12th Annual Utah Fall Employment Seminar

November 16, 2023

Ballard Spahr LLP

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Attendee handouts

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to download the materials for today's event.

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Religious Discrimination and Accommodations in the Workplace

Jay Zweig, Partner
Ballard Spahr, LLP
November 16 2023

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Outline of Today's Discussion

- Overview of religious accommodation standard pre-*Groff*
- Title VII, 1972 Amendment
- *TWA v. Hardison and the "de minimis* cost" standard
- Practical application and EEOC guidance
- *Groff v. DeJoy*
- "Substantial increased costs"
- "Clarifying" *Hardison*: what *Groff* says, what it doesn't say, and why it matters
- Employer best practices for religious accommodations *post-Groff*
- Preparing for and defending religious discrimination claims

Takeaways for Business and Employment Lawyers

- Update and distribute your policy on religious accommodation and discrimination to reflect: requests for religious accommodation will be considered on a case-by-case basis; the company will engage in an interactive dialogue with employees requesting accommodation based on a sincerely held religious belief; accommodations that impose substantial increased costs on the company will be denied.
- Train supervisors and HR employees who review requests for accommodation on updates to the law.
- Engage in an interactive dialogue with employees seeking religious accommodations, similar to the ADA accommodation process.
- Remember that impact on other employees, by itself, may not be a sufficient justification for denying a request for religious accommodation.

Religious Accommodations Pre-*Groff*

- Title VII of the Civil Rights Act protects employees and applicants for employment from discrimination by employers on the basis of race, color, national origin, sex, and religion.
- In 1972, Congress amended the Civil Rights Act to establish that employers must make reasonable accommodations for employees' religious beliefs or practices unless to do so would cause an undue hardship on the conduct of the employer's business.
- Neither Congress nor the EEOC offered guidance as to what constitutes an "undue hardship" under the law.
- In 1977, the Supreme Court decided *TWA v. Hardison*, 432 U.S. 63 (1977) and articulated a standard for determining undue hardship in the religious accommodation context.
- Since then, until the decision in Groff, employers (and the EEOC) understood that an employer need not make religious accommodations for employees that would involve more than a *de minimis* cost to the employer.

TWA v. Hardison: Underlying Facts

- TWA was an airline that operated a large maintenance and overhaul base. Hardison was hired on June 5, 1967.
- Hardison worked as a clerk in the Stores Department at TWA's Kansas City base. The Stores Department played an essential role in TWA's operations and operated 24 hours per day, 365 days per year. If a job in the department was not filled on a given day, an employee from another department would be shifted in or a supervisor had to cover.
- TWA was party to a collective bargaining agreement ("CBA") with the International Association of Machinists and Aerospace Workers union (the "Union").
- The CBA included a seniority system, which governed, among other things: shift assignment, selection of shifts, and job bidding.

Hardison's religious beliefs conflict with TWA's generally applicable work rules

- In the Spring of 1968, Hardison began to follow the Worldwide Church of God, which required as a tenet of the religion that followers refrain from work on the Sabbath– from sunset on Friday to Sunset on Saturday.
- Hardison informed TWA's Stores Department manager of his conviction and the manager agreed the union steward could seek a job swap or change of days off for Hardison. Hardison transferred to the 11 PM to 7 AM shift, which allowed him to observe the Sabbath.
- Then, Hardison bid for and received a transfer to another building where he would work the day shift, but at that location, he had insufficient seniority to bid for Saturdays off.

TWA and Hardison cannot agree on an accommodation

- At the new location, TWA agreed to permit the union to seek a change of work assignments for Hardison, but the Union was unwilling to violate the seniority system in this way.
- Hardison proposed that he be permitted to work a four-day week, but TWA rejected the proposal because, on the weekends, Hardison was the only person available on his shift to perform his job.
- TWA determined that its only options if Hardison was permitted to work four days per week would be an undue hardship on the business.

Hardison is terminated for refusing to work on Saturdays

- No accommodation was reached, and Hardison refused to report to work on Saturdays.
- After a hearing, Hardison was discharged on the grounds of insubordination for refusing to work his designated schedule.
- Hardison sued TWA and the Union for religious discrimination.

The District Court's Decision

- After a bench trial, the District Court ruled in favor of the Defendants.
- It held that the EEOC guidelines were applicable to the Union, but did not require the Union to violate its seniority system to accommodate Hardison.
- The District Court also held that TWA satisfied its reasonable accommodation obligation and any further accommodation would have been an undue hardship.
- Indeed, it wrote that not to find an undue hardship under these circumstances might impose "a priority of the religious over the secular" in violation of the Establishment Clause of the First Amendment.

Hardison's Appeal to the 8th Circuit

- The Court of Appeals for the Eighth Circuit reversed the District Court's judgment in favor of TWA and held that TWA **had not** satisfied its duty to accommodate.
- It held that TWA could have accommodated Hardison by:
  - Giving him Saturdays off, in violation of the seniority system established by the CBA;
  - Within the confines of the seniority system, permit him to work a 4-day week and fill in for Hardison with supervisors or other qualified personnel from another department on Saturdays; or
  - Within the confines of the seniority system, replace Hardison on the Saturday shift by paying premium wages.

The Court's Decision: *TWA v. Hardison*, 432 U.S. 63 (1977)

- The Court's 7 to 2 decision reversed the Eighth Circuit, holding that TWA satisfied its obligation to Hardison under Title VII, and the accommodation options he offered would have posed an undue hardship.
- Specifically, it concluded that TWA was not required to violate the seniority system of the CBA to accommodate Hardison:
  - "there were no volunteers to relieve Hardison on Saturdays and to give Hardison Saturdays off, TWA would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath." 432 U.S. at 81.
  - "i[t] would be anomalous to conclude that by "reasonable accommodation" Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far." Id. (emphasis added).

The Court's Decision Cont.

