

DEI Did Not Die: How Employers Can Implement DEI Programs in Light of the Harvard Admissions Ruling

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Students for Fair Admissions v. Harvard University



June 29, 2023 – the U.S. Supreme Court held that admissions policies at Harvard University and the University of North Carolina violated the Equal Protection Clause and Title VI of the Civil Rights Act of 1964.

- The decision ended affirmative action in college admissions as we know it.
- These are not employment cases, but since Title VI closely parallels Title VII, employers may face similar risks.

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Did the *SFFA* Decision Remove Race as a Factor Completely?

NO

“Nothing in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.”



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Title VII of the Civil Rights Act of 1964

The law has not changed!

Title VII prohibits employers from:

- Discriminating on the basis of race, color, religion, sex, or national origin;
- An employment action or policy cannot be:
 - ▶ Discriminatory on its face
 - OR
 - ▶ Facially neutral but have a disparate impact on members of a particular protected class (race, religion, gender, *etc.*)



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What Constitutes an “Adverse Employment Action”



- An employee or job applicant must show:
 - ▶ an “adverse employment action”; and
 - ▶ a causal connection between the diversity initiative and the “adverse employment action.”
- Traditionally, courts have limited “adverse employment actions” to “ultimate employment decisions” related to hiring, firing, promotion, or pay.
- Changes may be coming: *Muldrow v. City of St. Louis*

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Changing “Material Harm” Threshold



If the “material harm” threshold were eliminated or lowered, additional claims could potentially be brought to target additional DEI programs such as training or mentoring.

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Is DEI Dead?



In light of these decisions and the potential for claims, we've seen a chilling effect on DEI initiatives in companies.

- There's a general fear of efforts categorized as "DEI"
- What can an employer that is committed to achieving diversity, equity, and inclusion do?

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True or False?



It is legal for an employer to set a target that new hires must be at least 20% minority.

1. True
2. False



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Answer

FALSE

Programs that address race, gender, religion, *etc.* on their face are likely to be problematic, especially as they relate to ultimate employment actions like hiring and promotion.

- Quotas are unlawful because they indicate that the ultimate employment decision was based on race.
- Providing “extra credit” to a minority or female candidate is likely to also be unlawful.
- *E.g., Duvall v. Novant Health, Inc.*
- Measuring and evaluating are not unlawful.

What Can Employers Do?

- Increase the pipeline of qualified candidates by expanding recruitment and advertising such as developing relationships and recruiting at HBCUs, women’s colleges, and specialized schools.
- Train recruiters and hiring managers on implicit bias and inclusive interviewing practices.
- Implement blind application screening to avoid unconscious bias.
- Mandating diverse hiring pools or interviewing, *i.e.*, Rooney Rule.

Corporate Perspective

Be very clear on your organization's risk tolerance – balancing of many risks – legal, public relations, employee relations, *etc.*

- Cannot promise risk elimination

Ahhh, the stats...

- Consider how and what to measure, and what to do with the results.
- Protect the attorney-client privilege



True or False?

DEI training could arguably create a hostile work environment if attendance is compulsory and if members of certain racial or ethnic groups, or one sex, are disparaged.

1. True
2. False



Answer

TRUE

Companies are encouraged to implement DEI training programs promoting fairness, pluralism, and equal opportunity for employees.

- Discussions of race, gender, *etc.*, in the workplace do not necessarily violate Title VII.
- As with all hostile work environment claims, a lot will depend on what exactly was said, and the context in which it was said – during and after training.
- When employers talk about protected characteristics with a constant drumbeat of essentialist, deterministic, and negative language, they risk liability under Title VII.
- *E.g., De Piero v. Pennsylvania State University*

What Can Employers Do?

- Vet the training and the trainer.
- Implement training where employees are challenged to engage the material but are not made to feel shamed, degraded, or afraid to voice thoughts and feeling about the material.
- Solicit feedback on DEI programs.
- Provide guidance on the way these conversations occur in the workplace matters.

Corporate Perspective



- Be clear that the training is not political or based on sides, but a matter of fairness/equity and access in our practices.
- When kicking off training or in any communications, make space for opposing views.
- Don't let one voice dominate discussions - fight for balance.



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True or False?



It is legal for employers to restrict essential training opportunities to members of certain racial or ethnic groups, or to women.

