VOGEL Law Firm

Employment Law 2022

Tuesday, May 10 - Moorhead, MN

Thursday, May 12 – Bismarck, ND



VOGEL Law Firm

2020 - Our Hopes Were Dashed



But, we're back...



Today's Agenda



| 8:00 | The Greatest Adventure | 12:00 | Lunch |
|-------|---|-------|---|
| 8:30 | Federal Updates – Seth Thompson | 1:00 | Year In Review Bailey Fuchs & MacKenzie Hertz |
| 9:30 | Hiring & Firing – KrisAnn Norby Jahner | 2:00 | Promoting Diversity Meredith Larson |
| 10:30 | Break | 2:30 | Break |
| 10:45 | Remote Employees – Vanessa Lystad | 2:45 | Panel Discussion – Q & A Vogel Shareholders |
| 11:45 | Q & A | 4:15 | Prize Drawings!!! |

But first . . . housekeeping

- Question cards
- Survey Monkey Seminar evaluations
- PowerPoint slides in Technicolor @ www.vogellaw.com



Register to Win!!!!

- Register to win a AirPods, Scheels Gift Card, 50 Laws in 50 States and other great door prizes!
- Must register to participate in drawings!
- Must be <u>present</u> to win!







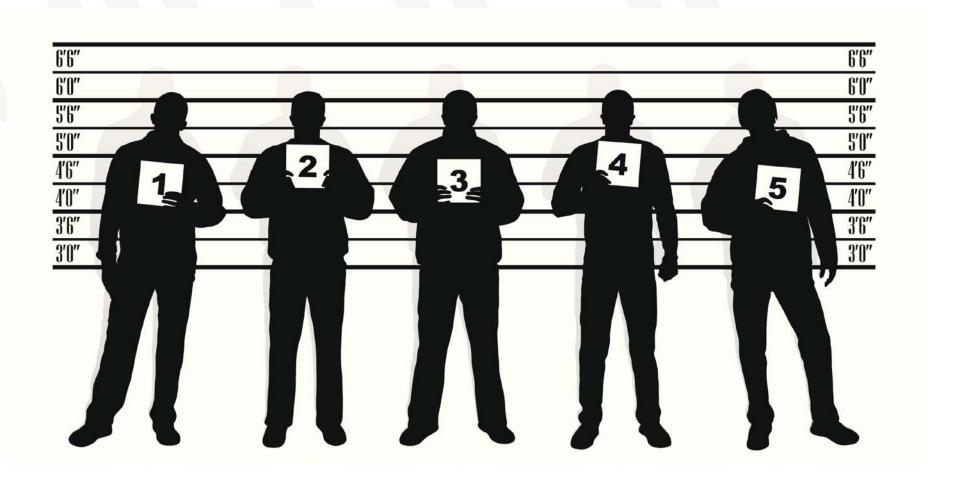
CLE Hours

 This seminar is approved for 6.5 CLE hours in North Dakota and 6.5 CLE hours in Minnesota.





The Line Up



QLK/QasTbe RhasehSerspects"







Our Secret Weapons

Jesse Walstad – Bismarck Litigation



Michelle Eaton Scimecca – Apple Valley Immigration Law

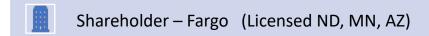


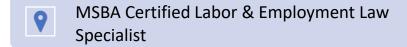
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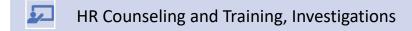
"The Greatest Adventure"

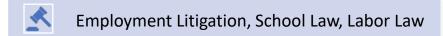
Lisa Edison-Smith | Shareholder Fargo Office

Lisa Edison-Smith









- Compliance, Administrative Agency Complaints
- Policy Review and Development
- Employment Mediation Qualified Neutral



sometimes I wonder if all this is happening because I didn't forward that email to 10 people.

"Hug my mother in public." "Ask the guy
I've liked for a
while if he
wants to come
around for
dinner and a
movie."

"What will you do when the Pandemic is Over?"

Reddit User

What did you want to do when this Pandemic was "Over"?





Unfortunately, it wasn't really "over" . . . and more was to come.

"What will you do when the Pandemic is Over?"

Reddit User

2020 - 2021 Defining moments . . .



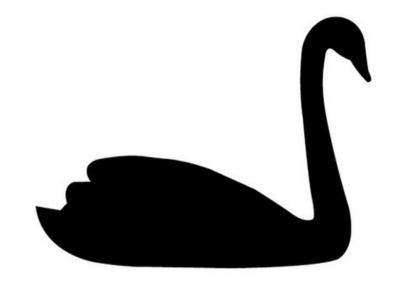
2022 Defining moments...



What Happened? What's Next?



Workplace Lessons from the Pandemic & other Defining Moments...