- Further, the Court opined that permitting Hardison to work a 4-day week and filling in for him on Saturdays using supervisors or other qualified personnel from another department, or paying premium wages to another employee not regularly scheduled on Saturdays, would constitute an undue hardship.
- "To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship." *Id*.
- "Like abandonment of the seniority system, to require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion." *Id*.
- The majority's opinion concludes with: "In the absence of clear statutory language to the contrary, we will not readily construe the statute [Title VII] to require an employer to discriminate against some employees in order to enable others to observe their Sabbath." *Id*. at 85.

Justice Marshall's Dissent

Joined by Justice Brennan

Justice Marshall interpreted the Court's decision and "*de minimis*" standard as nullifying the 1972 Amendment to Title VII, which required employers to make accommodations for religious observers unless to do so would pose an undue hardship. He wrote:

- "An employer, the Court concludes, need not grant even the most minor special privilege to religious observers to enable them to follow their faith." *Id*. at 87.
- "As a question of social policy, this result is deeply troubling, for a society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job." *Id.*
- "[A]s a matter of law today's result is intolerable, for the Court adopts the very position that Congress expressly rejected in 1972, as if we were free to disregard congressional choices that a majority of this Court thinks unwise. I therefore dissent." *Id.*

Workplace Religious Accommodations June 6, 1977 – June 29, 2023

- After the decision in *Hardison*, Congress did not act to clarify how much hardship on a business is undue in the context of religious discrimination under Title VII.
- Until the Court's decision in *Groff*, the EEOC's guidance on religious accommodations reflected the "*de minimis* cost" standard.
- During the COVID-19 pandemic, many employers relied on this standard in denying employees' requests for exemption from mandatory vaccination policies for religious reasons.
- EEOC charges of religious discrimination soared in FY 2022.
- Between 1997 and 2021, charges for religious discrimination made up between 2.1 and 4.2% of all EEOC charges.
- In 2022, religious discrimination was the basis for 18.8% of charges. See https://www.eeoc.gov/data/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2022

Groff v. Dejoy (2023)

- In an opinion authored by Justice Alito, a unanimous Court held that under Title VII, an employer is required to accommodate an employee's religious beliefs unless doing so would result in "***substantial increased costs***" in relation to the conduct of its particular business.
- The *Groff* Court opined that the decision in *Hardison* has been misconstrued by lower courts and the EEOC to give outsized weight to the phrase "more than a *de minimis* cost."
- Notably, both parties (Groff and the Postmaster General, represented by the Solicitor General) agreed that "the *de minimis* reading of Hardison [was] a mistake."

Groff did not overrule *Hardison*

- Although the result in *Groff* would seem to contradict the *Hardison* decision, the Court specifically did not overrule *Hardison*. Rather, it stated that *Groff* was a vehicle to clarify what *Hardison* stands for and what Title VII requires.
- Because it did not technically announce a new rule, it is likely that the Court's "clarified" standard will be applied to cases currently pending review, despite defendant employers' seemingly reasonable reliance on the *de minimis* standard.

Underlying Facts

- Groff is an Evangelical Christian who believes for religious reasons that Sunday should be a day of worship and rest.
- In 2012, Groff commenced employment with the United States Postal Service as a Rural Carrier Associate. When he began, the position did not require Sunday work.
- In 2013, USPS entered an agreement with Amazon to begin facilitating Sunday deliveries.
- In 2016, USPS signed a memorandum of understanding (MOU) with the relevant union (National Rural Letter Carriers' Association), which set forth how they would handle Sunday and holiday parcel delivery.
- The MOU specified the order in which USPS employees were to be called on for Sunday work, and under its terms, Groff would be required to work on Sunday.

Groff's religious beliefs conflict with USPS's generally applicable work rules

- Groff sought and received a transfer to a small rural station (Holtwood) with only seven employees, which, at the time, did not make Sunday deliveries.
- In March 2017, the new station began Amazon deliveries, including on Sundays.
- During peak season, Sunday deliveries that should have been carried by Groff were handled by the rest of the Holtwood employees, including the postmaster.
- During the rest of the year, Groff's Sunday assignments were redistributed to other carriers assigned to the regional hub.
- At least one affected USPS employee filed a grievance related to Groff's absences, alleging a conflict with his contractual rights.
- Throughout this time, Groff received progressive disciplinary action for failing to report to work on Sundays. In January 2019, he resigned, he stated, in anticipation of termination.

Lower Courts' Decisions

- The District Court granted summary judgment to USPS on Groff's religious discrimination claim.
- The Court of Appeals for the Third Circuit affirmed, holding that exempting Groff from Sunday work "imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale." 35 F. 4th at 174.
- The Third Circuit determined that this was an undue hardship under *Hardison*.
- Groff petitioned for Supreme Court Review, and SCOTUS granted certiorari.

The *Groff* Court's Analysis of *Hardison*

- In its unanimous decision, the *Groff* Court laid out the context in which *Hardison* was decided, including the 1972 Amendment to Title VII.
- The Court noted that the employer and union in *Hardison* had argued that the 1972 Amendment was an unconstitutional violation of the Establishment Clause of the First Amendment, but the *Hardison* Court did not squarely address that question.
- According to the *Groff* Court, the *Hardison* decision was based firmly on the issue of seniority rights.

Groff's Analysis of *Hardison* Cont.

- "[T]he Court identified no way in which TWA, without violating seniority rights, could have feasibly accommodated Hardison's request for an exemption from work on his Sabbath." 143 L. Ed. 2d 1041.
- "The [*Hardison* Court] found that not enough co-workers were willing to take Hardison's shift voluntarily, that compelling them to do so would have violated their seniority rights, and that leaving the Stores Department short-handed would have adversely affected its 'essential' mission."
- Notably, however, "leaving the Stores Department short-handed" was an option that would not have violated the seniority rights of other employees, as was allowing Hardison to work a 4-day week and having supervisors or other employees cover.