1. True
2. False



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Answer

FALSE

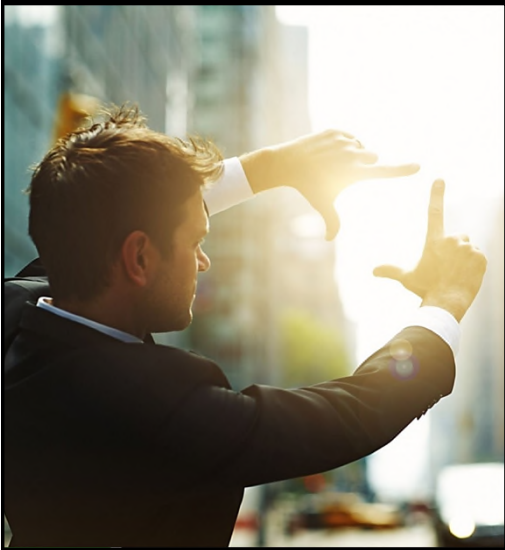
- Programs required for an employee to become eligible for a promotion, raise, benefits, *etc.*, cannot be based on race, sex, or another protected characteristic.
- There may be a question as to whether generalized programs have a material impact on employees sufficient to rise to the level of discrimination – we may need to wait for the Supreme Court to weigh in.



What Can Employers Do?

- Company-sponsored training and mentorship opportunities should be open to all employees.
- Do not roll back DEI training and mentorship programs for fear of exposure.
- Programming designed to address areas of importance for protected groups is okay so long as it is open to all.

Corporate Perspective



With limited funding, consider best way to spend to achieve maximum benefit

- Make connection between training and your workforce

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True or False?

Employers can sponsor affinity groups for racial minorities, LGBTQIA+ employees, religious groups, women, *etc.*

1. True
2. False



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Answer

TRUE

- Employers can sponsor affinity groups but assigning or denying membership may come with legal risk.
- It has yet to be determined by the courts if affinity groups can restrict membership to employees of a certain race, gender, *etc.*



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What Can Employers Do?

- Review criteria for creation, recognition, and funding of affinity groups
- Review charters/mission statements of affinity groups
- Self selection vs. assigning
- Depends on the programing – should not be the only source of essential training
- Question of open membership raises questions regarding weakening purpose of affinity group and what recourse an affinity group would have to remove disingenuous members

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Corporate Perspective

- Generally recommend maintaining open membership, but being clear on the needs being served by the group.
- These are spaces for allies not contrarians.
- There may be pointed occasions where a session will be centered on the needs of a core group and therefore will be limited (*i.e.*, immediate aftermath of George Floyd and/or Breonna Taylor).

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True or False?

It is legal for an employer to take race or gender into account in designing or administering an employee benefit plan.

1. True
2. False



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Answer

TRUE

- The U.S. Department of Labor has expressly permitted the use of race and ESG (environmental, social, and governance) as factors in designing and administering an employee benefit plan in at least two contexts.

BUT . . .



Regulations on ESG Investing



The Tiebreaker Rule. If competing investments “equally serve the financial interests of the plan over the appropriate time horizon,” you can choose based on “collateral benefits other than investment returns.” But you cannot “accept expected reduced returns or greater risks.”

Spence v. American Airlines, Inc.



American Airlines' 401(k) plan offers target date funds and index funds that are managed by or that invest in other investments managed by BlackRock. None of the funds are ESG funds. But plaintiff alleges that BlackRock, as an institutional investor, routinely votes for ESG-related issues, including oil companies, causing their shares to drop. Investments with ESG goals (formal or informal), plaintiff alleges, underperform their peers and benchmarks.

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Citigroup's Racial Equity Program



- Under the program, Citi pays the investment fees of funds offered under Citi's retirement plans if the fund's manager is a minority or female. The investment committee of Citi's plans are not required to offer funds with diverse managers. The diverse managers are not required to meet any performance goals to receive a subsidy.
- DOL's position: No fiduciary breach in considering as one factor in the selection process that investment fees otherwise payable by the plan will be paid instead by Citi. But the investment committee cannot exercise their authority for the purpose of advancing Citi's public policy goals.

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American Alliance for Equal Rights v. Fearless Fund



In August 2023, the American Alliance for Equal Rights (AAER), sued the Fearless Fund, an Atlanta-based investment fund. The Fearless Fund maintains a program that awards grants of up to \$20,000 to Black women entrepreneurs through its Strivers Grant. AAER's lawsuit alleges that the grant program violates § 1981 of the Civil Rights Act.

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What Can Employers Do?