BLACK SWAN EVENTS

The Pandemic was a "Black Swan" Event

The Black Swan Event



#1 – Expect the Unexpected

- Adapting is surviving
- Prepare for contingencies
- Less brick and mortar and more flexibility



#2 – Embrace a Hybrid Workplace

- Online meetings are here to stay
- Remote work means flexibility
- Increase reliance on technology
- Winning the recruiting battle



#3 – Company Culture and Onboarding

- Remote and hybrid workplaces pose challenges
- Focus on shared company values and communicating (and hiring for) those values
- Needed for increased formal and informal mentorship





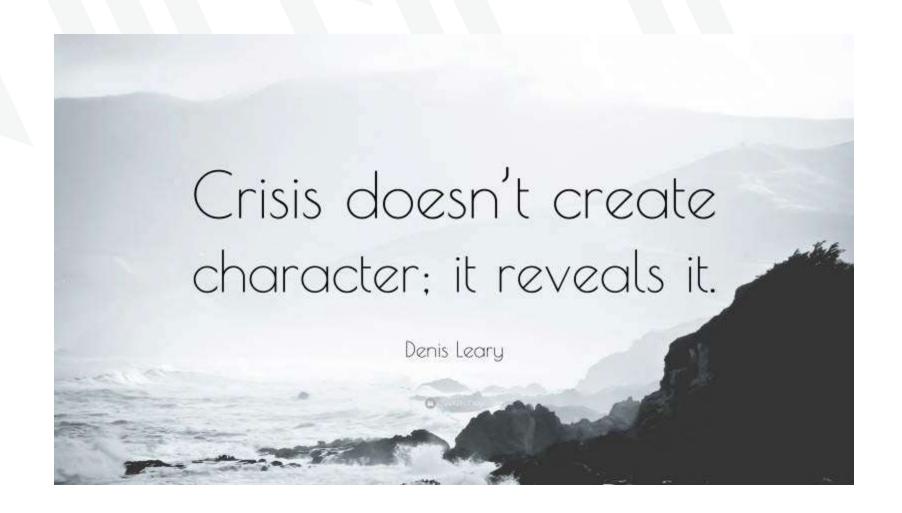
#4 - Workplace privacy and employee defections

- Need for more monitoring with remote workers expected increase in regulation and privacy rights
- Labor shortages and remote workers mean increased employee defections
- Non-compete legislation Feds and states will likely continue to focus on limits to non-compete laws with Biden Executive Order to FTC



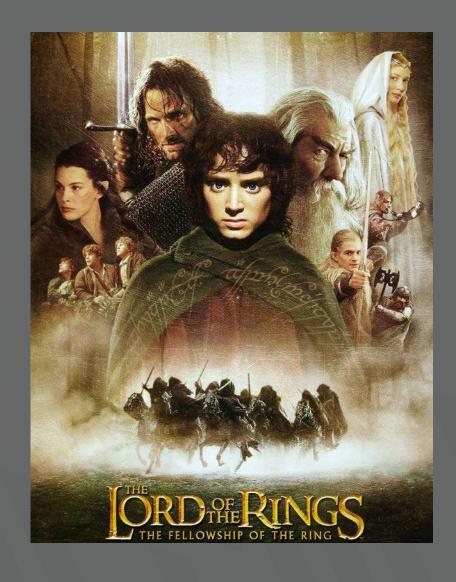
#5 – Treat People Right – It's Good for Business

- The great resignation and worker shortages company culture, work/life balance . . . keys to worker recruitment and retention
- Focus on diversity pandemic impacted women and minorities more significantly at times
- Worker safety, labor rights, equality all a focus under administration efforts



Deeds will not be less valiant because they are unpraised.

"Even a darkness must pass A new day will come And when the sun shines It will shine out the Clearer."



"It's the job
that's never
started as takes
longest to
finish."

"All we have to decide is what to do with the time that is given us."

GREATEST ADVENTURE IS WHAT LIES AHEAD J.R.R.TOLKIEN

YOU DIDN'T COME THIS FAR ONLY TO **COME THIS FAR**

QUESTIONS?



VOGEL Law Firm

Federal Updates: What's New with OSHA and the NLRB

Vogel Employment Law Seminar – May 10 (Moorhead) & May 12 (Bismarck)

Seth Thompson

- Shareholder Bismarck office
- Licensed in North Dakota and Minnesota
- Construction Law & General Civil Litigation
- Labor Law public & private employers
- Collective Bargaining & Arbitrations
- General Advice & Counsel
- Former Manager- 900-member labor union
- Master Electrician since 2003



TODAY'S AGENDA



- National Labor Relations Board (NLRB).
 - Leadership.
 - General Counsel Initiatives.
 - Other NLRB Activities.

- Occupational Safety and Health Administration (OSHA).
 - Leadership.
 - OSHA Activities.

New NLRB members and NLRB General Counsel



The Role of the Board and General Counsel

The Board

 Responsible for setting national labor policy via adjudication (case decisions) and administrative rulemaking.

General Counsel

- Independent from the Board.
- Responsible for the investigation and prosecution of unfair labor practice cases.
- Supervises NLRB field offices in the processing of cases.

Biden Administration NLRB Changes



Changes at the NLRB:

- Immediately after President Biden's inauguration, he asked General Counsel Peter Robb (Trump appointee) to resign.
- Robb refused, so he was fired.
 - First ever in NLRB history.
- President Biden later appointed.
 Jennifer Abruzzo as General Counsel.
 - Confirmed in Senate by 51-50 vote (VP Harris was tie-break).

The Current Board

Chair Lauren McFerran and John F. Ring







Gwynne A. Wicox

David M. Prouty









Chair Lauren McFerran: Biden Appointee

- NLRB Board member 2014-2020.
- Former Chief Labor Counsel for Senate HELP Committee.
- Worked for Senators Tom Harkin and Ted Kennedy.
- Union-side labor attorney.



John F. Ring: Trump Appointee

- Former NLRB Board Chair (2018-2021).
- Board member since 2018.
 - Term ends December 2022.
- Management-side labor attorney.