Groff's Interpretation of *Hardison*

- The *Groff* Court noted that the *Hardison* Court rejected an alternative accommodation suggested by Justice Marshall's dissent– that TWA pay premium wages for a replacement for three months, after which Hardison could transfer back to his old building and the night shift.
- According to Justice Marshall*, TWA's added expense for three months of overtime pay on Saturdays would have been about $150 ($1,250 in 2022 dollars).
- The *Groff* Court stated that Justice Marshall's calculations "certainly" produced considerably more than a *de minimis* cost. *Id*. at 1055-56.
- The *Groff* Court emphasized that *Hardison* made very clear that seniority rights "were off-limits" but it was unclear whether Hardison could have been accommodated without transgressing seniority rights.

Groff's "Clarified" Standard

- Groff urged the Court to instruct lower courts to rely on decades of ADA case law in defining "undue hardship" in the context of religious accommodations, *i.e.*, "significant difficulty or expense."
- The Government urged the Court to hold that the EEOC's interpretation and guidance on the issue "has been basically correct."
- The *Groff* Court rejected both elaborations. **"An employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business."**
- "We have no reservations in saying that a good deal of the EEOC's guidance in this area is sensible and will, in all likelihood, be unaffected by our clarifying decision today." *Id.* at 1059.
- "Faced with an accommodation request like Groff's, it would not be enough for an employer to conclude that forcing other employees to work overtime would constitute an undue hardship. Consideration of other options, such as voluntary shift swapping, would also be necessary."

Disposition

- The Court reversed the Third Circuit's decision and remanded the case for further proceedings.
- The Court determined that the lower courts may have dismissed a number of possible accommodations, "including those involving the cost of incentive pay, or the administrative costs of coordination with other nearby stations with a broader set of employees" because they assumed the "*de minimis* cost" standard in *Hardison* applied.
- "Without foreclosing the possibility that USPS will prevail, we think it appropriate to leave it to the lower courts to apply our clarified context-specific standard, and to decide whether any further factual development is needed." *Id.* at 1061.

What do we know for sure about religious accommodations post-*Groff*?

- Employers will be expected to incur higher costs to accommodate employees' religious practices than they have before.
- Employers will have to engage in an ADA-like interactive dialogue with employees requesting religious accommodations.
- Employers will not be expected to violate the terms of a bona fide seniority system in order to accommodate an employee's religious beliefs.
- Preferences of other employees, in and of themselves, are not sufficient to establish undue hardship.
- Depending on the nature of the employer, its size and operating costs, employers may be required to incur temporary costs, increased administrative costs, and allow voluntary or occasional shift swapping.

What *Groff* leaves out

- *Groff* does not deal at all with how an employer should assess whether a particular accommodation request is based on a "sincerely held religious belief."
- *Groff* did not deal with the Establishment Clause issue identified by the petitioners in *Hardison*.
- For example: In the case of a small employer, where no bona fide seniority system is in place and generally employees are required to work on weekends if assigned, would an employer be discriminating against non-religious employees if it permitted an exception to its work schedule rule to accommodate an employee's religious beliefs, which resulted in preferential shifts for the religious employee and additional burdens on non-religious employees?
- *Groff* does not clearly define "substantial increased costs."
- It notes that the dollar figures cited by Justice Marshall in his *Hardison* dissent are more than *de minimis*, but does not indicate whether they would now be considered "substantial".

Defending Against Religious Discrimination Claims

- First, assess whether employee's request is based on a sincerely held religious belief.
- Next, assess whether a conflict exists between an employee's sincerely held religious belief and one or more of the employer's work rules.
- Then, assess whether an accommodation exists that would eliminate the conflict without undue hardship.

Best Practice for Employers

- Create a system for employees to request religious accommodations similar to requests for ADA accommodations.
- Ensure the person or persons who review religious accommodation requests have received appropriate training on the current state of the law.
- Do not assume that the specific accommodation requested by the employee is the only possible accommodation to be considered.
- Thoroughly document the projected costs / impact to operations of an employee's proposed accommodation if employer is unwilling / unable to approve the accommodation.
- Consider and discuss alternatives to the employee's proposal and thoroughly document such consideration, offers of alternative accommodations, and attempts to engage the employee in an interactive dialogue.

Break

Program will resume at 9:45 AM MT

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Break

Program will resume at 9:45 AM MT

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Employment Law Update 2023: A Year in Review

