.
- Advised multinational Fortune 500 provider of integrated healthcare services on benefit plan restructuring and integration matters in merger with NYSE-listed technology services company, creating a leading tech-enabled healthcare service provider with a market capitalization of $17.6 billion at closing.
- Advised leading healthcare services provider on benefits and executive compensation issues in its $60 million acquisition of a global sourcing company.
- Advised a leading provider of financial software to U.S. financial institutions on employee benefits, and executive compensation issues and Section 280G (golden parachute) cleansing vote in its reverse triangular merger with a private equity-backed company.

CREDENTIALS

Recognition

- *Chambers USA: America's Leading Business Lawyers*, Employee Benefits & Executive Compensation (2023)
- Best Lawyers®, Employee Benefits (ERISA) Law (2013-2024)
- North Carolina *Super Lawyers* Rising Star, ERISA (2013)

Education

- University of North Carolina, J.D., *with honors*, 1996
- Duke University, A.B., 1991

Bar & Court Admissions

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

SMITH ANDERSON
expectexcellence®

J. Travis Hockaday

ATTORNEY
Chair, Workplace Law

thockaday@smithlaw.com
919.821.6757

OVERVIEW

Travis Hockaday leads the firm's Employment, Labor and Human Resources practice. He is recognized by *Best Lawyers*® 2021 in Litigation - Labor and Employment, and by *Benchmark Litigation* as a North Carolina Labor & Employment Star for 2021. His practice focuses on providing counseling and risk management advice on significant employment-related matters to both public and private companies across a variety of industries, identifying and managing employment-related issues in mergers, acquisitions, and reorganizations, and drafting complex employment and severance agreements for companies and C-suite executives. From 2010 to 2013, Travis provided counseling and risk management services on employment-related matters to a Fortune 500 company's legal department under a secondment arrangement.

Travis has extensive experience assisting employers with worker classification and co-employment issues, work health (ADA, FMLA, GINA) matters, and wage and hour compliance. He also conducts investigations into discrimination and harassment complaints, develops workplace policies, and advises employers on terminations, disciplinary actions and handling employee grievances. Travis regularly defends employers in federal and state courts and agencies (including the EEOC, U.S. DOL and U.S. DOJ) against discrimination, harassment, retaliation, wage and hour and whistleblower claims (including systemic discrimination claims).

Travis frequently develops and delivers training programs for executives, managers and human resources professionals, and is a co-author of the *North Carolina Human Resources Manual*, the 700-page authoritative guide for North Carolina employers.

EXPERIENCE

- Defending employers against claims involving discrimination, wrongful discharge, retaliation, harassment and civil rights claims.
- Defending wage and hour, ERISA, and other benefit-related claims.
- Representing clients in investigations conducted by both federal and state Departments of Labor, the Equal Employment Opportunity Commission and the U.S. Department of Justice.
- Representing clients before the North Carolina Division of Employment Security.
- Advising clients regarding the development of effective employee handbooks, policies and practices.

- Representing employers and individuals in connection with allegations of violation of non-compete agreements, unfair competition and tortious interference with contract.
- Providing training to management, human resource professionals and employees regarding numerous employment-related topics, including workplace discrimination and harassment, religion in the workplace, unemployment compensation, the Family and Medical Leave Act, the Americans with Disabilities Act, and the Uniformed Services Employment and Reemployment Rights Act.
- Advising clients on variety of state and federal regulatory issues.
- Serving as outside counsel to a state licensing agency.
- Advised a EU-based clinical research organization in a definitive agreement to acquire the pharmacovigilance business from a global, listed healthcare services company for approximately $10,000,000 in cash.
- Advised a contract research organization in a definitive agreement to acquire a specialized contract research organization for the biotechnology industry.
- Advised a private equity fund and its contract research solutions portfolio company in their acquisition of a statistical programming, consulting, and data management company.
- Advised a company specializing in video game and software development in a definitive agreement to acquire a company that developed a presence-based social networking platform connecting users online through live video on mobile and desktop apps.
- Advised a private equity fund in its acquisition of a leading provider of staffing resources to the biotechnology, pharmaceutical and medical device companies for clinical trial needs.
- Advised a leading CRO in Asia on the employment law aspects of its acquisition of CRO assets in the United States.
- Advised a publicly-traded health services company on the employment law aspects of its acquisition of a health services division of a privately-held company for $105 million in cash.
- Advised an online gaming company in a definitive agreement to acquire an online 3-D modeling company.
- Advised an online gaming company in an acquisition of a UK-based pioneer in the "kidtech" market.
- Advised a leading healthcare services provider on the employment law aspects of its $60 million cash acquisition of a global sourcing company.
- Advised a private equity-backed medical device repair services company on the employment law aspects of its sale of its wholly-owned operating subsidiaries to a strategic buyer operating in the medical device repair services industry.
- Advised a publicly-traded health information technologies and clinical research company on the employment law aspects of its acquisition of a consulting business focusing on orphan drug designations.
- Advised a private equity fund on the employment law aspects of its acquisition of a specialty pharmaceutical company.
- Advised a frozen foods company on the employment law aspects of its definitive agreement to acquire a frozen snacks business.
- Represented a private equity fund in its acquisition of a leading digital patient recruitment company.

CREDENTIALS

Recognition

- *Benchmark Litigation*, North Carolina Labor and Employment Star (2020-2021, 2023-2024)
- Best Lawyers®, Litigation - Labor and Employment (2019-2024)
- North Carolina *Super Lawyers,* Rising Star (2011, 2018)

Education

- University of North Carolina, J.D., 2003
- Campbell University, B.A., *summa cum laude*, 2000

Bar & Court Admissions

- North Carolina
- U.S. Court of Appeals for the Fourth Circuit
- U.S. District Court for the District of North Carolina

SMITH ANDERSON
expectexcellence®

Rosemary Gill Kenyon

ATTORNEY

rkenyon@smithlaw.com
919.821.6629

OVERVIEW

Rose Kenyon's practice involves all aspects of employment and labor law in a wide variety of industries for both private and public companies, including investigations, corporate governance matters, advising boards of directors and special committees and assisting companies on employment matters in mergers and acquisitions. She has extensive experience drafting complex employment agreements and separation agreements on behalf of both companies and executives.

Rose is a trusted advisor to employers on their most strategic and high risk employment issues, and clients describe Rose as a "…*very talented lawyer" and "very strong and practical"* (*Chambers USA*). She is a frequent speaker on emerging employment and labor law trends and regularly conducts training for human resources professionals and managers.

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

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

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

EXPERIENCE

- Served as lead in-house employment and labor counsel to a Fortune 500 company for 13 years, during a period of rapid change that included major workforce restructurings, union organizational activity, numerous employment based lawsuits and claims (including several multiple plaintiff suits and systemic claims), multiple OFCCP audits (including corporate headquarters and glass ceiling), among other things.
- Lead employment lawyer in numerous merger and acquisition transactions in a wide range of industries that included the resolution of significant transition issues regarding the misclassifications of workers (e. g., wage and hour, independent contractor), leased employee arrangements, liability for significant paid-time-off balances, professional employer organization arrangements, non-competition agreements, executive employment agreements, and cross-border issues, among other things.
- Conducted internal investigations into misconduct, embezzlement, harassment, threats of workplace violence and other wrongdoing, for both publicly-traded and private companies.

- Represented employers in the development of employment agreements, severance and non-competition agreements for senior level officers of both private and publicly-traded companies and private institutions of higher education.
- Represented CEOs and senior level officers of both private and publicly-traded companies, and private institutions of higher education, in connection with their employment agreements in a wide range of industries, including the institutional health care, pharmaceutical, banking, technology and manufacturing industries, and in higher education.
- Represented national and global companies in major reorganizations and downsizings of their workforces, including the relocation of offices, in a wide-variety of industries including the pharmaceutical, hospitality, technology, utility and manufacturing industries.
- Provided strategic and risk management advice on sensitive and high-risk employment decisions and processes, corporate governance and the development of system-wide policies and handbooks.
- Successfully defended employers in federal and state court and before administrative agencies against whistleblower claims under federal and state laws, systemic and individual claims of race discrimination, and sensitive harassment and gender discrimination claims, employment contract claims, wage and hour claims, classification issues, and in government audits.
- Advised a leading pharmaceutical and biotech contract development and manufacturing organization (CDMO) in a definitive agreement to acquire a preferred provider of cGMP Biostorage and pharma support services for an undisclosed amount.
- Advised a Nasdaq-listed pharmaceutical development company in the acquisition of a specialty dermatology company for up to $51 million in up-front and contingent consideration.
- Advised a Nasdaq-listed medical device company in the acquisition of a global leader in neuromodulation and rehabilitation medical devices for up $110 million in up-front and contingent consideration.
- Advised a private equity fund on the employment-related matters of its acquisition of a contract research organization focused on the ophthalmology industry for an undisclosed amount.
- Advised a special materials company on the employment law aspects of the acquisition of a global supplier of tantalum, tungsten, and niobium particulates.
- Advised a special materials company on the employment law aspects of the purchase of substantially all of the assets of a leading manufacturer of value-added ferrotitanium, titanium sponge, titanium powders, and specialty forms.

CREDENTIALS

Recognition

- Fellow, American College of Labor and Employment Lawyers
- *Chambers USA: America's Leading Business Lawyers,* Labor & Employment (2008-2023)
- Best Lawyers®

-
    - Employment Law - Management (2016-2024)
    - Litigation - Labor and Employment (2024)
- Women of Justice Award, *North Carolina Lawyers Weekly* (2012, 2019)
- North Carolina Pro Bono Honor Society
- North Carolina *Super Lawyers* (2012-2023)
- North Carolina *Super Lawyers*, Top 50 Women (2014)
- Academy of Women of the YWCA of the Greater Triangle, Inducted 2004
- Martindale-Hubbell AV Preeminent Rated
- Fellow, American Bar Foundation

Clerkships

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

Education

- University of Notre Dame, J.D., 1979
- Saint Mary's College (Notre Dame, IN), B.A., *magna cum laude*, 1976

Bar & Court Admissions

- Michigan
- North Carolina
- U.S. Court of Appeals for the Fourth Circuit
- U.S. District Court for the District of Virginia
- Virginia

SMITH ANDERSON
expectexcellence®

Kimberly J. Korando

ATTORNEY

kkorando@smithlaw.com
919.821.6671

*"She is a renowned speaker and a strong leader in labor and employment."***– Client quote in *Chambers USA***

OVERVIEW

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

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

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

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

Kim is a thought leader who frequently speaks and writes on human resources compliance and risk management issues in the business and legal community. She regularly collaborates with companies developing in-house training programs and has trained thousands of supervisors, managers and Human Resources professionals in legally compliant employment practices, as well as investigators for the U.S. Equal Employment Opportunity Commission. She serves on the Board of Editors for the nation's leading employment discrimination treatise, and authors a leading North Carolina workplace policies and forms guidebook that is updated annually through the North Carolina Chamber.

EXPERIENCE

Crossborder

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

Compensation and FLSA

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

Affirmative Action, Diversity Initiatives and EEO

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

Whistleblowing/Retaliation

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

Internal Investigations

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

Restructuring and Organizational Changes

- Designed RIFs, lay-offs, furloughs and recovery programs.

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

WorkHealth Initiatives and Risk Management

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

Crisis Management

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

Labor

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

Training

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

Technology and Related Policies

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

Mergers and Acquisitions

- Advised an international research-oriented healthcare group on employment-related matters in its acquisition of worldwide product rights to a rare disease therapy.

CREDENTIALS

Recognition

- *Chambers USA: America's Leading Business Lawyers,* Labor & Employment (2005-2023)
- Best Lawyers®
  - Employment Law - Management (2007-2024)
  - Labor Law - Management (2007-2024)
- Best Lawyers®, "Lawyer of the Year," Raleigh
  - Employment Law - Management (2024)
  - Labor Law - Management (2013, 2021)
- *Business North Carolina* Legal Elite, Employment Law (2022)
- North Carolina *Super Lawyers* (2006-2023)
- Fellow, American Bar Foundation
- Martindale-Hubbell AV Preeminent Rated since 1999
- *Oklahoma Law Review*, Note Editor

Education

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

Bar & Court Admissions

Supreme Court of the United States

U.S. Court of Appeals for the Fourth Circuit

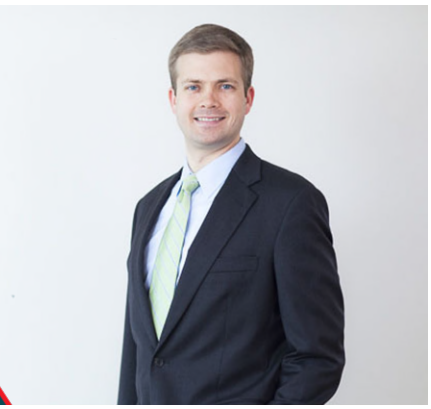
U.S. District Courts for the Eastern, Middle and Western Districts of North Carolina

All North Carolina State Courts

SMITH ANDERSON
expectexcellence®

Isaac A. Linnartz
ATTORNEY

ilinnartz@smithlaw.com
919.821.6819



OVERVIEW

Isaac Linnartz focuses on business litigation, employment litigation, and pre-litigation dispute assessment and risk mitigation. He has experience representing companies in high stakes litigation involving complex contract disputes, corporate governance issues, trade secret and confidentiality matters, and various business torts. On the employment side, he represents employers defending against claims of discrimination, retaliation, harassment, wrongful termination, and wage and hour violations. Additionally, Isaac assists with drafting, assessing, and litigating non-compete and non-solicit provisions, including assessing enforceability and litigating requests for emergency injunctive relief.

EXPERIENCE

Business Litigation

- Represented one of the nation's largest public utilities in complex contract litigation involving a long-term supply contract. Obtained a favorable judgment on an important remedies provision of the agreement after a bench trial in the North Carolina Business Court.
- Represented an internet marketing company in bringing trade secret and breach of contract claims against public company for misappropriating trade secrets and misusing confidential information obtained during due diligence for a potential business transaction. Obtained preliminary and permanent injunctions barring the defendant from using our client's confidential information or engaging in wrongful competition.
- Represented a publisher of telephone directories in a breach of contract case against a national telecommunications company. After a bench trial, the Court ruled in our client's favor on all issues, issued a declaratory judgment that saved the client over $100 million, and awarded over $1.2 million in attorneys' fees.
- Defended a bank in numerous consumer class action lawsuits around the country alleging that the bank facilitated improper lending practices.
- Represented a company and its directors and officers in defense of shareholder derivative claims filed under "say on pay" provisions of Dodd-Frank Act. Obtained dismissal of all claims in federal court.

- Defended a soft drink bottler against claims for breach of an alleged long-term requirements contract brought by cooperative of soft drink bottlers. The case was resolved by confidential settlement after a week-long trial in federal court in South Carolina.

Employment Litigation

- Defended a law firm and its former managing partner against discrimination claims asserted by a former equity partner in federal court. The trial court's decision dismissing the complaint was affirmed by the United States Court of Appeals for the Fourth Circuit in a unanimous published opinion following oral argument.
- Defended a public utility company against whistleblower retaliation, retaliatory discharge, wrongful discharge, and wage and hour claims brought by former employee. Obtained summary judgment in federal court that was affirmed on appeal by the Fourth Circuit.
- Defended a public utility company against sex discrimination, harassment, and retaliation claims brought by former employee. Obtained summary judgment in federal court that was affirmed on appeal by the Fourth Circuit.
- Defended a global provider of biopharmaceutical development services and commercial outsourcing services against sex and national origin discrimination claims brought by former pharmaceutical sales representative. The matter was favorably resolved by confidential settlement agreement.
- Defended a global provider of biopharmaceutical development services and commercial outsourcing services against national origin and pregnancy discrimination claims brought by former pharmaceutical sales representative. Obtained summary judgment in federal court in Florida.
- Defended a global provider of biopharmaceutical development services and commercial outsourcing services and supervisor against sex discrimination, disability discrimination, FMLA non-compliance, and FMLA retaliation claims brought by former pharmaceutical sales representative. The matter was mediated and favorably resolved by confidential settlement.
- Defended a community college against religious discrimination claim brought under Title VII and obtained dismissal with prejudice.
- Defended a public telecommunications company against claims of racial discrimination and retaliation brought by a former employee in federal court. Obtained dismissal with prejudice by showing through discovery that plaintiff made false representations to the court in applications to proceed in forma pauperis.
- Represented a global pharmaceutical, vaccines, and consumer health company in putative collective and class actions in Florida and New York alleging violations of federal and state wage and hour laws based on failure to pay overtime to pharmaceutical sales representatives.

Other Litigation

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

CREDENTIALS

Recognition

- North Carolina *Super Lawyers*, Rising Stars (2014-2022)
- Best Lawyers®
  - Commercial Litigation (2024)
  - Litigation - Labor and Employment (2024)
- *Benchmark Litigation*, 40 & Under List (2018-2023)
- *Benchmark Litigation*, North Carolina Labor and Employment Star (2019-2021, 2023)
- Selected, North Carolina Bar Association's Leadership Academy, Class of 2016
- Executive Editor, *Duke Law Journal*

Clerkships

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

Education

- Duke University, J.D., *cum laude*, 2009
  - *Order of the Coif*
- Duke University Divinity School, Master of Theological Studies, *summa cum laude*, 2009
- Duke University, B.A., History, 2004

Bar & Court Admissions

U.S. Court of Appeals for the Fourth Circuit

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

All North Carolina State Courts

SMITH ANDERSON
expectexcellence®

Justin B. Lockett

ATTORNEY

jlockett@smithlaw.com
919.821.6638

"Do what you can, with what you have, where you are." – ***Theodore Roosevelt***

OVERVIEW

Justin Lockett is an attorney with Smith Anderson's Litigation group and focuses his practice on advising clients on employment and general business litigation matters.

Justin's interests include chess, having served as Lead Chess Coach and Assistant Chief Tournament Director for Triangle Chess.

CREDENTIALS

Education

- Campbell Law School, J.D., with honors, 2022
  - The Order of Barristers
  - Dean's Excellence Merit Scholarship
  - Chief Comments Editor, *Campbell Law Review*
- North Carolina State University, B.A., summa cum laude, 2019

Bar & Court Admissions

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

SMITH ANDERSON
expectexcellence®

Caryn Coppedge McNeill

ATTORNEY
Management Committee

cmcneill@smithlaw.com
919.821.6746

OVERVIEW

Caryn McNeill leads Smith Anderson's Employee Benefits and Executive Compensation practice group. Caryn receives a Band 1 ranking in *Chambers USA*. Clients say she is a "*seasoned expert, incredibly knowledgeable and intelligent*" (*Chambers USA* 2021). The firm's Employee Benefits and Executive Compensation group is also highly credentialed, having consistently received the highest ranking (metropolitan Tier 1) from *U.S. News & World Report* and *Best Lawyers*® "Best Law Firms" since 2010 and recently been ranked in Band 1 of *Chambers USA* Employee Benefits & Executive Compensation. Caryn regularly advises public and private companies on all aspects of the design, implementation and administration of employee benefit plans and executive compensation arrangements, including stock option plans and other types of equity-based compensation arrangements. A significant part of her practice is devoted to counseling and negotiating on behalf of clients in connection with mergers and acquisitions.

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

EXPERIENCE

- Represented a Nasdaq-listed bank holding company with employee benefits matters related to its assumption of all customer deposits and certain other liabilities, and acquisition of substantially all loans and certain other assets, of a bridge bank, as successor to the failed bank subsidiary of a Nasdaq-listed bank holding company, from the Federal Deposit Insurance Corporation, as receiver for the bridge bank.
- Represented a North Carolina bank and its parent with respect to the employee benefits aspects of an approximately $220 million merger with another bank.
- Advised a multinational Fortune 500 provider of product development and integrated healthcare services on benefits-related matters in its merger with a NYSE-listed global information and technology services company, creating a leading information and tech-enabled healthcare service provider. The equity market capitalization of the joined companies was more than $17.6 billion at closing.
- Advised a special materials company on the acquisition of a leading manufacturer of wear-resistant metallic and ceramic alloy coatings.
- Advised a special materials company on the purchase of substantially all of the assets of a leading manufacturer of value-added ferrotitanium, titanium sponge, titanium powders, and specialty forms.

- Advised a leading utilities, solar, and electrical contractor in a definitive agreement to be acquired by an independent sponsor for an undisclosed amount of cash and equity.
- Provided employee benefits advice to a global LED lighting and semiconductor manufacturing company in connection with its agreement to sell $850 million of assets to a publicly traded German company. The parties terminated the sale before closing due to regulatory considerations.
- Represented a global provider of biopharmaceutical services in its $1.1 billion initial public offering and listing on the New York Stock Exchange, including design and preparation of new stock incentive plan and annual management incentive plan, and assistance with related disclosures.
- Served as company counsel with respect to ESOP's participation in $2.04 billion aftermarket auto parts industry merger.
- Advised a global contract research organization and drug development services company in a definitive agreement to acquire a provider of decentralized and traditional clinical trial-related services.
- Advised a global contract research organization and drug development services company in a definitive agreement to acquire a provider of mobile-connected self-service platform solutions for decentralized clinical trials.
- Advised an online gaming company in a definitive agreement to acquire an online 3-D modeling company.
- Advised an online gaming company in an acquisition of a UK-based pioneer in the "kidtech" market.
- Advised a contract research organization in a definitive agreement to acquire a specialized contract research organization for the biotechnology industry.
- Advised a private equity fund and its contract research solutions portfolio company in their acquisition of a statistical programming, consulting, and data management company.
- Represented a pharmaceutical company being acquired by a global biopharmaceutical company and negotiated related 280G treatment and future severance protection and incentive arrangements for seller's employees.
- Advised a public biotherapeutic company about the 409A issues associated with extending the term of expiring options and the correction of same.
- Represented an institutional ESOP trustee in connection with the purchase of 100% of the stock of a chemical supplier.
- Advise multiple companies about a variety of issues associated with the administration of their qualified retirement plans, including creating investment policy statements, reviewing investment performance and replacing investment options; analyzing fiduciary issues related to changes in employer contributions or other plan design issues due to changes in economic circumstances; and correcting operational failures arising in day-to-day plan administration.
- Advised a semiconductor and LED company on employee benefits aspects of the divestiture of its lighting products business unit for an initial cash payment of $225 million plus the potential to receive an earn-out payment based on the business's post-closing performance.
- Advised a publicly traded health services company on the employee benefits aspects of its acquisition of a health services division of a privately held company for $105 million in cash.
- Advised a 100% Employee Stock Ownership Plan-owned company providing support services to the poultry industry in an acquisition by a private equity-backed buyer for approximately $21 million in cash

and equity.

- Advised a private equity fund on the employee benefits aspects of its acquisition of a specialty pharmaceutical company.
- Represented a private equity fund in its acquisition of a leading digital patient recruitment company.

CREDENTIALS

Recognition

- Best Lawyers®, Employee Benefits (ERISA) Law (2010-2024)
- Best Lawyers®, "Lawyer of the Year," Raleigh, Employee Benefits (ERISA) Law (2013, 2016, 2018, 2020, 2024)
- *Chambers USA: America's Leading Lawyers for Business*, Employee Benefits & Executive Compensation (2021-2023)
- North Carolina *Super Lawyers* (2014-2023)
- *North Carolina Lawyers Weekly* "Women of Justice" Award Recipient (2019)
- *North Carolina Lawyers Weekly* "Leaders in the Law" Honoree (2017)
- Martindale-Hubbell AV Preeminent Rated
- Triangle Business Leader Media's Pro Bono Impact Award
- Fellow, American Bar Foundation

Education

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

Bar & Court Admissions

- North Carolina

SMITH ANDERSON
expectexcellence®

Kelsey I. Nix

ATTORNEY

knix@smithlaw.com
919.821.6728

OVERVIEW

Kelsey Nix represents and counsels clients in their most important patent, trade secret, copyright and trademark disputes. Kelsey co-leads Smith Anderson's Intellectual Property Litigation practice. Clients describe him as a strategic and creative litigator who focuses on the end result.

Kelsey joined Smith Anderson after practicing with international law firms in New York City for three decades. He has been lead counsel in dozens of litigated cases in the federal courts nationwide and the International Trade Commission, as well as the U.S. Patent Office in a wide range of technologies, including medical devices, aviation and avionics, pharmaceuticals, biotechnology, banking and trading platforms, encryption, e-commerce, microprocessors, telephony, security systems, modems and clean technologies such as LEDs.

Kelsey has counseled private equity, venture capital and hedge funds on strategic IP issues and has represented their portfolio companies in litigation. He is an experienced trial lawyer and negotiator with a history of protecting major product lines and driving favorable litigation and business results.

NOT ADMITTED TO PRACTICE IN NORTH CAROLINA

EXPERIENCE

Prior to joining Smith Anderson, Kelsey was:

- Lead counsel for a major life sciences and clinical diagnostics manufacturer in successfully resolving parallel U.S. and European patent infringement actions, and related inter partes reviews in the U.S. Patent Office, against a competitor, enforcing client's patents relating to fluorescence detection apparatuses useful in polymerase chain reaction (PCR).
- Lead counsel in successfully defending an international spirits manufacturer against patent infringement allegations in the ITC and in New York and Texas district courts.
- Lead counsel for a clinical diagnostics manufacturer in successfully resolving a U.S. patent infringement action against a competitor, enforcing client's patent relating to temperature control reaction modules useful in polymerase chain reaction (PCR).

- Co-chair in an ITC investigation involving digital signal processors, successfully represented semiconductor manufacturer in defending against claims of patent infringement. Following a two-week trial, the judge found the asserted patent invalid, unenforceable for inequitable conduct, and not infringed. The Commission affirmed.
- A member of teams that successfully represented pharmaceutical manufacturer in multiple Hatch-Waxman patent infringement actions in the district courts, and inter partes reviews (IPRs) in the U.S. Patent and Trademark office, related to abbreviated new drug applications and new drug applications to the FDA seeking approval of generic versions of analgesic oral and patch dosage forms.
- Lead counsel in successfully representing a global leader in the development and manufacture of aviation flight simulators and pilot training programs in enforcing antitrust claims and defending against trade secret and copyright claims involving business jets.
- Lead counsel in obtaining complete defense victory on summary judgment in copyright and trademark infringement case concerning aviation maintenance manuals, *Gulfstream v. Camp*, 428 F.Supp.2d 1369 (S.D. Ga. 2006).

CREDENTIALS

Education

- Duke University School of Law, J.D., 1987
- Columbia University, B.S., Mechanical Engineering, 1984
- Hendrix College, B.A., Physics, 1984

Bar & Court Admissions

- All New York State Courts
- New York
- Supreme Court of the United States
- U.S. Courts of Appeals for the Federal and Sixth Circuits
- U.S. District Courts for the Southern and Eastern Districts of New York
- U.S. Patent and Trademark Office (USPTO)

SMITH ANDERSON
expectexcellence®

David R. Ortiz

ATTORNEY

dortiz@smithlaw.com
919.821.6637

OVERVIEW

David Ortiz is a commercial and employment litigation attorney who represents clients in diverse business disputes and industries. David has experience with breach of contract disputes, unfair trade practices, state constitutional issues and various business-related claims. In addition, David has represented businesses in employment litigation matters in state and federal court as well as in arbitration, defending claims for discrimination, retaliation, harassment, wrongful termination, severance issues and other employment-related claims.

David joined Smith Anderson in 2019 after clerking for the Honorable James C. Dever III in the United States District Court for the Eastern District of North Carolina. David graduated from the University of Virginia School of Law in 2018. While in law school, David was the Managing Editor for Business of the *Journal of Law and Politics*, represented asylum applicants as part of the Immigration Law Clinic, and was a summer associate for a national law firm in Washington D.C. Before law school, David graduated in 2015 from the University of North Carolina at Chapel Hill with highest distinction.

CREDENTIALS

Recognition

Managing Editor for Business and Editorial Board Member, *Journal of Law and Politics*

Clerkships

Law Clerk to the Honorable James C. Dever III, Eastern District of North Carolina

Education

- University of Virginia School of Law, J.D., 2018

- University of North Carolina, *with highest distinction*, B.A., 2015
  - Phi Beta Kappa

SMITH ANDERSON
expectexcellence®

Stephen T. Parascandola

ATTORNEY

sparascandola@smithlaw.com
919.821.6775

OVERVIEW

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

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

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

He regularly counsels clients on risk management, particularly with respect to mergers and acquisitions, due diligence, insurance matters, investigations and audits, and public company environmental disclosures. He also has extensive experience representing clients before regulatory agencies and has handled a broad range of complex transactions for the purchase, sale, leasing, construction and development of commercial, industrial, and public utility properties.

Within the firm, Steve has held various leadership positions, most recently serving as a member of the firm’s Partnership Admission and Compensation Committees.

View Less

EXPERIENCE

- Advised a special materials company on the purchase of substantially all of the assets of a leading manufacturer of value-added ferrotitanium, titanium sponge, titanium powders, and specialty forms.
- Advised an investment company in a definitive agreement to purchase the outstanding equity interests of the largest independent blender and packager of lubricants to the automotive, agriculture, commercial and heavy duty markets in North America.
- Served as local environmental counsel for Fortune 100 company that owns and operates large scale waste-to-energy facilities.
- Represented a major convenience store chain for over 20 years in connection with acquisitions, enforcement defense, environmental permitting, and private party settlements throughout 14 states.
- Represented a leading North Carolina developer in connection with contaminated property redevelopments throughout North Carolina.
- Represented a global developer and manufacturer of pharmaceuticals, biopharmaceuticals and agrochemicals in connection with defense of one of the single largest OSHA enforcement actions ever brought by the N.C. Department of Labor.
- Represented an international privately-held soft drink manufacturer, seller and distributing company in connection with its acquisitions and environmental and OSHA compliance at facilities across the United States.
- Represented one of North Carolina’s largest community banks in connection with financing of Brownfields Program projects throughout North Carolina.
- Advised a semiconductor and LED company on the environmental aspects of the divestiture of its lighting products business unit for an initial cash payment of $225 million plus the potential to receive an earn-out payment based on the business’s post-closing performance.
- Assisted the largest electric utility in the United States for over 16 years with acquisitions, dispositions, and regulatory compliance regarding the utility's power plant properties, lakes, substations, transmission and distribution projects across North and South Carolina.
- Represented a national paper product company in connection with its environmental permitting and OSHA compliance at several North Carolina facilities.
- Represented a major convenience store chain with environmental insurance coverage disputes throughout the Southeast.
- Represented the largest electric utility in the United States who is a performing party in a CERCLA removal action at the largest Superfund Site in North Carolina and also in related contribution litigation brought against over 150 parties.
- Represented the nation's third-largest poultry producer in OSHA enforcement defense, managing OSHA inspections, and with responses to employee complaints made to NCDOL's OSH Division.
- Represented one of the nation's largest convenience store chains with the acquisition of 47 stores and 6 ethanol distribution facilities in Kansas and Missouri.
- Assisted a global developer and manufacturer of pharmaceuticals, biopharmaceuticals and agrochemicals with OSHA compliance, document requests and inspections by NCDOL's OSH Division.

- Represented various clients to defend against and avoid to third-party claims for property damage and personal injury related to off-site contamination from underground storage tanks and general facility operations.

CREDENTIALS

Recognition

- *Chambers USA: America's Leading Business Lawyers,* Environmental (2013-2023)
- Best Lawyers®, Environmental Law (2007-2024)
- *Business North Carolina* "Legal Elite," Environmental
- Martindale-Hubbell AV Preeminent Rated
- North Carolina *Super Lawyers* (2010-2013, 2016-2021)
- Marquis *Who's Who in American Law*
- Fluent in Italian and Spanish; conversational and written Portuguese

Education

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

Bar & Court Admissions

- Florida
- New York
- North Carolina

SMITH ANDERSON
expectexcellence®

Susan Milner Parrott

OF COUNSEL

sparrott@smithlaw.com
919.821.6664

OVERVIEW

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

EXPERIENCE

- Served as lead employment lawyer in the representation of a publicly-traded specialty pharmaceutical company in its acquisition of a privately-traded specialty pharmaceutical company.
- Served as lead employment lawyer for numerous acquisitions by a multi-state, publicly-traded convenience store operator.
- Prepared executive employment agreement for the president and chief executive officer of a publicly-traded bank holding company.
- Responsible for executive employment agreements required for the succession of the chief executive officer of a publicly-traded, global manufacturer of consumable products.
- Successfully defended U.S. Department of Labor investigations of wage and hour exemption classification in various industries including banking, software, retail distributing, restaurant, civil engineering and pharmaceutical manufacturing.
- Successfully defended North Carolina Department of Labor investigation of wage payment practices for retail distributing company.
- Conducted internal audits of wage and hour and wage payment matters for clients in various industries, including banking, pharmaceutical manufacturing and sales, retail and internet/technology.
- Advised a multinational Fortune 500 provider of product development and integrated healthcare services on employment-related matters in its merger with a NYSE-listed global information and technology services company, creating a leading information and tech-enabled healthcare service provider. The equity market capitalization of the joined companies was more than $17.6 billion at closing.
- Advised a private equity fund on employment-related matters in connection with its acquisition, equity and debt financing of a reference laboratory.