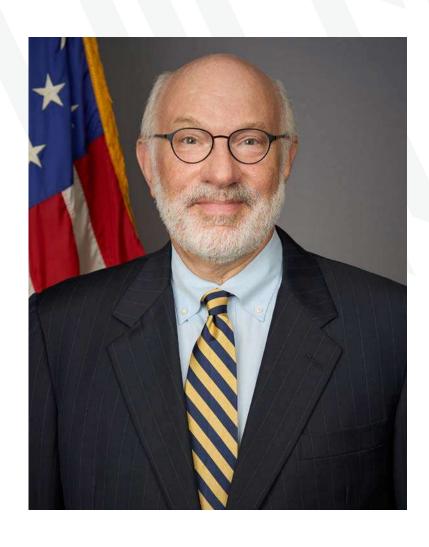
Marvin E. Kaplan: Trump Appointee

- Board member since 2017.
 - Second term ends December 2025.
- Chief Counsel to Occupational Safety and Health Review Committee.
- Management-side labor attorney.



Gwynne A. Wilcox: Biden Appointee

- Board member since 2021.
 - Term ends December 2023.
- Union-side labor attorney.
- Associate General Counsel for Service Employees. International Union Affiliate.
- NLRB Field Attorney.



David M. Prouty: Biden Appointee

- Board member since 2021.
 - Term ends December 2026.
- Union-side labor attorney.
- General Counsel for multiple International Unions.
- Chief Labor Counsel for Major League Baseball Players Association.

Current NLRB General Counsel



Jennifer A. Abruzzo: Biden Appointee

- General Counsel since 2021.
 - Five-year term.
- Union-side labor attorney.
- NLRB attorney for over 20 years.
- Special Counsel for Communication Workers of America (CWA) affiliate.

General Counsel Initiatives



General Counsel Abruzzo's Initiatives

- August 2021 Memo on Mandatory Submissions to Advice.
 - Identifies subject matters Regional Offices must submit to General Counsel prior to any decision.
 - Rationale: To give the new Board the opportunity to "examine" (a/k/a overrule) various precedents.
 - Identifies at least 40 Board decisions and principles to "examine."
 - "There are many important cases and issues not included in this initial memo; I fully expect that this memo will be supplemented at some point in the future to include other important issues, as well as refinements."

General Counsel Abruzzo's Initiatives: Handbook Rules

- Employer Handbook Rules.
 - 2004 Lutheran Heritage case: Facially neutral work rules violate the Act if employees would reasonably construe them to prohibit protected concerted activity.
 - Rules prohibiting "abusive and profane language," "harassment," and "verbal, mental and physical abuse" were lawful because they were intended to maintain order in the employer's workplace and did not explicitly or implicitly prohibit Section 7 activity.

General Counsel Abruzzo's Initiatives: Handbook Rules

- Obama NLRB interpreted "reasonably construe" very broadly.
 - Rules that could **potentially** infringe on employee rights, even if those policies had never been enforced or threatened to be enforced in such a manner, were illegal.
 - Rules suggesting that employees foster "harmonious interactions and relationships" or conduct themselves in a "positive and professional manner," now violated the Act.

General Counsel Abruzzo's Initiatives: Handbook Rules

- 2017 *Boeing* case: helpful guidance and rolled back interpretation of "reasonably construe."
 - Set a two-step balancing test focusing on the rule's actual impact.
 - General Counsel Memo 18-04 provided helpful concrete examples.
- January 2022: The Board invites briefing re overruling Boeing.
- March 2022: General Counsel Abruzzo asked the NLRB to overrule *Boeing* and return to the "reasonably construe" standard in *Stericycle, Inc.*

General Counsel Abruzzo's Initiatives: Confidentiality Provisions and Arbitration

- Most separation agreements contain confidentiality provisions requiring employees to release claims and to:
 - Keep confidential the amount of any bonus/separation payment.
 - To refrain from disparaging the employer.
- The General Counsel seeks to reexamine cases "finding that separation agreements that contain confidentiality and nondisparagement clause" are lawful.
 - The argument is that such clauses restrict employees from exercising their rights under the Act.

General Counsel Abruzzo's Initiatives: Confidentiality Provisions and Arbitration

- U.S. Supreme Court in 2018: Individual arbitration agreements containing class and collective-action waivers do not violate the Act. *Epic Systems Corp. v. Lewis*.
 - Epic Systems arguably left open the question if confidentiality provisions in arbitration agreements violate the Act.
- Expect General Counsel Abruzzo to go after confidentiality provisions in arbitration agreements and confidentiality agreements themselves, as previously noted.

General Counsel Abruzzo's Initiatives: Employer Free Speech

- Employers may lawfully gather employees on work time to discuss their views on unionization, in a non-coercive manner.
 - "The expressing of any views, argument, or opinion" about union issues does not constitute an unfair labor practice provided that it does not "include threats of reprisal or promises of benefits."
- April 7, 2022 General Counsel Memo urges the Board to find union discussions unlawful when employees "are (1) forced to convene on paid time or (2) cornered by management while performing their job duties."

General Counsel Abruzzo's Initiatives: Employers' Email Systems

- Employers can prohibit employees from using company email to discuss union organizing activities.
 - Email and computer systems are an employer's property.
 - Employees have other reasonable methods of communication.
- The General Counsel is actively seeking cases from Regional Offices involving email and other communication platforms to allow employee use for union organizing activities.

So, What Else Is New with the NLRB?