Jacqueline Mabatah
Ashley Waddoups

November 16, 2023

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Agenda

1. Utah Legislature
2. Utah Appellate Courts
3. 10th Circuit
4. U.S. Supreme Court


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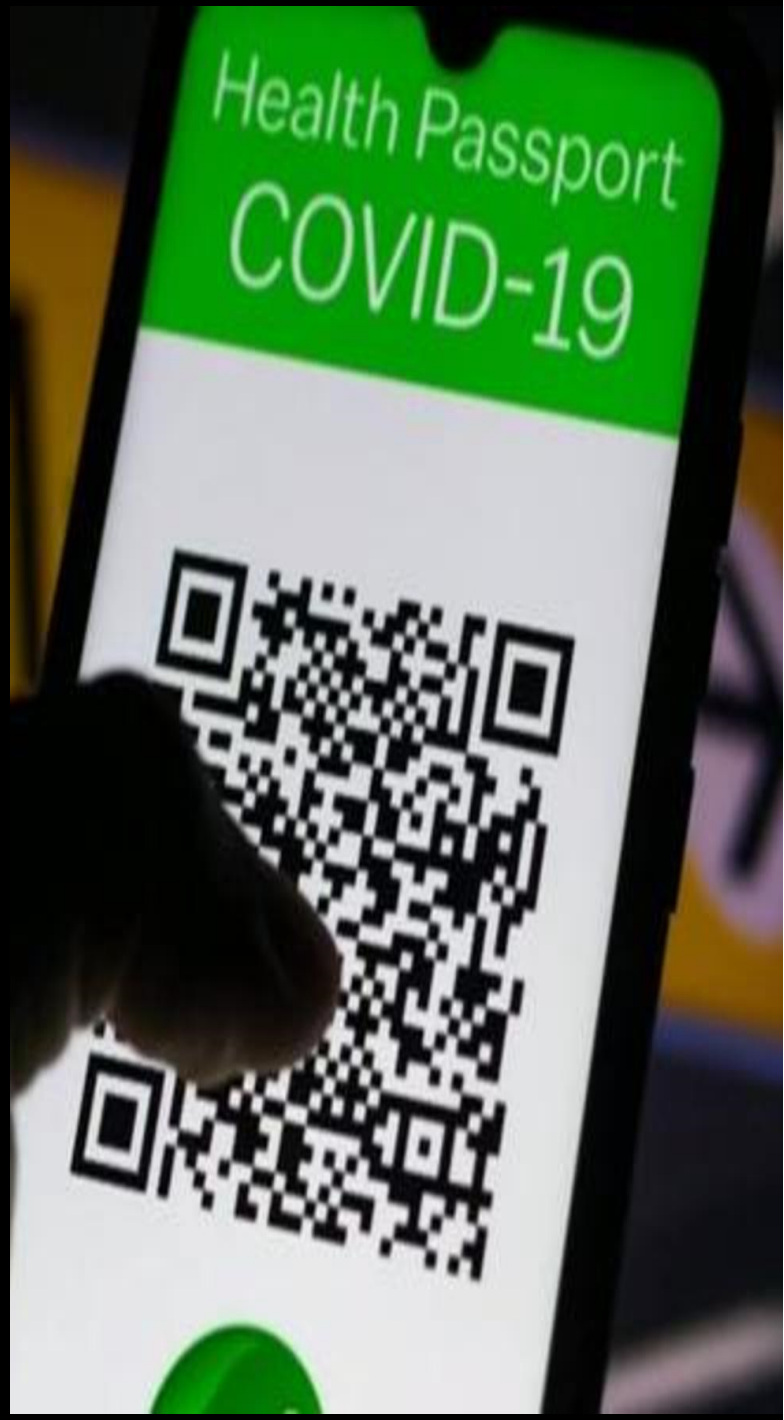
Workplace Vaccine Passport Prohibition H.B. 131—Enacts, Amends, and Repeals Provisions of the Utah Code

- This bill enacts a prohibition on the use of an individual's immunity status by employers.
- As a general rule, it is now unlawful for an employer to:
  a. refuse employment to an individual;
  b. bar an individual from employment; or
  c. discriminate against an individual in compensation or in a term, condition, or privilege of employment.



Workplace Vaccine Passport Prohibition
H.B. 131—Enacts, Amends, and Repeals Provisions of the Utah Code

- Exceptions for employers that:

  a. establish a nexus between a vaccination requirement and the employee's assigned duties and responsibilities; or

  b. identify an external requirement for vaccination that is not imposed by the employer and is related to the employee's duties and responsibilities.

- Also exceptions for government employees working in public health/medical setting, vaccinations required by those working in certain childcare programs, etc.

- Nothing prevents employers from *recommending* vaccination.

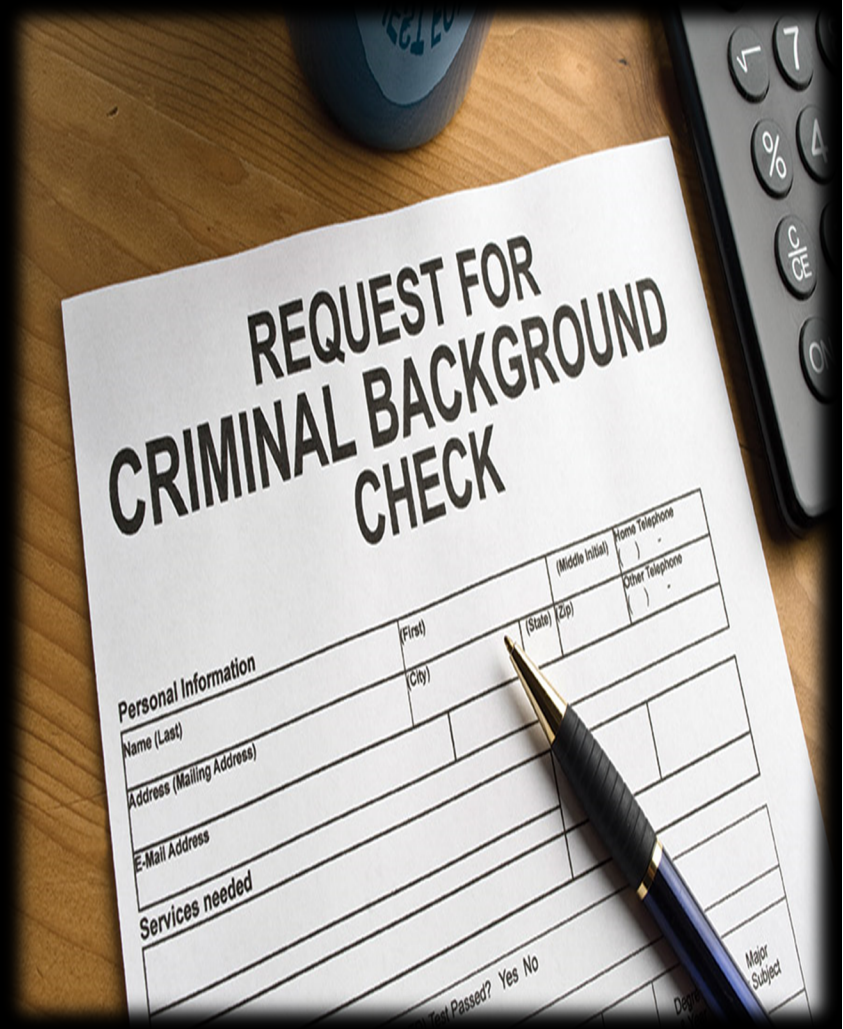
Creation of Workplace Violence Protection Order H.B. 324—Enacts and Amends Provisions of the Utah Code