- Advised a leading contract research organization on the employment law aspects of a definitive agreement to acquire a provider of contract research, clinical and regulatory and other consulting services.
- Advised a leading healthcare services provider on employment-related matters in connection with its $60 million cash acquisition of a global sourcing company.
- Advised a leading provider of pharmacy-based patient care solutions and medication synchronization services to independent and chain pharmacies on employment-related matters in its approximately $41 million sale of the company to a publicly-traded buyer.
- Advised a French multinational industrial and steel distributor on employment-related matters in connection with its acquisition of a controlling interest in a Virginia-based steel service center.
- Advised a frozen foods company on employment-related matters in connection with a definitive agreement to acquire a frozen snacks business.
- Appellate advocacy practice has included representation of clients before the North Carolina appellate courts, the Fourth Circuit Court of Appeals and the Supreme Court of the United States.

CREDENTIALS

Recognition

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

Education

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

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

Duke University, B.A., with honors 1974

Bar & Court Admissions

- North Carolina
- Supreme Court of the United States
- U.S. Court of Appeals for the Fourth Circuit
- U.S. District Court for the District of North Carolina

SMITH ANDERSON
expectexcellence®

David A. Pasley

ATTORNEY

dpasley@smithlaw.com
919.821.6797

OVERVIEW

David Pasley is a business litigation attorney who counsels and advocates for clients in a variety of business disputes, including breach of contract issues, trademark disputes, unfair trade practices and other business-related claims. He also has experience with employment litigation and has counseled and represented employers in cases involving claims of discrimination, retaliation, harassment, wrongful termination and other employment-related issues.

David joined Smith Anderson in 2018 after graduating with high honors from the University of North Carolina School of Law in 2017 and clerking for Judge Thomas Schroeder of the United States District Court for the Middle District of North Carolina. Prior to law school, David taught Eighth Grade English for two years in Orangeburg, South Carolina. David was born and raised in Raleigh and is excited to be part of the growing and thriving professional community here.

EXPERIENCE

- Represented a company in successfully protecting and enforcing intellectual property rights.
- Represented multiple corporations in defending claims of false advertising.
- Represented owner of commercial real estate in action brought to enforce property rights.
- Represented a private individual in dispute with the United States involving tax refund.
- Represented a company in defending claim arising out of breach of contract claim involving medical devices.
- Represented various employers in defending against sex, gender, and disability discrimination claims, as well as claims of wrongful termination and/or retaliation.

CREDENTIALS

Recognition

- *Best Lawyers: Ones to Watch®,* Commercial Litigation (2023-2024)
- Articles Editor, *North Carolina Law Review,* 2017
- 2015 Gressman-Pollitt Award for Best Overall Oral Advocacy

Clerkships

Honorable Thomas D. Schroeder, United States District Court for the Middle District of North Carolina

Education

- University of North Carolina School of Law, J.D., *with high honors*, 2017
  - Order of the Coif
- University of North Carolina, B.A., Philosophy*, with distinction*, 2012

Bar & Court Admissions

North Carolina

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

Tommy Postek

ATTORNEY

tpostek@smithlaw.com
919.821.6814

*"If we desire respect for the law, we must first make the law respectable." – **Justice Louis D. Brandeis***

OVERVIEW

Tommy Postek is an attorney with Smith Anderson's Employment, Labor and Human Resources practice.

Prior to joining Smith Anderson, Tommy worked for an international law firm as a member of its employment practice, representing employers before state and federal administrative agencies in discrimination claims, workers' compensation actions and other employment-related matters and assisting clients on other multifaceted legal issues. Prior to that, he practiced employment law with an international law firm in Denver, Colorado and served as Law Clerk to the Honorable Edward Bronfin in Denver District Court.

Tommy enjoys woodworking, cooking, basketball, golf and spending time with his family and brood of pets on a farm that he owns in Stokesdale, North Carolina. Born and raised in Sweden, Tommy speaks several languages, including English, Swedish, Polish, Danish and Norwegian.

LANGUAGES

Danish

Norwegian

Polish

Swedish

EXPERIENCE

- Advised a sports software company on its acquisition of an Australian software provider to military and sports organizations.

CREDENTIALS

Recognition

- *Best Lawyers: Ones to Watch® in America,* Labor and Employment Law - Management (2024)

Clerkships

Law Clerk to the Honorable Edward Bronfin, Denver District Court

Education

- University of Notre Dame Law School, J.D, 2017
  - Article Editor, *Notre Dame Journal of International & Comparative Law*
  - Treasurer, International Law Society
- Lynn University, B.S. in Business Administration, summa cum laude, 2014

Bar & Court Admissions

- Colorado
- North Carolina

SMITH ANDERSON
expectexcellence®

Edward F. Roche

ATTORNEY

eroche@smithlaw.com
919.821.6730

OVERVIEW

Ed Roche helps businesses navigate complex disputes. Ed regularly handles employment and intellectual property cases and a wide range of other business disputes, including claims for breach of contract, unfair trade practices, breach of fiduciary duty and violations of securities laws.

Ed enjoys working for clients of all shapes and sizes and in all sectors. He handles disputes at the administrative, trial and appellate levels, in state and federal courts across the country. Before litigation arises, Ed works with clients to optimize their positions and evaluate their litigation risk. Ed partners with clients to understand their businesses and goals, allowing him to advise them on how disputes will affect their overall business interests.

Before joining Smith Anderson in 2019, Ed was an attorney in the Washington, D.C. office of a global law firm and clerked for a federal appeals court judge.

EXPERIENCE

- Represent a California software company in contract disputes in California and Minnesota.
- Enforced a local business's intellectual property rights against an international retailer.
- Represented a bank in emergency proceedings to prevent harm to customers due to technology vendor's actions.
- Represent a technology company in a breach of contract action concerning royalty payments.
- Defended a construction company in a copyright dispute, prevailing after a two-day arbitration.
- Defended a government contractor against a whistleblower complaint, involving administrative proceedings in the Department of State and an appeal to a federal appeals court.
- Represented an insurance company in securing dismissal of employee's wrongful dismissal claims.
- Represented various employers in enforcing employee non-compete provisions.
- Helped online retailers secure takedowns of websites infringing retailer's intellectual property rights.
- Represented various clients in trademark proceedings at the Trademark Trial and Appeal Board ("TTAB").
- Helped clients respond to third-party subpoena requests.

Litigation experience Ed gained prior to joining Smith Anderson:

- Defended directors against shareholder derivative actions alleging securities violations, breaches of fiduciary duties and various related claims in state and federal courts.
- Represented mutual fund advisors against claims of excessive fees.
- Advised a university on potential antitrust dispute concerning the competitive opportunities open to the university's athletic program.
- Represented multinational technology companies responding to regulators' allegations of antitrust violations.
- Provided advice on First Amendment arguments for a news website to raise in appealing trial verdicts obtained by a public figure based on the website's news report.
- Represented a major pharmaceutical company in an investigation launched in response to a federal government subpoena seeking information on compliance with Anti-Kickback Statute.
- Served as counsel to the American Bar Association and individual plaintiffs in a lawsuit against the Department of Education, challenging the department's conduct in relation to the Public Interest Loan Forgiveness Program.
- Wrote briefs and delivered arguments to the U.S. Court of Appeals for the Sixth Circuit on behalf of a federal habeas petitioner.
- Represented a voting rights organization litigating constitutional and statutory civil rights claims in federal court to stop a state preventing access to public voter registration records.
- Coordinated nationwide litigation efforts to assist detained immigrants.

CREDENTIALS

Recognition

- *Best Lawyers: Ones to Watch® in America*
  - Commercial Litigation (2022-2023)
  - Litigation – Intellectual Property (2022-2023)
  - Litigation – Labor and Employment (2023)
- Editor in Chief, *North Carolina Law Review*
- North Carolina *Super Lawyers*, Rising Star (2022-2023)

Clerkships

Law Clerk to The Honorable Julia S. Gibbons, U.S. Court of Appeals for the Sixth Circuit

Education

- University of North Carolina, J.D., *with high honors*, 2014
  - *Order of the Coif*
- University of Oxford, Worcester College, B.A., Law, 2007

Bar & Court Admissions

- District of Columbia
- Massachusetts
- North Carolina
- Supreme Court of the United States
- U.S. Court of Appeals for the District of Columbia Circuit
- U.S. Court of Appeals for the Eleventh Circuit
- U.S. Court of Appeals for the Fifth Circuit
- U.S. Court of Appeals for the Fourth Circuit
- U.S. Court of Appeals for the Ninth Circuit
- U.S. Court of Appeals for the Sixth Circuit
- U.S. Court of Appeals for the Tenth Circuit
- U.S. District Court for the District of Columbia
- U.S. District Court for the Southern District of Illinois
- U.S. District Court for the Western District of Tennessee
- U.S. District Courts for the Eastern, Middle and Western Districts of North Carolina

SMITH ANDERSON
expectexcellence®

Shameka C. Rolla

ATTORNEY

srolla@smithlaw.com
919.821.6652

OVERVIEW

Shameka Rolla joined Smith Anderson's Litigation team after graduating from Wake Forest University School of Law where she was a member of the National Trial Team. Her practice focuses on a wide range of business disputes, including contract and business tort claims, as well as employment disputes, in which she defends employers against claims involving discrimination, wrongful discharge, retaliation, harassment and civil rights claims.

Shameka enjoys Duke University basketball, live sporting events and travel.

EXPERIENCE

- Defend employers against employment claims, including, without limitation, claims of discrimination, wrongful discharge, and retaliation, and wage and hour claims.
- Conduct internal investigations for employers regarding allegations of workplace misconduct, including, without limitation, claims of discrimination, harassment and retaliation.
- Represented a software company in federal district court in defending against breach of contract claim involving resale of software and related services and pursued numerous counterclaims; successfully obtained orders denying plaintiff's requests for TRO and preliminary injunction; case dismissed upon reaching a settlement.
- Successfully obtained a pre-trial dismissal of claims of intentional infliction of emotional distress and negligent supervision and retention against corporate clients.
- Successfully obtained a contested default judgment after oral argument in state court on behalf of client.
- Represented an individual against claims of breach of non-competition agreement, misappropriation of trade secrets, unfair competition, and unjust enrichment; successfully defended against motion for TRO; case dismissed upon reaching a settlement.
- Assist clients in responding to third-party subpoenas.

CREDENTIALS

Education

- Wake Forest University School of Law, J.D., 2020
  - The Order of Barristers
- Duke University, B.A., 2017
  - Phi Alpha Theta History Honor Society

Bar & Court Admissions

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

SMITH ANDERSON
expectexcellence®

Amelia L. Serrat

ATTORNEY

aserrat@smithlaw.com
919.821.6747

OVERVIEW

Amelia Serrat concentrates her practice in the areas of business litigation and products liability. She has experience litigating claims for breach of contract, unfair trade practices, fraud, breach of fiduciary duty, and other business-related claims. In addition, she defends manufacturers, distributors, and insurers of consumer, automotive, and industrial products.

While attending law school, Amelia completed an internship with Chief Judge Solomon Oliver, Jr. of the Northern District of Ohio.

EXPERIENCE

- Represented a closely-held company and its majority members in a conversion, breach of fiduciary duty, tortious interference, and unfair trade practices lawsuit before the North Carolina Business Court. Obtained a temporary restraining order and favorable settlement following expedited mediation.
- Defended former director of insolvent corporation against claims for breach of contract, fraud, and unjust enrichment brought by corporation's supplier, who also attempted to pierce the corporate veil to hold director individually liable for claims against corporate entities. Obtained pre-discovery dismissal of all claims in federal court, which was affirmed on appeal by the United States Court of Appeals for the Fourth Circuit.
- Represented an internet marketing company in bringing trade secret and breach of contract claims against a public company for misappropriating trade secrets and misusing confidential information obtained during due diligence for a potential business transaction. Obtained preliminary and permanent injunctions barring the defendant from using our client's confidential information or engaging in wrongful competition.
- Represented a venture capital firm and two of its principals in a defamation action against a once-anonymous individual.
- Defended a major automotive distributor in a warranty and consumer protection lawsuit. Obtained summary judgment in trial court and dismissal of appeal by the North Carolina Court of Appeals.
- Defends national manufacturers and retailers of asbestos-containing products in toxic tort lawsuits brought in North Carolina and South Carolina.

- Defends global component manufacturer of an agent used to extinguish certain fires in multidistrict litigation involving claims for alleged personal injuries, property damage, and environmental contamination.
- Provides strategic risk management advice and negotiates settlements of pre-litigation disputes in a broad range of matters including disputes involving complex contracts, software license agreements, consumer warranties, and non-compete and trade secret issues.
- Represents commercial landlords and management companies in enforcement of property rights.
- Assists clients in responding to government and third-party subpoenas and public records requests.

CREDENTIALS

Recognition

- *Best Lawyers: Ones to Watch® in America,* Commercial Litigation (2022-2024)

Education

- University of North Carolina School of Law, J.D., *with honors*, 2015
- University of North Carolina, B.A., English and Women's Studies, 2012
    - Buckley Public Service Scholar

Bar & Court Admissions

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

Academic Appointments

- Symposium Editor, *North Carolina Journal of Law and Technology*
- Pro Bono Coordinator, Domestic Violence Action Project
- Vice President, Women in Law
- Honor Court Member, Undergraduate Honor System

SMITH ANDERSON
expectexcellence®

Kerry A. Shad

ATTORNEY

Management Committee | Co-Chair, D&I Committee

kshad@smithlaw.com
919.821.6672

"Kerry is exceptional. She is direct and clear in communications, understands our business, people and strategy, and balances being assertive with innovative solutions." ***– Client quote in Chambers USA***

OVERVIEW

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

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

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

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

EXPERIENCE

- Successfully represented leading employers before the United States Equal Employment Opportunity Commission and state and local fair employment practices commissions across the country in connection with investigations of single claimant and class allegations.
- Retained as lead counsel for global pharmaceutical company to defend claims filed in arbitration under the company's ADR program.

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

- Served as "in-house" employment litigation counsel to large company managing employment litigation in jurisdictions across the country.
- Represented clients in arbitrations arising out of business sales and alleged violations of non-competition agreements.
- Developed highly participatory and mock trial training exercise for HR professionals and investigators for large global pharmaceutical company in which they experienced first-hand how their decisions and actions play out in front of a jury. The program was customized to client's policy and workforce.

CREDENTIALS

Recognition

- *Chambers USA: America's Leading Business Lawyers,* Labor & Employment (2012-2023)
- *Business North Carolina* Legal Elite, Employment Law (2008, 2014-2015, 2022)
- *Benchmark Litigation*
  - Top 50 Labor & Employment Litigators (2024)
  - North Carolina Litigation Star (2023-2024)
  - North Carolina Labor and Employment Star (2018-2024)
  - Top 250 Women in Litigation (2021-2023)
- *The Best Lawyers in America®*
  - "Lawyer of the Year," Raleigh, Employment Law - Management (2022)
  - Employment Law - Management (2009-2024)
  - Litigation - Labor & Employment (2009-2024)
- North Carolina *Super Lawyers* (2012-2023)
- *North Carolina Lawyers Weekly*, Power List, Employment Law (2021, 2023)
- *Triangle Business Journal*'s "Women in Business Award" (2015)
- Martindale-Hubbell AV Preeminent Rated

Education

- University of North Carolina, J.D., with honors, 1991
  - Editorial Board, *North Carolina Law Review*
  - Order of the Coif

- Florida State University, B.S., 1985

Bar & Court Admissions

- North Carolina

The Supreme Court's Decision in *SFFA v. Harvard and UNC* and its Implications for DE&I in Employment and Beyond

SMITH ANDERSON

The Supreme Court's Decision in *SFFA v. Harvard and UNC* and its Implications for DE&I in Employment and Beyond

Kerry A. Shad
Taylor M. Dewberry
November 14, 2023

EXPECT EXCELLENCE®

Today's Agenda

- Review of the recent Supreme Court rulings about race and college admissions
- Legal effect of the rulings in employment and supplier practices
- Practical implications
- Doing DEI right

Supreme Court Rulings Regarding Race and Admissions

SCOTUS Speaks on Race in Admissions

Students for Fair Admissions, Inc. ("SFFA") v. President and Fellows of Harvard College, and *SFFA v. University of North Carolina, et al.*

Decided June 29, 2023

SFFA v. Harvard and UNC

The admissions policies permitted a student applicant's race to be considered as part of an overall "holistic" assessment of the individual, along with things like grades, references, and extracurricular activities.

The UNC case alleged discrimination against White and Asian American students in violation of the Equal Protection Clause of the 14th Amendment.

"No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The Harvard case alleged discrimination against Asian Americans in violation of Title VI of the Civil Rights Act of 1964 which prohibits discrimination on the basis of race, color or national origin by federally funded programs.

SFFA v. Harvard and UNC

Both schools had relied on the 2003 Supreme Court case of *Grutter v. Bollinger* under which an educational institution may consider an applicant's race as one factor in an admissions policy *so long as* the policy satisfied "strict scrutiny" test:

a) is narrowly tailored to the compelling interest of promoting a diverse student body (because of the proven educational benefits of diversity), and

b) uses a holistic process to evaluate each applicant, where race/ethnicity is just one of many considerations (i.e., no quota system).

SFFA v. Harvard and UNC

- UNC Process:
  - "Readers" review applications and are required to consider race and ethnicity as one factor
  - Other factors are academic performance and rigor; standardized test results; extracurricular involvement; essay quality; personal factors and student background

SFFA v. Harvard and UNC

- UNC Process:
  - "School group review" receives a report on each student
  - May consider applicant's race
  - Goal to ensure that minority enrollment percentage was not lower than the minority representation in North Carolina's general population

SFFA v. Harvard and UNC

- Harvard's Process:
  - "First Readers" screen applications
  - Assigns scores in six categories: academic, extracurricular, athletic, school support, personal, and overall
  - Race can be considered in the "overall" score

SFFA v. Harvard and UNC

- Harvard's Process:
  - Full committee votes on each applicant
  - Racial composition of pool of tentatively admitted students is disclosed
  - Final cuts made – any applicants at risk of being cut are on a list with their legacy status, recruited athlete status, financial aid eligibility, and race
  - Race is a "determinative tip" for a significant % of admitted African American and Hispanic students

SFFA v. Harvard and UNC

- The Ruling:
  - "Strict scrutiny" invokes a two-part standard:

    1. Is the racial classification used for "further compelling government interests?"
    2. If so, is the use of race "narrowly tailored" to achieve that interest?

- **The UNC and Harvard policies failed both.**

SFFA v. Harvard and UNC

- No concrete way to measure progress towards the goals articulated by the schools as reasons they need to increase numbers of students who are not Asian or White — goals such as encouraging a robust exchange of ideas, fostering innovation and problem-solving and training future leaders.
- The Court reasoned, "[a]lthough these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny."

SFFA v. Harvard and UNC

- The Court reviewed the admission rates of different races of candidates, finding that race was used as both a positive and negative factor in evaluations.
- The Court also repeatedly expressed concern that there is no "end point" to the schools' race-based admission policies.
- By treating race as an evaluative factor, the schools were incorrectly assuming that all persons in a race share similar views or experiences.

SFFA v. Harvard and UNC

Bottom Line

Colleges and universities may **no longer** consider race as part of the college admissions process

SFFA v. Harvard and UNC

- The Court left the door slightly cracked open to allow for the discussion of "how race affected [a candidate's] life, be it through discrimination, inspiration or otherwise." But the Court cautioned that race itself cannot be a factor:
  - *"A benefit to a student who overcame racial discrimination, for example, must be tied to that student's courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to that student's unique ability to contribute to the university. In other words,* ***the student must be treated based on his or her experiences as an individual—not on the basis of race****." (emphasis added)*

Legal Implications for Employers and Suppliers

Legal Effect of Ruling on Private Employers

NO IMMEDIATE DIRECT LEGAL IMPACT ON PRIVATE EMPLOYERS

- Not a decision based on federal law that applies to employers – Title VII
- Employers are not legally required to make any changes to DEI, EEO, or affirmative action policies **if such practices comply with existing employment law**
- Employers can still have and focus on diversity as a core value
- Employers can still commit to a culture of inclusion
- Employers can and should maintain their EEO policies

Legal Effect of Ruling on Private Employers

- Confusion around the reach of the rulings in part because of the use of "**affirmative action**" in both educational and employment contexts.
  - In education, "affirmative action" had historically permitted colleges and universities to consider race as one factor that determined admissions. (See Grutter)
  - This is different from employers.
- **The law does not and never has recognized the ability for employers to make decisions of who to hire or promote based on the person's race or gender, rather than who is the best candidate for the role.**

Legal Effect of Ruling on Private Employers

- **Mandatory Affirmative Action (Employment)**
  - In employment, some employers are federal contractors and subject to requirements under the Office of Federal Contract Compliance Programs ("OFCCP").
  - These OFCCP requirements expect companies to make *targeted diversity recruiting efforts* aimed at increasing the diversity of applicant pools and pipelines.
  - In this context "affirmative action" is different from affirmative action in the education context.
  - **The final hiring decision still should be based on selecting the best qualified person, without regard to their race (or other protected status).**

Legal Effect of Ruling on Private Employers

- **Voluntary Affirmative Action (Employment)**
  - Employers can establish affirmative action programs compliant with Title VII and EEOC guidance.
  - To be lawful, the employer is required to show a manifest imbalance in the workforce based on race or gender when comparing representation to availability.
    - These programs must be temporary in nature (just long enough to remedy the imbalance)
    - May not unnecessarily trammel the interests of non-minority employees
    - A self-analysis that identifies policies or practices that have led to racial imbalances in traditionally segregated job categories and the action taken pursuant to the program is reasonable in relation to the problems identified by the self-analysis
    - Difficult to lawfully implement

Practical Implications

Practical Implications of the Rulings

- We are seeing legal challenges to some employer DEI efforts and expect more to come.
- This is not expected to impact many employer DEI efforts such as trainings, inclusion efforts, inclusive employee affinity groups.

Practical Implications of the Rulings

- After the SFFA decision, so called "Reverse" discrimination claims may increase.
- Title VII protects employees against discrimination based on race:
  - White
  - Black or African American
  - American Indian or Alaska Native
  - Asian
  - Native Hawaiian or Other Pacific Islander

Legal Challenges

- ***Duvall v. Novant*** **(W.D.N.C Nov 18, 2019)**
  - $10m jury verdict in 2022
    - Plaintiff was a Senior VP of Marketing & Communications
    - Several white male leaders were terminated and many women/minorities were promoted
    - Company had Long-Term Incentive plan that financially benefited senior leadership for improving D&I
    - Plaintiff was terminated in July 2018 without notice
      - No documented performance issues
      - Replaced by a white female and a black female
    - Bottom line -- Assumption that diversity efforts led to termination
    - Case is on appeal
- ***DiBenedetto v. AT&T Services, Inc.*** **(N.D. Ga. Nov 02, 2021)**
  - Alleging similarly that the company's diversity hiring practices discriminated against him
  - The supervisor allegedly told him he was unpromotable because he was a "58-year-old white guy"

Legal Challenges

- *Powers v. Broken Hill Proprietary Inc.* (S.D. Texas, 2022)
  - Mining, metals and petroleum company
  - 2016 goal to achieve gender balance
  - Progress toward goal to achieve gender balance was a factor in overall bonus pool and in individual bonuses
  - In 2016 women were 10% of new hires; in 2019-20 women were 60% of new hires

Legal Challenges

- *Powers v. Broken Hill Proprietary Inc.* (S.D. Texas, 2022)(con.)
  - Plaintiff lost his job in a restructuring
    - Applied for 4 jobs over 7 months
    - Women hired for all 4 roles
    - A woman hired into a job with similar title as Plaintiff's eliminated role

Legal Challenges

- *Powers v. Broken Hill Proprietary Inc.* (S.D. Texas, 2022)(con.)
  - Although no final court decision on the case, the court decided the case should continue to move forward in the litigation because it could be possible that the company considered gender in the decisions that limited Powers' employment opportunities
    - The company would need to present evidence to show otherwise
  - Case settled in February/March 2023 – no court decision
  - **Bottom line – *Could the employer show that it was making hiring decisions based on the most qualified candidate?***

Legal Challenges

- *Bradley et al v. Gannett Co., Inc.* (E.D. Va. Aug 18, 2023)
  - Ongoing class action
  - Commitment to "achieve racial and gender parity with the diversity of our nation, throughout our workforce"
  - Alleged to be a quota and commitment to hire a % of individuals based on race without regard to the applicant pool

Legal Challenges

- **13 Attorneys General** and Senator Tom Cotton sent letters to business leaders
  - Warning against racial preferences or quotas in employment and contracting
- **21 Attorneys General** then sent letters urging businesses to continue to use recruitment initiatives and vendor diversity programs
  - Acknowledging the barriers that women and PoC often face in the workplace and the value of DEI efforts
  - Making the business case for diversity efforts
  - Clarifying the holding of the SCOTUS decision

Legal Challenges

- Actual and threatened shareholder litigation over DEI practices alleging corporate mismanagement
  - ***Craig v. Target,et al.*** (M.D. Fla. Aug 8, 2023)
    - LGBTQ merchandising
    - Adoption of ESG and DEI "mandates"
  - **Letter to Kellogg CEO** (Aug 9, 2023)
    - LGBTQ merchandising
    - Alleged race-based hiring/employment practices
    - Commitment to diverse suppliers
    - Employee training limited to employees of a certain protected classes

Legal Challenges

- In 2022, The American Civil Rights Project also threatened to sue the McDonald's Corp., the Starbucks Corp. and Novartis AG over diversity policies.
  - McDonald's - diversity goals for the composition of its senior leadership
    - American First Legal has asked the EEOC to investigate McDonald's DEI practices (4/23)
    - Strive Asset Management Fund wrote an additional letter challenging its DEI practices (7/23)
  - Starbucks - diversity goals for workers and suppliers
    - Suit filed 8/22 and dismissed 9/23
  - Novartis - preferred program for outside law firms that commit to diversity minimums
    - The group wrote a similar letter challenging Coca-Cola's proposed diversity requirements for outside counsel
      - Coca-Cola never implemented the plan

Legal Challenges

- In late August, two large law firms were sued over their Fellowship programs
  - One limited to persons of color, LGBTQ, and/or people with disabilities
    - If heterosexual and non-disabled, excluded if white
  - One limited to persons of color and LGBTQ
    - If white and heterosexual, excluded
- In early October, the lawsuits were dropped against both firms as the firms adjusted the requirements clarifying that all law students may apply (with no limitations based on protected class)
- Other large firms have recently received similar demand letters

Legal Challenges

- **Supplier Diversity Generally**
  - Supplier diversity challenges are largely brought under Section 1981
    - Which prohibits race discrimination in making and enforcing contracts
  - Courts have applied Title VII's voluntary affirmative action standard in both the employment and education-related space
  - We have yet to see if courts would apply a similar voluntary affirmative action standard in the supplier diversity space

Legal Challenges

- *American Alliance for Equal Rights ("AAER") v. Fearless Fund Management LLC* (Aug 8, 2023 ND Ga.)
  - AAER alleged that the Fund that provides grants and other perks to small businesses owned by Black women violates Section 1981
  - AAER's complaint requested a preliminary injunction to prevent the Fund from awarding this cycle of grants
  - The district court denied AAER's preliminary injunction request (finding that a 1st Amendment argument may be dispositive)
  - The 11th Circuit granted AAER's request for preliminary injunction on emergency appeal

Legal Challenges

- *Ultima Servs. Corp. v. United States Dep't. of Agriculture* (E.D. Tenn. Mar 4, 2020)
  - Ultima (a company owned by a White woman) sued the USDA in 2020 after it lost a contract that had been moved to the 8(a) program
  - The TN District Court struck down a government program providing preferences to minority-owned businesses under the Small Business Act
  - In an opinion that heavily cites to *SFFA*, the court concluded that the government's challenged minority-owned business program violated the Equal Protection Clause with regard to its methodology for applying a "rebuttable presumption of social disadvantage" to individuals of certain minority groups

Legal Challenges

- *Bolduc v. Amazon.com Inc.* (E.D. Tex. Jul 20, 2022)
  - Amazon faces a lawsuit alleging that the company's $10,000 startup bonus offered to "Black, Latinx, and Native American" delivery service partners (independent businesses contracted to deliver Amazon packages to customers' homes) violates "§ 1981 by excluding Whites and Asian-Americans"

Legal Challenges

- Some states have laws that also would support legal action by contractors for discrimination based on race, gender, other protected characteristics (e.g. New Jersey, California)

Doing DEI Right

What Does This Mean for DEI Initiatives?

DEI Remains Important!

Potential Benefits of DEI

- Education of employees
- Create stronger sense of community and greater retention
- Sense of wellbeing and belonging
- Connect to wider audience/clients
- Being allowed to be authentic creates psychological safety and leads to "best work"
- Belief in availability of opportunities for development/advancement
- Increased empathy leads to stronger teams
- Many others!!

Doing DEI Right

- Understand what DEI programs are: DEI programs in the employment context are policies and practices aimed at ensuring equal opportunities and outreach to certain underrepresented groups in the workforce, such as women, people of color, LGBTQ+ individuals, and people with disabilities
  - It is NOT "affirmative action"
  - It is not making decisions based on protected class status
- **Can still have diversity, equity, inclusion, belonging, and accessibility policies and a culture grounded in these values**

Doing DEI Right

- DEI programs might include:
  - outreach to diversity-focused recruitment sources to identify a strong pipeline of diverse talent
  - creating non-exclusive mentoring programs aimed at supporting diverse talent within a company (beware of exclusive accelerated development programs)
  - unconscious bias training, bystander intervention training, how to be an ally training
  - skills based training to develop employee skills to be better qualified to move into other roles
  - having other policies and practices to champion and promote diversity within the workforce, such as affinity groups and awareness events (open to all)

Doing DEI Right

- DEI programs cannot include:
  - using protected categories, such as race, to decide who to hire or promote, or
  - setting aside positions to be filled by a woman or racial/ethnic minority, or
  - setting a quota for a specific number of individuals to be hired based on a protected class.

Doing DEI Right

- Materials should continue to reference hiring and promoting the person best qualified
- They should not indicate that a woman or minority is wanted for the role

Doing DEI Right

- **Explain why DEI Programs are important**
- Reiterate and be educated on how increased diversity can improve the company's bottom line through increased collaboration, employee engagement, and better decision-making

Doing DEI Right

- Speak in terms of diversity of thought, inclusion, equity, and wide-ranging perspectives and experiences – not just in terms of demographic diversity (e.g., race, gender, etc.)

Doing DEI Right

- ***Example:*** Smith Anderson's Excellence in Diversity 1L Fellowship - The fellowship is open to first-year students who are enrolled full-time at ABA-accredited law schools who have demonstrated a commitment to promoting diversity and inclusion through their activities, background and life experiences, as well as members of groups that have been historically underrepresented in the legal profession, including first-generation college students and those from disadvantaged socioeconomic backgrounds.

Doing DEI Right

- ***Be Inclusive***
  - Employee development programs and affinity groups are designed to eliminate barriers and increase belonging
  - Be clear to employees that participation in an affinity group or advancement program, while focused on a certain group, is open to anyone

Doing DEI Right

Consider Race-Neutral Diversity Factors in Hiring

- Criteria that, while race neutral, nonetheless tend to increase racial diversity in the workplace
- Such factors may include socioeconomic status, first generation professionals, unique personal circumstances or geographic diversity
- Continue to always hire the best qualified person for the role

Doing DEI Right

- Consider requiring that qualified diverse candidates be part of every pool of candidates for positions
  - doesn't mean you have to hire a diverse candidate
  - but that qualified diverse candidates are considered

Doing DEI Right

- Remember not to use race or other protected categories when making employment decisions – even for purposes of furthering diversity objectives
- Hires should not be based on "fit"– can allow for unconscious bias
- Be careful about linking compensation directly to increased hiring/promotion of individuals in a protected class

Do an Inventory of DEI Initiatives

Examples of Activities in Each Category

Permissible	Uncertain/Caution	High Risk	Impermissible
• Recruiting using affinity-based job fairs, diverse media, HBCUs, and similar organizations • Equal employment opportunity to all employees and applicants • Defining "diversity" broadly (not limited to protected classes only) • Providing disability accommodations for applicants and reviewing job descriptions for accessibility • Trainings on anti-harassment, implicit bias, and anti-discrimination • Maintaining demographic data for EEO-1 forms and assessment of selection processes (with proper storage and appropriate access) • Mandatory (under EO 11246 and OFFCP regulations) and Voluntary Affirmative Action programs (compliant with Title VII and EEOC guidance) • Factoring in compliance with the EEO policy and Affirmative Action policies with compensation • For suppliers – fostering relationships with organizations that provide diverse business accreditation; asking vendors to describe their DEI programs/commitments	• Pipeline, mentorship, training, and sponsorship programs for individuals based on protected classes (consider opening to all employees to opt-in) • Statements discussing DEI goals (should be vetted by counsel to ensure not to inadvertently say anything impermissible or something that could be used as evidence of reverse discrimination) • Employee Resource Groups (should be open to all employees in and outside of the unifying protected class) • Aspirational goals for diversity of a workplace (allowed but careful not to be a quota; how goals are achieved matters) • Consideration of a diverse slate of qualified applicants • Practices that may be interpreted as employment decisions based on the employee's or applicant's protected class; Facially neutral policies/practices that may have adverse impact • Engaging suppliers based on diverse ownership • The use of self-identification surveys requesting more demographic information than required (permissible with proper procedures in place)	• Allowing those with hiring decision-making power to have access to demographic information creates a presumption that information was used in the decision-making process • Commitment to a certain dollar number to racially diverse suppliers (challenged under Section 1981 and various state law); a points-based system awarded to diverse vendors • Tying in compensation with certain diversity hiring targets	• Protected class quotas • Job openings, scholarships, and internships limited only to those of a certain protected class • Employment decisions based on the individual's protected class

DEI is Legal and Makes Organizations Better

"Diversity helps companies attract top talent, sparks innovation, improves employee satisfaction, and enables companies to better serve their customers."