Other NLRB Activities: Joint-Employer Doctrine

- The Board will find that two separate entities are joint employers if they "share or codetermine" the "essential terms and conditions of employment" for a work force.
 - E.g., Contractor/subcontractor, franchisee/franchisor, parent/subsidiary, staffing companies.
 - Both employers liable for ULPs of the other.
- April 2020: NLRB adopted a reasonable Joint-Employer Rule
 - Made it more difficult for businesses to be held legally responsible for labor law violations of staffing companies, franchisees, and other related organizations.

Other NLRB Activities: Joint-Employer Doctrine

- April 2020 Final Rule:
 - The purported joint employer must "possess and exercise substantial direct and immediate control" over one or more "essential terms and conditions of employment" of another employer's employees, such that the "entity meaningfully affects matters relating to the employment of those employees."
 - Merely having the ability to control is not enough.

It's Groundhog Day at the NLRB!



- December 2021: Board announces it will again engage in rulemaking on the standard for determining joint employer status.
- Expect the April 2020 Rule to be rescinded, making it easier for the NLRB to establish joint employer status.

Other NLRB Activities: Election Petitions, ULPs, and NLRB Funding Are On The Rise

- During the first six months of FY 2022, union representation petitions increased 57%.
 - Petition filings have decreased since 2015.
- During the first six months of FY 2022, ULP charges increased 14%.

• In March 2022 President Biden released his FY 2023 budget, which requests \$319.4 million for the NLRB—a 16% increase.

Other NLRB Activities: "Quickie Election" Data

 In 2014 the NLRB radically increased the time between election petition filing and the election.

 Traditionally, the time between an election petition filing and the election averaged about 38 days.

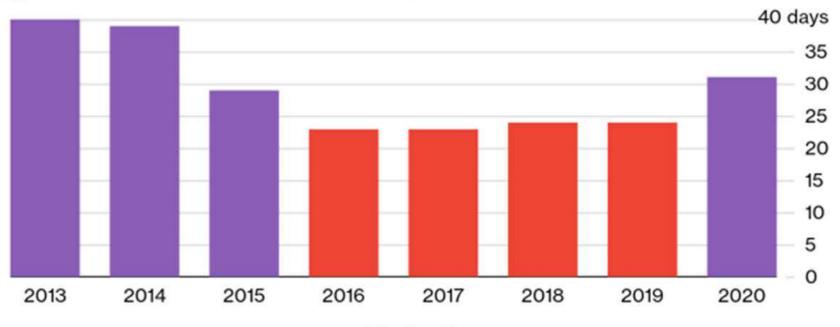
 "Quickie" or "Ambush" elections sought to reduce this time to roughly 14-21 days to make it harder for employers effectively respond.

Other NLRB Activities: "Quickie Election" Data

Length of NLRB Representation Election Process, 2013-2020

Median Number of Days From Petition Date to Election Date

Obama Administration NLRB rules in effect year-round



Election Year

NLRB Data analyzed by Bloomberg Law 2020 figures cover elections held Jan. 1-Nov. 30, 2020.

Other NLRB Activities

Increased use of mail ballot elections.

 Proposed increased access to employer's private property for organizing purposes.

• Expansion of Weingarten rights to non-union employees.

 Increased use of federal courts to obtain interim injunctive relief against alleged ULPs.

Protecting the Right to Organize Act (Pro Act)

- Ends Right To Work Laws.
- Expands definition of "employee" and "supervisor."

- Imposes mandatory arbitration on first contracts.
- Reinstitute "Quickie Elections."

Expands penalties for violations of the Act.

What's New With OSHA?



Secretary of Labor Martin J. Walsh

 Became Secretary of Labor March 2021.

- Former Mayor of Boston and state representative.
- Former union member and leader.

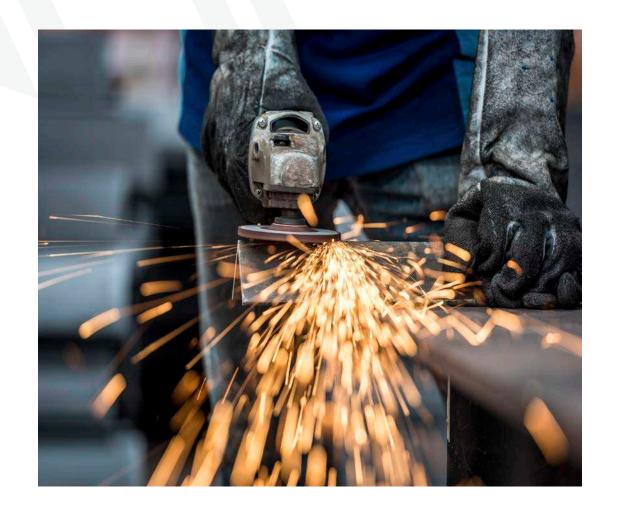


The Vaccine Mandate

- In October 2021, OSHA issued an emergency temporary standard (ETS) implementing a mandate for all employers with more than 100 employees.
 - Test or vaccinate.
- January 2022: Supreme Court blocked OSHA's ETS as beyond OSHA's statutory authority.
 - "Although COVID-19 is a risk that occurs in many workplaces, it is not an occupational hazard in most."
 - OSHA subsequently withdrew the ETS.

Heat Stress Emphasis Program and Forthcoming National Standard

- In September 2021, OSHA initiated measures to protect workers from hot environments to reduce ambient heat exposure.
- OSHA commenced the rulemaking process to develop national standards for indoor and outdoor work.