- Employers, or their authorized agents, may petition for a workplace violence protection order/ex parte workplace violence protection order if:
  - The employer reasonably believes workplace violence has occurred against the employer or an employee of the employer.
  - Workplace violence means "knowingly causing or threatening to cause bodily injury to, or significant damage to the property of, a person[.]"
  - If an employer seeking a workplace violence protective order as described in Subsection (1) has knowledge that a specific individual is the target of workplace violence, the employer shall make a good faith effort to notify the targeted individual that the employer is seeking a workplace violence protective order.

Employee Screening Requirements for Mental Health Professionals H.B. 468—Enacts and Amends Provisions of the Utah Code

- Generally*, employers may not:
  - Exclude a mental health professional applicant from consideration because of an arrest or offense that occurred when the applicant was a juvenile, a juvenile adjudication, or make an inquiry relating to expunged criminal history.

*Several exceptions apply. For example, there is an exception if the mental health professional applicant will be working with certain vulnerable populations such as children or the elderly.



Employee Tip Sharing
S.B. 73—Amends Provisions of the Utah Code

An employer may allow an employee who is not a tipped employee to participate in a bona fide tip pooling or sharing arrangement with another employee who is not a tipped employee in accordance with the Fair Labor Standards Act of 1938, 29 U.S.C. Sec. 201 et seq., and 29 C.F.R. Sec. 531.50 through 531.60.

Utah Appellate Courts

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Vicarious Liability

Burton v. Chen

- Plaintiff asserted that physician and pain clinic ("Defendants") were liable for physician assistant's alleged tortious misconduct, including sexual abuse and intentional infliction of emotional distress.
- The Utah Supreme Court held that Defendants could not be liable for physician assistant's alleged misconduct because 1) the alleged acts were not of the type of conduct he was hired to perform; 2) his actions were not motivated by a desire to further his employer's interests.
- The Court also expressly rejected plaintiff's argument that the Utah Physician Assistant Act ("Act") superseded traditional principles of respondeat superior liability. The Court will not overturn precedent lightly, and nothing in the language of the Act indicated that the legislature intended to make such a sweeping change to longstanding Utah jurisprudence.

Limitations on Apportionment of Permanent Disability Benefits

Barker v. Labor Comm'n

- Plaintiff had been exposed to welding fumes, fly ash, cement, and foam concentrate during the several years he had worked for Burrell Mining Products. He had also been a smoker for at least 25 years.
- Plaintiff applied for full-time disability benefits based on a chronic breathing disorder that prevented him from working. The Utah Labor Commission ("ULC") reduced his benefits by 75% on grounds that the majority of his disability was caused by non-industrial causes—i.e., his smoking.
- The Utah Court of Appeals was asked to determine whether Utah law permits apportionment where a worker has only one disability, but where that disability results from a disease that has both industrial and non-industrial causes. Based on the facts before it, the Court concluded that the ULC did not have grounds to apportion plaintiff's disability benefits.

Limitations on Apportionment of Permanent Disability Benefits

Barker v. Labor Comm'n (continued)

- Construing the Utah Occupational Disease Act, the Court held that as the proponent of apportionment, the employer bears the burden of demonstrating that apportionment is appropriate.
- The Court further held that Utah Code § 34A-3-110(1)-(4) only allows for apportionment in discrete circumstances, none of which applied to the facts of the instant case. Subsections (1)-(2) applied to multiple causes of a disease, whereas subsections (3)-(4) applied to multiple causes of a disability. Here, the question was the cause of plaintiff's disease.
- Subsection (1) only allows for apportionment if employment by non-Utah employer causes all or part of the disease. Subsection (2) only applies if the disease is caused by "substantial exposure outside of employment or to which the general public is commonly exposed"—such as communicable diseases like COVID-19. Neither of these subsections were applicable to Barker's case.

Adverse Employment Actions

Christensen v. Lab. Comm'n & Salt Lake Cnty.

- Plaintiff's new supervisor made several comments about her appearance that made her feel uncomfortable. He also started monitoring her and her work much more closely than he monitored other employees. Previously, plaintiff had been considered an above-average employee, but her new supervisor claimed he needed to monitor her more closely on grounds of poor performance.
- After plaintiff reported supervisor's to her boss and union representative, her supervisor continued to closely monitor her. Among other things, he followed her at work, frequently checked in on her in her office, and he outlined her errors at internal meetings in front other employees. Plaintiff's boss did not help the situation: he told plaintiff to stop discussing supervisor's behavior with her coworkers, and he also did not report her complaints to HR for further investigation.
- The Utah Court of Appeals held that this monitoring was excessive and constituted retaliatory discrimination. Just because plaintiff's supervisor continued same/similar conduct towards her did not mean that it did not constitute retaliation.

Employee Remedies if Retaliatory Discrimination has Occurred

Christensen v. Lab. Comm'n & Salt Lake Cnty. (continued)

Utah Antidiscrimination Act ("UAA") does not allow for an award of non-economic damages.

- To be entitled for back-pay, employee must prove actual loss of pay. In other words, an employee cannot leave job voluntarily and assert claim for back pay.
- In UAA cases, the Utah Labor Commission Appeals Board retains authority to award attorney fees. It cannot assess the "quality, amount, or value of legal services" but it can enter an award of fees related to plaintiff's successful showing of retaliation.
- Damages can be awarded for harms arising from fact that employee was required to use vacation days, sick pay, or to retire earlier than they had originally planned.