"The [rulings] do not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background."

"It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure that workers of all backgrounds are afforded equal opportunity in the workplace."

Statement of EEOC Chair Charlotte A. Burrows, June 29, 2023

Questions?


SMITH ANDERSON
The Supreme Court's Decision in *SFFA v. Harvard and UNC* and its Implications for DE&I in Employment and Beyond
Kerry A. Shad
Taylor M. Dewberry
November 14, 2023
EXPECT EXCELLENCE®

What Goes Up Does Not Come Down: Wage and Hour Updates

SMITH ANDERSON

What Goes Up Does Not Come Down

Wage and Hour Updates – Including Proposed New Salary Basis Minimums

Kevin M. Ceglowski

November 14, 2023

EXPECT EXCELLENCE®

"Don't panic now, there will be plenty of time for that later" – Gregg Easterbrook

- August 30, 2023: DOL proposed an increase to the FLSA's annual salary-level threshold from $35,568 to $55,068.
- $684 per week to $1,059 per week
- Highly compensated from $107,432 to $143,988 per year
  - 85th percentile of full-time salaried workers nationally
- Final rule not in effect, so amount could change
  - Comment period through November 7, 2023
- Don't panic: There will be lawsuits
- Built in mechanism to increase the amount every three years

A Little History

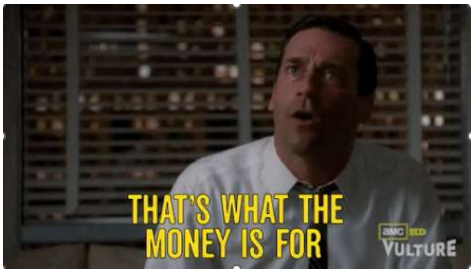
- 1938: $30 per week
- 1940: Raised to $50 per week for administrative and professional exemptions
- Increases in 1949, 1958, 1963, 1970, 1975
- 2004: $455 per week
- 2016: $913 per week
  - Never takes effect – enjoined by a federal judge
- September 2019, the DOL under the Trump administration raised the threshold to $35,568 ($684 per week) effective January 1, 2020

FLSA Exemption Reminders

- Executive
- Administrative
- Professional
  - Learned
  - Creative
- Computer Employee
- Outside Sales
- Highly Compensated

That's What the Money Is For! - Don Draper

- It takes more than salary
- The duties test are equally important, and more frequently failed
- Let's review – different for each of executive, administrative, and professional exemptions



Mistakenly Independent

- Proposed new independent contractor classification rule published October 14, 2022
- Biden administration pursuing a "totality of the circumstances" test
- DOL received 54,000 comments on the rule
- Current proposed effective date: ???
  - White House OMB received Final Rule September 28, 2023

What's the Difference Anyway?

- Trump era rule:
  - Five Factors
  - Particular focus on:
    - Nature and degree of control of the work
    - Worker's opportunity for profit or loss
- Proposed new rule:
  - Return to prior test
  - Six Factors, weighted equally
  - Overall, a "totality-of-the-circumstances analysis" that considers "economic reality"

Grab Bag – state and local variety pack

- Chicago eliminates the tip credit
- State minimum wage laws
  - Connecticut went to $15.00 per hour June 1, 2023
  - New York
    - $14.20 statewide
    - $15.00 in NYC, Long Island, Westchester Count
  - Puerto Rico
    - $9.50 per hour July 1, 2023
  - Maryland $15.00 statewide January 1, 2024
  - Nevada minimum wage is adjusted annually based on a set formula.
    - July 1, 2023, $11.25 for employees not offered qualifying health insurance and to $10.25 per hour for employees offered qualifying health insurance.
    - July 1, 2024, there will be a uniform minimum wage of $12.00 per hour for all employees.

California

- New state level minimum wage for certain jobs
- $25 per hour for many healthcare workers
- $20 per hour for fast food workers (April 1, 2024)

SMITH ANDERSON

What Goes Up Does Not Come Down

Wage and Hour Updates – Including Proposed New Salary Basis Minimums

Kevin M. Ceglowski

November 14, 2023

EXPECT EXCELLENCE®

Downsizing with Dignity: Reduction in Force Best Practices

SMITH ANDERSON

Downsizing with Dignity

Reduction in Force Best Practices

Kevin M. Ceglowski
November 14, 2023

EXPECT EXCELLENCE®

High level considerations for any termination

- Legal Requirements
- Compliance with company policies
- Consider past practices
- Decision making
  - Proof
  - Consistency
  - Pretext-free

"But we are an at-will state"

- Why is this an almost useless defense?
- Is there an employment contract?
- Any verbal promises of a term or conditions for termination?
- Does the handbook or policies limit the right to terminate?
- Is termination against public policy?
- Is there evidence of discrimination / retaliation?
- Any recent protected activity?
- Is there a collective bargaining agreement?

Protected Activity

- USERRA
- FMLA
  - Not protected from actions that would have affected the employee if not on FMLA leave, but employer has burden to prove that employee would not have been employed at reinstatement.
- Wage and hour, OSHA, accommodation requests, workers' comp claims, harassment or discrimination investigations

Common Reasons for RIF

- Cost reduction
- Lack of work
- Changing skills needs
- Physical relocation or site closings
- Outsourcing or offshoring

Selection Criteria

- Do not cut corners on this step
- Business case
  - Skills
  - Experience
  - Documented Performance
  - Seniority
  - Bumping
  - Voluntary program considerations
- Legal review

Group Layoff/Reductions In Force

- WARN Act
  - Detailed analysis required to determine whether obligations triggered
  - Covered employer must give at least 60 days' notice of plant closing or mass layoff to affected employees, state dislocated worker unit, and local government (some exceptions apply)

Group Layoff/Reductions In Force

- WARN Act
  - Covered employer – 100 or more employees or 100 or more employees collectively working at least 4,000 hrs./week
  - Affected employee – employee that reasonably may be expected to experience an employment loss as a result of a proposed plant closing or mass layoff

Group Layoff/Reductions In Force

- WARN Act:
  - Plant closing – permanent or temporary shutdown of single site of employment, or one or more facilities or operating units at single site, resulting in employment loss at the single site occurring within any 30-day period, for 50 or more employees (excluding part-time)
  - Mass layoff – RIF, not qualifying as a plant closing, resulting in employment loss at the single site within any 30-day period, for 50-499 employees and that number is at least 33% of active employees or for 500 or more employees

Group Layoff/Reductions In Force

- WARN Act common problems
  - Applying the part-time employee rules
  - Identifying single-site of employment
  - Counting employment losses (which employees, which reasons, over what period)
  - Changes in termination date
  - Calculating notice date
  - Content of notice

Group Layoff/Reductions In Force

- Mini-WARN Acts and other notification laws
  - Applicable in at least 20 states, DC and Puerto Rico (including CA, CT, GA, HI, IL, IA, KS, ME, MD, MA, MI, MN, NH, NJ, NY, OH, OR, PA, RI, SC, TN, VT, WI)
- Disparate impact analysis

Group Layoff/Reductions In Force

- Waivers of age discrimination claims with exit incentive or other employment termination programs offered to a group or class of employees
  - Must provide 45 days for consideration of agreement
  - Must provide disclosures as to the class, unit or group of persons covered by the program, eligibility factors and time limits, as well as job titles and ages of all individuals eligible or selected for the program, and ages of all individuals in the same job classification or organizational unit who are not eligible or selected

Release Considerations

- Age discrimination waivers:
  - Understandable
  - Waiver must refer to rights/claims under ADEA
  - No prospective waiver
  - Consideration must be in excess of anything to which employee already is due
  - Advise employee in writing to consult attorney
  - 21 days for consideration (45 if offered with exit incentive or other termination program to group/class)
  - Seven days for revocation (regardless of whether review period is 21 or 45 days)

Make the Money Right

- Determine when final pay is due under applicable state law
  - May differ from policy/practice
- Consider:
  - Bonuses
  - Commission payments
  - Accrued but unused vacation, sick days, other PTO

Give Notice When Notice is Due

- Does employment agreement/offer letter require a certain type or period of notice?
- COBRA
  - Offer group health plan continuation coverage
- State-required notice of reason for termination
  - Not required, or advisable, in NC
  - Some states require (for example, NY)

Several Ounces of Preparation

- Security considerations
  - Think in advance about potential problem people and situations
- Protect worksite, confidential information, IT systems, choose time, place and participants carefully
- Witness – at least two people in every meeting
- Prepare and rehearse (including responses to anticipated questions)
- Give the real reason
- Do not argue or debate
- Avoid reentry into work areas

The Truth and (Some of) The Truth

- References
  - Provide only dates of employment and position held
- Avoid post-termination statements inconsistent with real reasons for termination
  - References
  - Letters of recommendation
  - Unemployment paperwork/hearings

SMITH ANDERSON

Downsizing with Dignity

Reduction in Force Best Practices

Kevin M. Ceglowski
November 14, 2023

EXPECT EXCELLENCE®

Navigating Rough Seas: Non-Compete Law in 2023

SMITH ANDERSON

Navigating Rough Seas: Non-Compete Law in 2023

Isaac A. Linnartz
Shameka C. Rolla
November 14, 2023

EXPECT EXCELLENCE®

National Developments

FTC Enforcement

For Release

FTC Cracks Down on Companies That Impose Harmful Noncompete Restrictions on Thousands of Workers

Agency action eliminates noncompetes covering thousands of workers, promoting greater economic opportunity and competition

January 4, 2023

FTC Enforcement

- Non-competes involving
  - large numbers of workers who are paid low wages,
  - hold low-skill positions or
  - lack access to significant confidential information/customer relationships
- Also interested in highly specialized workers in highly concentrated industries

FTC Non-Compete Rulemaking

For Release

FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition

Agency estimates new rule could increase workers' earnings by nearly $300 billion per year

January 5, 2023

FTC Non-Compete Rulemaking

Proposed rule would:

- ban all worker non-competes as "unfair methods of competition"
- extend to de facto non-competes
- be prospective and retrospective (requiring rescission of existing non-competes)

*Limited exception for sale-of-business non-competes

FTC Non-Compete Rulemaking

- Timing of final rule
  - 26,813 comments submitted
  - Per Bloomberg Law article, no vote on final rule expected until April 2024 (vague/unsourced)
- As drafted, proposed rule would go into effect 180 days after publication of final rule

FTC Non-Compete Rulemaking

- Potential challenges
  - Court challenges
    - Statutory authority
    - Reasonableness
    - Will the rule be enjoined?
    - How much judicial review and on what schedule?
  - Political challenges
    - Congressional disapproval
    - Change in administration (before/after final rule)

FTC Enforcement Continues

For Release

FTC Takes Action Against Another Company That Imposed Harmful Noncompete Restrictions on Its Workers

Agency action puts an end to noncompete restrictions that Anchor Glass Container Corp. imposed on its employees

March 15, 2023

FTC Enforcement Continues

- Non-compete involving
  - large number of workers (300) across a variety of positions, including salaried employees
  - one-year restriction on
    - working with another employer with same/substantially similar services and
    - selling products to customers or prospective customers with whom employee interacted
- Recent comments from the FTC Chair suggest that such enforcement actions will continue

NLRB General Counsel's Memo

- On May 30, 2023, NLRB GC opines that non-competes generally constitute an "unfair labor practice"
- Argument is that non-competes prevent employees from leaving employment or threatening to leave, either individually or collectively, infringing on their NLRA rights
- Applies to employees with unionized and non-unionized workforces
- Does not apply to employees in supervisory roles (assign/reward/discipline)

NLRB General Counsel's Memo

- Low-wage and medium-wage employees
- May extend to other agreements that limit employee mobility/concerted action
- Suggests that the NLRB intends to pursue enforcement actions and is looking to its regional offices to identify potential violations

NLRB Enforcement

- NLRB complaint filed on September 1, 2023 against an Ohio medical clinic and spa operator offering non-surgical aesthetic services
- Alleges that its use of non-competes, non-solicits, training repayment agreements, and other restrictive provisions violated the NLRA
- Alleges a variety of conduct by the employer—some very standard non-compete/non-solicit/confidentiality language and some fairly oppressive provisions and draconian conduct
- Seeks rescission of the challenged provisions and compensatory damages

FTC & DOL Partnership

For Release

FTC, Department of Labor Partner to Protect Workers from Anticompetitive, Unfair, and Deceptive Practices

New agreement establishes formal collaboration between agencies on issues affecting workers

September 21, 2023

Continuing State Fragmentation

State Legislation

- CA, ND, and OK have banned non-competes since the 1800s
- Minnesota non-compete ban, effective July 1, 2023
  - Prospective only
  - Still permits non-solicits, confidentiality agreements/NDAs, and non-competes in sale-of-business context

State Legislation - New York

- Potential New York non-compete ban passed by New York legislature on June 20, 2023
  - If signed, it would go into effect 30 days later
  - Prospective only
  - Would permit confidentiality agreements and likely permit non-solicits

State Legislation - California

- Two new California laws go into effect on January 1, 2024
- These laws will
  - void contracts with post-employment restrictive covenants "regardless of where and when the contract was signed,"
  - make it a civil violation for an employer to enter or attempt to enforce such a contract,
  - expand an employee's ability to obtain attorney's fees for a successful challenge, and
  - require companies to notify employees subject to such covenants that their restrictions are void and unenforceable

State Legislation

- Several states have enacted restrictions on non-competes
- 11 states and DC have varying wage thresholds for non-competes
- A number of states have complicated statutory schemes governing non-competes

Practical Advice

What's an employer to do?

- Live in the world that exists
  - Changing landscape
  - State fragmentation
  - Regulatory pressure
- Prepare for the world that may come
  - Augment/backstop non-competes

Don't Panic

- Most state non-compete law is unchanged
- What about the FTC/NLRB enforcement risk?
  - Most cautious: Rescind and notify
  - More reasonable: Proceed with caution

Do Assess

- How are you using non-competes?
- Warning flags: non-competes for
  - Low-wage employees
  - Low-skill positions
  - Employees with little access to customer relationships or confidential information
  - Large groups of employees

Do Assess

- Where are you using non-competes?
  - Consider business locations (including remote employees)
  - Be aware of states with non-compete bans, wage thresholds, or complex statutory requirements
  - Know that choice of law may not help

Do Assess

- What non-compete forms are you using?
  - Beware zombie non-compete forms
  - A bad non-compete often means no non-compete
  - Potential penalties or fee-shifting in certain states

Non-Competes (Tailored Version)

- What about entering into new non-competes?
- FTC and NLRB have relatively limited enforcement resources
- Non-competes should be conservative, limited, and tailored
- Now is not the time to go big and bold on who/how broad

A Non-Compete by Any Other Name

- What alternatives could augment or backstop non-competes?
- Legitimate purposes for non-competes:
  - Protecting customer relationships
  - Protecting confidential information and trade secrets

Protecting Customer Relationships

- Assess who has the customer relationships
- Customer non-solicits are still permitted in most states
  - FTC non-compete ban would not ban non-solicits
  - NLRB has not questioned the legality of reasonable non-solicits

Protecting Customer Relationships

- Again, Tailored Version
  - Customers the employee had business contact with during the last 1—2 years of employment
  - Not all of the employer's customers at any time
  - Not customers of distinct affiliated businesses

Protecting Confidential Information

- Confidentiality agreements
  - Wide agreement that employers should be able to protect their confidential information
  - Easier to enforce than non-competes and non-solicits
  - Key element of trade secret protection

Protecting Confidential Information

- Channel Oprah
- Confidentiality agreements with
  - Employees
  - Vendors (where appropriate)
  - Customers (where appropriate)
- A confidentiality policy in an employment handbook is not a substitute

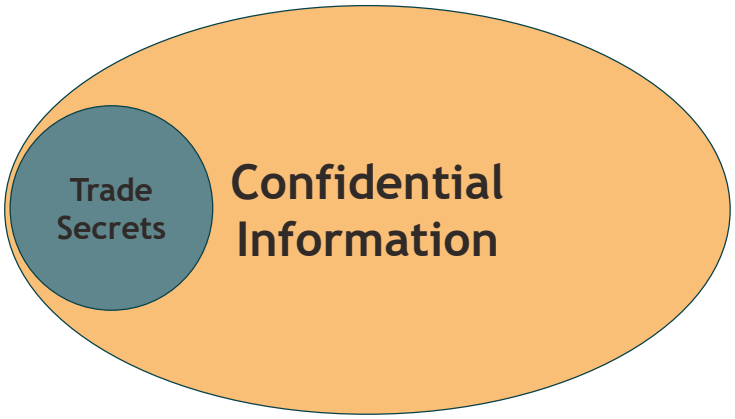
Protecting Confidential Information

- Take confidentiality agreements seriously
  - Onboarding/orientation
  - Training for current employees
  - Offboarding
  - Continuing obligations letter

Protecting Confidential Information

- A confidentiality agreement should include a carveout allowing an employee to engage in protected activity
- To preserve the opportunity to recover exemplary damages and attorneys' fees under the Defend Trade Secrets Act, a company must provide specific notice to the employee or contractor about their right to disclose trade secret information (see sample language in Appendix)

Protecting Trade Secrets



Protecting Trade Secrets

- One weird trick to make your trade secret not a trade secret
  - Fail to take "reasonable" efforts to maintain its secrecy
- What are "reasonable" efforts?

Reasonable Efforts

- Reasonable Efforts
  - Confidentiality agreements
    - Essential for trade secret protection
    - Don't forget vendors and customers
  - Need-to-know principle
    - Assess who needs access to trade secrets

Reasonable Efforts

- Physical Controls
  - External security
  - Access controls
    - Who can enter
    - Who can go where
  - Locks

Reasonable Efforts

- Electronic Controls
  - Access controls
  - Firewall
  - Anti-virus/anti-phishing
  - IT policies
  - IT monitoring

Reasonable Efforts

- Other Policies
  - Confidentiality
  - Use of company property/technology
  - BYOD / personal devices
  - Code of conduct
- Onboarding, training, and offboarding

Summary

- The non-compete seas are rough
- Don’t panic, but do assess
- Don’t overreach
- Augment and backstop non-competes with
  - non-solicits
  - confidentiality agreements
  - trade secret protections

Appendix: DTSA Carveout for Protected Activity

Sample DTSA notice: Notwithstanding any other provision of this Agreement, [Employee/Contractor] will not be held criminally or civilly liable under any federal or state trade secret law for the disclosure of a trade secret that is made (i) in confidence to a federal, state, or local government official, either directly or indirectly, or to an attorney and (ii) solely for the purpose of reporting or investigating a suspected violation of law, or that is made in a complaint or other document that is filed under seal in a lawsuit or other proceeding; and in the event that [Employee/Contractor] files a lawsuit for retaliation by the Company for reporting a suspected violation of law, [Employee/Contractor] may disclose the Company's trade secrets to [Employee's/Contractor's] attorney and use the trade secret information in the court proceeding if [Employee/Contractor] files each document containing the trade secret under seal and does not disclose the trade secret, except pursuant to court order.

SMITH ANDERSON

Navigating Rough Seas: Non-Compete Law in 2023

Isaac A. Linnartz
Shameka C. Rolla
November 14, 2023

EXPECT EXCELLENCE®

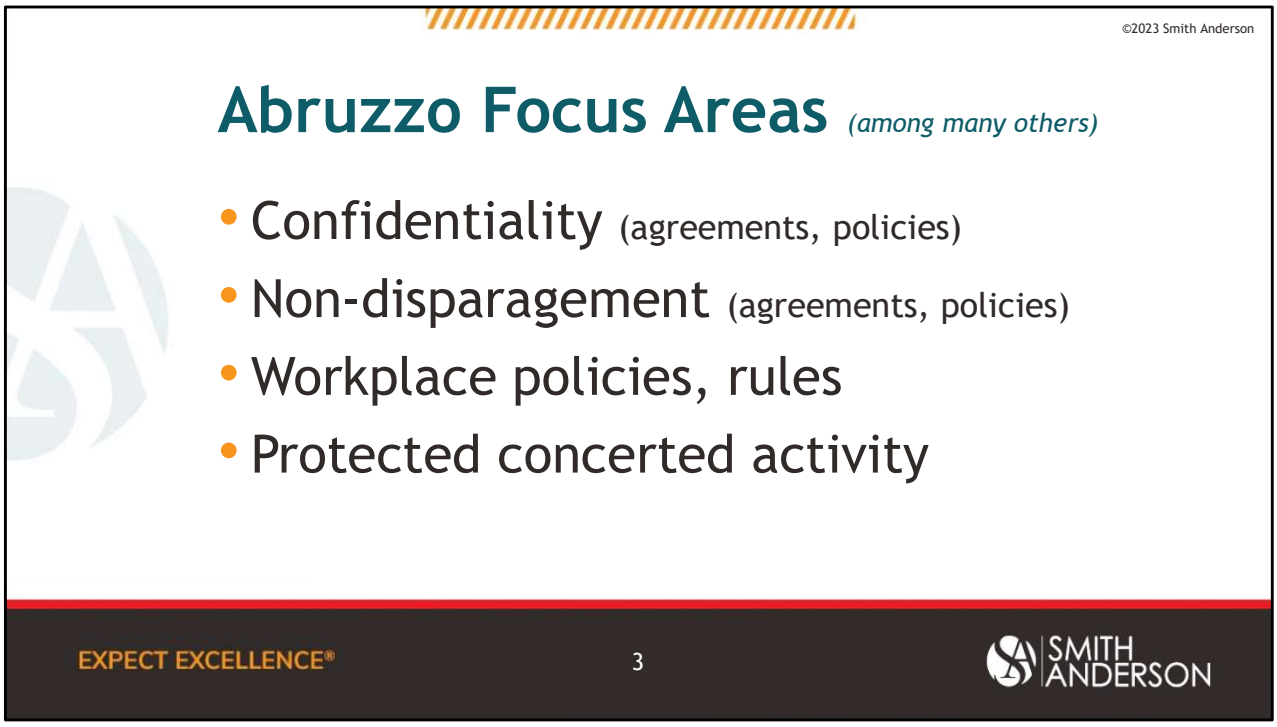
Beware: Your Common(sense) Workplace Policies and Practices May Now Be Unfair Labor Practices


SMITH ANDERSON
Beware: Your Common(sense) Policies and Practices May Now Be Unfair Labor Practices
Kimberly J. Korando
November 14, 2023
EXPECT EXCELLENCE®

NLRB leadership changes

Peter Robb
General Counsel
National Labor Relations Board
FIRED January 20, 2021

Jennifer Abruzzo
General Counsel
National Labor Relations Board
TAKES OFFICE July 22, 2021



Other areas of focus discussed in **MEMORANDUM GC 21-04** (August 12, 2021) and **MEMORANDUM GC 23-04** (March 20, 2023): Mandatory Submissions to Advice

MEMORANDUM GC 23-02 (October 31, 2022): Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights

MEMORANDUM GC 23-08 (May 30, 2023): Non-Compete Agreements that Violate the National Labor Relations Act

Independent contractor status: The Atlanta Opera, Inc., 372 NLRB No. 95 (June 13, 2023)

Standard for Determining Joint Employer Status, 88 Fed. Reg. 73946 (Oct. 27, 2023)

It's not just about unions…

National Labor Relations Act (NLRA) applies to…

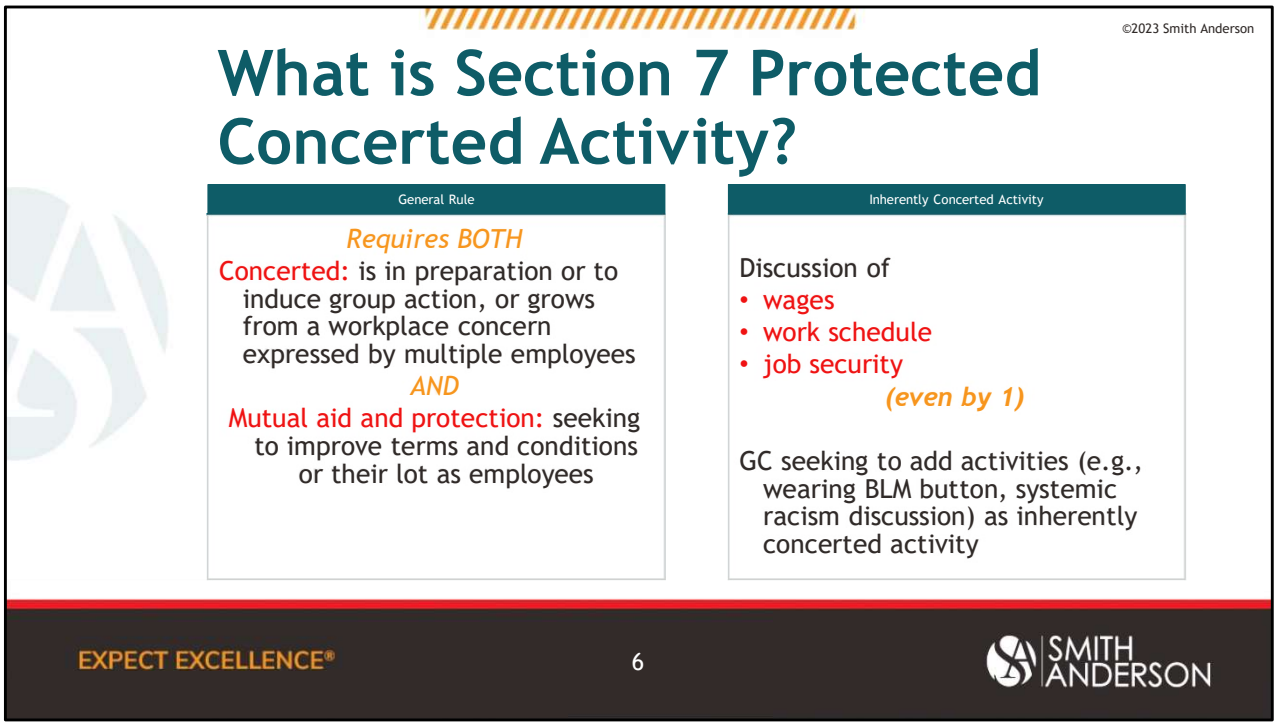
. . . ***non-supervisory*** employees in ***union-free*** (and union) workplaces

Does NOT apply to supervisors and managers

It's all about Section 7 rights

. . . gives right to engage in *concerted activities* for *mutual aid or protection* (aka *protected concerted activity*) *(Section 7)*

. . . outlaws rules or practices that interfere with Section 7 rights *(Section 8)*



Advice Memorandum (October 19, 2021), Kaiser Permanente Bernard J. Tyson School of Medicine

- GC contends: (1) the Charging Party's (physician and medical school professor) classroom conversation was inherently concerted because it discussed issues of race faced by Black faculty and students as well as systemic racism in medicine, and that conversation was for mutual aid or protection; (2) the Charging Party's tweets were a protected concerted activity on their own as well as being a logical outgrowth of the discussion.

Advice Memorandum (September 9, 2021), The Home Depot

- GC contends that: (1) employee discussions in the workplace regarding racism should be deemed inherently concerted because systemic racism, including an employer's racial discrimination or racial harassment, and/or tolerance of such discrimination or harassment, necessarily implicates significant terms and condition of employment and is of vital importance to employees; and (2) the Board should expand the circumstances under which it applies the inherently concerted doctrine beyond a conversation between two people to include the wearing of a slogan or button.

What can interfere with Section 7 rights?

Overly broad rules, policies and practices that *reasonably chill* exercise of Section 7 rights

=> UNLAWFUL

Rule/policy that is *ambiguous* as to Section 7 application and contains *no limiting language or context* that clarifies otherwise

=> UNLAWFUL

How does NLRB evaluate "reasonably chill"?

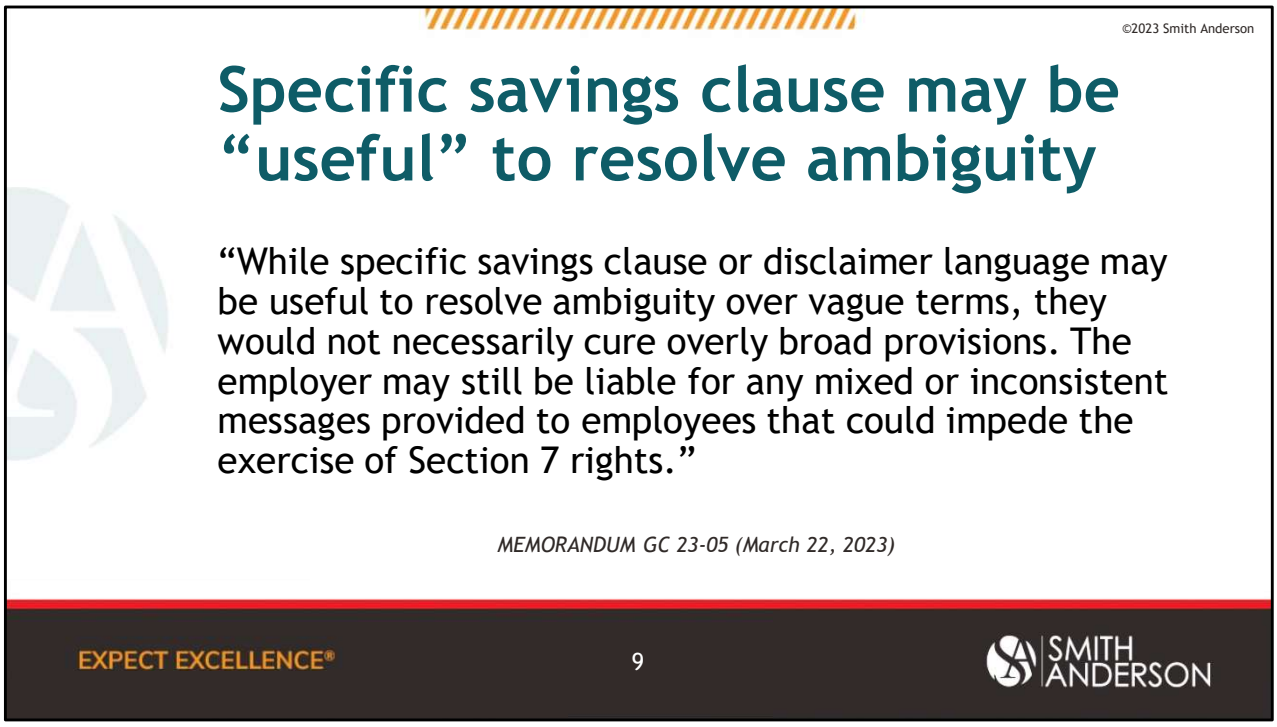
- Effect of rule on a reasonable employee who is in position of economic vulnerability taking in totality of circumstances

Generic savings clause will NOT cure overly broad

…administered in compliance with all applicable laws including Section 7 of NLRA

…not be applied or construed in a manner that improperly interferes with employee rights under NLRA

…not be interpreted or applied so as to interfere with employee rights to engage in concerted activities for mutual aid or protection



MEMORANDUM GC 23-05 (March 22, 2023):

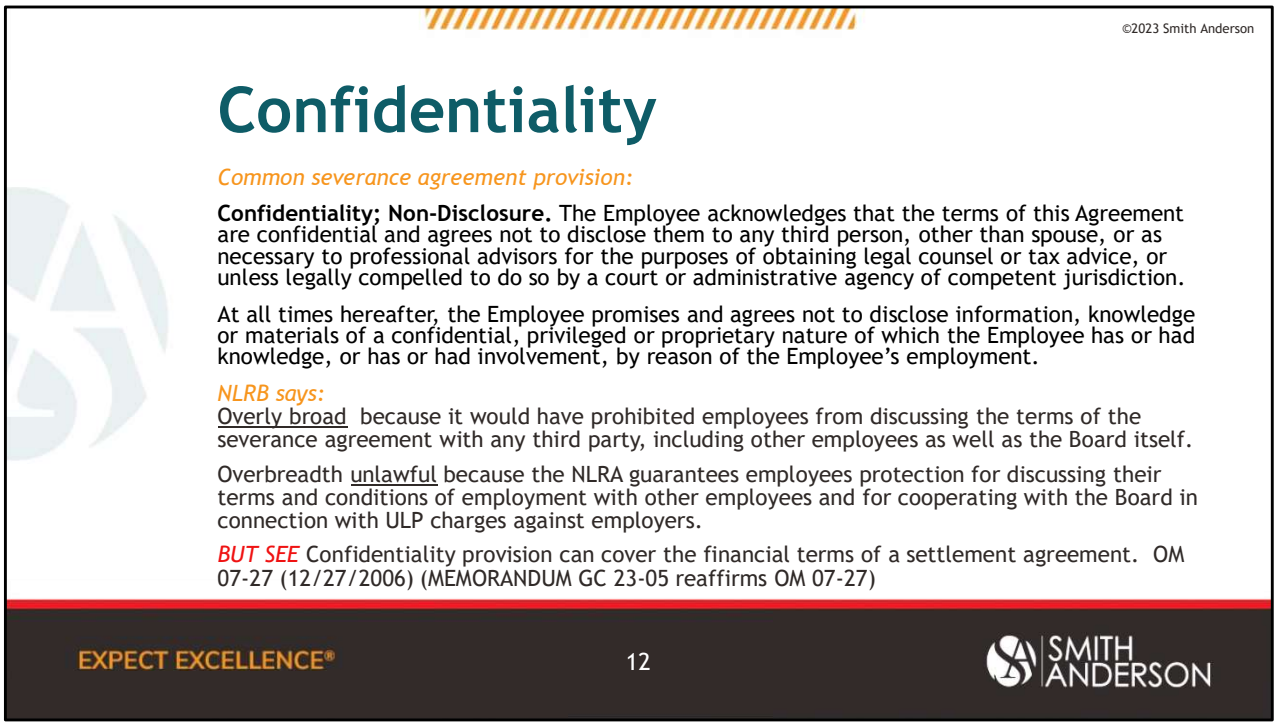
As noted in my *Stericycle* brief to the Board regarding employer rules, I [GC] asked it to formulate a model prophylactic statement of rights, which affirmatively and specifically sets out employee statutory rights and explains that no rule should be interpreted as restricting those rights, that employers may—at their option—include in handbooks in a predominant way to mitigate the potential coercive impact of workplace rules on the exercise of Section 7 rights and simplify compliance, which could also easily apply to severance agreements. I noted that the description of statutory rights should focus on Section 7 activities that are of primary importance toward the fulfillment of the Act's purposes, commonly engaged in by employees (particularly in non-union workplaces, since they do not have union representatives available to bargain over rules and guide employees as to their rights), and likely to be chilled by overbroad rules, and provided suggested model language for inclusion to make it clear to employees that they had rights to engage in: (1) organizing a union to negotiate with their employer concerning their wages, hours, and other terms and conditions of employment; (2) forming, joining, or assisting a union, such as by sharing employee contact information; (3) talking about or soliciting for a union during non-work time, such as before or after work or during break times, or distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms; (4) discussing wages and other working conditions with co-workers or a union; (5) taking action with one or more co-workers to improve working conditions by, among other means, raising work-related complaints directly with the employer or with a government agency, or seeking help from a union; (6) striking and picketing, depending on its purpose and means; (7) taking photographs or other recordings in the workplace, together with co-workers, to document or improve working conditions, except where an overriding employer interest is present; (8) wearing union hats, buttons, t-shirts, and pins in the workplace, except under special circumstances; and (9) choosing not to engage in any of these activities.