How to DEI-fy your benefit plans

- 401(k) plan
- Health and welfare plan
- Bonus plans



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Takeaways



- Risk Management vs. Risk Elimination
- Assess your internal and external documents to evaluate vulnerability to challenge
- Restructuring of DEI initiatives - use Justice Roberts' Easter Egg
- Focus on nondiscrimination– hiring, promotions, terminations, pay equity

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Contractors, Cannabis and Changes Galore: Important State and Federal Updates in 2024

Presented by:
Suzanne Decker
Sasha Hodge-Wren



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The Life Cycle of an Employee

Today we'll be following Chris P. Bacon, a job seeking hopeful on his journey to land his dream job as a marketing consultant for a major U.S. pork distributor, Pepe Roni Industries, Inc., located in New Jersey.



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The Job Interview



- Chris comes in for an interview with the hiring manager, Dan Druff, who can't seem to stop scratching his head.
- Chris does great on his interview and thinks he's a shoe-in for the job but, is worried about a prior conviction on his record for a drunk and disorderly in Punxsutawney, Pennsylvania on Groundhog Day 2008.

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The Job Interview

- Mr. Druff thinks Chris is a good candidate but wonders if he can pass a background check.
- Previously, Mr. Druff had a prior candidate who he really liked, but was not able to hire him because of a prior conviction.
- To get out ahead of this, Mr. Druff wants to ask Chris upfront whether he has any convictions that would prevent him from passing a background check so that nobody's time is wasted.

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Can the Hiring Manager Ask Chris During the Interview about Passing a Background Check?

1. Yes, it's relevant to the position he's applying for.
2. No, this type of inquiry is prohibited under the ADA.
3. Yes, since the company is likely legally required to conduct background checks on prospective employees in their industry.
4. No, this kind of inquiry is prohibited under state law.



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Clean Slate Laws

- California
- Colorado
- Connecticut
- Delaware
- Michigan
- Minnesota
- New Jersey
- New York
- Pennsylvania
- Oklahoma
- Utah
- Virginia



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Ban the Box



Employers generally MAY NOT ask about prior arrests, criminal accusations that are not pending or did not result in a conviction, or criminal convictions before making a conditional offer.

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The Job Offer



- Chris is offered the marketing consultant position and is approved to work remotely from his home in Washington, D.C.
- Chris is told his offer for the job is contingent upon successful completion of a background check and drug test (to include THC testing).
- Chris is worried because he is a holder of a medical marijuana card and knows he won't pass the drug screening and notifies the Company's HR department of his card-holder status.

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The Drug Test

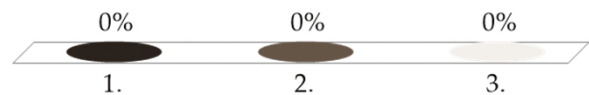
The Company has serious concerns about hiring someone who uses marijuana on a regular basis and the risks it believes such use may pose. The Company advises Chris to complete the drug screening, and it will follow up with him once it has had a chance to review the results. Unsurprisingly, Chris's drug test results came back positive for THC. His remaining results come back negative.

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What Can the Company Do?

1. Rescind the job offer to Chris based on his drug test results since marijuana is still illegal under federal law.
2. Ignore the marijuana results and treat Chris as if he had fully passed the drug screening.
3. Give Chris a one-time pass for the failed marijuana test but inform him that he has to quit using marijuana in order to remain employed with the Company.



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Legal Status of Marijuana

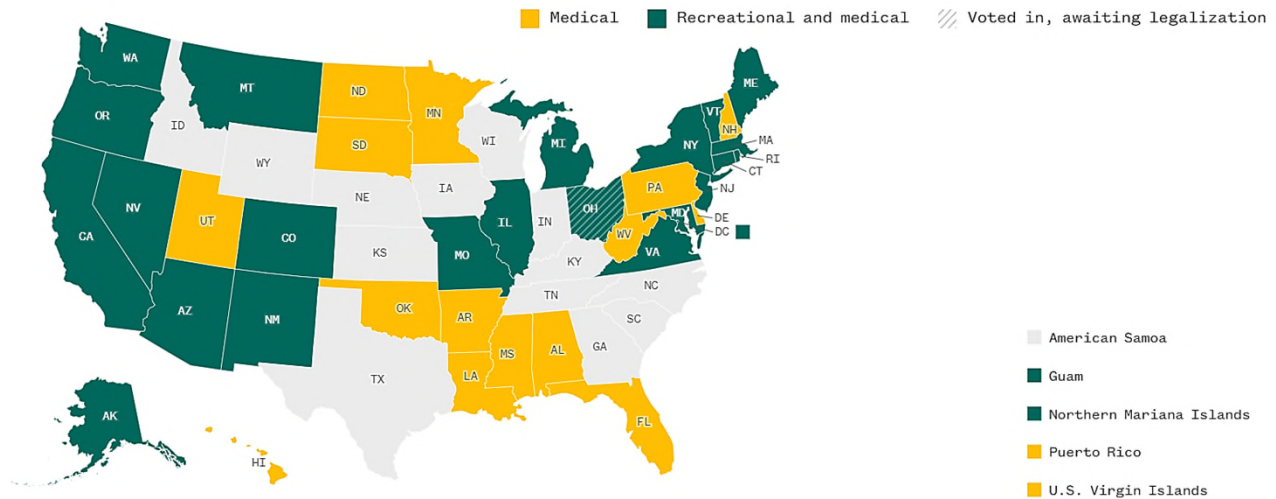
- Illegal under federal law
- Medical marijuana is legal in 41 states and D.C.
- Recreational marijuana is legal in 25 states and D.C.