Statutory Right of Municipal Employees to Confront Accusers

Brindley v. Logan City & Logan City Emp. Appeals Bd.

- The Utah Court of Appeals held that pursuant to the plain language of Utah Code § 10-3-1106(4)(a)(iii), municipal employees must be allowed to confront any witness whose testimony is *considered* by municipal appeals board. This rule applies even if the board's decision is not necessarily based witness's testimony.
- Based on this fact, the court set aside the decision of Logan City Appeals Board ("Board"), and the Board was instructed to conduct further proceedings, including a new hearing if necessary.

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Failure to Accommodate

Wise v. DeJoy

- The Postal Service may have failed to accommodate a pregnant employee who was prohibited from lifting, pulling, or pushing items over twenty pounds.
- The employer alleged that she was required to handle items in excess of twenty pounds on two occasions. The Postal Service claimed she had not asked for any help.
- The Court reversed the lower court's granting of the Postal Service's motion for summary judgment finding that there were disputed facts on whether the Postal Service accommodated her request.

Failure to Accommodate Cont.

Brigham v. Frontier Airlines, Inc.

- 10th Cir. Affirmed entry of summary judgment on former employee's Americans with Disabilities Act (ADA) claim because requested accommodations were not plausibly reasonable.
- While an employer must accommodate an employee's disability, the employee must request a plausibly reasonable accommodation.
- Further, while the ADA requires employers to participate in an "interactive process" with the employee to determine a mutually suitable accommodation, an employer's failure to do so does not create an independently actionable claim under the ADA.

U.S. Supreme Court

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Decisions Based on Race

Students For Fair Admissions, Inc. v. President and Fellows of Harvard College

- In its seminal decision, the United States Supreme Court held that Harvard and the University of North Carolina's admission process that utilized race as a factor when deciding whether to admit students violated the Equal Protection Clause of the 14th Amendment of the United States Constitution.
- Decision has put an end to affirmative action in student admissions at colleges that receive federal funding.
- The import of the decision primarily relates to actions of the government and other public sector employers, but it nonetheless places greater scrutiny on any employer process that provides additional credit based upon a protected category such as race.

First Amendment Protections

303 Creative LLC v. Elenis

- A Colorado website designer sued the state preemptively challenging Colorado's antidiscrimination law that protects LGBTQ+ individuals from discrimination.
- The web designer alleged that her compliance with the law interfered with her First Amendment right to free speech.
- The United States Supreme Court ruled in plaintiff's favor concluding that plaintiff's free speech rights trumped Colorado's legal protections against discrimination.

Overtime Pay

Helix Energy Solutions Group, Inc. v. Hewitt

- The plaintiff worked on an offshore rig where he typically worked 12 hours a day, seven days a week for a 28-day period and then would have 28 days off. His employer paid him a day rate, but generally his annual compensation was over $200,000.
- The plaintiff sued claiming he was entitled to unpaid overtime wages.
- Exempt as a bona fide executive employee under the "highly compensated employees" rule/ salary basis test codified at 29 CFR § 541.602(a)?
- No! The Supreme Court held that the day rate Helix paid to Mr. Hewitt did not satisfy the salary basis test, and therefore Mr. Hewitt was entitled to overtime, because a day rate of payment was not a fixed compensation scheme "without regard to the number of days or hours worked."

Break

Program will resume at 11:00 AM MT

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Dead Man Walking?
The Future of Non-Competes and other Restrictive Covenants

Jason Boren

November 16, 2023

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Restrictive Covenants

What are They?

- Restrictive covenants in the labor and employment context are agreements between an employer and employee that restrict the activities of an employee both during and following separation of employment.
- **Four** types of restrictive covenant agreements:
  - **Non-compete**-restricts working for a competitor
  - **Non-solicitation**-restricts solicitation of customers and/or employees
  - **Non-disclosure/confidentiality**-restricts use or disclose confidential information
  - **Non-disparagement**-restricts what an employee can say about employer

Are They Enforceable?

- *Kasco Servs. Corp. v. Benson*: A court is required to enforce restrictive covenant agreements if:
  - There was no "bad faith" in negotiations
  - The agreement was "supported by consideration"
  - The agreement was "necessary to protect the legitimate interests of the business"
  - It was "reasonable in its restrictions."
- May place "no greater restraint" than is "reasonably necessary" to secure protection of an employer's "legitimate interests."
  - Trade Secrets, Goodwill, Investment in employee training.

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Non-Compete Agreements

Non-Competes Falling Out of Favor (Federal)

- President Biden signed executive order on July 9, 2021 calling for ban of non-compete agreements in employment contracts and encouraging the Chair of the FTC to ban them through its rule-making authority.
- FTC released a proposed rule in January 2023 categorically prohibiting non-competes retroactively stating that they were an unfair method of competition, which suppress wages, stifle innovation and make it harder for entrepreneurs to start new businesses. The agency has not released a final rule yet. (Currently taking comments-over 26,000).
- May 30, 2023, National Labor Relations Board (NLRB) general counsel issued a memorandum stating that overbroad non-compete agreements were unlawful.

An estimated*
18%
of U.S. workers
are covered by
noncompetes.

That's 30 million people.

The FTC estimates that banning noncompetes may:

- Increase workers' earnings by nearly $300 billion
- Save consumers up to $148 billion on health costs each year
- Double the number of companies in the same industry founded by a former worker

Researchers estimate that banning noncompetes nationwide may close racial and gender wage gaps by 3.6-9.1%.**

The FTC invites comments on its preliminary proposal **ftc.gov/noncompetes**

FEDERAL TRADE COMMISSION

*Source: Starr, Prescott & Bishara, Noncompete Agreements in the U.S. Labor Force (2021)
**Source: Johnson, Lavetti & Lipsitz, *The Labor Market Effects of Legal Restrictions on Worker Mobility* (2020)

Non-Competes Falling Out of Favor (Federal)

FTC Proposed Rule

Prohibit

- Noncompete clauses

Require

- Rescind existing noncompete clause
- Actively inform employees noncompetes not in effect

Noncompete Agreements Legislative Research and Counsel

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FTC Rule Exceptions

Sale of a business: Does not apply to a non-compete clause entered into by a person who is selling a business if that person owns at least 25% of the business.