Is an overly broad policy okay, . . .

". . .if we **NEVER** enforce it against employees who have engaged in protected activity?"

Answer: **No.** Mere existence of overly broad policy without ANY evidence of unlawful application violates the law.

CONFIDENTIALITY AGREEMENTS AND POLICIES



McLaren Macomb, 372 NLRB No. 58 (2023):

Employees were offered severance agreements that included confidentiality, non-disclosure, and non-disparagement provisions. These provisions (1) required the employees to keep the terms of the severance agreement confidential; (2) prohibited the employees from disclosing confidential, privileged, or proprietary information they acquired in the course of their employment; and (3) restricted the employees from making any potentially disparaging or harmful public statements about the employer or its representatives. Further, the severance agreements included a provision authorizing the employer to seek and obtain injunctive relief in the event any of the employees violated the confidentiality, non-disclosure, or non-disparagement provisions.

6. **Confidentiality Agreement.** The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction.
7. **Non-Disclosure.** At all times hereafter, the Employee promises and agrees not to disclose information, knowledge or materials of a confidential, privileged, or proprietary nature of which the Employee has or had knowledge of, or involvement with, by reason of the Employee's employment. At all times hereafter, the Employee agrees not to make statements to Employer's employees or to the general public which could disparage or harm

the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives.

ALJ says not a violation. Board disagreed and said provisions unlawful because they had a reasonable tendency to interfere with, restrain, or coerce employees' exercise of the rights afforded them by the NLRA.

Confidentiality provision was overly broad because:

- it would have prohibited employees from discussing the terms of the severance agreement with any third party, including other employees as well as the Board itself. This overbreadth was unlawful, the Board reasoned, because the NLRA guarantees employees protection for discussing their terms and conditions of employment with other employees and for cooperating with the Board in connection with ULP charges against employers.

Non-disparagement provision was unlawful because:

- "[p]ublic statements by employees about the workplace are central to the exercise of employee rights under the [NLRA]." The Board further emphasized that the prohibition lacked any temporal limitation and the Act's protections apply to employee activities regardless of whether they occur within the workplace.

The Board clarified that its decision did not preclude employers from lawfully offering severance agreements to employees, even where certain provisions in such agreements arguably interfered with Section 7 rights. Instead, the standard moving forward in analyzing severance agreements' lawfulness would be whether the waiver of Section 7 rights in an agreement's provisions was "narrowly tailored," though the Board declined to offer a definition or examples of provisions that would satisfy this standard.

Decision has retroactive effect and maintaining and/or enforcing a previously-entered severance agreement with unlawful provisions constitutes a continuing violation of the NLRA by the employer permitting the NLRB GC to timely assert ULP charges alleging violations based on severance agreements offered outside the six-month statute of limitations, potentially subjecting employers to liability for violations which they otherwise might expect to be time-barred.

Confidentiality: Another Approach

Confidentiality

A. Subject to subparagraph []C below., Employee shall keep the financial terms and provisions of this Agreement confidential, and … will not disclose, such terms to third parties, except as follows: (i) s/he may reveal such terms to members of his/her immediate family or to an attorney whom s/he may consult for legal advice provided that such persons agree to maintain the confidentiality of the Agreement, or representatives of any governmental agency referenced in subparagraph []C below, and (ii) s/he may disclose such terms to the extent such disclosure is required by law.

****

C. Nothing in this section is intended, nor shall be construed, to (i) prohibit Employee from any communications to, or participation in any investigation or proceeding conducted by, U.S. Equal Employment Opportunity Commission, National Labor Relations Board or other governmental agency with jurisdiction concerning the terms, conditions and privileges of employment or jurisdiction over the Company's business, (ii) interfere with, restrain or prevent Employee communications regarding wages, hours or other terms and conditions of employment, or (iii) prevent Employee from otherwise engaging in any legally protected activity, including but not limited to exercising any rights under Section 7 of the National Labor Relations Act (if applicable), all of which Employee has the legal right to do.

Confidentiality Prohibitions Apply To Policies Too

Common policy provision:

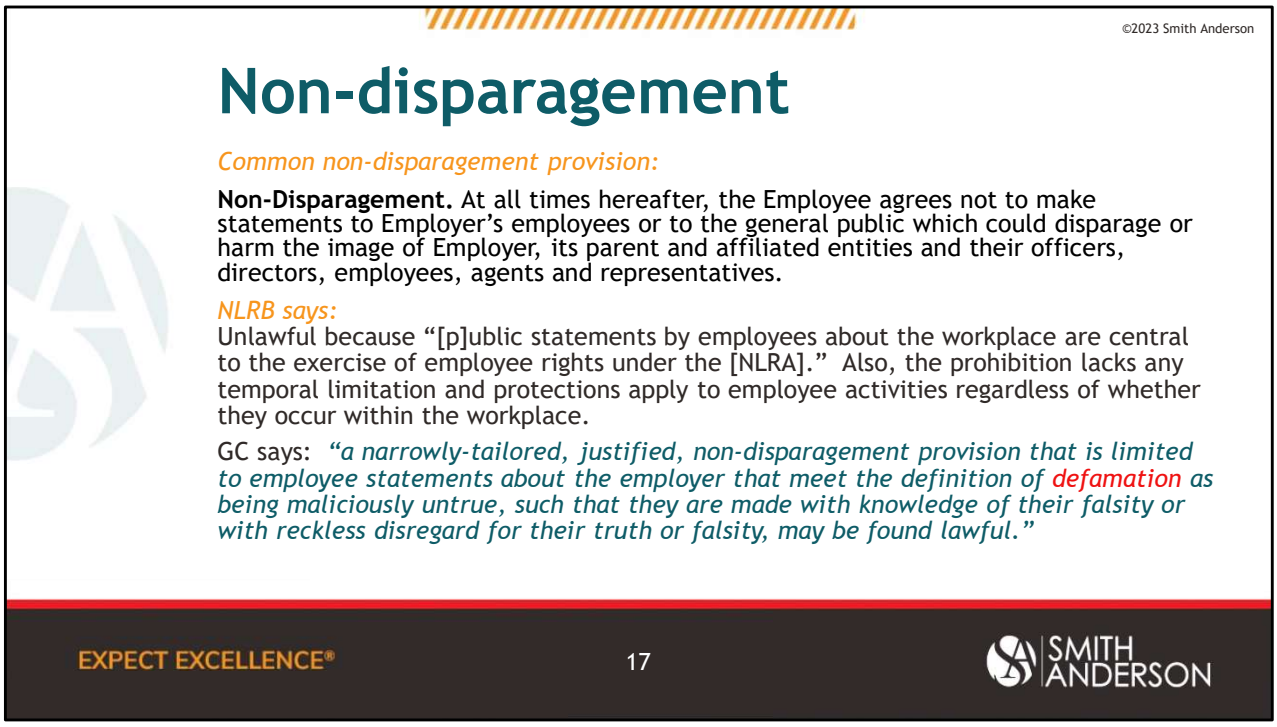
Confidential information includes, but is not limited to, non-public technical, business and financial information and plans, as well as private information about customers, suppliers and employees. Confidential information must not be disclosed to unauthorized persons, including competitors, reporters or to other employees whose duties do not require use of such information.

Red Flags in confidential information definitions:

- *Employee information, personnel information*
- *Pay, compensation*

Unlawful	Because
Don't disclose confidential customer, team member or company information. . . . You should never share confidential information with another team member unless they have a need to know the information to do their job. Marking handbook or policies confidential	…reasonably interpreted as prohibiting employees from discussing/disclosing information regarding their own or others' conditions of employment
Non-public information includes: • Any topic related to the financial performance of the company; • Information that has not already been disclosed by authorized persons in a public forum; and • Personal information about another employee, such as his or her medical condition, performance, compensation or status in the company.	…this explanation specifically encompasses topics related to Section 7 activities, employees would reasonably construe the policy as precluding them from discussing terms and conditions of employment among themselves or with non-employees.
Lawful	**Because**
Employees must maintain the confidentiality of the company's trade secrets and private and confidential information (i.e., information regarding the development of systems, processes, products, know-how, technology, internal reports, procedures or other internal business-related communications) Confidential information does not include information lawfully acquired by non-management employees about wages, hours or other terms and conditions of employment, if used by them for purposes protected by the National Labor Relations Act, engaging in concerted activity for their mutual aid or protection.	… it provides sufficient examples of prohibited disclosures for employees to understand that it does not reach protected communications about working conditions. … expressly excludes information about terms and conditions of employment

NON-DISPARAGEMENT



McLaren Macomb, 372 NLRB No. 58 (2023):

Employees were offered severance agreements that included confidentiality, non-disclosure, and non-disparagement provisions. These provisions (1) required the employees to keep the terms of the severance agreement confidential; (2) prohibited the employees from disclosing confidential, privileged, or proprietary information they acquired in the course of their employment; and (3) restricted the employees from making any potentially disparaging or harmful public statements about the employer or its representatives. Further, the severance agreements included a provision authorizing the employer to seek and obtain injunctive relief in the event any of the employees violated the confidentiality, non-disclosure, or non-disparagement provisions.

> **6.** **Non-Disclosure.** At all times hereafter, the Employee promises and agrees not to disclose information, knowledge or materials of a confidential, privileged, or proprietary nature of which the Employee has or had knowledge of, or involvement with, by reason of the Employee's employment. At all times hereafter, the Employee agrees not to make statements to Employer's employees or to the general public which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives.

ALJ says not a violation. Board disagreed and said provisions unlawful because they had a reasonable

tendency to interfere with, restrain, or coerce employees' exercise of the rights afforded them by the NLRA.

MEMORANDUM GC 23-05 (March 22, 2023):

Are there ever non-disparagement provisions in a severance agreement that could be found lawful?

It is critical to remember that public statements by employees about the workplace are central to the exercise of employees' rights under the Act. In *McLaren Macomb*, the Board referenced *NLRB v. Electrical Workers Local 1229 (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464 (1953) and *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007), enfd. sub. nom. *Nevada Service Employees, Local 1107 v. NLRB*, 358 Fed. Appx. 783 (9th Cir. 2009), when finding an overly broad non-disparagement ban that encompassed all disputes, terms and conditions, and issues, without a temporal limitation and with application to parents and affiliates and their officers, representatives, employees, directors and agents. ***Thus, a narrowly-tailored, justified, non-disparagement provision that is limited to employee statements about the employer that meet the definition of defamation as being maliciously untrue, such that they are made with knowledge of their falsity or with reckless disregard for their truth or falsity, may be found lawful.***

MEMORANDUM OM 07-27 (December 27, 2023):

(3) … Clauses that Prohibit an Employee from Engaging in Non-defamatory Talk about the Employer

****

Similar to an overly broad confidentiality clause, non-Board adjustments that limit a discriminatee's ability to engage in discussions with other employees that include non-defamatory statements about the employer severely limits an employee's right to engage in concerted protected speech. Such a restriction on the Section 7 rights of an employee is repugnant to the purposes and policies of the Act. Therefore, Regions should not approve a withdrawal request where the non-Board adjustment prohibits the discriminatee from engaging in non-defamatory speech about the employer.

Words May Matter-Defamation v. Disparagement

GC:

- Defamation: as being maliciously untrue, such that they are made with knowledge of their falsity or with reckless disregard for their truth or falsity

Merriam-Webster:

- Defamation: the action of damaging the good reputation of someone; slander (false spoken statement) or libel (false written statement)
- Disparage: to belittle the importance or value of (someone or something): to speak slightingly about (someone or something)

Non-disparagement: Another Approach

Non-Defamation

B. Subject to subparagraph []C below, Employee represents and warrants that since receiving this Agreement, s/he (i) has not made, and going forward will not make, defamatory remarks about the Company or its products, services, business practices, directors, officers, managers or employees to anyone; nor (ii) has not taken, and going forward will not take, any action that may impair the relations between the Company and its vendors, customers, employees or agents or that may be detrimental to or interfere with the Company or its business.

****

C. Nothing in this section is intended, nor shall be construed, to (i) prohibit Employee from any communications to, or participation in any investigation or proceeding conducted by, U.S. Equal Employment Opportunity Commission, National Labor Relations Board or other governmental agency with jurisdiction concerning the terms, conditions and privileges of employment or jurisdiction over the Company's business, (ii) interfere with, restrain or prevent Employee communications regarding wages, hours or other terms and conditions of employment, or (iii) prevent Employee from otherwise engaging in any legally protected activity, including but not limited to exercising any rights under Section 7 of the National Labor Relations Act (if applicable), all of which Employee has the legal right to do.

MEMORANDUM GC 23-05 (March 22, 2023):

Are there other provisions typically contained in severance-related agreements that you view as problematic?

Confidentiality, non-disclosure and non-disparagement provisions are certainly prevalent terms. However, I believe that some other provisions that are included in some severance agreements might interfere with employees' exercise of Section 7 rights, such as: non-compete clauses; no solicitation clauses; no poaching clauses; broad liability releases and covenants not to sue that may go beyond the employer and/or may go beyond employment claims and matters as of the effective date of the agreement; cooperation requirements involving any current or future investigation or proceeding involving the employer as that affects an employee's right to refrain under Section 7, such as if the employee was asked to testify against co-workers that the employee assisted with filing a ULP charge.

STANDARDS OF CONDUCT (WORK RULES) AND PRACTICES

Stericycle – A New Standard for Legality

Issue

Is a rule that does not ***expressly*** restrict employees' protected concerted activity under Section 7 nonetheless facially unlawful under Section 8?

REMEMBER

It's all about Section 7 rights

. . . gives right to engage in *concerted activities* for *mutual aid or protection* (aka *protected concerted activity*) *(Section 7)*

. . . outlaws rules or practices that interfere with Section 7 rights *(Section 8)*

Stericycle Test

- Does the rule have a reasonable tendency to chill employees from exercising their Section 7 rights when viewed from the perspective of an employee who is economically dependent on the employer and who contemplates engaging in protected concerted activity?
- "Where the language is ambiguous and ***may be*** misinterpreted by the employees in such a way as to cause them to refrain from exercising their statutory rights, then the rule is invalid ***even if interpreted lawfully by the employer in practice***."
- Employer can rebut the presumption that a rule is unlawful by proving that it advances legitimate and substantial business interests that cannot be achieved by a more narrowly tailored rule.

Message from the NLRB

"Our new standard gives employers the necessary leeway to maintain rules of their own choosing to advance legitimate and substantial business interests.

They simply need to narrowly tailor those rules to significantly minimize, if not altogether eliminate, their coercive potential.

If employers do so, their rules will be lawful to maintain."

Stericycle, Inc., 372 NLRB No. 113 (Aug. 2, 2023)

The Lone Dissent

"…it is virtually impossible to craft work rules that are general enough to serve their intended lawful purpose without being susceptible to an interpretation that infringes on Section 7 rights.
…

Employers therefore should assume that simply by maintaining work rules, they are violating the National Labor Relations Act. We have returned to a bygone era, from 2011 to 2017, when the Board majority rarely saw a challenged rule it did not find unlawful."

Marvin E. Kaplan, Member

Stericycle in a Nutshell…

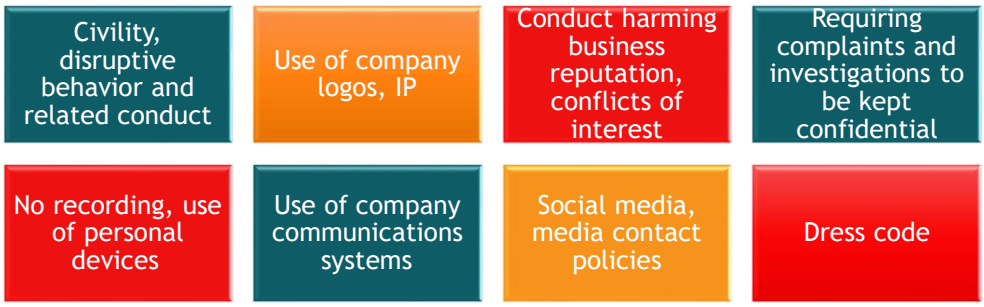
- NLRB allows employers to promulgate and maintain workplace rules only as long as they are narrowly tailored to "advance legitimate and substantial business interests," and minimize the risks of interfering with workers' rights to act collectively.
- A policy or rule is presumptively unlawful to maintain if an employee could reasonably interpret it to have a coercive meaning that in any way limits Section 7 rights to engage in concerted activity.

Virtually any workplace rule can be given an interpretation that deems it a restriction on Section 7 rights

Take-aways

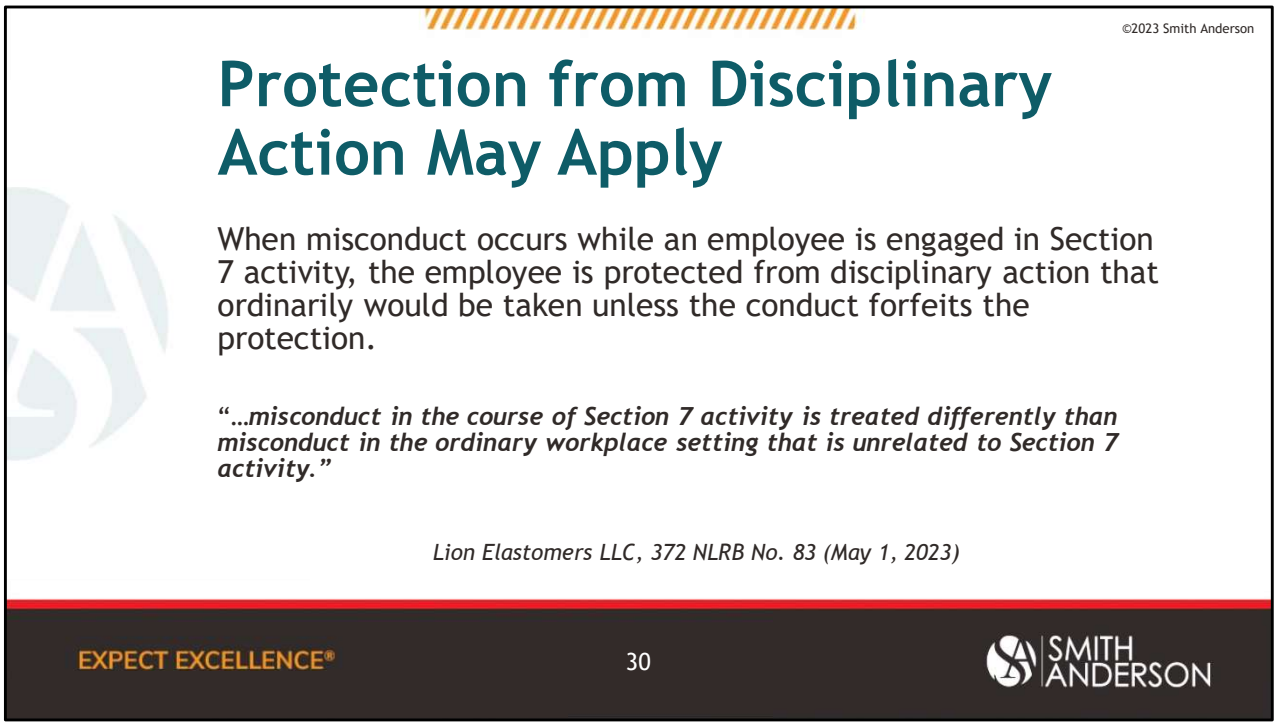
- No rule is automatically lawful based on its subject matter
- Particularized analysis required of
  - specific rule
  - its language
  - employer interest actually invoked to justify it
- Adoption and maintenance of rule is unlawful, even if never enforced

Policies Warranting Close Review



28

Disciplinary Action for Misconduct During Section 7 Activity



Rationale:

"The protections Section 7 affords would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses. Thus, when an employee is discharged for conduct that is part of the res gestae of protected concerted activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such a character as to render the employee unfit for further service." *Lion Elastomers LLC, 372 NLRB* at p.2 (quoting *Consumer Powers Co.,* 282 NLRB 130 (1986).

How do you decide whether protection has been forfeited?

Context matters. 3 different settings with different rules:

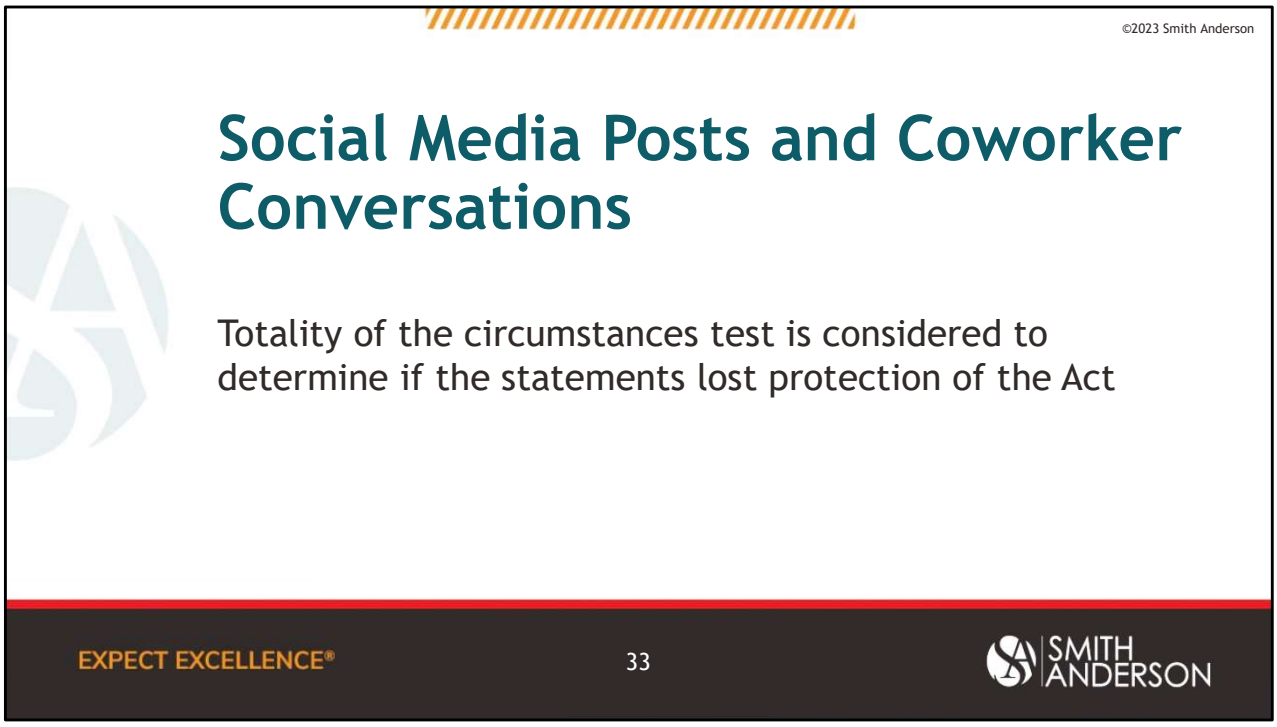
- Conduct Toward Management
- Social Media Posts and Coworker Conversations
- Picket Line Misconduct

Conduct Toward Management

4-factor Atlantic Steel test to determine whether an employee's outburst during a conversation with management retains protection:

- the place of the discussion
- the subject matter of the discussion
- the nature of the employee's outburst
- whether the outburst was, in any way, provoked by an employer's unfair labor practice

Lion Elastomers LLC, 372 NLRB No. 83 (May 1, 2023) citing Atlantic Steel Co., 245 NLRB No. 107, p. 816 (Sept. 28, 1979)



Desert Springs Hospital Medical Center, 363 NLRB No. 185, slip op. at 1 fn. 3 (2016)

Pier Sixty, LLC, 362 NLRB 505, 506 (2015), enfd. 855 F.3d 115 (2d Cir. 2017) (the Board considered factors such as: employer antiunion hostility, provocation, impulsivity, location, subject matter, nature of the post in question, whether the employer maintained specific rules prohibiting the language at issue or otherwise previously deemed it offensive, and whether the discipline issued was typical as compared to similar offenses)

Picket Line Misconduct

Clear Pine Mouldings, Inc. standard applies

- Employee loses protection where "the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act."

Tips and Final Thoughts- Documents

- Review handbooks, policy statements, codes of conduct, agreements and other documents for provisions that could implicate Section 7 rights
- Decide whether/what remedial action is warranted. Possible options:
  - A. Remove provisions
  - B. Add clarifying/limiting verbiage
  - C. Add (moderately) robust safe harbor provision:
    - -Conspicuous upfront and referenced in individual provisions
    - -Embedded in individual provisions
  - D. B and C
  - E. Maintain status quo
- Consider adopting "dual tier" provisions with supervisors/managers being governed by the traditional policy provisions

Tips and Final Thoughts-Actions

- Add Section 7 Concerted Activity analysis to discipline/termination risk analysis:
  - Was employee acting to benefit self as well as other employee(s)?
  - Had employee solicited other employee views/support?
  - Would action sought benefit employee as well as others?
  - Apply misconduct during Section 7 activity analysis (as applicable)
- Educate HR and supervisors on what constitutes Protected Concerted Activity


SMITH ANDERSON
Beware: Your Common(sense) Policies and Practices May Now Be Unfair Labor Practices
Kimberly J. Korando
November 14, 2023
EXPECT EXCELLENCE®

The Intersection of Employee Health and the Workplace: Successfully Managing Obligations Under the ADA, the FMLA, and State Laws

SMITH ANDERSON

The Intersection of Employee Health and the Workplace

Successfully Managing Obligations Under the ADA, FMLA, PWFA and State Laws

Rosemary Gill Kenyon

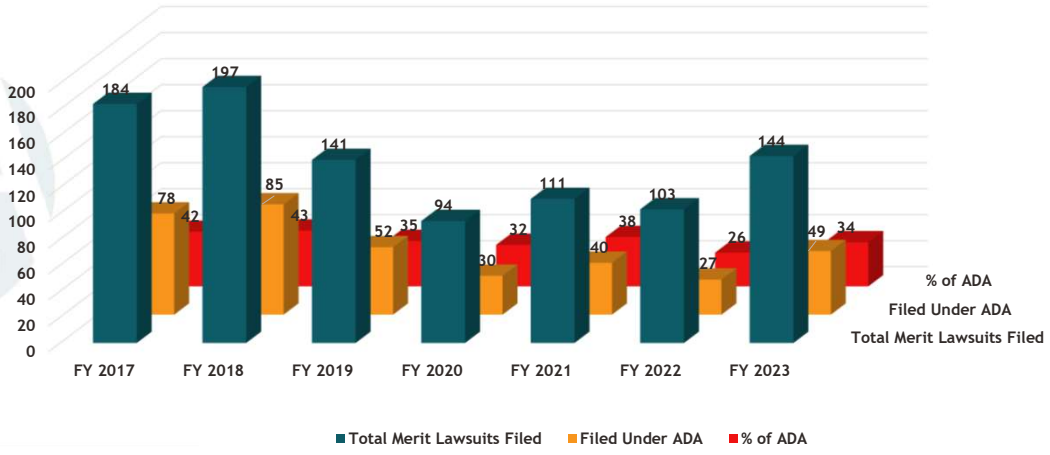
November 14, 2023

EXPECT EXCELLENCE®

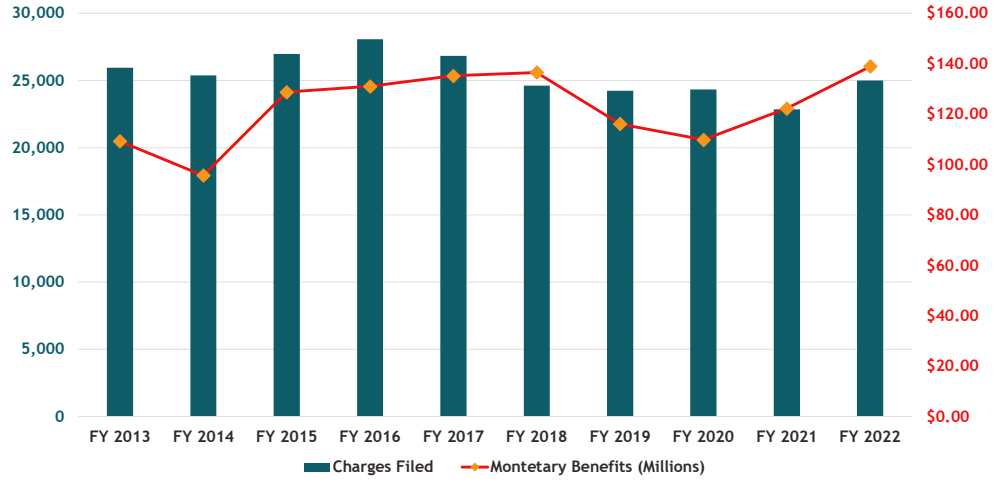
EEOC Reinvigorated

- Better staffed/leadership in place
- Strategic Plan – with focus on persons with disabilities
- Significant rise in number of lawsuits brought in FY 2023
- Expect more enforcement going forward

EEOC Lawsuits Filed Under the ADA



ADA Charge Statistics



EEOC Regulatory Actions Impacting Workplace Health

- Hearing Disabilities in the Workplace and the ADA, January 24, 2023 (technical assistance)
- Proposed regulations issued under the Pregnant Workers Fairness Act ("PWFA")
- Proposed Enforcement Guidance on Harassment in the Workplace, September 29, 2023 (explicitly covering disability harassment)

ADA and Remote Work

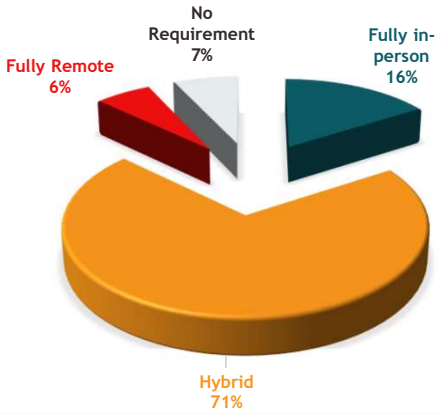
Has the Covid remote-work-experiment changed ADA analysis?

Remote Work - How much of the U.S. workforce is working remotely:

Bureau of Labor Statistics:

27% of U.S. workforce working remotely at least part of the time, August-September 2022

LITTLER ANNUAL EMPLOYMENT SURVEY REPORT



Pew Research Center

Of those employees with *teleworkable* jobs:

		January 2023	January 2022
Work remotely all of the time		43%	35%
Hybrid (net)		35%	41%
	Remote most of the time	17%	20%
	Remote some of the time	18%	21%
Rarely remote		11%	12%
Never remote		11%	12%

ADA and Remote Work

Trend:

- More frequent requests for remote work
- Decisions are complicated by hybrid schedules that may undermine employer's claim that in-person presence is an essential function
- Courts are beginning to question in-person requirements

➢ Individually evaluate each request and make decision based on specific facts

Long Covid

- CDC says:
  - 1 in every 13 American adult (7.5%) has "long Covid"
  - 1 in every 5 who have had Covid still have "long Covid"
- Symptoms may be significantly disabling
- EEOC recognizes that long Covid can be a disability

ADA and Harassment

Covid and masks

- EEOC and case law have recognized disability-based harassment and hostile environment claims
- Pandemic era created divisions in the workplace
- Case to watch – supervisor refused to let pharmacy technician wear a mask during early days of Covid

Adults with Disabilities

- Employment rate:

	Disabled	Not disabled
2022	21.3%	65.4%
2021	19.1%	63.7%

- Unemployment rate:

	Disabled	Not disabled
2022	7.6%	3.5%
2021	10.1%	5.1%

Invisible Disabilities

- Most persons with invisible disabilities tend not to disclose them to employer:
  - 47% - SHRM Study 2023
  - 88% - Harvard Business Review, 2023

- Why?
  - Stigma
  - Isolation by co-workers
  - Increased scrutiny at work
  - Don't believe they will be treated fairly

ADA Challenges

Mental health issues on the rise

- The percentage of adults who receive mental health treatment increased between 2019 and 2021 among adults aged 18–44, from 18.5% to 23.2%*
- 30% of ADA EEOC charges in FY 2022 were based on mental health discrimination claims (up from 10% in 2010)
- Anxiety, depression and PTSD are the leading conditions, accounting for 11.6%, 8.2% and 5.1% of all ADA charges in FY 2022

ADA Challenges

- When disability is disclosed after performance problems or difficult conduct has occurred
- Generally, there is no requirement to consider retroactive requests for accommodations
- But was employer on notice?