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Legal Status of Marijuana



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Jurisdictions Limiting Cannabis-Related Employment Decisions

- California
- Connecticut
- District of Columbia
- Illinois
- Maine
- Minnesota
- Oklahoma
- Nevada
- New Jersey
- Pennsylvania
- Washington
- Rhode Island
- Virginia*
- San Francisco, California
- Philadelphia, Pennsylvania
- New York City, New York

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Cannabis in the DMV

- Recreational Cannabis is legal in DC, MD and VA.
- Maryland tried to pass a statute creating protections for employee cannabis use, but it did not pass.
- The District of Columbia limits employer testing.
- Virginia silent on employer testing.

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The Job Offer Cont'd

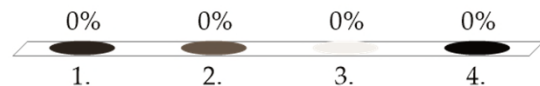
Despite the positive test, Chris was offered full time employment as a marketing consultant. His offer letter informed him that he would be classified as exempt, with a salary of \$35,000/annually. In this role, Chris will primarily fill out template marketing blasts and send them to potential clients that he's sourced and circulate pre-generated social media posts. Chris, who had only ever worked at the Broccoli Hut, was thrilled to get this position.

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Has Chris Been Properly Classified as Exempt?

1. Yes, as a marketing consultant, he will be performing exempt job duties.
2. No, Chris's salary is too low to qualify as exempt.
3. Yes, Chris is paid on a salary basis.
4. No, Chris's job duties require no independent discretion or judgment on matters of significance.



Current FLSA Regulations

- **Main exemptions:** Administrative, executive, professional, computer, and outside sales
- **Salary basis requirement:** \$684/week or \$35,568 annually
- Highly compensated employees must earn \$107,432 annually (in addition to meeting the salary basis requirement)



Proposed Changes to the Rules

- Salary threshold will be increased to \$1,059 per week or \$55,068 per year generally
- HCE exemption requirement will jump to \$143,988 per year
- Thresholds to increase automatically every 3 years based on U.S. wage data
- Employees in U.S. territories where federal minimum wage applies will be subject to the same requirements as mainland U.S. employees

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The Non-Compete

As a part of the offer, the Company required Chris to sign a Non-Compete which it requires all employees to do under company policy. The agreement prohibits Chris from working for any competitor of Pepe-Roni in any capacity and in any jurisdiction for 2 years after his employment ends and from soliciting the Company's customers and employees for the same period of time. The agreement advises Chris to confer with an attorney before signing and gives him 21 days to consider the agreement.

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Did the Company Do Anything Wrong?

1. Yes, the non-compete lasts for too long to be enforceable.
2. No, the Company has a legitimate interest in preventing Chris from sharing its trade secrets with a competitor.
3. Yes, the non-compete covers too large of a geographic area to be enforceable.
4. No, because the Agreement advises Chris to confer with an attorney and gives him 21 days to consider the agreement.