Heat Stress Emphasis Program and Minnesota Standard

- The proposed national standard is not yet clear but expect national heat standards to be a complex calculus beyond temperature.
- Minnesota's State Standard.
 - Minnesota is one of only four states with state heat standards.
 - Minnesota's standard is for indoor workers and requires employers to measure heat using the "Wet-Bulb Globe Temperature" index.
 - Calculated by air temperature, air speed, humidity, and radiation.
 - Permissible heat levels vary by three levels of exertion.

OSHA's Noise Hazard Initiative: Regional Emphasis Program

- In 2021, OSHA implemented a REP in Region 5, which includes Minnesota, increasing noise regulation enforcement.
 - OSHA subsequently added REPs in 7 of 10 of OSHA's 10 regions.
 - Expect a nationwide focus.

OSHA PELs for Noise

| Duration | PEL |
|------------|--------|
| 8 hours | 90 dB |
| 4 hours | 95 dB |
| 2 hours | 100 dB |
| 1 hour | 105 dB |
| 1/2 hour | 110 dB |
| 15 minutes | 115 dB |

OSHA's Proposed Rule re Tracking of Workplace Injuries and Illnesses

- March 2022: OSHA proposed injury/illness reporting changes.
- Currently, employers with 250 or more employees and employers with 20-249 employees in select industries must electronically submit OSHA Form 300A information annually.
- Proposed changes:
 - Require establishments with 100 or more employees in certain high-hazard industries to electronically submit information from their OSHA Forms 300, 301 and 300A to OSHA once a year.

OSHA's Proposed Rule re Tracking of Workplace Injuries and Illnesses

 Updates the classification system used to determine the list of industries covered by the electronic submission requirement.

 Removes the current requirement for establishments with 250 or more employees not in a designated industry to electronically submit information from their Form 300A to OSHA annually.

 Requires establishments to include their company name when making electronic submissions to OSHA.

OSHA's Proposed Rule re Approval of Arizona's Occupational Safety and Health Plan

- In April 2022, OSHA proposed a rule revoking its 1985 approval of the State of Arizona's Occupational and Safety Health Plan.
 - Arizona refused to adopt the healthcare COVID-19 ETS in June 2021.
 - This proposal is "in response to nearly a decade-long pattern of failures to adopt and enforce standards and enforcement policies at least as effective as those used by the department's Occupational Safety and Health Administration."
- OSHA has never revoked approval of any of the 21 State Plans.

OSHA's Increased Funding

- OSHA has steadily received increased funding.
 - FY 2019: \$558M.
 - FY 2020: \$582M.
 - FY 2021: \$591M.
 - FY 2022: \$612M.
- OSHA's FY 2023 request: \$701M.



Compliance Tips: NLRB

- Be prepared for a more aggressive NLRB, particularly in the areas of General Counsel Abruzzo's August Memo.
 - Handbooks.
 - Confidentiality provisions in separation agreements.
 - Employer email systems.
 - Employer's ability to speak against the union.
- Union organizing is on the rise.
 - Increased inflation causing uncertainty with workers.
 - Union friendly administration and agencies.

Compliance Tips: NLRB

- Conduct exit interviews and pay attention to the workforce.
 - Union buzzwords: "We need a voice," "Dignity," and "Respect."
- Be mindful of unusual groups of employees assembling.
- Conversation changes when supervisors are present.
- Employees show greater interest in wages, benefits, handbook provisions, etc., and ask for copies of documentation (SPDs, policies and procedures, etc.)

Compliance Tips: OSHA

- Be prepared for a more aggressive OSHA.
 - Heat and noise monitoring.
 - Increased routine inspections.
- Have an effective safety and health program.
- Have a plan for OSHA visits.
 - Identify who will be the employer's representative if OSHA arrives.
 - The representative should escort the inspector.
 - Maintain good records that are easily accessible.
 - Cooperate: OSHA will allow abatement in real time.

Links

- August 12, 2021 General Counsel Abruzzo memorandum:
 file:///C:/Users/sat/Downloads/Mandatory%20Submissions%20to%20Advice%20(1).pdf
- February 10, 2022 General Counsel Abruzzo memorandum on Inter-agency Coordination: <u>file:///C:/Users/sat/Downloads/Inter_agency%20Coordination.pdf</u>
- April 7, 2022 General Counsel Abruzzo memorandum on Captive Audience and Other Mandatory Meetings: <u>file:///C:/Users/sat/Downloads/The%20Right%20to%20Refrain%20from%20Captive%20Audience%20and%20ther%20Mandatory%20Meetings.pdf</u>
- 2017 General Counsel Robb memorandum re handbook policies:
 file:///C:/Users/sat/Downloads/GC%2018 04%20Guidance%20on%20Handbook%20Rules%20Post Boeing.
 pdf.pdf
- NLRB Joint Employer Rule: Fact Sheet: https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-7581/fact-sheet-joint-employer-final-rule.pdf

Links

- February 1, 2022 memorandum re Seeking 10(j) Injunctions in Response to Unlawful Threats or Other Coercion During Union Organizing Campaigns:
 - https://f.datasrvr.com/fr1/022/40126/NLRB General Counsel Memo Seeking 10 j Injunctions in Response to Unlawful Threats or Other Coercion During Union Organ izing .pdf
- April 21, 2022 OSHA Proposed Rule to Revoke Final Approval of Arizona's Occupational and Health Plan: https://www.federalregister.gov/documents/2022/04/21/2022-08424/arizona-state-plan-for-occupational-safety-and-health-proposed-reconsideration-and-revocation
- OSHA's noise exposure regulations:

https://www.osha.gov/noise#:~:text=OSHA%20sets%20legal%20limits%20on,a%205%20dBA%20exchange%20 rate

Links

- OSHA's proposed rulemaking re Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings: https://www.osha.gov/heat-exposure/rulemaking
- OSHA's proposed rulemaking re Occupational Injury, Illness, and Recordkeeping Regulations: https://www.osha.gov/news/newsreleases/national/03282022-0
- OSHA's Noise Hazard Overview: https://www.osha.gov/noise
- OSHA's Region 5 Regional Emphasis Program (REP) for Exposure to Noise Hazards:
 https://www.osha.gov/sites/default/files/enforcement/directives/CPL 04-00-27.pdf

QUESTIONS?