ADA Challenges

What is employer's obligation to accommodate requests relating to commuting?

- Courts are divided about this issue
- Recent case from the 7th Circuit (Chicago)

EEOC v. Charter Communications

ADA Challenges

- Lawful opioid use, including use in recovery program
- Considering additional leave as an accommodation when FMLA runs out or when FMLA does not apply

ADA Challenges

Hearing impairments

- Priority for EEOC – several cases filed in 2023
- Recent case – jury awarded $36 million in damages

Meaning of Disability is Broad

- Case law under the ADA
- State laws define more broadly under state disability laws

ADA Best Practices

Obtain medical documentation when considering accommodations

- Permitted under the ADA
- Clarifies the condition and how it impacts work and avoids blurriness when things go wrong or get more complicated
- Employees sometimes overstate the need for accommodations, inadvertently or deliberately

ADA Best Practices

Scope of medical documentation needed:

- Diagnosis?
- How condition impacts major life activities?
- How condition impacts ability to perform job duties?
- How long condition will last?
- Recommended accommodations?

ADA Best Practices

Employers recognize when the interactive process has been triggered

- Triggered when employer is on notice that a physical condition may impact performance
- No magic words
- May be informal or arise in casual conversation with supervisor or co-worker
- HR might not have necessary information

Pregnant Worker Fairness Act (PWFA)

- Requires accommodations for pregnancy
- Avoid ADA definition of disability

FMLA Leave

Employers must provide appropriate notices

- 3+ FMLA notices are required:
  - Posting/handbook
  - Notice to specific employee when employer acquires knowledge of need for leave, with Notice of Rights (within 5 business days)
  - Designation Notice after employer receives enough information to determine if leave qualifies (e.g., receipt of medical certification) (within 5 business days)

FMLA Leave

- Employee must provide advance notice of foreseeable leave
- Employee may be required to use the employer's "usual and customary" method to notify of need for leave
- Employee must give notice as soon as possible for unforeseen leave

State Paid Leave and Sick Pay Laws

- Paid family leave
  - Enacted by at least 12 states plus Washington, DC
  - Others considering legislation
- Paid Sick leave
  - Enacted in at least 18 states and Washington, DC

State Paid Leave and Sick Pay Laws

- Variety of approaches
  - State pays
  - Employer pays
  - Opt in

State Paid Leave and Sick Pay Laws

- Multi-state employers must become familiar with laws
- Written policies to advise employees of rights
- Notice requirements

Questions?

SMITH ANDERSON

The Intersection of Employee Health and the Workplace

Successfully Managing Obligations Under the ADA, FMLA, PWFA and State Laws

Rosemary Gill Kenyon

November 14, 2023

EXPECT EXCELLENCE®

Using AI in HR 2.0 and ChatGPT Too!


SMITH ANDERSON
Using AI in HR 2.0 and ChatGPT Too!
Kimberly J. Korando
Tommy Postek
November 14, 2023
EXPECT EXCELLENCE®

AI Defined

A form of technology where the software:

- "learns" from the data it analyzes or tasks it performs and
- adapts its "behavior" based on what it learns from the data to improve its performance of certain tasks over time

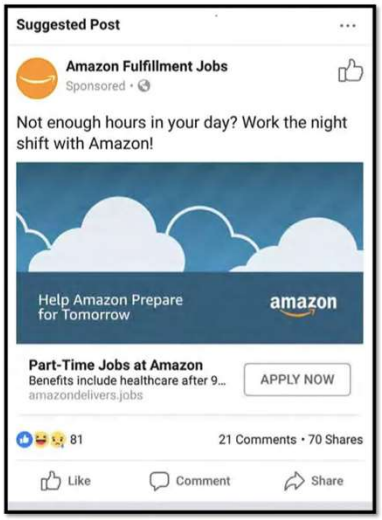
How does AI work?

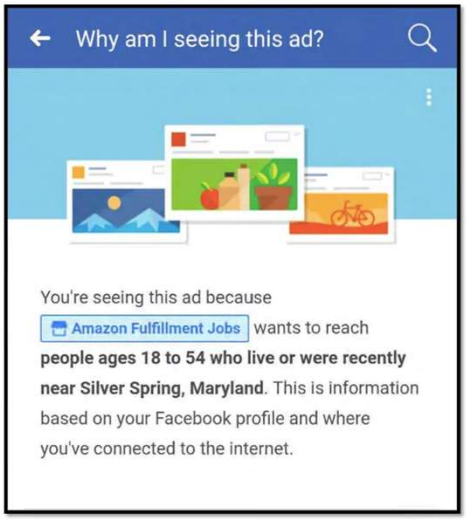
Two key elements	Computer software programmed to execute algorithms over a data set to, among other things:
• Data set • Algorithm: sets of code with instructions to perform specific tasks over a data set	• Recognize patterns • Reach conclusions • Make informed judgments • Optimize practices • Predict future behavior • Automate repetitive functions

Simply put

AI is technology that mimics human intelligence to perform tasks ordinarily performed by humans

Remember HAL?
2001: A Space Odyssey (1968)





5

Evidence submitted in age discrimination civil action filed in United States District Court for the Northern District of California, Bradley et al. v. T-Mobile et al., Civil Action 5:17-cv-07232

AI in Recruiting and Hiring

Sourcing and Screening Candidates

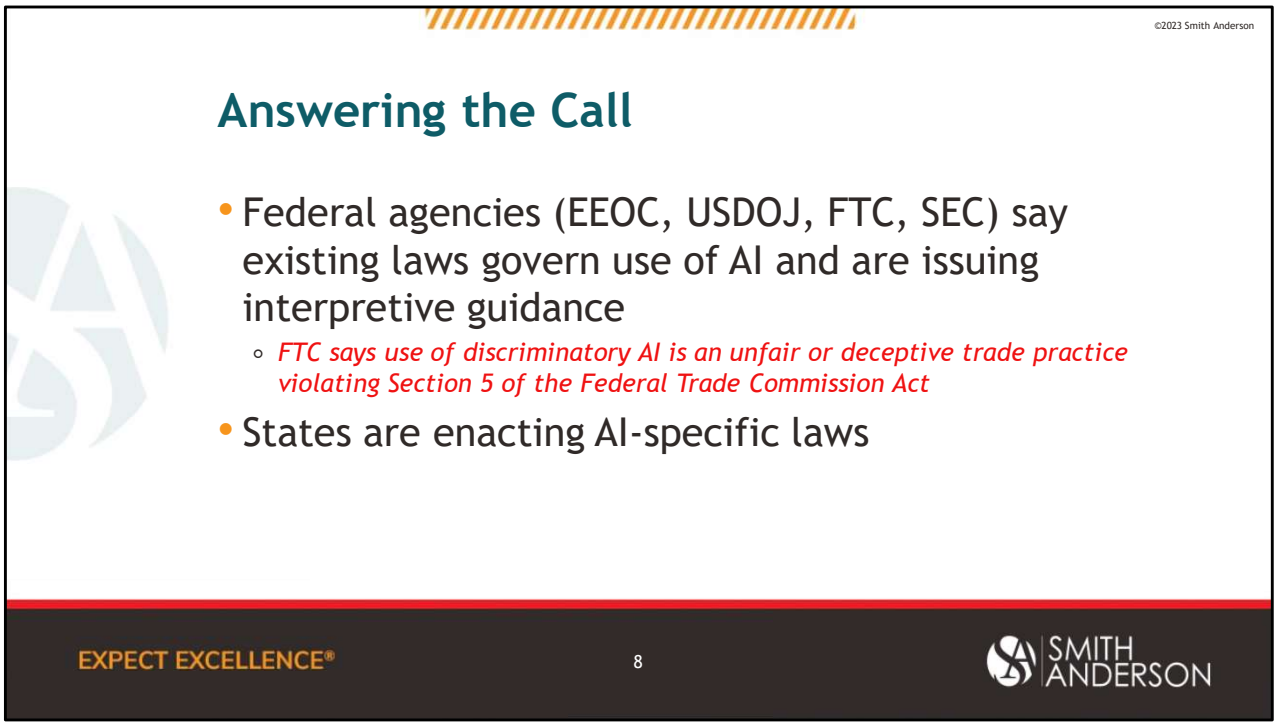
- Show job ads to targeted groups
- Scan resumes and prioritize using keywords
- Score resumes
- Use chat bot to ask questions about preliminary qualifications, desired salary

Online Testing

- "Job fit" scores on:
  - personalities
  - aptitudes
  - cognitive skills
  - perceived "cultural fit"

Video interview Analysis

- Analyze:
  - candidate responses
  - facial expressions
  - speech patterns



Equal Employment Opportunity Commission, *The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees*, *available at* https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence (last accessed Oct. 22, 2023)

Equal Employment Opportunity Commission, *Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964*, *available at* https://www.eeoc.gov/select-issues-assessing-adverse-impact-software-algorithms-and-artificial-intelligence-used (last accessed Oct. 22, 2023)

Federal Trade Commission, *Aiming for Truth, Fairness, and Equity in Your Company's Use of AI*, *available at* https://www.ftc.gov/business-guidance/blog/2021/04/aiming-truth-fairness-equity-your-companys-use-ai (last accessed Oct. 23, 2023)

Joint Statement on Enforcement Efforts Against Discrimination and Bias in Automated Systems, *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/EEOC-CRT-FTC-CFPB-AI-Joint-Statement%28final%29.pdf (last accessed Oct. 22, 2023)

NIST, *AI Risk Management Framework*, *available at* https://www.nist.gov/itl/ai-risk-management-framework (last accessed Oct. 22, 2023)

The White House*, Blueprint for an AI Bill of Rights*, *available at* https://www.whitehouse.gov/ostp/ai-bill-of-rights/ (last accessed Oct. 22, 2023) The AI Bill of Rights provides:

- AI-powered tools should be designed and used in an equitable way such that an individual should not face discrimination.

- AI-powered tools should have built-in protections against abusive data practices and allow individuals to have agency over how their data is used.

- Individuals should know that AI is being used on them and how it impacts them.

- Individuals should be able to opt out of having AI-powered tools used on them and should be able to access a person who can remedy any problems they encounter with AI-powered tools.

- Individuals should be protected from AI-powered tools that are ineffective or unsafe.

The Risks

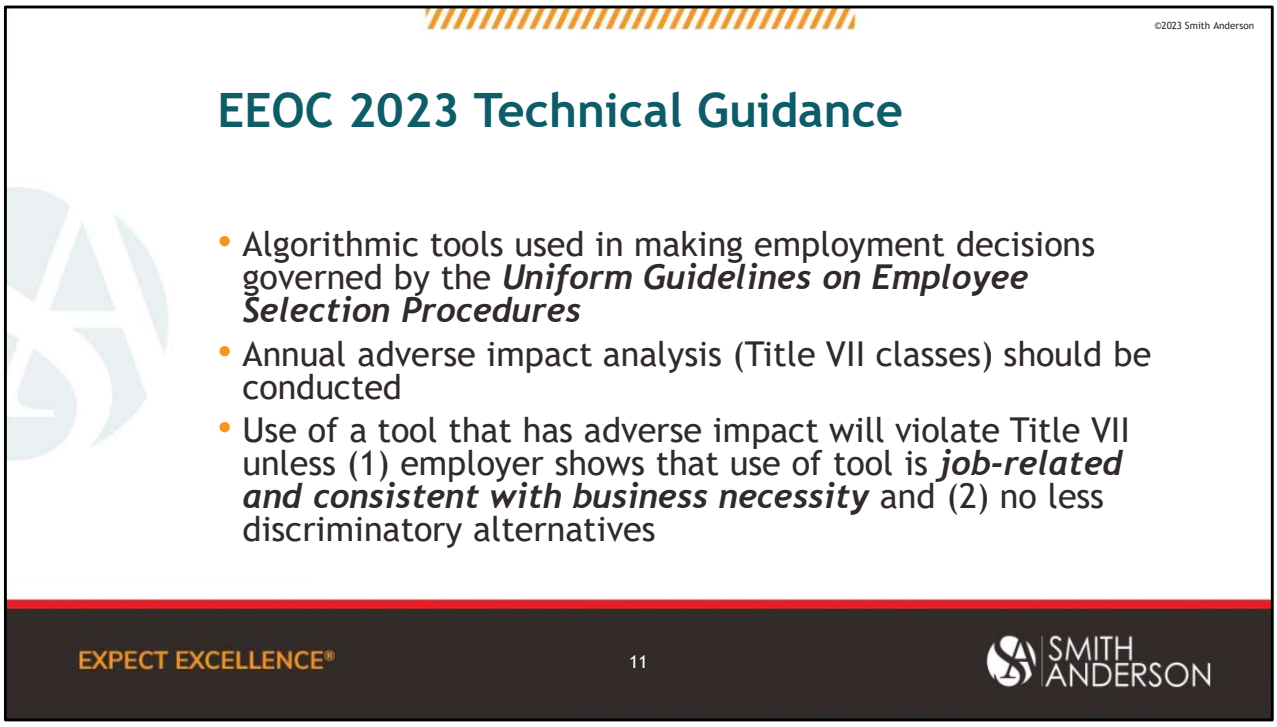
- Systemic discrimination
- Unknown “black box” of algorithms
- Disability accessibility and accommodation challenges
- Unlawful inquiries or screening criteria
- Vendor violation liability
- Patchwork of state laws

Systemic Discrimination

Depending on the available data set and the algorithms used,

AI recruiting tools may duplicate and proliferate past discriminatory practices in:

- Identifying who gets the job ad
- Identifying and evaluating candidates



See EEOC Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964 | U.S. Equal Employment Opportunity Commission (eeoc.gov) May 18, 2023:

Questions and Answers

1. Could an employer's use of an algorithmic decision-making tool be a "selection procedure"?
Under the *Guidelines*, a "selection procedure" is any "measure, combination of measures, or procedure" if it is used as a basis for an employment decision. As a result, the *Guidelines* would apply to algorithmic decision-making tools when they are used to make or inform decisions about whether to hire, promote, terminate, or take similar actions toward applicants or current employees.

2. Can employers assess their use of an algorithmic decision-making tool for adverse impact in the same way that they assess more traditional selection procedures for adverse impact?
As the *Guidelines* explain, employers can assess whether a selection procedure has an adverse impact on a particular protected group by checking whether use of the procedure causes a selection rate for individuals in the group that is "substantially" less than the selection rate for individuals in another group.
If use of an algorithmic decision-making tool has an adverse impact on individuals of a particular race, color, religion, sex, or national origin, or on individuals with a particular combination of such characteristics (e.g., a combination of race and sex, such as for applicants who are Asian women), then use of the tool will violate Title VII unless the employer can show that such use is "job related and consistent with business necessity" pursuant to Title VII.

3. Is an employer responsible under Title VII for its use of algorithmic decision-making tools even if the tools are designed or administered by another entity, such as a software vendor?

In many cases, yes. For example, if an employer administers a selection procedure, it may be responsible under Title VII if the procedure discriminates on a basis prohibited by Title VII, even if the test was developed by an outside vendor. In addition, employers may be held responsible for the actions of their agents, which may include entities such as software vendors, if the employer has given them authority to act on the employer's behalf. This may include situations where an employer relies on the results of a selection procedure that an agent administers on its behalf.
Therefore, employers that are deciding whether to rely on a software vendor to develop or administer an algorithmic decision-making tool may want to ask the vendor, at a minimum, whether steps have been taken to evaluate whether use of the tool causes a substantially lower selection rate for individuals with a characteristic protected by Title VII. If the vendor states that the tool should be expected to result in a substantially lower selection rate for individuals of a particular race, color, religion, sex, or national origin, then the employer should consider whether use of the tool is job related and consistent with business necessity and whether there are alternatives that may meet the employer's needs and have less of a disparate impact. (See Question 7 for more information.) Further, if the vendor is incorrect about its own assessment and the tool does result in either disparate impact discrimination or disparate treatment discrimination, the employer could still be liable.

4. What is a "selection rate"?
"Selection rate" refers to the proportion of applicants or candidates who are hired, promoted, or otherwise selected. The selection rate for a group of applicants or candidates is calculated by dividing the number of persons hired, promoted, or otherwise selected from the group by the total number of candidates in that group. For example, suppose that 80 White individuals and 40 Black individuals take a personality test that is scored using an algorithm as part of a job application, and 48 of the White applicants and 12 of the Black applicants advance to the next round of the selection process. Based on these results, the selection rate for Whites is 48/80 (equivalent to 60%), and the selection rate for Blacks is 12/40 (equivalent to 30%).

5. What is the "four-fifths rule"?
The four-fifths rule, referenced in the *Guidelines*, is a general rule of thumb for determining whether the selection rate for one group is "substantially" different than the selection rate of another group. The rule states that one rate is substantially different than another if their ratio is less than four-fifths (or 80%).
In the example above involving a personality test scored by an algorithm, the selection rate for Black applicants was 30% and the selection rate for White applicants was 60%. The ratio of the two rates is thus 30/60 (or 50%). Because 30/60 (or 50%) is lower than 4/5 (or 80%), the four-fifths rule says that the selection rate for Black applicants is substantially different than the selection rate for White applicants in this example, which could be evidence of discrimination against Black applicants.

6. Does compliance with the four-fifths rule guarantee that a particular employment procedure does not have an adverse impact for purposes of Title VII?
The four-fifths rule is merely a rule of thumb. As noted in the *Guidelines* themselves, the four-fifths rule may be inappropriate under certain circumstances. For example, smaller differences in selection rates may indicate adverse impact where a procedure is used to make a large number of selections, or where an employer's actions have discouraged individuals from applying disproportionately on grounds of a Title VII-protected characteristic. The four-fifths rule is a "practical and easy-to-administer" test that may be used to draw an initial inference that the selection rates for two groups may be substantially different, and to prompt employers to acquire additional information about the procedure in question.
Courts have agreed that use of the four-fifths rule is not always appropriate, especially where it is not a reasonable substitute for a test of statistical significance. As a result, the EEOC might not consider compliance with the rule sufficient to show that a particular selection procedure is lawful under Title VII when the procedure is challenged in a charge of discrimination. (A "charge of discrimination" is a signed statement asserting that an employer, union, or labor organization is engaged in employment discrimination. It requests EEOC to take remedial action. For more information about filing charges of discrimination with the EEOC, visit the EEOC's website (https://www.eeoc.gov/.)
For these reasons, employers that are deciding whether to rely on a vendor to develop or administer an algorithmic decision-making tool may want to ask the vendor specifically whether it relied on the four-fifths rule of thumb when determining whether use of the tool might have an adverse impact on the basis of a characteristic protected by Title VII, or whether it relied on a standard such as statistical significance that is often used by courts.

7. If an employer discovers that the use of an algorithmic decision-making tool would have an adverse impact, may it adjust the tool, or decide to use a different tool, in order to reduce or eliminate that

impact?
Generally, if an employer is in the process of developing a selection tool and discovers that use of the tool would have an adverse impact on individuals of a particular sex, race, or other group protected by Title VII, it can take steps to reduce the impact or select a different tool in order to avoid engaging in a practice that violates Title VII. One advantage of algorithmic decision-making tools is that the process of developing the tool may itself produce a variety of comparably effective alternative algorithms. Failure to adopt a less discriminatory algorithm that was considered during the development process therefore may give rise to liability.

The EEOC encourages employers to conduct self-analyses on an ongoing basis to determine whether their employment practices have a disproportionately large negative effect on a basis prohibited under Title VII or treat protected groups differently. Generally, employers can proactively change the practice going forward.

Uniform Guidelines on Employee Selection Procedures (UGESP)

ESTABLISHING JOB-RELATED AND CONSISTENT WITH BUSINESS NECESSITY

Conduct adverse impact analysis *(under legal privilege)*	
No adverse impact	Adverse impact
=> no further action required	=> "validate" by conducting validation study in accordance with UGESP
	• Validation study should include investigation of alternatives with less discriminatory impact
	VALIDATION + NO LESS DISCRIMINATORY ALTERNATIVES = JOB-RELATED AND CONSISTENT WITH BUSINESS NECESSITY
Retain adverse impact analysis and validation study (if applicable)	

Algorithm "Black Box"

- Lack of transparency in the algorithmic process may render it impossible to determine how or why an AI tool reached a decision or made a prediction

Why is this a problem?

- Employers unable to satisfy legal obligation to articulate a "legitimate nondiscriminatory" reason for a decision because they do not know how or why the AI tool did what it did

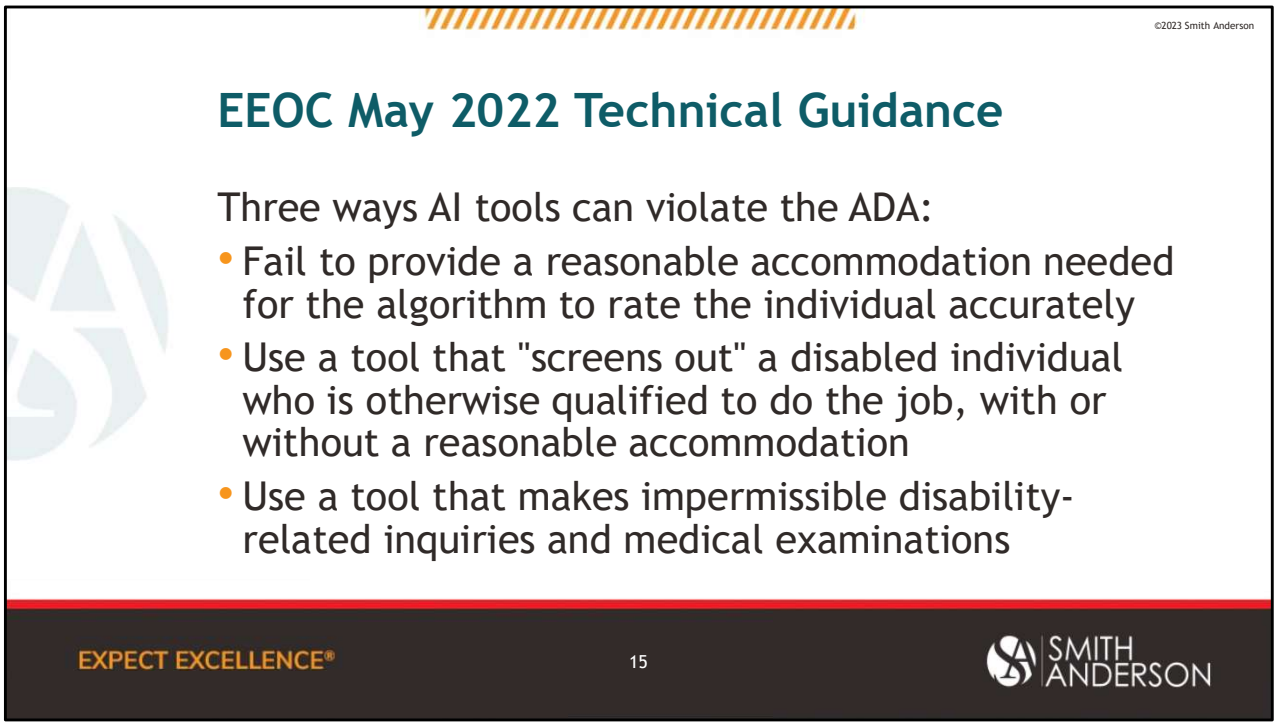
Disability Accessibility

When using online recruiting tools for

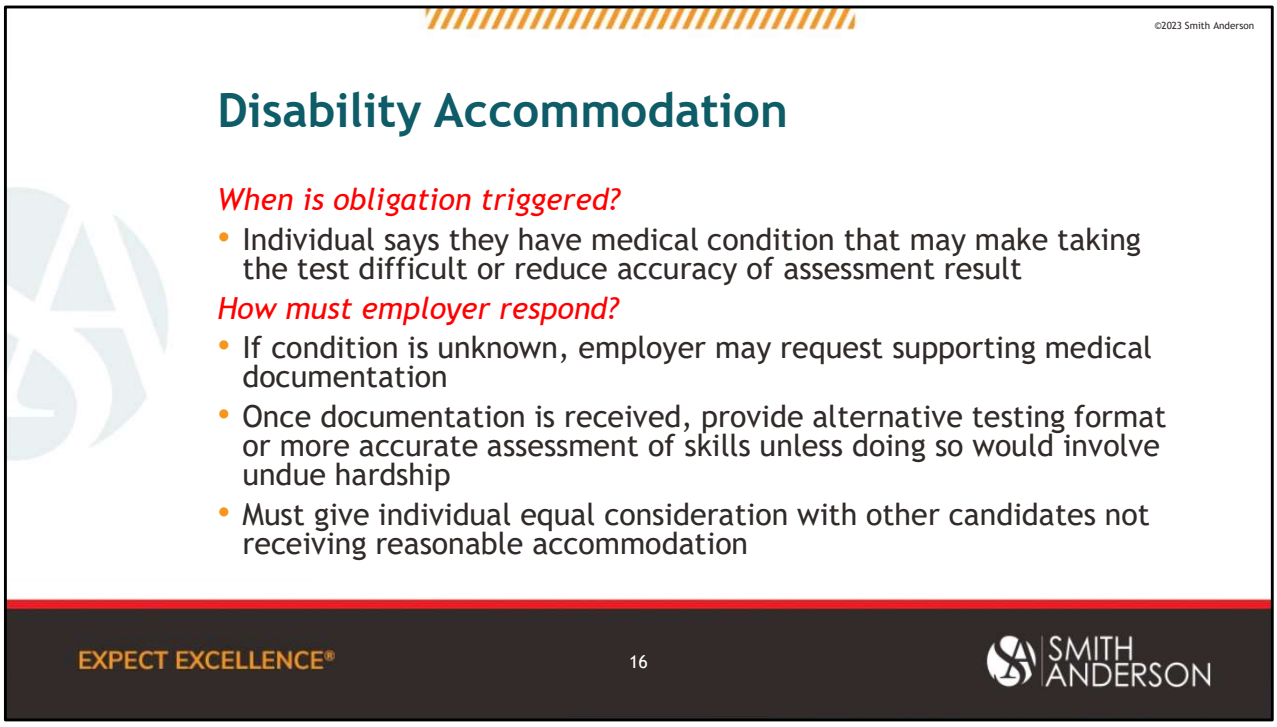
- interviews
- initial screening
- testing

…ensure that the platform is accessible to individuals who are hearing, sight or manually impaired

Web site features must be accessible. *See Web Content Accessibility Guidelines (WCAG) and Section 508 Standards.*



The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees, U.S. Equal Employment Opportunity Commission, Technical Assistance Guidance (May 12, 2022) https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence ("EEOC Technical Guidance")



EEOC Technical Guidance:

5. May an employer announce generally (or use software that announces generally) that reasonable accommodations are available to job applicants and employees who are asked to use or be evaluated by an algorithmic decision-making tool, and invite them to request reasonable accommodations when needed?
Yes. An employer may tell applicants or employees what steps an evaluation process includes and may ask them whether they will need reasonable accommodations to complete it. For example, if a hiring process includes a video interview, the employer or software vendor may tell applicants that the job application process will involve a video interview and provide a way to request a reasonable accommodation. Doing so is a "promising practice" to avoid violating the ADA.

6. When an employer uses algorithmic decision-making tools to assess job applicants or employees, does the ADA require the employer to provide reasonable accommodations?
If an applicant or employee tells the employer that a medical condition may make it difficult to take a test, or that it may cause an assessment result that is less acceptable to the employer, the applicant or employee has requested a reasonable accommodation. To request an accommodation, it is not necessary to mention the ADA or use the phrase "reasonable accommodation."

Under the ADA, employers need to respond promptly to requests for reasonable accommodation. If it is not obvious or already known whether the requesting applicant or employee has an ADA disability and needs a reasonable accommodation because of it, the employer may request supporting medical documentation. When the documentation shows that a disability might make a test more difficult to take or that it might reduce the accuracy of an assessment, the employer must provide an alternative

testing format or a more accurate assessment of the applicant's or employee's skills as a reasonable accommodation, unless doing so would involve significant difficulty or expense (also called "undue hardship").

For example, a job applicant who has limited manual dexterity because of a disability may report that they would have difficulty taking a knowledge test that requires the use of a keyboard, trackpad, or other manual input device. Especially if the responses are timed, this kind of test will not accurately measure this particular applicant's knowledge. In this situation, the employer would need to provide an accessible version of the test (for example, one in which the applicant is able to provide responses orally, rather than manually) as a reasonable accommodation, unless doing so would cause undue hardship. If it is not possible to make the test accessible, the ADA requires the employer to consider providing an alternative test of the applicant's knowledge as a reasonable accommodation, barring undue hardship.

Other examples of reasonable accommodations that may be effective for some individuals with disabilities include extended time or an alternative version of the test, including one that is compatible with accessible technology (like a screen-reader) if the applicant or employee uses such technology.

Employers must give individuals receiving reasonable accommodation equal consideration with other applicants or employees not receiving reasonable accommodations.

The ADA requires employers to keep all medical information obtained in connection with a request for reasonable accommodation confidential and must store all such information separately from the applicant's or employee's personnel file.

Online Assessments

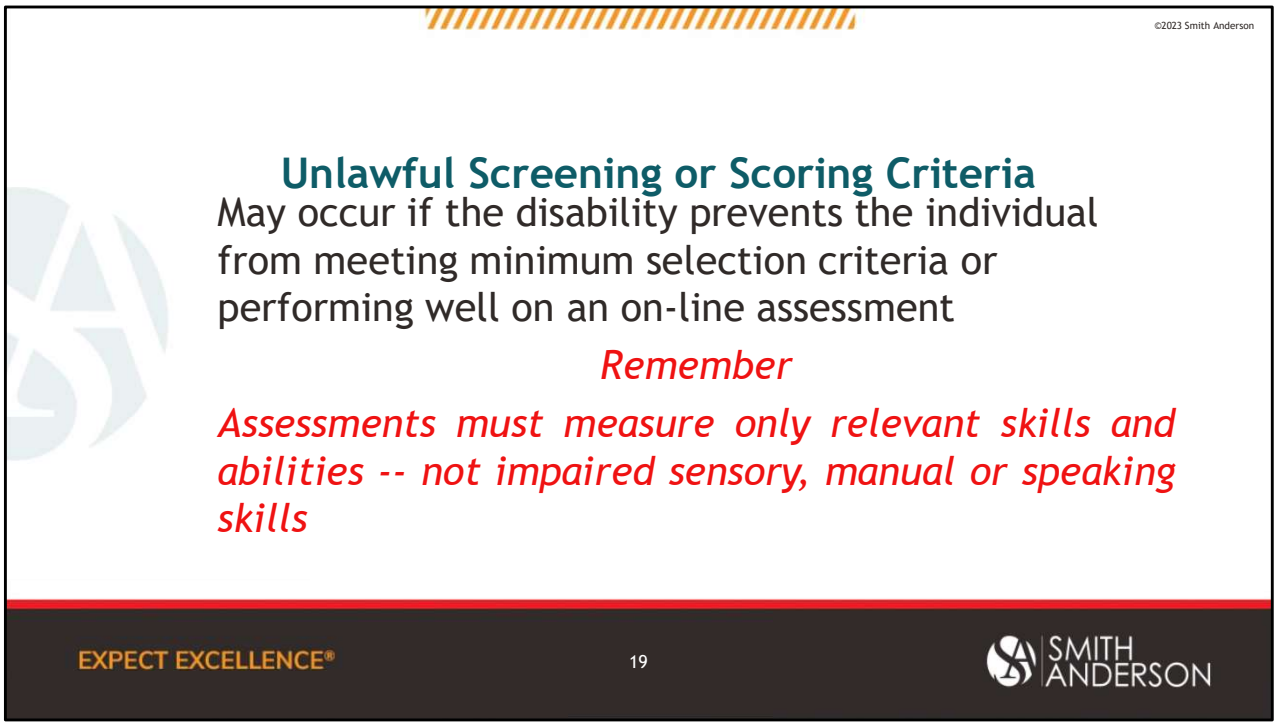
Remember things that may improperly screen out individuals with disabilities

- *Assessment FORMAT*
- *Assessment SCORING*

Disability Accommodation *(cont'd)*

FORMAT examples

- Limited manual dexterity impacting use of keyboard, track pad or other manual input device => *allow oral responses or extended response time*
- Visual impairment => *screen reader compatibility*



EEOC Technical Guidance

8. When is an individual "screened out" because of a disability, and when is screen out potentially unlawful?
Screen out occurs when a disability prevents a job applicant or employee from meeting—or lowers their performance on—a selection criterion, and the applicant or employee loses a job opportunity as a result. The ADA says that screen out is unlawful if the individual who is screened out is *able to perform the essential functions of the job* with a reasonable accommodation if one is legally required. Questions 9 and 10 explain the meaning of "screen out" and Question 11 provides examples of when a person who is screened out due to a disability nevertheless can do the job with a reasonable accommodation.