Non-Competes Banned



- California
- Minnesota
- Oklahoma
- North Dakota

Non-Competes Limited

- **Colorado:** \$123,750 per year
- **District of Columbia:** Non-medical specialist employees - \$154,200. Medical specialists - \$257,000 (adjusts based on CPI)
- **Illinois:** \$75,000 per year
- **Maryland:** 150% of state minimum wage (\$22.50 per hour or \$46,800 in 2024)
- **Maine:** 400% of the federal poverty level (currently \$60,240 for individuals)
- **Massachusetts:** Must be exempt (\$684* per week)
- **Nevada:** No hourly employees
- **New Hampshire:** 200% of federal minimum wage (\$14.50)
- **Oregon:** \$113,241/year (adjusted annually)
- **Rhode Island:** Exempt & earning 250% of the federal poverty level (\$37,650 for individuals)
- **Washington:** \$120,559.99 per year (adjusted annually)
- **Virginia:** \$73,320 per year (adjusted annually)

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Hypothetical

About a year into his employment, Chris decided he wanted to expand his marketing expertise and open his own consulting firm. As such he started his own LLC All About Me, LLC and approached Pepe about entering into a consulting agreement with his new company. This was more desirable to the Company because it would allow it to pay Chris hourly and avoid paying certain taxes. Under the terms of this agreement, Chris would work as a contractor for at least 3 years, maintain his company laptop and email address; work roughly 48 hours per week and be paid \$20 per hour. Chris has no employees and would continue performing the same functions he did as a marketing consultant.

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Independent Contractor Rule

Effective March 11, 2024

- Intended to provide a consistent approach for classifying workers
- Restores the multifactor analysis used by courts for decades to determine worker classification



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The Economic Realities Test

- Opportunity for profit or loss based on managerial skill
- The financial stake and nature of any resources a worker has invested in the work
- The degree of permanence of the work relationship
- The degree of control an employer has over the person's work
- Whether the work the person does is essential to the employer's business
- Whether the worker uses specialized skills to perform the work and whether those skills contribute to business-like initiative

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The Termination



The Company decides that the independent contractor arrangement isn't going to work and also feels that Chris's performance has been less than desirable. As a result, Pepe-Roni decides to terminate Chris's employment.

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The Termination Cont'd

The Company wants Chris to sign a severance agreement under which he will agree to release any claims he has against the Company and agree not to make any non-disparaging comments about the Company to anyone. The agreement also includes a confidentiality provision, prohibiting Chris from disclosing any of the terms of the agreement or negative aspects of his employment to anyone.

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States That Limit Confidentiality & Non-Disclosure Provisions



- Arizona
- California
- Colorado
- Hawaii
- Illinois
- Maine
- Maryland*
- Nevada
- New Jersey
- New York
- Pennsylvania*
- Tennessee
- Utah
- Vermont
- Virginia
- Washington

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Common Themes



Generally, cannot prohibit employees from discussing or disclosing facts or circumstances relating to:

- Discrimination
- Harassment
- Retaliation
- Sexual Assault
- Unlawful employment practices or conduct

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The Termination Cont'd

Chris has refused to sign the severance agreement and asserts that he has been wrongfully terminated and refuses to return his Company laptop and cell phone.



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What Can the Company Do?

1. Hold Chris's last paycheck until he returns the equipment.
2. Deduct the cost of the equipment from Chris last paycheck.
3. Call the police.
4. Go to his house and demand the equipment back.



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States with Same Day (or Similar) Final Pay Requirements



- Alaska
- California
- Colorado
- District of Columbia
- Hawaii
- Michigan (maybe)
- Minnesota
- Missouri
- Nevada
- New Hampshire
- New Mexico
- Oregon
- South Carolina
- Utah
- Vermont

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Wage Deduction Limitations



- Alaska
- Arkansas
- California
- Delaware
- Hawaii
- Illinois
- Kansas
- Minnesota
- New York
- Ohio

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FLSA Compliance Issues



2006 DOL Opinion Letter provides that deducting from the salary of an exempt employee to reimburse the company for damage to or loss of company equipment would violate the FLSA's salary basis requirement.

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Privacy Concerns and Retrieving Confidential Information



- You may want to request access to employee's personal device to remove confidential information.
- However, there are privacy concerns which could give rise to a statutory claim or a common law claim of invasion of privacy.
- Do you have the employee's consent to search?

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Other Options

- Threatening to bring legal action against the employee for failing to return the property
- Filing suit
- Pressing charges



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Accommodations in the Office and Beyond: Navigating Accommodation Issues in the Post-Covid Hybrid Workplace

Presented by:
Stephanie Baron
Elisabeth Hall
Kathleen Pontone



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The Americans with Disabilities Act ("ADA")



- The ADA guarantees equal opportunity for individuals with disabilities in public accommodations, employment, transportation, state and local government services, and telecommunications
- Title I covers employment
- Title II covers state and local government
- Title III covers public accommodations

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Title I: Employment



- The ADA makes it unlawful to discriminate in employment against an individual with a disability.
 - ▶ Must provide "reasonable accommodations" to employees with disabilities.
 - Adjustments to a work setting that make it possible for employees with disabilities to perform the essential functions of their jobs.
 - ▶ However, employers are not required to provide an employee with a reasonable accommodation if it would cause "**undue hardship**" to the employer.
 - Significant difficulty or expense to employer

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What Are “Essential Functions?”