Other post-employment restrictive covenants: NDAs and non-solicit agreements are not *per se* banned, but may constitute a *de facto* non-compete agreement if overly broad.

Non-Competes Falling Out of Favor (States)

State-by-State Survey

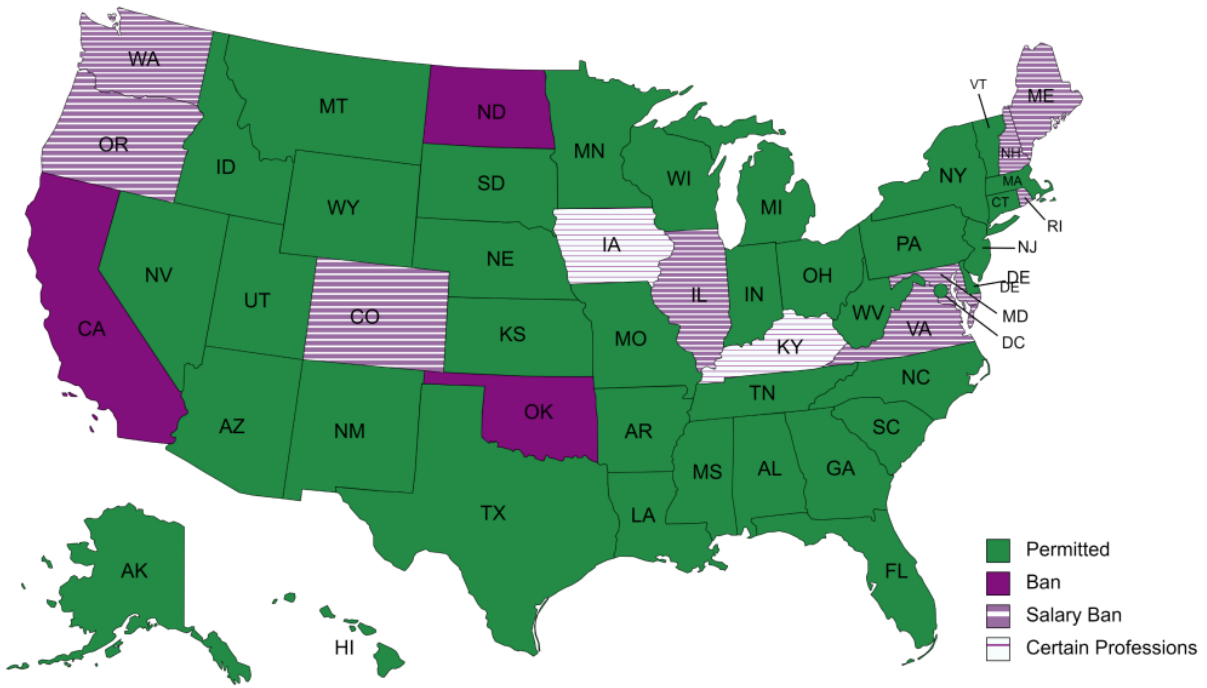
Banned 3
CA, ND, OK

Salary Threshold 10
CO, DC, IL, ME, MD, NH, OR, RI, VA, WA

Certain Professions 2
IA, KY

Trending
2022: five states and DC effected legislation designed to limit use of NCA

18 states have proposed or pending legislation.



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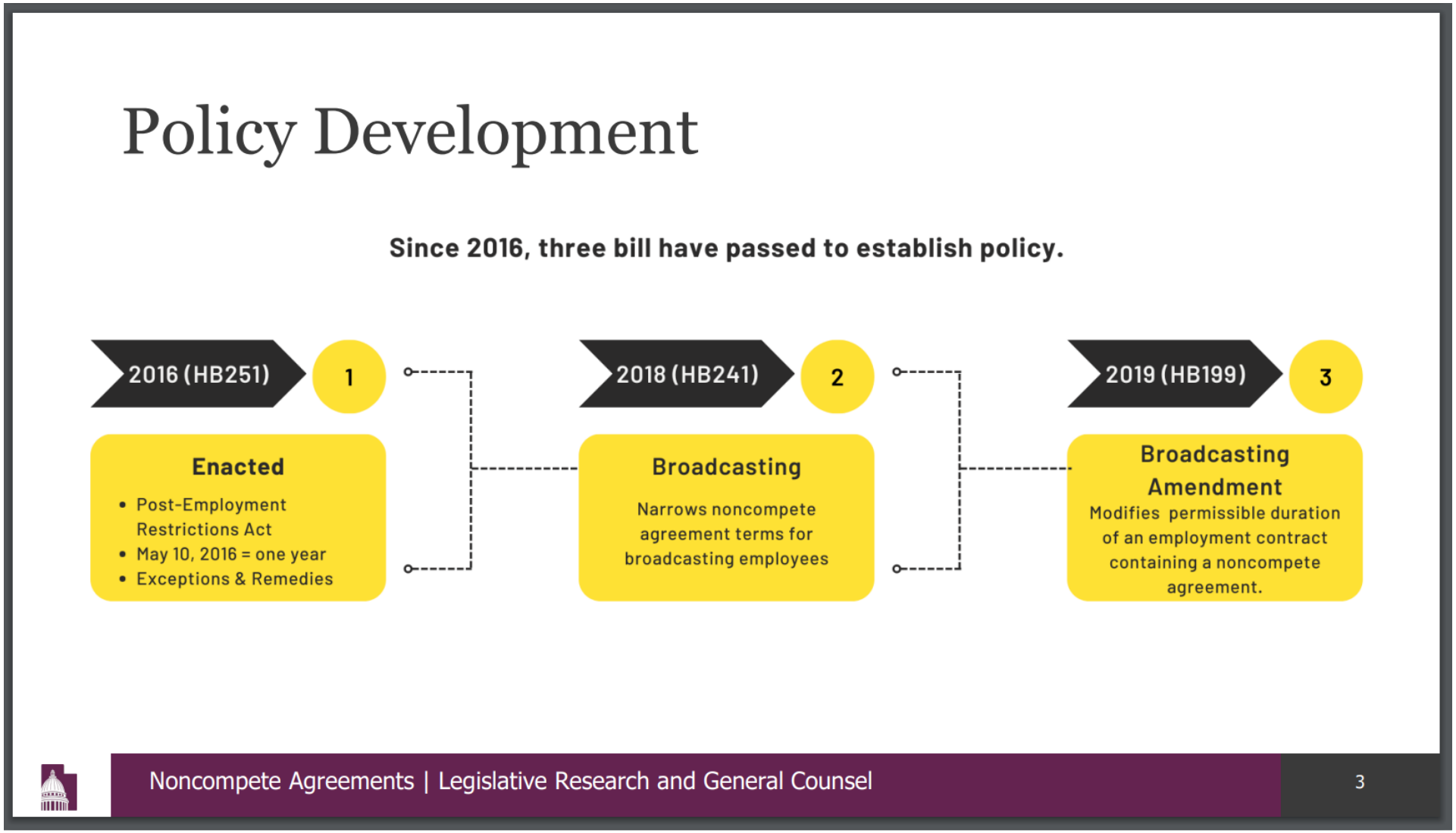
Non-Competes Falling Out of Favor (Utah)