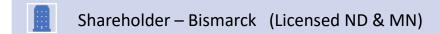


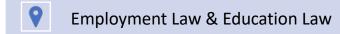
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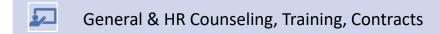
Hiring, Firing & General Workplace Trends: A 2022 Update

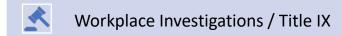
KrisAnn Norby-Jahner | Attorney
Bismarck Office

KrisAnn Norby-Jahner









- Compliance & Administrative Agency Complaints
- Policy Review and Development
 - Mediation Qualified Neutral



AGENDA

TOP 5 EMPLOYMENT ISSUES FOR 2022:

- I. Hiring
- II. Firing
- III.Workplace
 Trends to
 Watch: 2022

I. HIRING

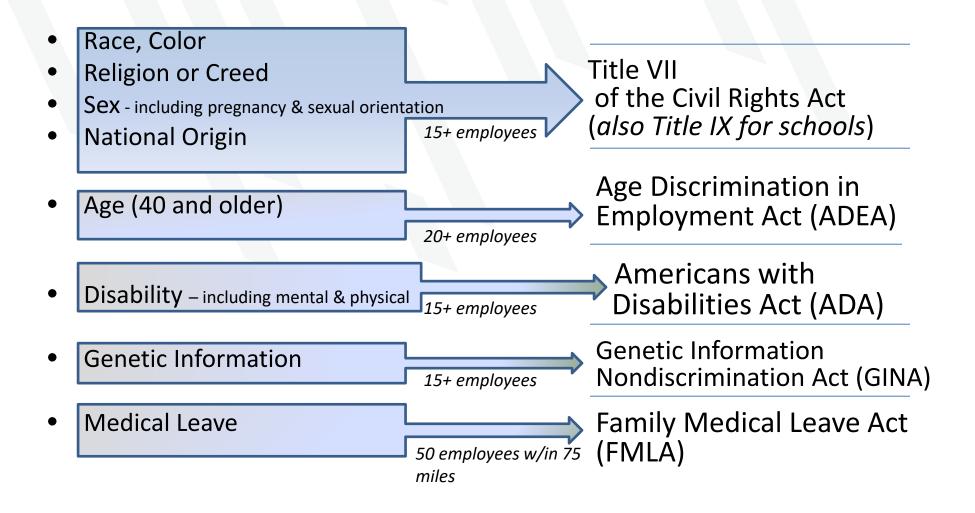
Goals for Hiring

- ✓ Applications Receipt.
 Receive qualified applications
- ✓ Most Qualified Retention.
 Retain the most qualified applicant
- ✓ Ensure EEO.
 Equal Employment Opportunity in the process
- ✓ Keep it Legal!

 Stay out of trouble aka legal compliance.



Federal Law: "Protected classes"



ND Law: "Protected classes"

- Race, Color
- Religion
- Sex (including pregnancy & sexual orientation)
- National Origin
- Age (40 or older)
- Disability (physical or mental)
- Marital Status
- Status with regard to Public Assistance
- Participation in lawful activity off employer's premises during nonworking hours which is not in direct conflict with employer's essential business-related interests.

North Dakota Human Rights Act



MN Law: "Protected classes"

- Race, Color, Creed
- Religion
- Sex
- Sexual Orientation & Gender Identity
- National Origin
- Age (40 or older)
- Disability (physical or mental)
- Familial Status
- Status with regard to Public Assistance
- Local Human Rights Commission activity





Other Federal Laws Regarding Hiring...

- Immigration Reform & Control Act
 - ✓ Citizenship
 - ✓ Nation of Origin
- National Labor Relations Act (NLRA)
 - ✓ Union membership
- Uniformed Services Employment and Reemployment Rights Act (USERRA)
- Bankruptcy Act
- Consumer Credit Protection Act
 - ✓ Wage garnishments



General Rules for Hiring

- Objectivity. Be Fair & Objective
- <u>Ultimate Goal</u> = assess applicant's potential to perform the job
- Careful Questions. Ask only "need to know" questions to measure: knowledge, skills and abilities for particular job
- Focus = potential and actual ability to perform each specific job function
- NOTE: Liability for discrimination exists, regardless of whether information unlawfully solicited or volunteered.



Planning: Develop Specific Interview Questions

- Review applications and résumés
 - ✓ Match job description to applications.
- Prepare questions.
 - ✓ Make questions that are specific to the job description.
 - ✓ Make questions that are specific to job qualifications.
 - ✓ Create open-ended questions (not "yes/no" questions)



Recognizing Off Limit Topics / Questions

- Are you asking a direct question about a protected category?
 - E.g. "I see you're pregnant. Tell me about your pregnancy journey."
- Will the answer give you information about a protected category?
 - E.g. "Are you responsible for any school drop-offs in the mornings?"
- Has the interviewee asked a question or made a statement that seeks a response from you about a protected category?
 - E.g. "How old are your front desk workers?