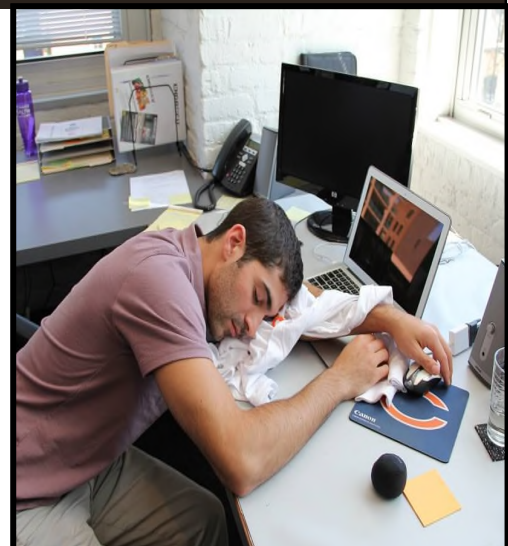
- Fundamental to the position:
 - ▶ Not marginal
- How about:
 - ▶ Attendance and punctuality?
 - ▶ Ability to work in stressful environment?
 - ▶ Ability to work well with co-workers?
 - ▶ In-office work?
- Job descriptions are helpful evidence so be objective in wording

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Is it a Disability?

Creed has been showing up at the office late and he seems distracted. He has always been a bit odd, but lately, some of his comments have been more inappropriate and he has been missing deadlines and mixing up client names. Last week, Pam found him asleep in the lunchroom and Angela reported that her sister saw him at a bar at 2 am on a Tuesday really intoxicated. Toby confronts Creed and asks if he is an alcoholic. Creed denies having a drinking problem but says that he has been taking a new medication to help improve his memory and it sometimes makes him sleepy.



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What Should the Company Do Next?



1. Tell Creed that he must seek treatment for alcoholism if he wants to keep his job; the Company will provide him leave to do so.
2. Discipline Creed for the performance issues; at the same time, ask him if he needs accommodation for a disability.
3. Discipline Creed for the performance issues; don't make any assumptions or say anything at all about his medical issues.
4. Don't discipline Creed for the performance issues; instead, ask him if the Company can contact his doctor for more information about his medical issues so it can decide what to do next.



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Is it a Disability?



- Just about any medical condition may be considered a disability.
 - ▶ Alcoholism can be a disability – but employer does not need to accommodate bad behavior that is a symptom of the condition.
 - ▶ Current illegal drug use or alcohol abuse – not a disability.
- Employee is not necessarily required to say: “I have a disability” or “I need accommodation.”
- Where the employer is on notice that employee’s performance is impacted by a medical issue (physical or mental) – may be obligated to engage in an interactive process to see if accommodation is possible.
- BUT – be cautious of “regarding” an employee as disabled.

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The Interactive Process



- Be clear about the role’s essential functions
- Get clarity on the reasonable accommodation need:
 - ▶ What is the limitation and how does it tie to the job duties
 - ▶ Suggested accommodations
 - ▶ BUT - Does not need to be employee’s preferred accommodation



Hypothetical



Last month, Andy requested to work from home after getting into a boating accident. Dunder Mifflin provided him reasonable accommodation paperwork, which he and his doctor completed. The doctor’s note indicated that he could not drive with his right foot for at least eight weeks, so working from home would be easier for him.

Can the Company Require Andy to Return In-office?

1. Probably not, it's just eight weeks.
2. Yes, commuting to work has nothing to do with whether he can do his job.
3. Yes, but only if Dwight agrees he would drive him.
4. None of the above.

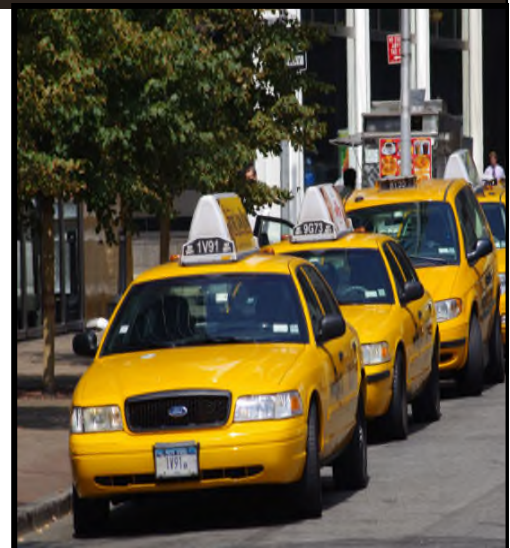


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Commute Related Accommodations

- Circuit split as to whether an employer has obligation to accommodate
- Engage in interactive process
- Be creative: ride share, taxi, public transportation, modified hours or days of the week



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The Company Granted the Accommodation, But...