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Non-Competes Falling Out of Favor (Utah)

- In May 2016, Utah passed its Post-employment Restrictions Act Utah Code Section 34-51-101 *et seq*. As amended, it provides:
  - Employer and employee may not enter into a covenant not to compete for a period of more than one year from the day on which the employee is no longer employed.
  - A non-compete that violates this rule is void and any attempt to enforce it will result in payment of costs, fees and damages by employer.
  - Law does not prohibit non-compete agreed upon in a severance agreement or the sale of a business.
  - Statute does not cover nonsoliciation or nondisclosure agreements

Trending Policies

- Limiting use to the protection of trade secrets
- Minimum salary thresholds
- Term limits on post-employment restrictions
- Employee notice and "time to consider" requirements
- Limiting legal recourse against employees

Who Should You Have Sign a Non-Compete?

Utah Courts

Limited to services that are:

Special

Unique

Extraordinary

Noncompete Agreements Legislative Research and Counsel

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Non-Solicitation Agreements

Non-Solicitation Agreements

- Protect **customer** and **employee** relationships
- Not limited to one year in Utah non-compete statute; must still be negotiated in good faith, consideration given, reasonable in time/scope, necessary for a legitimate business interest.
  - e.g. Limit to employees/customers with whom employee worked/had information about.
- More favored than non-competes; can accomplish same purpose without restraining competition

Non-Solicitation Agreements

Drafting Tips

- Acknowledgment that the company spends significant time and expense recruiting and training employees and loss of employees would cause harm/company relationships give competitive advantage/goodwill.
- Employees-Refrain from directly or indirectly soliciting, recruiting, or attempting to solicit, hire, or recruit or customer.
- Engage in any behavior that could be expected to result in termination of engagement with Employer or employer's relationship with any contractors, consultants or employees, customers including solicitation or encouragement to discontinue or reduce business with employer.
- Covers direct, indirect communications of any kind or nature to solicit or hire away.
- Include remedies (Liquidated damages/injunctive relief)
- Choice of law/venue/forum
- Provide a copy to employee
- Give them an opportunity to review and consult with counsel
- Give employee another copy upon termination

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Non-Disclosure/Confidentiality Agreements

Non-Disclosure/Confidentiality Agreements

- Restricts employees from **using** or **disclosing** employer trade secret and confidential information.
- Take care to ensure confidential information is treated as such. If you don't do it, courts will be hesitant to do so.
  - Common, but carelessly drafted
  - Inconsistently followed/enforced

Non-Disclosure/Confidentiality Agreements Preventative Measures

- Specifically define the confidential information
- Give employee time to review/consider and consult attorney
- Don't release information before agreement is signed.
- Don't mark public information as confidential
- Limit employees' access to trade secret/confidential information
- Limit discussions about information in public places
- Only give access to employees who need to know
- Lock desks, file cabinets and offices
- Require return of information
- Include remedies (liquidated damages/Injunctive Relief

Non-Disclosure/Confidentiality Agreements Preventative Measures

Exit Interviews

- Inventory office contents/emails/items removed
- Remind employees to contractual obligations and give copies
- Get employee to acknowledge obligations
- Request in writing return of all materials and/or deletion of computer data
- Warning letters may be necessary in some circumstances

Non-Disparagement Agreements

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Non-Disparagement Agreements

- Precludes employee from saying anything negative about the company or its products, services, or leaders
  - In February, the NLRB reviewed a case where employer offered severance to 11 workers on the condition that they would not make any statements that could "disparage or harm the image" of the employer, its affiliates, and its employees and required the agreement to remain confidential
  - The NLRB determined that these terms violated the National Labor Relations Act which gives workers the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection

Non-Disparagement Agreements

Following this decision, NLRB General Counsel issued a guidance memorandum

- NLRB will seek to void only those provisions it determines to be unlawful (not entire agreement)
- Narrowly tailored confidentiality clauses used to restrict the dissemination of proprietary or trade secret information based on legitimate business justifications are lawful.
- Narrowly tailored, justified, non-disparagement provisions that limit 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.

Q&A

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Thank You for Joining Us

12th Annual
Utah Fall Employment Seminar

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