Preparation Goal: Don't ask questions that will...

• Give you (unsolicited) information about:

- ✓ Race
- √ Age or date of birth
- √ Gender or sexual orientation
- √ Children, child care, pregnancy
- √ Marital status
- ✓ National origin
- ✓ Religion/ religious affiliations
- ✓ Drugs/ alcohol/ substance abuse
- ✓ Workers' compensation history
- ✓ Disability or medical history
- ✓ Serious Illness (HIV/AIDS, COVID-19, etc.)



Religious Questions

Allowed:

- ✓ Can you work on weekends?
- ✓NOTE: Employers may ask questions and receive information about religion only when a bona fide occupation qualification exists, such as when hiring a clergy person for a religious establishment.

- ✓ Is your name Muslim?
- ✓ Comments on school religious affiliation, religious jewelry worn by applicant, clothing style.
- √ What do you plan to do for Christmas?
- ✓ Do you go to church on Saturdays or Sundays?



Race Questions

Allowed:

- ✓ Race is often legitimately needed for affirmative action purposes or to track applicant flow. One way to obtain racial information and simultaneously guard against discriminatory selection is for employers to use a Form EEO-1, Voluntary Self-Identification.
- ✓ Employers must keep a completed Form EEO-1 separate from the application and not share the information on it with others or consider the information during the selection process.

• Not Allowed:

✓ Any questions about race (not connected to EEO)



National Origin Questions

• Allowed:

- ✓ Are you legally authorized to work in this position?
- ✓ If you are hired, are you able to provide documentation to prove that you are eligible to work in the U.S.?

- ✓ Tell me about your ancestry
- ✓ What is your native language?
- ✓ What country are you from?
- ✓ That sounds like an Arabic name. What's your background?
- ✓ Your application says you spent a year in Israel. Are you Jewish?
- ✓ Are you a citizen of the U.S.?
- ✓ What country are you from?
- ✓ Where is your accent from?
- ✓ What nationality is your last name?
- ✓ When does your visa expire?



Citizenship Questions

• Allowed:

✓ Are you legally authorized to work in this position?

- > Where were you born?
- > Are you American?
- > When did you come to America?
- > That's a unique name, where is it from?



Age Questions

Allowed:

✓ In order to work here, the law requires that you be at least 18 years old. Are you at least 18 years old?

√ Can you supply transcripts of your education?

- > When did you graduate?
- > How old are your children?
- > Have any grandchildren?
- > Do you remember the 1960 election?
- > When are you planning to retire?
- ➤ I see you went to school at Marquette, did you go to school with my father?



Sex/ Marital Status Questions

• Allowed:

- ✓ Are you available to travel as required by the job description?
- ✓ Can you work overtime with little or no notice?
- ✓ Can you work evenings and weekends?

- ✓ Are you married?
- √When do you plan to start a family?
- ✓ Do you have children?



Gender & Pregnancy Questions

- ✓ Do you have any children? Do you plan on having any children soon?
- √ Who will take care of your children while you work?
- ✓ Will you leave this job if your husband is transferred?
- ✓ Will your husband move if we transfer you?
- ✓ Do you have a family?
- ✓ Do you mind having a male/female supervisor?
- ✓ Are you comfortable working in an all male/female work environment?
- √ How much time off will you need to have a baby?



Disability Questions: Permissible

• Allowed:

- ✓ Can you perform the duties listed in the job description, with or without accommodation?
- ✓If an individual has a <u>known</u> disability, "How will the job functions be performed, with or without an accommodation?"
- √ How many days were you absent from work last year?
- ✓ Are you able to perform the duties of this job?



Disability Questions: NOT Permissible

- ✓ Do you have a disability?
- ✓ Have you ever filed a workers' compensation claim?
- ✓ Do you have a history of drug or alcohol addiction?
- √ Applicant's health
- √ Hospitalization
- ✓ Medical treatment or major illness
- ✓ Prescriptions
- ✓ Defects, disabilities, impairments, diseases, medical conditions, restrictions
- ✓ Absences due to illness
- ✓ Absence for illnesses
- √ **NOTE: Employers must provide reasonable accommodation to candidates who have disabilities.



Military Services Questions

• Allowed:

✓ What experience did you gain in the uniformed service that is relevant to the job you would be doing?

- ✓ Please provide the status of your military discharge.
- ✓ Will you miss work to perform military service?



Arrests & Convictions Questions

- **EEOC Guidance**: employers should **TIMING**: Take note of MN Law conduct individualized assessment of employee or applicant's criminal history to determine if person's criminal background is job-related.
 - √ Blanket policies or practices of excluding individuals with criminal records NOT permitted.
 - ✓ Must take steps to prevent discrimination under Title VII of the Civil Rights Act of 1964.

- "Ban the Box" law (cannot inquire re criminal record until applicant selected for interview, or if no interview, until given conditional job offer)
- DISCLAIMERS re FELONY: Provide statement that conviction will not automatically disqualify candidate.

Volunteered Information

- <u>Unintended Info</u> = Even when you ask only legal questions during an interview, you may receive information you would prefer not to know from applicants who make such a disclosure voluntarily.
- Example = an applicant may disclose that she is pregnant and will need time off for childbirth if she is hired.
- What do you do? The best way to handle this situation is not to pursue it and not make any note of it. Just as you should ask only job-related questions, you must disregard any information the applicant voluntarily discloses that is not related to the job.