9. Could algorithmic decision-making tools screen out an individual because of a disability? What are some examples?
Yes, an algorithmic decision-making tool could screen out an individual because of a disability if the disability causes that individual to receive a lower score or an assessment result that is less acceptable to the employer, and the individual loses a job opportunity as a result.

An example of screen out might involve a chatbot, which is software designed to engage in communications online and through texts and emails. A chatbot might be programmed with a simple algorithm that rejects all applicants who, during the course of their "conversation" with the chatbot, indicate that they have significant gaps in their employment history. If a particular applicant had a gap in employment, and if the gap had been caused by a disability (for example, if the individual needed to stop working to undergo treatment), then the chatbot may function to screen out that person

because of the disability.

Another kind of screen out may occur if a person's disability prevents the algorithmic decision-making tool from measuring what it is intended to measure. For example, video interviewing software that analyzes applicants' speech patterns in order to reach conclusions about their ability to solve problems is not likely to score an applicant fairly if the applicant has a speech impediment that causes significant differences in speech patterns. If such an applicant is rejected because the applicant's speech impediment resulted in a low or unacceptable rating, the applicant may effectively have been screened out because of the speech impediment.

11. Screen out because of a disability is unlawful if the individual who is screened out is able to perform the essential functions of the job, with a reasonable accommodation if one is legally required. If an individual is screened out by an algorithmic decision-making tool, is it still possible that the individual is able to perform the essential functions of the job?

In some cases, yes. For example, some employers rely on "gamified" tests, which use video games to measure abilities, personality traits, and other qualities, to assess applicants and employees. If a business requires a 90 percent score on a gamified assessment of memory, an applicant who is blind and therefore cannot play these particular games would not be able to score 90 percent on the assessment and would be rejected. But the applicant still might have a very good memory and be perfectly able to perform the essential functions of a job that requires a good memory.

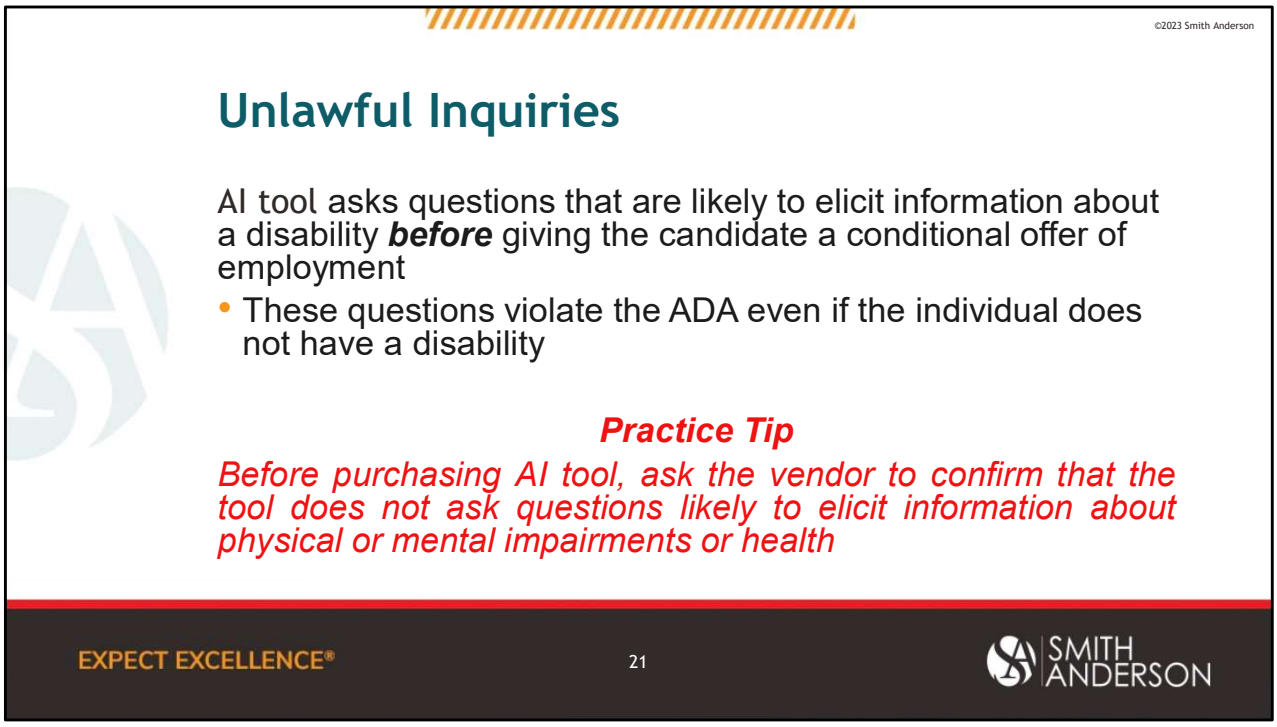
Even an algorithmic decision-making tool that has been "validated" for some purposes might screen out an individual who is able to perform well on the job. To say that a decision-making tool has been "validated" means that there is evidence meeting certain professional standards showing that the tool accurately measures or predicts a trait or characteristic that is important for a specific job. Algorithmic decision-making tools may be validated in this sense, and still be inaccurate when applied to particular individuals with disabilities. For example, the gamified assessment of memory may be validated because it has been shown to be an accurate measure of memory for most people in the general population, yet still screen out particular individuals who have good memories but are blind, and who therefore cannot see the computer screen to play the games.

An algorithmic decision-making tool also may sometimes screen out individuals with disabilities who could do the job because the tool does not take into account the possibility that such individuals are entitled to reasonable accommodations on the job. Algorithmic decision-making tools are often designed to predict whether applicants can do a job under typical working conditions. But people with disabilities do not always work under typical conditions if they are entitled to on-the-job reasonable accommodations.

For example, some pre-employment personality tests are designed to look for candidates who are similar to the employer's most successful employees—employees who most likely work under conditions that are typical for that employer. Someone who has Posttraumatic Stress Disorder ("PTSD") might be rated poorly by one of these tests if the test measures a trait that may be affected by that particular individual's PTSD, such as the ability to ignore distractions. Even if the test is generally valid and accurately predicts that this individual would have difficulty handling distractions under typical working conditions, it might not accurately predict whether the individual still would experience those same difficulties under modified working conditions—specifically, conditions in which the employer provides required on-the-job reasonable accommodations such as a quiet workstation or permission to use noise-cancelling headphones. If such a person were to apply for the job and be screened out because of a low score on the distraction test, the screen out may be unlawful under the ADA. Some individuals who may test poorly in certain areas due to a medical condition may not even need a reasonable accommodation to perform a job successfully.

Screening or Scoring Criteria May Be Unlawful When…

Examples	Issue
Screens out candidates with employment gaps	Gap may be due to medical condition (or pregnancy, child or family care)
Analyzes and evaluates speech patterns to evaluate problem-solving skill	Speech impediment may result in lower rating not reflective of problem-solving skill
Analyzes ability to ignore distractions	AI may use "typical" working conditions and not take into account performance with an accommodation (e.g., noise cancelling head phones)
Chat bot asks whether individual can stand for 3 hours and stops the screening when the answer is No	Candidates using a wheelchair who could perform the essential functions seated (as an accommodation) are excluded from consideration without accommodation consideration



EEOC Technical Guidance:

13. How could an employer's use of algorithmic decision-making tools violate ADA restrictions on disability-related inquiries and medical examinations?
An employer might violate the ADA if it uses an algorithmic decision-making tool that poses "disability-related inquiries" or seeks information that qualifies as a "medical examination" before giving the candidate a conditional offer of employment. This type of violation may occur even if the individual does not have a disability.

An assessment includes "disability-related inquiries" if it asks job applicants or employees questions that are likely to elicit information about a disability or directly asks whether an applicant or employee is an individual with disability. It qualifies as a "medical examination" if it seeks information about an individual's physical or mental impairments or health.

An algorithmic decision-making tool that could be used to identify an applicant's medical conditions would violate these restrictions if it were administered prior to a conditional offer of employment. Not all algorithmic decision-making tools that ask for health-related information are "disability-related inquiries or medical examinations," however. For example, a personality test is not posing "disability-related inquiries" because it asks whether the individual is "described by friends as being 'generally optimistic,'" even if being described by friends as generally optimistic might somehow be related to some kinds of mental health diagnoses.

Note, however, that even if a request for health-related information does not violate the ADA's restrictions on disability-related inquiries and medical examinations, it still might violate other parts of

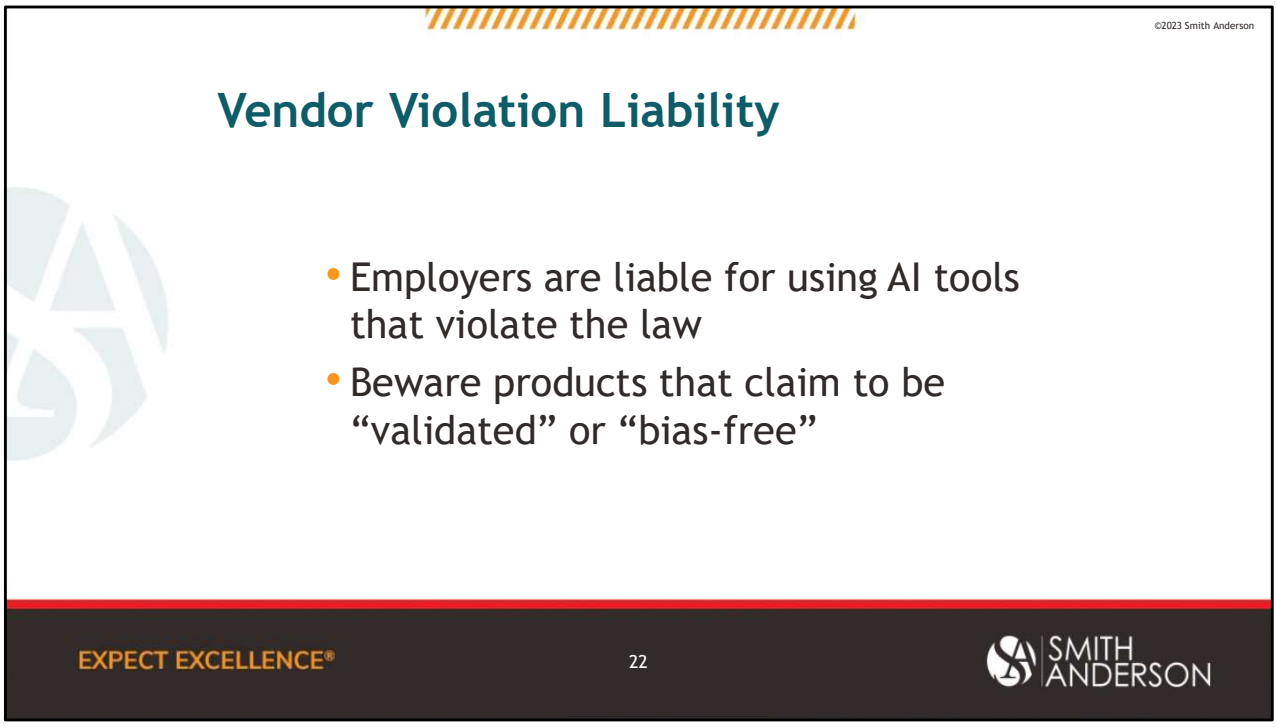
the ADA. For example, if a personality test asks questions about optimism, and if someone with Major Depressive Disorder ("MDD") answers those questions negatively and loses an employment opportunity as a result, the test may "screen out" the applicant because of MDD. As explained in Questions 8–11 above, such screen out may be unlawful if the individual who is screened out can perform the essential functions of the job, with or without reasonable accommodation.

Once employment has begun, disability-related inquiries may be made and medical examinations may be required only if they are legally justified under the ADA.

For more information on disability-related inquiries and medical examinations, see *Pre-Employment Inquiries and Medical Questions & Examinations*, and *Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA*.

EEOC Promising Practices:

Before purchasing an algorithmic decision-making tool, an employer should ask the vendor to confirm that the tool does not ask job applicants or employees questions that are likely to elicit information about a disability or seek information about an individual's physical or mental impairments or health, unless such inquiries are related to a request for reasonable accommodation. (The ADA permits an employer to request reasonable medical documentation in support of a request for reasonable accommodation that is received prior to a conditional offer of employment, when necessary, if the requested accommodation is needed to help the individual complete the job application process.)



EEOC Technical Guidance:

3. Is an employer responsible under the ADA for its use of algorithmic decision-making tools even if the tools are designed or administered by another entity, such as a software vendor?
In many cases, yes. For example, if an employer administers a pre-employment test, it may be responsible for ADA discrimination if the test discriminates against individuals with disabilities, even if the test was developed by an outside vendor. In addition, employers may be held responsible for the actions of their agents, which may include entities such as software vendors, if the employer has given them authority to act on the employer's behalf.

7. Is an employer responsible for providing reasonable accommodations related to the use of algorithmic decision-making tools, even if the software or application is developed or administered by another entity?
In many cases, yes. As explained in Question 3 above, an employer may be held responsible for the actions of other entities, such as software vendors, that the employer has authorized to act on its behalf. For example, if an employer were to contract with a software vendor to administer and score on its behalf a pre-employment test, the employer likely would be held responsible for actions that the vendor performed—or did not perform—on its behalf.

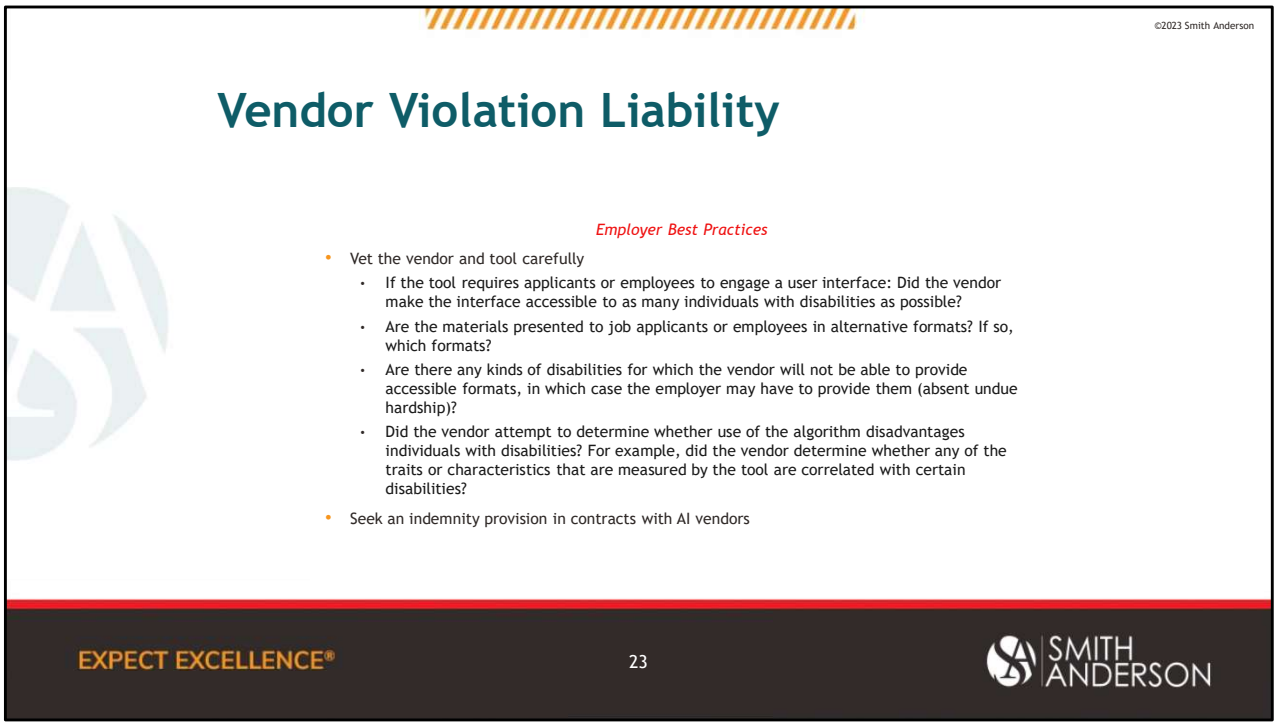
Thus, if an applicant were to tell the vendor that a medical condition was making it difficult to take the test (which qualifies as a request for reasonable accommodation), and the vendor did not provide an accommodation that was required under the ADA, the employer likely would be responsible even if it was unaware that the applicant reported a problem to the vendor.

10. Some algorithmic decision-making tools may say that they are "bias-free." If a particular tool makes this claim, does that mean that the tool will not screen out individuals with disabilities?

When employers (or entities acting on their behalf such as software vendors) say that they have designed an algorithmic decision-making tool to be "bias-free," it typically means that they have taken steps to prevent a type of discrimination known as "adverse impact" or "disparate impact" discrimination under Title VII, based on race, sex, national origin, color, or religion. This type of Title VII discrimination involves an employment policy or practice that has a disproportionately negative effect on a group of individuals who share one of these characteristics, like a particular race or sex.

To reduce the chances that the use of an algorithmic decision-making tool results in disparate impact discrimination on bases like race and sex, employers and vendors sometimes use the tool to assess subjects in different demographic groups, and then compare the average results for each group. If the average results for one demographic group are less favorable than those of another (for example, if the average results for individuals of a particular race are less favorable than the average results for individuals of a different race), the tool may be modified to reduce or eliminate the difference.

The steps taken to avoid that kind of Title VII discrimination are typically distinct from the steps needed to address the problem of disability bias. If an employer or vendor were to try to reduce disability bias in the way described above, doing so would not mean that the algorithmic decision-making tool could never screen out an individual with a disability. Each disability is unique. An individual may fare poorly on an assessment because of a disability, and be screened out as a result, regardless of how well other individuals with disabilities fare on the assessment. Therefore, to avoid screen out, employers may need to take different steps beyond the steps taken to address other forms of discrimination. (See Question 12.)



EEOC Technical Guidance:

12. What could an employer do to reduce the chances that algorithmic decision-making tools will screen out someone because of a disability, even though that individual is able to perform the essential functions of the job (with a reasonable accommodation if one is legally required)?

First, if an employer is deciding whether to rely on an algorithmic decision-making tool developed by a software vendor, it may want to ask the vendor whether the tool was developed with individuals with disabilities in mind. Some possible inquiries about the development of the tool that an employer might consider include, but are not limited to:

•If the tool requires applicants or employees to engage a user interface, did the vendor make the interface accessible to as many individuals with disabilities as possible?

•Are the materials presented to job applicants or employees in alternative formats? If so, which formats? Are there any kinds of disabilities for which the vendor will not be able to provide accessible formats, in which case the employer may have to provide them (absent undue hardship)?

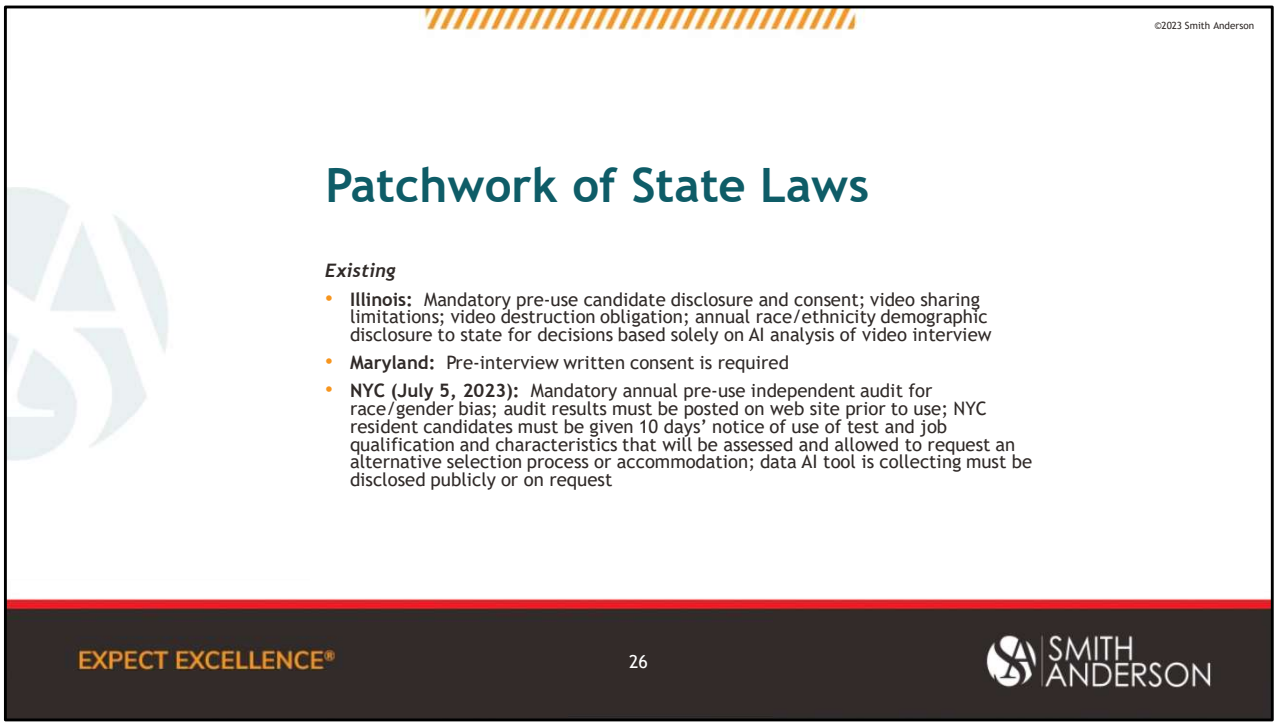
•Did the vendor attempt to determine whether use of the algorithm disadvantages individuals with disabilities? For example, did the vendor determine whether any of the traits or characteristics that are measured by the tool are correlated with certain disabilities?

What EEOC is Telling Job Seekers

- Ask employer about its use of AI tools and what it is testing for to determine if they might impose problem related to your disability
- If so, notify the employer that you have a medical condition and need an accommodation to ensure you are evaluated accurately
- If you discover the AI poses a problem after the process is underway, notify the employer asap and request an accommodation
- If you have received a poor decision based on AI, think about whether your condition may have prevented you from getting a better result and ask to be reassessed with an accommodation
- If the employer says No, tell them about the EEOC Technical Guidance or contact EEOC to assist in “next steps”

EEOC "Promising Practices"

AI Selection	Candidate Notification	Processing Requests
Confirm AI tool does not seek health information	Inform individuals that disability accommodations are available along with process for requesting them	Train staff to recognize and promptly process accommodation requests
Ensure AI measures abilities or qualifications for the position's essential functions directly, and not by mere correlation	Clearly explain in an accessible format: -the traits the algorithm assesses; -how it assesses those traits; and -what factors may affect the rating	Train staff to use alternative means of rating individuals when the evaluation process is inaccessible or otherwise unfairly disadvantages someone who has requested a reasonable accommodation
Use tools designed to be accessible to as many different disabilities as possible and that engage in user testing		Ensure third party test administrators either: -promptly forward all accommodation requests to the employer; or -contractually agree to provide reasonable accommodations on the employer's behalf



Illinois: Artificial Intelligence Video Interview Act

Sec. 5. *Disclosure of the use of artificial intelligence analysis.* An employer that asks applicants to record video interviews and uses an artificial intelligence analysis of the applicant-submitted videos shall do all of the following when considering applicants for positions based in Illinois before asking applicants to submit video interviews:

(1) Notify each applicant before the interview that artificial intelligence may be used to analyze the applicant's video interview and consider the applicant's fitness for the position.

(2) Provide each applicant with information before the interview explaining how the artificial intelligence works and what general types of characteristics it uses to evaluate applicants.

(3) Obtain, before the interview, consent from the applicant to be evaluated by the artificial intelligence program as described in the information provided.

An employer may not use artificial intelligence to evaluate applicants who have not consented to the use of artificial intelligence analysis.

Sec. 10. *Sharing videos limited.* An employer may not share applicant videos, except with persons whose expertise or technology is necessary in order to evaluate an applicant's fitness for a position.

Sec. 15. *Destruction of videos.* Upon request from the applicant, employers, within 30 days after receipt of the request, must delete an applicant's interviews and instruct any other persons who received copies of the applicant video interviews to also delete the videos, including all electronically generated backup copies. Any other such person shall comply with the employer's instructions.

Sec. 20. *Report of demographic data.*

(a) An employer that relies solely upon an artificial intelligence analysis of a video interview to

determine whether an applicant will be selected for an in-person interview must collect and report the following demographic data:

(1) the race and ethnicity of applicants who are and are not afforded the opportunity for an in-person interview after the use of artificial intelligence analysis; and

(2) the race and ethnicity of applicants who are hired.

(b) The demographic data collected under subsection (a) must be reported to the Department of Commerce and Economic Opportunity annually by December 31. The report shall include the data collected in the 12-month period ending on November 30 preceding the filing of the report.

(c) The Department must analyze the data reported and report to the Governor and General Assembly by July 1 of each year whether the data discloses a racial bias in the use of artificial intelligence.

Maryland: Labor and Employment – Use of Facial Recognition Services – Prohibition

3–717.

(A)

(1) In this section the following words have the meanings indicated.

(2) "Facial recognition service" means technology that analyzes facial features and is used for recognition or persistent tracking of individuals in still or video images.

(3) "Facial template" means the machine–interpretable pattern of facial features that is extracted from one or more images of an individual by a facial recognition service.

(B) An employer may not use a facial recognition service for the purpose of creating a facial template during an applicant's interview for employment unless an applicant consents under subsection (c) of this section.

(C) (1) An applicant may consent to the use of facial recognition service technology during an interview by signing a waiver.

(2) The waiver signed under paragraph (1) of this subsection shall state in plain language:

(I) The applicant's name;

(II) The date of the interview;

(III) That the applicant consents to the use of facial recognition during the interview; and

(IV) Whether the applicant read the consent waiver.

New York City: Subchapter 25: Automated Employment Decision Tools

§ 20-870 Definitions.
For the purposes of this subchapter, the following terms have the following meanings:

Automated employment decision tool. The term "automated employment decision tool" means any computational process, derived from machine learning, statistical modeling, data analytics, or artificial intelligence, that issues simplified output, including a score, classification, or recommendation, that is used to substantially assist or replace discretionary decision making for making employment decisions that impact natural persons. The term "automated employment decision tool" does not include a tool that does not automate, support, substantially assist or replace discretionary decision-making processes and that does not materially impact natural persons, including, but not limited to, a junk email filter, firewall, antivirus software, calculator, spreadsheet, database, data set, or other compilation of data.

Bias audit. The term "bias audit" means an impartial evaluation by an independent auditor. Such bias audit shall include but not be limited to the testing of an automated employment decision tool to assess the tool's disparate impact on persons of any component 1 category required to be reported by employers pursuant to subsection (c) of section 2000e-8 of title 42 of the United States code as specified in part 1602.7 of title 29 of the code of federal regulations.

Employment decision. The term "employment decision" means to screen candidates for employment or employees for promotion within the city.

§ 20-871 Requirements for automated employment decision tools.
a. In the city, it shall be unlawful for an employer or an employment agency to use an automated employment decision tool to screen a candidate or employee for an employment decision unless:

1. Such tool has been the subject of a bias audit conducted no more than one year prior to the use of such tool; and

2. A summary of the results of the most recent bias audit of such tool as well as the distribution date of the tool to which such audit applies has been made publicly available on the website of the employer or employment agency prior to the use of such tool.

b. *Notices required.* In the city, any employer or employment agency that uses an automated employment decision tool to screen an employee or a candidate who has applied for a position for an employment decision shall notify each such employee or candidate who resides in the city of the following:

1. That an automated employment decision tool will be used in connection with the assessment or evaluation of such employee or candidate that resides in the city. Such notice shall be made no less than ten business days before such use and allow a candidate to request an alternative selection process or accommodation;

2. The job qualifications and characteristics that such automated employment decision tool will use in the assessment of such candidate or employee. Such notice shall be made no less than 10 business days before such use; and

3. If not disclosed on the employer or employment agency's website, information about the type of data collected for the automated employment decision tool, the source of such data and the employer or employment agency's data retention policy shall be available upon written request by a candidate or

employee. Such information shall be provided within 30 days of the written request. Information pursuant to this section shall not be disclosed where such disclosure would violate local, state, or federal law, or interfere with a law enforcement investigation.

§ 20-872 Penalties.

a. Any person that violates any provision of this subchapter or any rule promulgated pursuant to this subchapter is liable for a civil penalty of not more than $500 for a first violation and each additional violation occurring on the same day as the first violation, and not less than $500 nor more than $1,500 for each subsequent violation.

b. Each day on which an automated employment decision tool is used in violation of this section shall give rise to a separate violation of subdivision a of section 20-871.

c. Failure to provide any notice to a candidate or an employee in violation of paragraphs 1, 2 or 3 of subdivision b of section 20-871 shall constitute a separate violation.

d. A proceeding to recover any civil penalty authorized by this subchapter is returnable to any tribunal established within the office of administrative trials and hearings or within any agency of the city designated to conduct such proceedings.

§ 20-873 Enforcement.

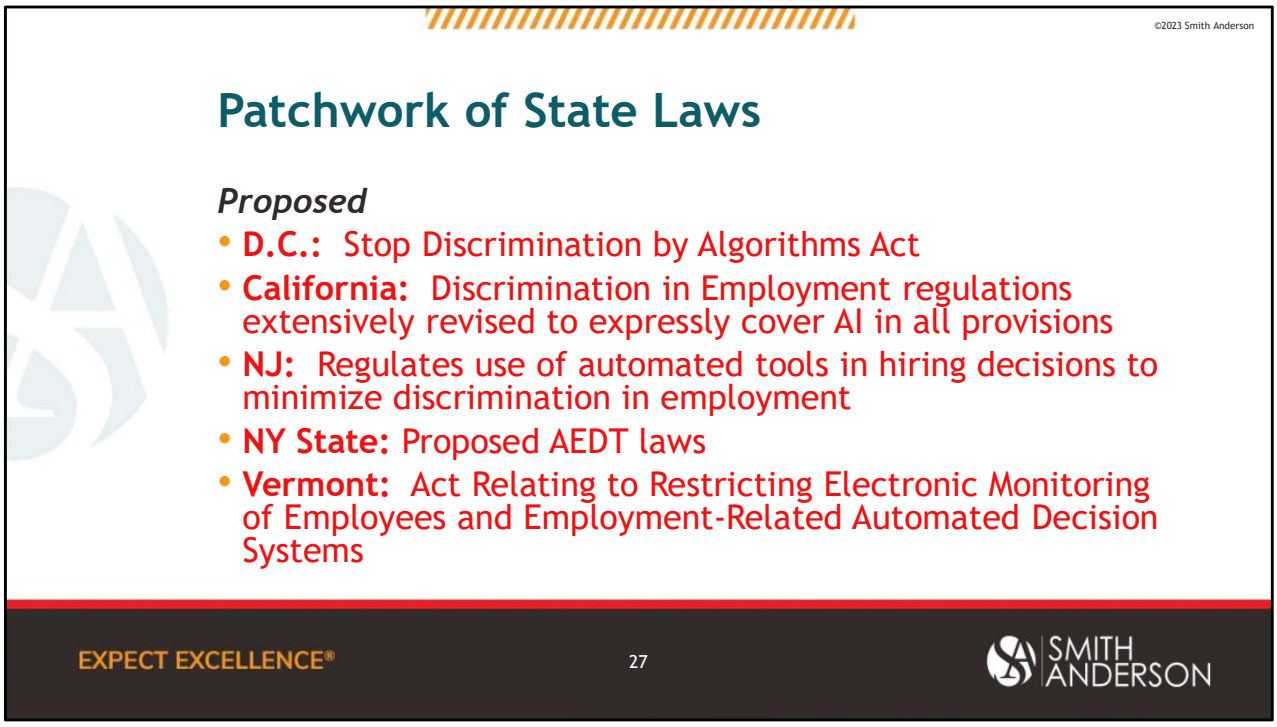
The corporation counsel or such other persons designated by the corporation counsel on behalf of the department may initiate in any court of competent jurisdiction any action or proceeding that may be appropriate or necessary for correction of any violation issued pursuant this subchapter, including mandating compliance with the provisions of this chapter or such other relief as may be appropriate.

§ 20-874 Construction.

The provisions of this subchapter shall not be construed to limit any right of any candidate or employee for an employment decision to bring a civil action in any court of competent jurisdiction, or to limit the authority of the commission on human rights to enforce the provisions of Title 8, in accordance with law.

New York City Council, *Automated Employment Decision Tools*, *available at* https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4344524&GUID=B051915D-A9AC-451E-81F8-6596032FA3F9

New York City Department of Consumer and Worker Protection, *Notice of Adoption of Final Rule*, *available at* https://rules.cityofnewyork.us/wp-content/uploads/2023/04/DCWP-NOA-for-Use-of-Automated-Employment-Decisionmaking-Tools-2.pdf (last accessed Aug. 16, 2023); Council of the District of Columbia, *B24-0558 – Stop Discrimination by Algorithms Act of 2021*, *available at* https://lims.dccouncil.gov/Legislation/B24-0558 (last accessed Aug. 16, 2023).