Shortly thereafter, Pam, Dwight and Angela complain that Andy frequently does not timely respond to emails or calls, which impacts their ability to do their job.

- What do you do when the accommodation is not working?

Pregnant Workers Fairness Act (“PWFA”)



Pregnant employees are covered under the PWFA

- Pregnant and postpartum workers have the right to reasonable accommodations – law provides additional protections beyond the ADA (pregnant worker does not need to have a disability to be entitled to accommodation).
- PWFA requires employers to provide employees with reasonable accommodations necessitated by pregnancy, childbirth or related medical conditions unless doing so would impose an undue hardship on the employer.
- Employer can’t mandate accommodation without discussion with employee or require an employee to take leave if another accommodation is available that would allow the employee to continue working.

Medical Verification



Generally, do not request supporting medical verification in the following instances:

- When both the limitation and the need for reasonable accommodation are obvious
- When the employee or applicant has already provided sufficient information, *i.e.*, the employee has already provided a medical note imposing lifting restrictions for a specific time-period
- When an employee states or confirms they are pregnant and requests one of the four common accommodations: carrying water and drinking as needed, taking additional restroom breaks, sitting or standing, and breaks, as needed, to eat and drink
- When the limitation is lactation or pumping

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Providing Urgent Maternal Protections for Nursing Mothers Act (the “PUMP” Act)



- Expands upon the requirements set forth in the Break Time for Nursing Mothers provision of the Fair Labor Standards Act (“FLSA”)
 - ▶ This provision requires employers to provide **non-exempt** nursing mothers reasonable break time to “pump” or otherwise express breast milk **and** a private place to do so (other than a bathroom) for at least one year after giving birth.
 - ▶ May be unpaid unless it’s an otherwise paid break, if unpaid, will be relieved from duties for entire break
- Must also provide reasonable pumping breaks for **exempt** employees.
 - ▶ Exempt employees must still be paid their full weekly salary as the law requires, whether or not they take breaks to express breast milk.

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Title II of the ADA

- Covers state and local governments
- Prohibits discrimination against individuals with disabilities in accessing services, programs, or activities
- Public education (schools), public transportation, recreation, health care, social services, courts, voting, emergency services
- Provides people with disabilities an equal opportunity to benefit from such programs

Title III of the ADA

- Title III requires public accommodations to provide people with disabilities an equal opportunity to access the goods or services they offer
- Public accommodations include restaurants, hotels, doctors' offices, pharmacies, retail stores, museums, libraries, private schools, day care centers, transportation depots, convention centers, homeless shelters, theaters, and amusement parks
- Private clubs and religious organizations are not covered under Title III

Specific Requirements Under Title III



Public Accommodations must:

- Make sure that a person with a disability can access their goods or services
- Communicate with people with disabilities as effectively as they communicate with others
- Comply with specific architectural standards for physical accessibility when constructing a new building or altering a place of public accommodation or commercial facility
- Remove architectural and communication barriers and barriers to participation in programs when it is readily achievable to do so
- Make reasonable modifications to policies, practices, and procedures where needed
- Allow service animals to be with their person even if there is a no pets policy

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Architectural Barriers



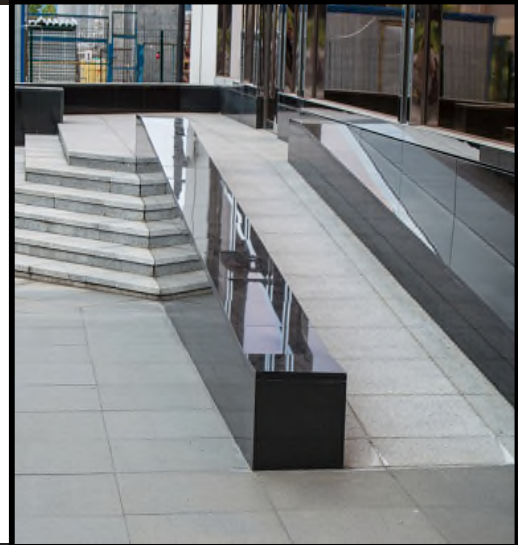
- Architectural barriers are physical elements of a building that prevent movement or access for people with disabilities
 - ▶ *E.g., a business that is only accessible by stairs creates a barrier for wheelchair users*
- Public accommodations must remove architectural barriers from existing facilities when it is "readily achievable" to do so
 - ▶ "Easily accomplishable and able to be carried out without much difficulty or expense"
 - ▶ Requires case-by-case assessment of factors specific to the business
 - ▶ Must provide feasible alternatives when barrier removal is not readily achievable