D.C.: Stop Discrimination by Algorithms Act

- Prohibits algorithm using a range of personal characteristics
- Requires notice to candidates with adverse AI results, including the factors used to reach the determination and the opportunity for the candidate to submit corrective information
- Requires annual bias audit and report to the Office of the Attorney General, including algorithm performance metrics, the reason for using the algorithm, and disclosure of any algorithmic determination complaints received

California: Proposed Modifications to Employment Regulations Regarding Automated-Decision Systems (ERRADS):

- Covers employers and covered entities: Any employer that employs any individual who resides in California; any vendor or person acting on behalf of any such employer that provides services related to recruiting, applicant screening, hiring, or the administration of automated-decision systems for an employer's use in recruitment, hiring, and other actions; an employment agency, labor organization, or apprenticeship program; or a non-religion-based nonprofit organization.

- Defines "automated-decision systems" as any "computational process that screens, evaluates, categorizes, recommends, or otherwise makes a decision or facilitates human decision making that impacts applicants or employees." An automated-decision system may be derived from and/or use

ML, algorithms, statistics, and/or "other data processing or artificial intelligence techniques." ERRADS deems the following tasks actions by an automated-decision system:

(A) using computer-based tests, such as questions, puzzles, games, or other challenges to:

(i) make predictive assessments about an applicant or employee;

(ii) measure an applicant's or employee's skills, dexterity, reaction-time, and/or other abilities or characteristics; and/or

(iii) measure an applicant's or employee's personality trait, aptitude, attitude, and/or cultural fit;

(B) directing job advertisements or other recruiting materials to targeted groups;

(C) screening resumes for particular terms or patterns; and/or

(D) analyzing facial expression, word choice, and/or voice in online interviews.

Providing that:

- AI measuring an individual's reaction time may unlawfully screen out individuals with certain disabilities
- AI analyzing an individual's tone or facial expressions during a video-recorded interview may unlawfully screen out individuals based on race, national origin, gender, or a number of other protected characteristics
- Personality-based questions, including those asked using an automated-decision system, may constitute a medical or psychological examination or inquiry. Personality-based questions include, but are not limited to, tests or questions that measure: optimism and/or positive attitudes; personal or emotional stability; extroversion or introversion; and/or intensity

California also has introduced proposed legislation similar to the New York City AEDT law (A.B. 331). The bill would:
•Require employers to conduct an impact assessment.
•Impose notice requirements.
•Require AEDT deployers or developers to create a governance program.
•Prohibit using AEDT tools with a discriminatory impact.

New Jersey Proposed AEDT Law
New Jersey introduced A.B. 4909 and S.B. 1926, both bills would make it unlawful to sell or offer for sale an AEDT unless the tool has been subject to a bias audit within a year of the sale or offer; includes, at no additional cost, an annual bias audit service providing the purchaser with the audit results; and includes a notice stating that the tool is subject to the provisions of the AEDT law.

Employers using an AEDT to screen employment candidates must notify each candidate within 30 days of using the tool that an automated employment decision tool, which is subject to an audit for bias, was used in connection with the candidate's application for employment and the tool assessed the job qualifications or characteristics of the candidate.

New York State Proposed AEDT Laws

New York state introduced NY A00567. This bill would make it unlawful for employers to use AEDT to screen applicants for employment unless:
•A disparate impact analysis is conducted at least annually to assess the actual impact of any AEDT used by any employer to select candidates for jobs within New York and provided to the employer.
•Before using the AEDT, the employer makes publicly available on its website a summary of the most recent disparate impact analysis of the AEDT tool and the tool's distribution date.
•The employer provides to the NYS DOL a summary of the most recent disparate impact analysis provided to the employer at least annually.

New York state also has introduced S. 7623. The bill would amend the N.Y. Labor Law to restrict the use by an employer or an employment agency of electronic monitoring or an automated employment decision tool to screen a candidate or employee for an employment decision unless such tool has been the subject of a bias audit within the last year and the results of such audit have been made public and; require notice to employment candidates of the use of such tools. The proposed law imposes broader requirements than the NYC AEDT law, including: unlawful to "discipline or terminate the employment of an employee solely on the basis of their refusal to comply to the collection of their data by an electronic monitoring tool;" "[a]n employer shall not require employees or candidates that apply for a position of employment to consent to the use of automated employment decision tools in an employment decision, nor shall an employer discipline or disadvantage an employee or candidate for employment solely as a result of their request for accommodation."

Vermont Proposed H.114, entitled "**An Act Relating to Restricting Electronic Monitoring of Employees and Employment-Related Automated Decision Systems."**
H.114 would limit the use of automated decision systems for employment-related decisions related to hiring or affecting an employee's compensation, benefits, or terms and conditions of employment, decisions relating to the discipline, evaluation, promotion, or termination of an employee.

H.114 also would require that electronic monitoring must be the least invasive means, with respect to the employee, to accomplish a purpose identified as an essential job function and be used with the smallest number of employees to collect the smallest amount of data necessary to accomplish said purpose. Employers would be required to provide a 15-day notice to employees prior to any monitoring efforts and provide the name of any person, whether within the employer or outside, who will have access to any information, how frequently the monitoring will occur, and how often the data will be destroyed.

Data & Trust Alliance Safeguards include 4 components: Evaluation (55 questions in 13 categories for completion by the HR vendor), Education and Assessment (detailed guidance for HR teams assessing vendor response), Scorecard (to grade and compare vendors and document issues) and Implementation Guidance (for integrating the safeguards into an organization's systems).

World Economic Forum Toolkit includes a guide covering key topics and steps in the responsible use of AI-based HR tools, and two checklists - one focused on strategic planning and the other on the adoption of a specific tool.

General discussion about generative AI

"The hottest new programing language is English." – Andrej Karpathy

- Word of the Presentation: Review
- ***Word of the Slide***

Review Counter: 1

What is generative AI?

- Traditional AI
  - Specific task
  - Go fetch
- Generative AI
  - Creates new work
  - Infinite Monkey Theorem - Émile Borel
    - No
    - BUT: you get a product that may seem fine, but if you found out 1000 monkeys typed it out, I bet you would review the document very carefully before presenting it as usable

Word of the Slide: ***Generative AI "GAI"****: AI that has the ability to not just find existing items, but is able to create new products based on existing and available data.*

Review Counter: 2

Stages of using AI

- Person
- MAGIC
  - Stage 1: Initial Data
  - Stage 2: Training
- Result
  - BUT
    - Issue with prediction and probability
    - Trained behavior based on a fixed start and equally correct end
- Back to Person: **Review**

Word of the Slide: ***LLM***: *Large Language Model – recognizes and predicts words*

Second Word of the Slide: ***GPT***: *General Pre-trained Transformer*

Review Counter: 3

How does it work?

- How does stage 1 work?
  - Preschool, middle school and High school
  - Learn to speak and be creative and human

Word of the Slide: ***Synthetical cohesion:*** *does it sound like a person wrote this?*

- How does stage 2 work?
  - College
  - Leave the humanity, take the skills
  - Trained through **review** to be correct and to get it right

Second Word of the Slide: ***Lexical similarity****: how close was the answer to being right?*

Review Counter: 4

One AI to rule them all?

Probably Not

- Issue with training
- What is the data set?
- Who will monitor?
- What data will be used and what will happen to collected data?
- Who will **review** and ensure quality?

Word of the Slide: ***Retrieval augmented generation (RAGs):*** *what data will be taken in deciding the answer*

Review Counter: 5

What can it do?

- Is it a Magic Pill?
  - No – it is a tool
- AI is *really* good at sounding human
  - *Example: physicians use AI to generate scripts for discussing sensitive topics with families*
  - Help with smaller tasks – low risk applications
- Can I use it to replace you?
  - Drafting Legal documents – handbooks, policies etc.
    - Unlimited resources, specialized focus, retained experts – yes with couple of months to train the AI
      - What if new legislation or new policy?
    - Even so – risk is there – need to **review** with full understanding of what are the boundaries of correct and incorrect policies – likely need a lawyer
- Difference between searching:
  - Employee Severance Agreement
  - ((Employee OR Employment OR Severance OR Separation) /s Agreement OR contract) /255 "North Carolina") % ("disparagement" OR (((21 OR 45) /s days) /s consider)
- Good Applications?
  - *Industry specific tasks **reviewed** and approved by experts before use*

Word of the Slide: ***Loss Function:*** *the training of the AI by allocating points to generated answers*

Review Counter: 7

Inherent risks

- AI is being developed by companies – AI is a tool, but someone trained the AI and provided the data
- Media literacy and cautious and skeptical approach to info
  - Who created this?
  - What sources does it pull from?
  - Who was used to train the AI?
  - How did they **review** the data and the AI generated product?
  - When was it trained?
  - What if there is a change in the laws, how quickly will that be reflected?
  - Is that law clear – without any diverging interpretations?

Review Counter: 8

Inherent Risks *(cont.)*

You have a document, now what?

- First **review**
- Second **review**
- Third **review**…
- Understand the tool and its function/limitations
  - Apple Pie or Handbook
- Be proactive: act rather than react
- **Review** some more

Word of the Slide*: *Hallucination:
When AI creates a fake fact

Review Counter:
12

Who takes on the risk?

- The suspects:
  - The company that owns the AI software?
  - The company using the generated product?
  - HR?
  - The person who formulated the question?
  - The reviewer?
  - The person who trained the AI?
  - The person who provided the Data?
  - The reviewing lawyer?
  - The AI?

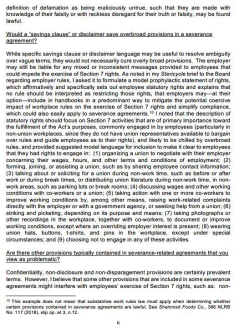
- AI use policies
- What laws do we have?
- What laws are coming?
  - Guides
  - Best Practices
  - International Predictions?
- Risk Tolerance

Word of the Slide: ***Model***
Temperature: *risk indication - how creative will the AI be allowed to be*

Review Counter:
12

Review illustration

- How many times did we mention reviewing?
- Are the following definitions the correct ones we gave as part of the Word of the Slide?
  - ***Hallucination**: When AI makes up a fake fact*
  - ***Loss Function**: The training of the AI by **reviewing** and allocating points to generated answers*
  - ***GPT**: Generic Pre-trained Transformer*
- More practical example:



definition of defamation as being maliciously untrue, such that they are made with knowledge of their falsity or with reckless disregard for their truth or falsity, may be found lawful.

Would a "savings clause" or disclaimer save overbroad provisions in a severance agreement?

While specific savings clause or disclaimer language may be useful to resolve ambiguity over vague terms, they would not necessarily cure overly broad provisions. The employer may still be liable for any mixed or inconsistent messages provided to employees that could impede the exercise of Section 7 rights. As noted in my *Stericycle* brief to the Board regarding employer rules, I asked it to formulate a model prophylactic statement of rights, which affirmatively and specifically sets out employee statutory rights and explains that no rule should be interpreted as restricting those rights, that employers may—at their option—include in handbooks in a predominant way to mitigate the potential coercive impact of workplace rules on the exercise of Section 7 rights and simplify compliance, which could also easily apply to severance agreements.[10] I noted that the description of statutory rights should focus on Section 7 activities that are of primary importance toward the fulfillment of the Act's purposes, commonly engaged in by employees (particularly in non-union workplaces, since they do not have union representatives available to bargain over rules and guide employees as to their rights), and likely to be chilled by overbroad rules, and provided suggested model language for inclusion to make it clear to employees that they had rights to engage in: (1) organizing a union to negotiate with their employer concerning their wages, hours, and other working conditions; (2) forming, joining, or assisting a union, such as by sharing employee contact information; (3) talking about or soliciting for a union during non-work time, such as before or after work or during break times, or distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms; (4) discussing wages and other working conditions with co-workers or a union; (5) taking action with one or more co-workers to improve working conditions by, among other means, raising work-related complaints directly with the employer or with a government agency, or seeking help from a union; (6) striking and picketing, depending on its purpose and means; (7) taking photographs or other recordings in the workplace, together with co-workers, to document or improve working conditions, except where an overriding employer interest is present; (8) wearing union hats, buttons, t-shirts, and pins in the workplace, except under special circumstances; and (9) choosing not to engage in any of these activities.

Are there other provisions typically contained in severance-related agreements that you view as problematic?

Confidentiality, non-disclosure and non-disparagement provisions are certainly prevalent terms. However, I believe that some other provisions that are included in some severance agreements might interfere with employees' exercise of Section 7 rights, such as: non-

[10] This example does not mean that substantive work rules law must apply when determining whether certain provisions contained in severance agreements are lawful. See *Shamrock Foods Co.*, 366 NLRB No. 117 (2018), slip op. at 3, n.12.

6

Review Counter:
16


SMITH ANDERSON
Using AI in HR 2.0 and ChatGPT Too!
Kimberly J. Korando
Tommy Postek
November 14, 2023
EXPECT EXCELLENCE®

Secure 2.0 — Major Changes to Employer Retirement Plan Landscape

SMITH ANDERSON

SECURE 2.0

Impact on Employer Retirement Plans

Kara Brunk

November 14, 2023

EXPECT EXCELLENCE®

Overview of Select Provisions

Changes Currently Effective

- Increased RMD Age
- Expansion of Self-Correction
- Overpayment Recoupment Relief
- Employer Contribution Roth Treatment

Changes Effective After 12/31/2023

- Roth Catch-up Contribution Requirement
- Student Loan Payments Treated as Elective Deferrals
- Increases Mandatory Cash-out Limit
- Emergency Savings Accounts
- 10% Early Withdrawal Penalty Exceptions
- Auto Enroll/Escalation Failure Correction

Changes Effective After 12/31/2024

- Increase to Catch-up Limit
- Auto-Enrollment Requirement
- Expands Long-term Part-time Worker Eligibility

Changes Effective After 12/31/2025

- Roth Catch-up Contribution Requirement

Changes Currently Effective

Required Minimum Distributions

Increased (Sec. 107)

Beginning Date Age

Required Beginning Date (RBD) Age

Date of Birth	RBD Age	Authority
Before July 1, 1949	70 ½	Pre-SECURE Act
On or after July 1, 1949 and before January 1, 1951	72	SECURE Act
On or after January 1, 1951 and before January 1, 1960	73	SECURE 2.0
On or after January 1, 1959	75	SECURE 2.0

Required Changes

- Apply new RBD age in determining:
  - Amount of the distribution that is not eligible for rollover;
  - Availability of period-certain forms of payment after RBD

Optional Changes

- Plan sponsor may consider changing plan's required commencement date to align with SECURE 2.0
- Fewer issues for defined contribution plans
- Defined benefit (pension) plans must provide actuarial increases for extended period
  - Are participants actively accruing benefits?
  - Does the plan permit terminated vested participants to defer beyond normal retirement?
  - Did the plan extend the required commencement age to 72 under SECURE Act?

Matching and Non-elective Contribution

Optional Roth Treatment (Sec. 604)

Optional Roth Treatment

- Effective for contributions made after December 29, 2022
- 401(a), 403(b) or governmental 457(b) can allow employees to choose whether employer matching or nonelective contributions may be made on a Roth basis (some or all)

Impact/Limitations of Roth Election

- Employer contributions treated as Roth are included in the employee's gross income for the year
- Employer contributions must be 100% vested

EPCRS

Expansion of Self-Correction (Sec. 305)

Expansion of Self-Correction

- Generally effective December 29, 2022
- "Eligible inadvertent failures" may be self-corrected prior to audit
  - Defined expansively to include any failure that occurs despite compliance practices and procedures that satisfy the standards of EPCRS
  - Does not include failures that are egregious, related to the diversion or misuse of plan assets, or relate to an abusive tax avoidance transaction
  - Self-correction must be completed within a reasonable time after the failure is identified
- Updated EPCRS Guidance to be issued by December 29, 2024

Plan Loans Failures

- Loan failures may be self-corrected according to the rules in EPCRS
- Loan failures self-corrected under EPCRS as permitted by SECURE 2.0 will be treated as meeting the requirements of the VFC Program
  - Secretary of Labor may impose reporting or other procedural requirements.

Recovery of Plan Overpayments

Flexibility and Participant Protections (Sec. 301)

Changes to Overpayment Process

- Plan relieved of obligation to recover overpayments and reimburse the plan trust if certain conditions are met
- Plan can take participant's hardship into account in determining overpayment collection
- Grants new participant protections where traditional overpayment protection is pursued

Changes Effective After 12/31/2023

Student Loan Payments

Treated as Elective Deferrals for Purposes of Matching Contributions (Sec. 110)

Overview

- Effective for plan years beginning after December 31, 2023
- Employer may make matching contributions on "Qualified Student Loan Payment"

"Qualified Student Loan Payment"

- "Qualified Student Loan Payment": Payment made by an employee in repayment of qualified education loan incurred by employee solely to pay qualified higher education expenses
  - Limited by 402(g), less elective deferrals made by the employee for such year
  - Employee must certify annually to payment
  - Employer may rely on employee certification of payment

Matching Contribution

- Must be made at same rate as deferrals
- Must be made on behalf of employees otherwise eligible to receive matching contributions on account of elective deferrals
- All employees eligible to receive matching contributions on elective deferrals must be eligible to receive matching contributions on Qualified Student Loan Payments
- Matching contributions may be made on a different schedule, pending regulatory guidance

Treatment for Purposes of Nondiscrimination Rules

- Plan may separately test employees receiving matching contributions on student loan repayments
- Matching contributions will count toward safe harbor 401(k) requirements or safe harbor automatic enrollment 401(k) plan requirements

Mandatory Cash-out Limit

Increased amount (Sec. 304)

Increases Cash-out Limit

- Effective for distributions made after December 31, 2023
- Cash-out limit currently set at $5,000
  - Amounts between $1,000 and $5,000 must be automatically rolled over to an IRA
- Increases the $5,000 amount to $7,000
- Optional to implement

Emergency Savings Account

Linked to Individual Account Plans (Sec. 127)

Emergency Savings Account

- Plan years beginning after December 31, 2023
- Can be offered to NHCEs linked to defined contribution plan, on a Roth basis
- May offer auto enrollment up to 3% of pay
- Contributions cease at $2,500 (indexed) or lower amount
- Must be invested in principal preservation investment
- Must permit at least one withdrawal per month without penalty, and at least four withdrawals per year without fees

10% Early Withdrawal Penalty Exceptions

Emergency Expenses (Sec. 115), Domestic Abuse (Sec. 314)

Certain Distribution Provisions

- Emergency Expenses (Sec. 115): Participants may take up to $1,000 in a calendar year as an emergency personal expense distribution.
  - Distributions after December 31, 2023
- Domestic Abuse (Sec. 314): Victims may withdraw the lesser of $10,000 or 50% of their account under a defined contribution plan during the one-year period beginning on the date on which the individual is a domestic abuse victim.
  - Self-certify eligibility and withdrawals may be repaid over a three-year period
  - Distributions after December 31, 2023

Auto Enrollment/Escalation

Correcting Failures (Sec. 350)

Auto Enrollment and Auto Escalation Failures

1. Reasonable administrative errors made in implementing auto enrollment or auto escalation provision; or
2. failure to afford employee opportunity to make affirmative election because improperly excluded.

Must be corrected prior to 9½ months after the end of the plan year in which the failures occurred.

Changes Effective After 12/31/2024

Catch-up Contributions

Increased Limits (Sec. 109)

Increased Limits

- Effective for taxable years beginning after December 31, 2024
- Increases catch-up contribution limit for individuals ages 60-63
- Increased to greater of $10,000 or 150% of the regular catch-up amount in effect for 2024 (then adjusted for inflation)
- Limit is lower for SIMPLE Plans

Automatic-Enrollment

Requirement for New Plans (Sec. 101)

Requirement for New Plans

- Effective for plan years after December 31, 2024
- Unless exemption applies, new 401(k) and 403(b) plans must provide for automatic enrollment and must satisfy three additional requirements
- Exemptions for:
  - Existing retirement plans
  - Plans with 10 or less employees
  - Certain “new” businesses
  - Church plans and governmental plans

Potential Issues

- Employer that first adopts a MEP on or after December 29, 2022 will be treated as adopting a new plan
  - Changes to PEO?
- Plan mergers of existing and new plans
- Issues in transactions not addressed

Participation by Long-term Part-time Workers

Expanded Eligibility (Sec. 125)

Background under SECURE 1.0

- Historically, tracked "year of service" under minimum participation requirements
  - 1,000 hours in an eligibility computation period
- "Long-term Part-time worker" rule added in 2019
  - Must permit elective deferrals
  - No requirement for matching or nonelective contributions
  - First eligible in plan years beginning on or after January 1, 2024

Expansion under SECURE 2.0

- Excludes service prior to January 1, 2021 for purposes of vesting under SECURE 1.0
- Effective for plan years beginning after December 31, 2024
  - Now two consecutive years of service (instead of three under SECURE Act)
  - Extends requirement to 403(b) plans

Changes Effective After 12/31/2025

Catch-up Contributions

Roth Requirement (Sec. 603)

Roth Requirement

- Effective for taxable years beginning after December 31, 2023~~23~~25
- Catch-up contributions must be made as Roth contributions
- Exception for employees with compensation of $145,000 or less, indexed
- Not applicable to SIMPLE IRAs or SEPs

Reminder: Plan Amendments

Plan Amendments

Remedial Amendment Period (Sec. 501)

Remedial Amendment Period

- Ending on the last day of the first plan year beginning on or after January 1, 2025 (December 31, 2025 for calendar year plans).
- For governmental plans and collectively bargained plans, the last day of the first plan year beginning on or after January 1, 2027 (December 31, 2027 for calendar year plans).
- Same deadline applies for amendments under the CARES Act and SECURE 1.0


SMITH
ANDERSON
SECURE 2.0
Impact on Employer Retirement Plans
Kara Brunk
November 14, 2023
EXPECT EXCELLENCE®

OSHA Hot Topics and Trends: 2023 and Beyond

SMITH ANDERSON

OSHA Hot Topics and Trends: 2023 and Beyond

Stephen T. Parascandola

November 14, 2023

EXPECT EXCELLENCE®

OVERVIEW

- Recent OSHA enforcement initiatives
- Inflation & OSHA Penalties
- Top 10 Most Cited Violations
- New NEP for Heat-Related Hazards
- New Rule: Electronic Recordkeeping and Reporting

Federal OSHA Enforcement Trends

- In January of 2023, DOL released a new policy allowing instance-by-instance ("IBI") citations for high-gravity serious violations of OSHA standards related to falls, trenching, machine guarding, respiratory protection, lockout tagout and other violations
- IBI can mean individual citations per machine, per location, per entry or per employee
- Regional administrators and Area Directors are advised to use IBI citations when:
  - The employer has received a willful, repeat or failure-to-abate violation within the last five years
  - The employer failed to report a fatality or an injury
  - The citations arose out of a fatality or catastrophic injury

Federal OSHA Initiatives

- In January of 2023, DOL released a memo highlighting discretion of Regional Administrators and Area Directors not to group violations
- Goal is to increase penalties to deter further violations
- Under the new policy, inspectors are encouraged not to group citations if evidence allows for separate citations

Inflation & OSHA Penalties

- The Dept. of Labor scales up the maximum federal civil penalty for inflation
- Recent inflation has caused penalties to balloon

Year	2021	2022	2023
Serious/Nonserious	$13,653/violation	$14,502/violation	$15,625/violation
Failure to Abate	$13,653/day	$14,502/day	$15,625/day
Willful/Repeated	$136,532/violation	$145.027/violation	$156,259/violation

NC OSHA Inspections

- Approx. 2,218 inspections in FY2021 (5% increase and 802 more than average state program)
- 4,312 violations in FY2021 (8% increase; more than average state program (~2,569 violations))
- 60% Serious; 35% Nonserious; 5% Other (repeat, willful, failure-to-abate and unclassified)
- 54% of inspections were in the construction industry
- $7,123,571 assessed in penalties (up ~8.5% from FY2020)

OSHANC Most Cited Violations - FY2021

- Fall Protection (training, equipment, ladders, scaffolds, residential construction)
- Personal protective equipment (eye and face protection)
- Machine Guarding
- Lockout/Tagout (control of hazardous energy)
- Hazard communication (written programs & training)

Top Tips to Reduce OSHA Violation Risk

1. Review and update safety policies and procedures
2. Conduct and document regular safety inspections
3. Provide and document proper employee training
4. Keep detailed records of all safety efforts
5. Provide personal protective equipment (PPE)
6. Enforce the use of PPE
7. Monitor subcontractors for compliance and penalize subcontractors for noncompliance

Top 10 OSHA Citations for FY2023

1. Fall Protection – General Requirements (1926.501): **7,271 violations**
2. Hazard Communication (1920.1200): **3,213 violations**
3. Ladders (1926.1052): **2,978 violations**
4. Scaffolding – General Requirements (1926.451): **2,859 violations**
5. Powered Industrial Trucks (1910.178): **2,561 violations**

Top 10 OSHA Citations for FY2023

6. Lockout/Tagout (1910.147): **2,554 violations**
7. Respiratory Protection (1910.134): **2,481 violations**
8. Fall Protection – Training Requirements (1926.503): **2,112 violations**
9. Personal Protective and Lifesaving Equipment – Eye and Face Protection (1926.102): **2,074 violations**
10. Machine Guarding – General Requirement (1910.212): **1,644 violations**

Top 10 OSHA Citations for FY2022

1. Fall Protection (1926.501)
2. Hazard Communication (1920.1200)
3. Respiratory Protection (1910.134)
4. Ladders (1926.1053)
5. Scaffolding – General Requirements (1926.451)

Top 10 OSHA Citations for FY2022

6. Control of Hazardous Energy – Lockout/Tagout (1910.147)
7. Powered Industrial Trucks (1910.178)
8. Fall Protection – Training Requirements (1926.503)
9. Personal Protective and Lifesaving Equipment – Eye and Face Protection (1926.102)
10. Machine Guarding – General Requirement (1910.212)

Top 10 OSHA Citations for FY2021

1. Fall Protection (1926.501)
2. Respiratory Protection (1910.134)
3. Ladders (1926.1053)
4. Scaffolding (1926.451)
5. Hazard Communication (1910.1200)

Top 10 OSHA Citations for FY2021

6. Control of Hazardous Energy – Lockout/Tagout (1910.147)
7. Fall Protection – Training Requirements (1926.503)
8. Personal Protective and Lifesaving Equipment – Eye and Face Protection (1926.102)
9. Powered Industrial Trucks (1910.178)
10. Machine Guarding – General Requirement (1910.212)

Heat-Related Hazards: New NEP

- April 2022: OSHA announced a National Emphasis Program (NEP) on heat-related hazards
- The NEP is scheduled to remain in effect through 2025
- OSHA plans to develop a workplace heat standard
- OSHA will conduct heat-related inspections in high-risk industries on days the National Weather Service has announced a heat warning
- Employers are encouraged to protect workers from heat hazards by providing ample access to water, rest, shade, additional training and acclimatization procedures for new or returning employees
- Target industries include residential and commercial building, roadwork, utilities, manufacturing, farming, warehousing and others

New Rule: Expanded Reporting Requirements

- US DOL announced a new rule effective January 1, 2023
- Employers with 100+ employees in certain industries will be required to electronically submit their OSHA Forms 300 and 301
- OSHA will publish some of the collected data on its website alongside the employer's name


SMITH ANDERSON
OSHA Hot Topics and Trends: 2023 and Beyond
Stephen T. Parascandola
November 14, 2023
EXPECT EXCELLENCE®

Accommodations Galore! Employer's Guide to Understanding Obligations to Accommodate Disability, Pregnancy and Religion

SMITH ANDERSON

Accommodations Galore! Employer's Guide to Understanding Obligations to Accommodate Religion, Pregnancy and Disability

J. Travis Hockaday

November 14, 2023

EXPECT EXCELLENCE®

Groff v. DeJoy – New Standard for Religious Accommodation Requests

- Background:
  - Title VII requires employers to make reasonable accommodations for religious needs of employees so long as doing so does not cause undue hardship on conduct of employer's business
  - Since 1977, "undue hardship" has been often construed to mean anything more than a "*de minimus* cost"
  - NO MORE…

New undue hardship standard

- *Groff*:
  - Rejects *de minimus* standard saying that it was taken out of context from a single line in the 1977 case and that subsequent courts ignored other language regarding "substantial" costs
  - "[U]ndue hardship is shown when a burden is substantial in the overall context of the employer's business"
  - Clarified that Title VII requires an employer to show that the burden of religious accommodation would result in **"substantial increased costs in relation to the conduct of its particular business"**

"Substantial increased costs"

- Fact-specific, case by case inquiry
- All relevant factors must be considered:
  - Particular accommodations requested
  - Practical impact in light of employer's:
    - Nature
    - Size
    - Operating cost

"Substantial increased costs"

- No undue hardship imposed by:
  - Infrequent/temporary costs of premium wages for substitutes
  - Voluntary shift swapping
  - Occasional shift swapping
  - Administrative costs involved in reworking schedules
  - Employee animosity

What does it mean?

- Time will tell…
- NOT the ADA undue hardship standard (significant difficulty and expense), but also not literally *de minimus*
- Focus should be on the ***impact to the business***
  - Impacts on coworkers are relevant only to the extent those impacts go on to affect the conduct of the business
  - Bias/hostility to a religious practice or accommodation CANNOT be considered "undue"

What to do now?

- Review policies and procedures and update language as needed to delete any "*de minimus*" language
- Consider whether pending/recently denied requests are defensible under new standard
- Prepare for increase in requests and train HR and management
- Consider whether DEI initiatives take religious differences into account

Common Religious Accommodations

- Vaccine mandate exemptions
- Schedule changes
- Voluntary shift substitutions/swaps
- Lateral transfers or changes in tasks
- Modifying practices/policies (dress, grooming, use of facilities)
- Permitting prayer/religious expression

Requests for Religious Accommodation

- Employee responsibilities
  - Give notice of conflict between religion and work
  - Discuss request/provide documentation
- Employer responsibilities
  - Consider request by engaging in interactive process
  - Provide reasonable accommodation (unless it would cause undue hardship)

Recognizing and Handling Requests

- No “magic words” required from employee
- Supervisors should involve HR immediately
- Process:
  - Discuss conflict with employee
  - Consider employee’s requested accommodation
  - Consider alternative reasonable accommodations (if necessary)
  - Provide reasonable accommodation (unless it would cause undue hardship under new standard)
- Do not retaliate

Pregnant Workers Fairness Act (PWFA)

- Effective June 27, 2023
- Applies to public/private employers of 15 or more employees, federal agencies, unions and employment agencies
- Covers gap in federal law for pregnant and postpartum employees and applicants seeking accommodations
  - Before, under then-existing law, to receive accommodation they had to have a disability related to pregnancy or identify similarly situated employees with accommodations
- Deals only with accommodations (other laws cover discrimination against workers on basis of pregnancy, childbirth and related conditions)

PWFA - resources

- The law: https://www.eeoc.gov/statutes/pregnant-workers-fairness-act
- Proposed regulations published August 11, 2023:
  - https://www.federalregister.gov/documents/2023/08/11/2023-17041/regulations-to-implement-the-pregnant-workers-fairness-act
- Final regulations expected late December 2023
- For EEOC guidance, see https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act

PWFA – prohibits employers from…

- Failing to make reasonable accommodation to the known limitations related to pregnancy, childbirth or related medical condition of a qualified employee, absent undue hardship on operation of business
- Requiring employee to accept an accommodation other than any reasonable accommodation arrived at through the interactive process

PWFA – prohibits employers from…

- Denying employment opportunities because of the need to make reasonable accommodations
- Requiring employee to take paid or unpaid leave if another reasonable accommodation can be provided (LEAVE IS A LAST RESORT)
- Taking adverse action because of a request for or use of reasonable accommodation

PWFA – prohibits employers from…

- Retaliating against applicant or employee for reporting/opposing unlawful discrimination under PWFA, filing charge, etc.
- Interfering with rights under PWFA

PWFA – key concepts

- "Reasonable accommodation" – same as ADA
- "Undue hardship" – generally same as ADA, but proposed rule adds additional factors to analysis
- "Interactive process" – same as ADA
- BUT, others vary from ADA…

PWFA – "Known Limitation"

- Physical or mental conditions related to, affected by, or arising out of pregnancy, childbirth or related medical conditions that the employee (or representative) has communicated to the employer ***whether or not such condition meets the ADA definition of disability***

PWFA – "Known Limitation"

- PWFA intended to cover healthy/uncomplicated pregnancies
- Unlike ADA, employee need not show that limitation meets a specific severity level to be covered
- "Physical or mental condition" may be modest, minor and/or episodic
- EEOC: employers may request additional information sometimes, but not always; should not usually be necessary

PWFA – "related medical conditions"

- Miscarriage, stillbirth or abortion; infertility; fertility treatment; lactation and conditions related to lactation; use of birth control; menstrual cycles; postpartum depression, anxiety or psychosis; vaginal bleeding; preeclampsia; pelvic prolapse; preterm labor; ectopic pregnancy; gestational diabetes; cesarean or perineal wound infection; maternal cardiometabolic disease; endometriosis; hormone level changes; and others.
- Also may include conditions not unique to pregnancy/birth, but related to or exacerbated by pregnancy/birth (such as migraines, nausea/vomiting, high BP, incontinence and more)

PWFA – "Qualified Employee"

- Employee/applicant who, with or without reasonable accommodation, can perform the essential functions of the position
- However, still considered qualified if:
  - Inability to perform essential function is for a temporary period
  - Essential function could be performed in the near future (proposed rule: 40 weeks per request), and
  - Inability to perform essential function can be reasonably accommodated

PWFA – "Qualified Employee"

- Unlike ADA, employee can still be a "qualified employee" and entitled to reasonable accommodation even if they are temporarily unable to perform the essential functions of the position
  - ADA requires accommodation only to extent employee can perform essential functions of position

PWFA – typical accommodations

- Ability to sit/drink water
- Closer parking
- Flexible hours, scheduling changes
- Appropriately sized uniforms/apparel
- Additional break time for bathroom, eating, rest
- Leave/time off to recover from childbirth
- Temporary suspension of one or more essential functions

PWFA – typical accommodations

- Excusal from strenuous activities
- Excusal from activities that involve exposure to compounds not safe for pregnancy
- Light duty
- Modifying work environment for accessibility
- Acquiring/modifying equipment/devices
- Adjusting/modifying exams/policies

PWFA – not undue hardship…

- Well, typically, and per proposed rule
- "Predictable assessments" (for which no documentation should be requested)
  - Allowing an employee to carry water and drink, as needed, in work area
  - Allowing an employee extra restroom breaks
  - Allowing an employee whose work requires standing to sit and whose work requires sitting to stand
  - Allowing breaks as needed to eat and drink

PWFA – requesting accommodation

- Per proposed rule:
  - Request does not need to be in writing
  - Request does not need to include any specific words or phrases
  - Request may be made in conversation or other form of communication

Other laws still apply

- Title VII
  - Protects against discrimination based on pregnancy, childbirth and related medical conditions
  - Requires employers to treat affected workers the same as other workers similar in their ability or inability to work

Other laws apply

- ADA
  - Protects from discrimination based on disability
  - Requires reasonable accommodation unless undue hardship
  - Pregnancy itself is NOT a disability under ADA, but some pregnancy-related conditions may be disabilities

Other laws apply

- FMLA
  - Provides covered employees with unpaid, job-protected leave
- PUMP Act
  - Broadens workplace protection for employees who express breast milk
- State/local laws – be sure to check!
  - NC – one of very few states with no statewide laws prohibiting pregnancy discrimination or requiring pregnancy accommodations

PWFA – what to do now?

- Review/update accommodation policies/processes
- Train HR personnel involved in accommodation process
- Revisit "essential functions" of jobs – can they be restructured/revised on temporary basis if needed?
- Think about types of light duty tasks that may be offered to pregnant employees who request accommodation

Accommodations for COVID/Long COVID

- EEOC: end of public health emergency does not mean employers can automatically terminate reasonable accommodations that were provided due to pandemic-related circumstances
- Employers may evaluate accommodations made during that time and, in consultation with employee, assess whether there continues to be a need for accommodation
  - May include request for documentation regarding ongoing need and possible alternatives

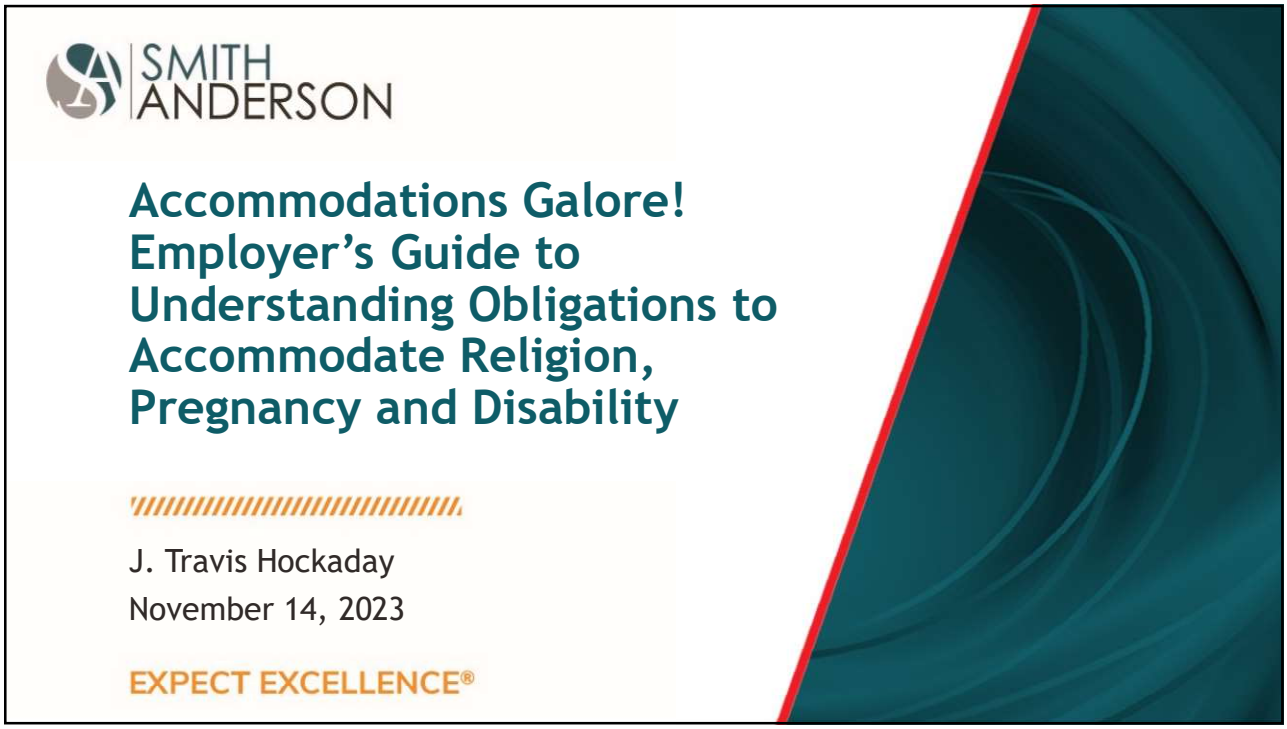
Accommodations for COVID/Long COVID

- Long COVID may be disability under ADA
- Examples of possible accommodations for employees with Long COVID:
  - Quiet workspace, use of noise cancelling devices and uninterrupted work time for brain fog
  - Alternative lighting and reducing glare for headaches
  - Rest breaks for joint pain/shortness of breath
  - Flexible schedule or telework for fatigue
  - Removal of "marginal functions" that involve exertion

Accommodations for COVID/Long COVID

See EEOC's Update to Covid-19 Technical Assistance (May 15, 2023):

https://www.eeoc.gov/newsroom/eeoc-releases-update-covid-19-technical-assistance


SMITH ANDERSON
Accommodations Galore! Employer's Guide to Understanding Obligations to Accommodate Religion, Pregnancy and Disability
J. Travis Hockaday
November 14, 2023
EXPECT EXCELLENCE®

EEO Update

SMITH ANDERSON

EEO UPDATE

Zebulon D. Anderson
November 14, 2023

EXPECT EXCELLENCE®

EEOC DEVELOPMENTS

Administrative Statistics

- Volume
  - FY 2022 = 73,485 charges
  - 19% ↑ and first ↑ in 6 years
  - By far the most religion discrimination claims in a year
    - Went from 2,111 and 3.4% of all charges to 13,814 and 18.8%
    - Many were vaccine-related and SCOTUS has championed religion claims
  - Over last 10 years, retaliation and disability claims have increased the most
  - Retaliation has remained most common claim for over a decade – now 51.6% of all charges
  - Cause finding in only 2.2% - tied with 1996 for lowest ever

Administrative Statistics (cont.)

- Location
  - Charge volume ↑ - most since 2018
  - FY 2022: NC – 5% of all charges nationwide
  - 8 States (Texas, Florida, California, Georgia, Illinois, Pennsylvania, New York and North Carolina) account for over 50% of all charges nationwide

Litigation Statistics

- In FY 2022 – 91 new merits lawsuits filed by EEOC
  - 27% decrease from FY 2021
  - Fewest since 2016 and the 2nd fewest ever
  - About 50% of the lawsuits included SEP claims
  - Much less EEOC litigation than 10-15 years ago
  - When EEOC pursues litigation, its results are successful
    - 94.8% success rate (settlements and jury verdicts)
  - Litigation resolutions: 96 for $39.7m benefiting 1,461 employees – slight ↑ in monetary relief

Systemic Statistics

- Systemic cases are EEOC priority
- Systemic cases involve 20+ employees and are focused on matters in which the alleged discrimination is the result of a "pattern or practice" or "policy" that has a broad impact
- FY 2022
  - 431 systemic investigations
  - 347 systemic investigation resolutions = $29.8m
  - Systemic charges: far more likely to result in "cause" determination – 47% vs. 2%
  - New lawsuits: 14% were systemic and 27% were multi-CP
  - Active lawsuits: 18% are systemic and 25% are multi-CP
  - EEOC litigation is *heavily* focused on systemic and multi-CP cases

EEOC Examples of Practices and Policies that may involve Systemic Discrimination

- **Hiring/Promotion/Assignment/Referral**
  - Criminal/credit background checks
  - Recruitment practices such as favoring or limited to word-of mouth
  - Tap-on-the-shoulder promotion policies
  - Steering of applicants to certain jobs or assignments based on race or gender
  - Historically segregated occupations or industries
  - Job ads showing preference ("young," "energetic," "recent graduate," "men only," "women only")
  - Customer preference
  - Big data-using algorithm to sort through applications
  - Personality or customer service tests; physical ability or capacity tests; cognitive tests
  - No rehire of retired workers or hiring of currently employed persons only

Systemic Examples from EEOC (cont.)

- **Policies/Practices**
  - Mandatory religious practices by employers who do not qualify as religious organizations
  - Paternal leave policies that do not give the same benefits for men and women
  - Mandatory maternity leave
  - Fetal protection policies
  - English only rules
  - Age-based limits on benefits or contributions to pension or other benefits

Systemic Examples from EEOC (cont.)

- **Lay-off/Reduction in Force/Discharge policies**
  - Mandatory retirement
  - Layoffs, reorganizations and RIFs - disparate treatment and disparate impact based on a protected characteristic
  - Waivers that may prevent employees from filing complaints or assisting the EEOC
  - Waivers that do not comply with the Older Workers Benefit Protection Act

Systemic Examples from EEOC (cont.)

- **ADA/GINA**
  - "No fault" attendance policies
  - Non-accommodation for medical leave
  - Light duty policies for only work-related injuries
  - 100% healed return to work requirements
  - Pre-employment medical inquiries

EEOC Composition

- General Counsel
  - Karla Gillbride – D – Confirmed October 2023 and term ends October 2027
    - seat was vacant for 2 years
    - success challenging arbitration and advancing disability rights
- Five Commissioners
  - Kalpana Katagul – D – Confirmed August 2023 and term ends July 2027
  - Keith Sonderling – R - Confirmed September 2020 and term ends July 2024
  - Andrea Lucas – R – Confirmed September 2020 and term ends July 2025
  - Charlotte Burrows (Chair) – D - Confirmed August 2019 and term ends July 2023, but renominated
  - Jocelyn Samuels (Vice-chair) – D – Confirmed September 2020 and term ends July 2026
- What it Means
  - Effective August 2023, control returned to Democrats, but gridlock could resume if Burrows confirmation is delayed
  - With Democrat GC now in place, we anticipate more robust litigation efforts by EEOC
  - Democrat objectives had been stalled, but we anticipate more robust admin activity

Strategic Enforcement Plan: FY 2024-28

- Long awaited update to the Plan that has been in place since 2013
- The SEP has proven to be an accurate guidepost for EEOC enforcement priorities
  - EEOC will "focus on [these] priorities to maximize the EEOC's impact"
- New SEP adopted with input from stakeholders
- New SEP re-emphasizes EEOC focus on systemic issues

Strategic Enforcement Plan: FY 2024 - 28 (cont.)

- EEOC identified six subject matter priorities after focusing on these factors:
  - Issues that will have broad impact
  - Issues affecting workers who are unaware of their rights
  - Issues arising in developing areas of the law
  - Issues involving policies or practices that impede enforcement
  - Issues best addressed by government action

Strategic Enforcement Plan: FY 2024 - 28 (cont.)

1. Eliminating barriers in recruitment and hiring
   - The "use of technology, including artificial intelligence and machine learning, to . . . make or assist in hiring decisions where such systems intentionally exclude or adversely impact protected groups"
   - "job advertisements that exclude or discourage certain protected groups from applying"
   - Steering people into specific jobs based on protected characteristics
   - Limiting access to training based on protected characteristics
   - Reliance on application systems that are difficult for people with disabilities to access
   - Reliance on screening tools, including those influenced by AI, that have disparate impact
   - Continued underrepresentation of women and minorities in industries and sectors (such as construction, finance and STEM) is a concern

Strategic Enforcement Plan: FY 2024 - 28 (cont.)

2. Protecting vulnerable workers
   - immigrant and migrant workers and workers on temporary visas
   - people with developmental or intellectual disabilities
   - workers with mental health related disabilities
   - individuals with arrest or conviction records
   - LGBTQI+ individuals
   - temporary workers
   - older workers
   - individuals employed in low wage jobs, including teenage workers employed in such jobs
   - survivors of gender-based violence
   - Native Americans/Alaska Natives
   - persons with limited literacy or English proficiency

Strategic Enforcement Plan: FY 2024 - 28 (cont.)

3. Selected emerging and developing issues
   - Qualification standards and inflexible policies or practices that discriminate against individuals with disabilities
   - Protecting workers affected by pregnancy, childbirth or related medical conditions under the Pregnancy Discrimination Act (PDA) and the Pregnant Workers Fairness Act (PWFA), as well as pregnancy-related disabilities under the Americans with Disabilities Act (ADA)
   - Addressing discrimination influenced by or arising as backlash in response to local, national or global events, including discriminatory bias arising because of recurring historical prejudices (e.g., discrimination, bias and hate directed against religious minorities – including antisemitism and Islamophobia)
   - Discrimination associated with the long-term effects of the COVID-19 pandemic, including Long COVID
   - Technology-related employment discrimination

Strategic Enforcement Plan: FY 2024 - 28 (cont.)

4. Advancing Equal Pay for all workers
   - Pay discrimination on the basis of any protected characteristic
   - Pay discrimination at the intersection of protected characteristics (e.g., groups comprised of people with more than one protected characteristic)
   - Pay secrecy policies
   - Discouraging or prohibiting workers from asking about pay or sharing their pay with coworkers
   - Reliance on past salary history or applicant's salary expectations to set pay

Strategic Enforcement Plan: FY 2024 - 28 (cont.)

5. Preserving access to the legal system
   - EEOC will challenge policies and practices that limit substantive rights, discourage or prohibit individuals from exercising their rights under employment discrimination statutes or impede the EEOC's investigative or enforcement efforts
   - Specifically, the EEOC will focus on:
     - overly broad waivers, releases, non-disclosure agreements or non-disparagement agreements
     - unlawful, unenforceable or otherwise improper mandatory arbitration provisions
     - employers' failure to keep applicant and employee data and records as required by statute or EEOC regulations
     - retaliatory practices that could dissuade employees from exercising their rights under employment discrimination laws – this includes retaliatory practices that impact employees who have not engaged in protected activity

Strategic Enforcement Plan: FY 2024 - 28 (cont.)

6. Preventing and remedying systemic harassment
   - Since 2018, over 34% of all charges include allegations of harassment
   - EEOC will focus on combatting systemic harassment in all forms and on all bases—including sexual harassment and harassment based on race, disability, age, national origin, religion, color, sex (including pregnancy, childbirth or related medical conditions, gender identity and sexual orientation) or a combination or intersection of any of these
   - Notably, "a claim by an individual or small group may fall within this priority if it is related to a widespread pattern or practice of harassment"

Strategic Enforcement Plan: FY 2024 - 28 (cont.)

- EEOC also identified procedural tools to advance these six areas
  - Years ago the EEOC endeavored to investigate *all* charges
  - Faced with limited resources, it shifted to a focus on identifying and investigating "priority" charges
  - "Priority" charges will include those that raise SEP subjects and that the resolution of which will have broad impact
  - At the administrative stage, early litigation stage, and appellate stage, EEOC will "prioritize meritorious cases that raise SEP priorities or are otherwise likely to have strategic impact"

EEOC Priorities for 2024

- In connection with its budget request for 2024, EEOC identified its six target priorities

1. Racial Justice and Systemic Discrimination
   - Systemic Race Discrimination – over 33% of all charges in last 5 years allege race discrimination
   - Promote Diversity, Equity, Inclusion & Accessibility
2. Pay Equity
   - Women working FT earn 82 cents to a dollar when compared to white men
   - Women of color earn less

EEOC Priorities for 2024 (cont.)

3. Promote DEI&A
   - Mostly focused on the federal sector
4. Artificial Intelligence and Algorithmic Fairness
   - Per EEOC, AI clearly has potential to discriminate
   - EEOC has plans to provide further guidance and education to stakeholders

EEOC Priorities for 2024 (cont.)

5. Retaliation
   - Volume of charges containing allegations of retaliation have increased every year for 20 years
   - EEOC will collaborate with DOL and NLRB
6. Strengthening the EEOC
   - By 2020, EEOC staffing was at lowest level in 4 decades
   - Workload was highest ever with population increase and new laws
   - Staffing has increased the last two years, but more is needed

EEOC Activities in 2023

- Over the last two years, EEOC funding has increased
- At the same time, Congressional action on EEOC Commissioner and GC nominations was delayed until recently
- This adversely impacted the EEOC's ability to implement priorities and objectives identified by the Biden administration
- Still, we began to see more activity in 2023
- And the stage now is set for more robust EEOC activity, both at the administrative level and on the litigation front in 2024

EEOC Activities in 2023 (cont.)

- Pregnant Workers Fairness Act
  - Became effective June 27, 2023, and EEOC began accepting charges for alleged violations
  - That law imposes pregnancy accommodation obligations on employers
  - On October 11, 2023, EEOC issued a Notice of Proposed Rulemaking and comment period has expired
  - Proposed rule can be found here: https://www.federalregister.gov/documents/2023/08/11/2023-17041/regulations-to-implement-the-pregnant-workers-fairness-act
  - Notably, it includes multiple examples of accommodations that EEOC believes are required
  - Anticipate final rule will be issued by year-end

EEOC Activities in 2023 (cont.)

- COVID-19 Technical Assistance
  - On May 15, 2023, EEOC issued updates to its COVID-19 Technical Assistance
  - https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#
  - One significant issue that was addressed relates to accommodations for Long COVID
  - Another significant issue related to harassment, with EEOC suggesting that employers may offer to its employees examples of COVID-harassment
    - "For example, one illustration might show a supervisor or coworker violating the ADA/Rehabilitation Act by harassing an employee with a disability-related need to wear a mask or take other COVID-19 precautions. Another illustration might show a supervisor or coworker violating Title VII by harassing an employee who is receiving a religious accommodation to forgo mandatory vaccination."

EEOC Activities in 2023 (cont.)

- Assessing Adverse Impact in AI Influenced Selection Tools Technical Assistance
  - On May 18, 2023, EEOC issued Technical Assistance concerning adverse impact caused by use of AI in selection procedures
  - https://www.eeoc.gov/laws/guidance/select-issues-assessing-adverse-impact-software-algorithms-and-artificial
  - Narrow focus ("adverse impact" + "selection") with helpful Q&A
  - EEOC lists various tools that may be implicated:
    - resume scanners that prioritize applications using certain keywords
    - employee monitoring software that rates employees on the basis of their keystrokes
    - "chatbots" that ask job candidates about their qualifications and reject those who do not meet pre-defined requirements
    - video interviewing software that evaluates candidates based on their facial expressions and speech patterns
    - testing software that provides "job fit" scores for applicants or employees regarding their personalities, aptitudes, cognitive skills or perceived "cultural fit" based on their performance on a test

EEOC Activities in 2023 (cont.)

- Resource Guide for Disability Discrimination Under Rehabilitation Act
  - On September 26, 2023, EEOC and DOL issued a resource guide concerning disability discrimination under the Rehabilitation Act
  - https://www.eeoc.gov/employment-protections-under-rehabilitation-act-1973-50-years-protecting-americans-disabilities
  - Not much new, but a useful guide for federal contractor covered by the statute

EEOC Activities in 2023 (cont.)

- Advancing Equal Opportunity in the Construction Industry
  - On May 31, 2023, EEOC issued a very detailed report on the advancement of equal opportunity in the construction industry
  - https://www.eeoc.gov/building-future-advancing-equal-employment-opportunity-construction-industry
  - Report Summary noted:
    - "discrimination remains a substantial barrier to entry, retention, and advancement of women and people of color in construction"
    - "some of the most egregious incidents of harassment and discrimination investigated by the [EEOC] have arisen in the construction industry"

EEOC Activities in 2023 (cont.)

- Following investigation, EEOC identified these findings:
  - Women and people of color are underrepresented in the construction industry and especially in the higher-paid, higher-skilled trades
  - Discrimination based on sex, race, and national origin persists and contributes to the underrepresentation of women and workers of color in construction
  - Harassment is pervasive on many jobsites and poses a significant barrier to the recruitment and retention of women and workers of color in the industry
  - Racial harassment in construction often takes virulent forms and nooses appear with chilling frequency on jobsites across the country
  - Harassment in construction is a workplace safety issue as well as a civil rights issue
  - Construction workers who experience discrimination, particularly those on temporary assignments or in apprenticeships, often do not know to whom or how to report violations
  - Retaliation is a serious problem in construction and hinders efforts to prevent and remedy unlawful discrimination and harassment in the industry
- EEOC will be focused on these issues administratively and in litigation

EEOC Activities in 2023 (cont.)

- Proposed Enforcement Guidance on Harassment
  - On October 2, 2023, EEOC issued long-awaited Proposed Enforcement Guidance on Harassment, and the comment period closed November 1, 2023
  - https://www.eeoc.gov/proposed-enforcement-guidance-harassment-workplace
  - EEOC explains that this Guidance will not have the effect of law or be binding, but "provide[s] clarity to the public regarding existing requirements under the law or Commission policies."
  - It is a comprehensive and useful analysis of the governing law that addresses the various liability standards and defenses for the different varieties of harassment claims
  - It will replace the prior Guidance issued on this topic
- Some highlights include:

EEOC Activities in 2023 (cont.)

- Sexual orientation harassment
  - Sex-based harassment includes harassment based on sexual orientation and gender identity, including how that identity is expressed. Examples include epithets regarding sexual orientation or gender identity; physical assault; harassment because an individual does not present in a manner that would stereotypically be associated with that person's gender; intentional and repeated use of a name or pronoun inconsistent with the individual's gender identity (misgendering); or the denial of access to a bathroom or other sex-segregated facility consistent with the individual's gender identity

EEOC Activities in 2023 (cont.)

- Harassment directed to others
  - Harassing conduct can affect an employee's work environment even if it is not directed at that employee . . . . For instance, the use of gender-based epithets may contribute to a hostile work environment for women even if the epithets are not directed at them.
- Historical workplace culture no defense
  - Although conduct must be evaluated in the context of the specific work environment in which it arose, there is no "crude environment" exception to Title VII if the harassment otherwise meets the standard of severe or pervasive harassing conduct.

EEOC Activities in 2023 (cont.)

- Harassment outside of work through technology
  - Conduct that can affect the terms and conditions of employment, even though it does not occur in a work-related context, includes electronic communications using private phones, computers or social media accounts, if it impacts the workplace. For example, if an Arab American employee is the subject of ethnic epithets that a coworker posts on a personal social media page and either the employee learns about the post directly or other coworkers see the comment and discuss it at work, then the social media posting can contribute to a racially hostile work environment
  - Given the proliferation of digital technology, it is increasingly likely that the non-consensual distribution of real or computer-generated intimate images using social media can contribute to a hostile work environment if it impacts the workplace

EEOC Activities in 2023 (cont.)

- Joint employment harassment in temporary worker context
  - If a worker is jointly employed by two or more employers, then each of the worker's employers may be responsible for taking corrective action to address any alleged harassment about which it has notice. An employer has the same responsibility to prevent and correct harassment of temporary employees as harassment of permanent employees
  - As with any employer, a temporary employment agency is responsible for taking reasonable corrective action within its own control. Corrective action may include, but is not limited to: ensuring that the client is aware of the alleged harassment; insisting that the client conduct an investigation and take appropriate corrective measures on its own; working with the client to jointly conduct an investigation and/or identify appropriate corrective measures; following up and monitoring to ensure that corrective measures have been taken; and providing the worker with the opportunity to take another job assignment at the same pay rate, if such an assignment is available and the worker chooses to do so

EEOC Activities in 2023 (cont.)

- Reasonable care to prevent harassment includes policy, process, and training components
  - For an anti-harassment *policy* to be effective, it should generally have the following features:
    - defines what conduct is prohibited;
    - is widely disseminated;
    - is comprehensible to workers, including those who the employer has reason to believe might have barriers to comprehension, such as employees with limited literacy skills or limited proficiency in English;
    - requires that supervisors report harassment when they are aware of it;
    - offers multiple avenues for reporting harassment, thereby, allowing employees to contact someone other than their harassers;
    - clearly identifies accessible points of contact to whom reports of harassment should be made and includes contact information; and
    - explains the employer's complaint process, including the processes anti-retaliation and confidentiality protections.

EEOC Activities in 2023 (cont.)

- For a complaint *process* to be effective, it should generally have the following features:
  - provides for prompt and effective investigations and corrective action;
  - provides adequate confidentiality protections; and
  - provides adequate anti-retaliation protections
- For *training* to be effective, it should generally have the following features:
  - explains the employer's anti-harassment policy and complaint process including any alternative dispute resolution process, and confidentiality and anti-retaliation protections;
  - describes and provides examples of prohibited harassment, as well as conduct that, if left unchecked, might rise to the level of prohibited harassment;
  - provides information about employees' rights if they experience, observe, become aware of or report conduct that they believe may be prohibited;
  - provides supervisors and managers information about how to prevent, identify, stop, report and correct harassment, such as actions that can be taken to minimize the risk of harassment, and clear instructions for addressing and reporting harassment that they observe, that is reported to them or of which they otherwise become aware of;
  - tailored to the workplace and workforce;
  - provided on a regular basis to all employees; and
  - provided in a clear, easy-to-understand style and format

EEOC Activities in 2023 (cont.)

- Investigation Guidance
  - An investigation is adequate if it is sufficiently thorough to "arrive at a reasonably fair estimate of truth." The investigation need not entail a trial-type investigation, but it should be conducted by an impartial party and seek information about the conduct from all parties involved. If there are conflicting versions of relevant events, it may be necessary for the employer to make credibility assessments so that it can determine whether the alleged harassment in fact occurred. Accordingly, whoever conducts the investigation should be well-trained in the skills required for interviewing witnesses and evaluating credibility
  - Upon completing its investigation, the employer should inform the complainant and alleged harasser of its determination and any corrective action that it will be taking, subject to applicable privacy laws

SCOTUS

SCOTUS

- Court continues to focus on employment-related issues with about 15% of its docket this term touching on employment law, though not all those decisions addressed EEO issues
- Court also continues to focus on religious rights and some commentators have noted concern about the Court's very expansive view of Free Exercise and what that means for employment and other laws

SCOTUS (cont.)

- *Students for Fair Admissions v. President and Fellows of Harvard College*
  - As you have heard, this decision almost certainly will have an impact on employer's DE&I initiatives
- *Groff v Dejoy*
  - As you have heard, the Court has re-interpreted Title VII's undue hardship defense in religious accommodation cases
  - Further example of the Court advancing religious exercise rights at the possible expense of non-discriminatory workplace rules

SCOTUS (cont.)

- *303 Creative v. Elenis*
  - Lorie Smith, through 303 Creative, wanted to sell wedding website designs to the public, but not designs that promoted same-sex marriage
  - Worried that such an approach would violate CO law, she filed a lawsuit
  - Smith argued that she was willing to offer website services to all people, regardless of sexual orientation, but that requiring her to offer wedding website designs that promoted same-sex marriage would be contrary to her right to express her religious beliefs – framing this as a free speech dispute
  - While recognizing that governments have a compelling interest in eliminating discrimination through public accommodation laws, the Court concluded (6-3) that compelling Smith to speak in a preferred way violated First Amendment rights
  - Accepting the premise that Smith would serve gay customers, as long as she was not compelled to create expressive content that violated her beliefs, the Court concluded that the First Amendment requires tolerance and that forcing Smith to develop expressive websites inconsistent with her beliefs violated Constitutional rights

SCOTUS (cont.)

- The lengthy dissent challenged the decision, arguing that the Court "for the first time in its history, grants a business open to the public a Constitutional right to refuse to serve members of a protected class"
  - The dissent challenges the underlying premise of the decision, suggesting that an assertion that you will sell wedding website services to gay couples as long as the content doesn't relate to gay marriage is illegitimate
- While not technically an employment-law case, the decision clearly invites the question of when might employment-based anti-discrimination laws be avoided based on a First Amendment right to express religious speech
- What does this mean for employers? Nothing directly, but it further reinforces that when religious rights are implicated in the workplace, employers find themselves in an increasingly complex arena that may warrant seeking legal advice

SCOTUS (cont.)

- *Williams v. Kincaid* (4th Cir)
  - Williams is a transgender woman (identifies as female, but was assigned male at birth) with gender dysphoria who was incarcerated for a criminal violation
  - Gender dysphoria is "discomfort or distress that is caused by a discrepancy between a person's gender identity and that person's sex assigned at birth"
  - She was assigned to the women's side of the prison; but, when prison officials realized that she retained the genitalia with which she was born, they moved her to the men's side of the prison
  - There, she was persistently harassed because of her sex and identity
  - She filed a lawsuit asserting disability discrimination claims
  - The District Court dismissed those claims, concluding that gender dysphoria is not a disability under the statutes, and Williams appealed

SCOTUS (cont.)

- ADA prohibits discrimination against qualified individuals who have a disability
- A "disability" is a "physical or mental impairment that substantially limits one or more major life activities"
- Everyone agreed that gender dysphoria fits within this definition
- But the ADA also excluded "certain conditions" from the definition of disability, including "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identify disorders not resulting from physical impairment, or other sexual behavior disorders"
- The majority concluded that "gender dysphoria" is a newly recognized condition not a "gender identity disorder" as identified in the ADA
- It also concluded that the statutory exclusion applied only to gender identity disorders "not resulting from physical impairment" and that Williams' condition did result from a physical impairment

SCOTUS (cont.)

- Defendant asked SCOTUS to review, and ultimately review was denied
- Justice Alito, joined by Justice Thomas, filed an opinion dissenting, explaining why they thought the Court should decide the case
  - According to Justice Alito, the question of ADA coverage for gender dysphoria was a question of national importance, and the Fourth Circuit had effectively "invalidated a major provision" of the ADA, which would have "far-reaching and controversial effects."
  - He further explained that he believed that the ruling would "raise a host of important and sensitive questions regarding such matters as participation in women's and girls' sports, access to single-sex restrooms and housing, the use of traditional pronouns, and the administration of sex reassignment therapy."
- For now, the Fourth Circuit decision stands
  - The ADA is interpreted broadly, and employers generally should assume that conditions are covered
  - In the 4th Circuit, gender dysphoria is a disability
- It seems likely, however, that the issues and concerns raised by Justice Alito soon will come before the Court

SCOTUS (cont.) – Adverse Action

- *Chambers v. District of Columbia* (DC Cir.) (*en banc*)
  - Chambers worked for DC Attorney General
  - She sought lateral transfers to different units where she hoped to have lower caseload
  - Transfer requests were denied, and she sued, alleging sex discrimination
  - Summary Judgment for employer based on precedent that held that transfer is actionable only if it results in "objective tangible harm"
  - Affirmed by DC panel
  - Reversed by *en banc* decision that overrules prior law

SCOTUS (cont.) – Adverse Action

- Title VII states that it is "an unlawful employment practice ... to fail or refuse to hire or to discharge any individual, or otherwise 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"
- So, the question is whether denial of job transfer "discriminate[s] against" an employee with respect to the "terms . . . of employment"
- Court concludes that denial of transfer constitutes such discrimination under the plain meaning of the statutory text and that the "objective tangible harm" standard is grounded in nothing

SCOTUS (cont.) – Adverse Action

- *Muldrow v. City of St. Louis* (8th Cir.)
  - Muldrow worked for St. Louis P.D.
  - She was laterally transferred to a position at the same rate of pay but with duties she claimed were more administrative
  - She sued, alleging, among other things, sex discrimination
  - Summary Judgment for employer based on precedent that held that transfer was actionable only if it results in a "materially adverse employment action," which did not include lateral transfers
  - Affirmed by 8th Cir Panel

SCOTUS (cont.) – Adverse Action

- Muldrow sought SCOTUS relief
- Petition was granted, and oral argument is set for December
- The issue before the Court is limited to – "Does Title VII prohibit discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage?"

SCOTUS (cont.) – Adverse Action

- This current version of the Court consistently has a applied a strict interpretation to the plain meaning of statutory language
- Title VII does not include any sort of "materiality" language for actionable adverse action
- On the other hand, concluding that there is no materiality component could open the floodgates
- Furthermore, SCOTUS (years earlier though) has concluded that there is a materiality component to actionable retaliation under Title VII, despite a similar lack of textual support
- For now, the safest approach is to assume that any transfer decision (or similar employment action) might be actionable and to scrutinize such decisions under normal discrimination analysis

SMITH ANDERSON

EEO UPDATE

Zebulon D. Anderson

November 14, 2023

EXPECT EXCELLENCE®