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New Construction and Alterations

- When constructing or altering buildings or commercial facilities, public accommodations must make them accessible to persons with disabilities
- ADA Standards for Accessible Design *2010 is current version
- Safe Harbor - facilities built or altered before March 15, 2012 that comply with the 1991 Standards for Accessible Design do not have to be changed to satisfy the 2010 Standards
- Recommend using an ADA consultant



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Parking Lot Requirements

ADA sets forth specific requirements for parking lots

- Certain amount of ADA-compliant spaces
- Size, width, and surface requirements
- Generally need van accessible spaces
- Access aisles



**Note: State and local laws may have additional requirements*

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Hypothetical



A retail store recently installed self-checkout aisles. A blind customer wants to use the self-checkout aisle, but the self-checkout registers do not have the necessary auxiliary services to serve him. The customer complains alleging that the store has violated the ADA because he is unable to use its self-checkout service.

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Did the Store Violate the ADA?

1. Yes, the customer needs to be able to access everything that other customers can.
2. Yes, the self-checkout registers did not come with built-in auxiliary aids to serve all customers, which the store is required to have.
3. No, if the store provides an alternative modification that allows the customer to check out.
4. No, but only if the store replaces the existing register with the customer's register of choice that will allow him to check out by himself.



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Reasonable Modifications

- Public accommodations must make “reasonable modifications” in their policies, practices, and procedures to accommodate a person with a disability.
- Interactive process for evaluating modifications is similar to the process for evaluating reasonable accommodations under Title I.
- A fundamental alteration is not required.
- Defined as “something that causes a change in the essential nature of your business.”

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Public Facing Website?

- If yes, your website is a public accommodation for the purposes of the ADA!
- No federal standard for compliance
- Many states have adopted the WCAG 2.0 Level AA
- Rise of lawsuits as a result of the use of “testers” claiming to attempt to buy a product, *etc.*, on a website
- Difficult to manage = quick paycheck for testers

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Religious Accommodations



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Facts



Groff worked for USPS delivering mail. Trouble began when his office started to deliver Amazon packages. USPS moved his office, then that rural office started to deliver Amazon packages too. Groff took absences and others delivered on Saturdays until he quit – undue burden on the conduct of the business.



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Religious Accommodations Under Title VII



(Slip Opinion)

OCTOBER TERM, 2022

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

GROFF *v.* DEJOY, POSTMASTER GENERAL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 22–174. Argued April 18, 2023—Decided June 29, 2023

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Long Precedent Reversed!



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Groff Holding

- Employers must accommodate employee's request for Sundays off unless they can prove that the "burden" of granting the accommodation would result in substantial incurred costs in relation to the conduct of its particular business.
- *Groff* reversed 50 years of precedent established under *TWA v. Hardison* which provided that the cost is merely more than *de minimus* cost.

Types of Accommodations

Generally, these cases arise in several contexts:

1. Schedules

- a) Sabbath observation
- b) A Catholic employee needs a schedule change to attend church services on Good Friday

2. Appearance Standards – hair, headwear, clothing – pants, long skirts

- a) A Jewish employee needs a modification from the uniform policy to wear a head covering

3. Prayer time

- a) A Muslim employee needs additional breaks during Ramadan for prayers at prescribed times

4. Religious Advocacy

- a) Parables "Have a blessed day"
- b) A Christian pharmacy employee needs to be excused from filling birth control prescriptions
- c) A Jehovah's Witness seeks to change job tasks at a factory to avoid working on war weapons

5. Vaccinations

What Constitutes a Religious Belief?

- Sincerely held religious belief does not have to be an organized religion, or a tenant of the religion the employee belongs to
- Cannot be completely made up or deliberately false
- Must be sincere
- The amount of probing an employer can do depends on the circumstances
- Title VII also protects religious beliefs that are new, uncommon, not part of a formal church or sect, or only held by a small number of people
- Social, political, or economic philosophies, or personal preferences, are not "religious" beliefs under Title VII



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