Consistency

- <u>Same Questions.</u> To be sure that you obtain the same information from all candidates for a position, it is important to prepare and consistently use the same questions for each interview and follow a structured interview process.
- Result = Fairness. Doing this will help ensure you treat all candidates equally and fairly and help you avoid any complaints of illegal discrimination.



Making the Hiring Decision

- Consider members of protected groups in hiring decisions.
- Maintain awareness of diversity ratios.
- Avoid assurances to applicants of job longevity.
- Avoid statements that limit right to terminate at will.
- Document the process!*
- *NOTE: Public entities should take note of open records requirements for materials of final applicants.



II. FIRING

Termination – Planning Process

Making the Decision:

Making the decision to terminate an employee and conducting the termination meeting are two of the most difficult responsibilities managers have.

• Legal Compliance:

Knowledge of the laws and best practices as well as training help both the manager and the employee end the relationship on a positive note.

• Training:

➤ It is essential that all managers, in addition to human resource staff, acquire appropriate knowledge to make these important decisions and to conduct professional termination meetings. This presentation provides you with that knowledge.



Types of Terminations

Voluntary

- An employee provides a resignation stating his or her intention to leave the organization within a specified period of time.
- Reasons for voluntary terminations include:
 - ➤ A new job.
 - ➤ Personal reasons (e.g., relocation, health, family obligations).
 - >Retirement.



Types of Terminations

Involuntary

- The employer initiates termination of an employee's employment.
- Reasons for involuntary terminations often include:
 - ➤ Unsatisfactory performance
 - Fails to perform essential functions of position and meet established goals;
 - Excessive absenteeism.
 - ➤ Organizational change
 - E.g., layoffs and reductions in force.
 - **≻**Misconduct
 - E.g., violations of the employer's code of ethics and conduct, policies, practices, procedures or rules.



Protected Classes (again!)

RED FLAG Laws to Watch during Involuntary Termination:

- Title VII of the Civil Rights Act of 1964: Prohibits employers from terminating employment based on race, color, religion, gender and national origin.
- Pregnancy Discrimination Act (PDA): An amendment to Title VII, prohibits termination of employment based on pregnancy and childbirth.
- Americans with Disabilities Act (ADA): Prohibits employers from terminating employment based on disability.
- Age Discrimination in Employment Act (ADEA): Prohibits employers from terminating employment based on being age 40 and older.



- Uniformed Services Employment and Reemployment Rights Act (USERRA): Prohibits employers from terminating employment based on military service.
- Family and Medical Leave Act (FMLA): Prohibits employers from terminating employment based on requesting FMLA leave or use of FMLA leave.

Employment at Will

• Employment at will pertains to the employer's right to terminate the employment relationship at any time, for any lawful reason, with or without notice, as long as the employer does not violate an employment contract.



Maintain Policies – Progressive Discipline?

- Example Policy on Involuntary
 Terminations / Progressive Discipline:
- [Company Name] has a progressive disciplinary policy, which may include:
 - Coaching and counseling.
 - Verbal warning.
 - Written warning.
 - Final written warning.
 - Termination.
 - *DISCLAIMER: This policy does not affect the at-will employment relationship. All or any of these steps may be skipped, and involuntary termination at-will may occur at any time.



Example Procedure for Involuntary Termination

- 1. The supervisor obtains approval from upper Management and HR to proceed with termination.
- 2. Supervisor completes employee action form before day of the termination.
- 3. Supervisor meets with employee and informs him/ her of reason(s) for termination.
- 4. Supervisor collects company property at time of termination.

- 5. Date of separation is employee's last day worked.
- 6. Terminated employees paid in accordance with state and federal laws; earned but unused paid time off will be paid in accordance with the company's policy.
- 7. Insurance coverage and other benefits will terminate according to the company policy and the individual benefits plan.

Importance of Documentation

- To establish credibility and to support the termination decision, employer should objectively document incidents, poor performance, and conversations with employees.
- Documentation is <u>an ongoing</u> process (not just occurring at termination time)!



Documentation for Termination Includes...

- DATES. The dates of any incident or conversation between you and a problem employee. Documenting events shows that the decision to terminate an employee is supported by a record of prior incidents.
- DISCPLINARY RECORD. A record of violations of policies or procedures, such as poor performance, absenteeism, insubordination, disruptive behaviors and unethical behavior. Whenever possible, include the language the employee used and how the incident affected your department or the company as a whole.
- CONVERSATIONS. Details of conversations you had with the employee and any disciplinary actions you took in response to the employee's performance deficiencies. Also note realistic guidelines you gave the employee and deadlines you set for improvement.

- EVALUATIONS. Employee appraisals performed, details of meetings that took place to determine an employee's progress toward established goals and notes regarding the employee's level of participation throughout the process.
- WARNING RECORD. A record of giving verbal or written warnings to the employee. The employee must sign a document that acknowledges receipt of each warning.



Guidelines for Termination Meeting

Before the termination meeting:

- Have written notes for what to communicate.
- Time the meeting carefully.
- Hold the discussion in private.
- Schedule a conference room in advance, if necessary.
- Consider having a representative from human resources or another manager in the room.



Guidelines for Termination Meeting

During the termination meeting:

- Avoid small talk.
- Remain calm.
- Clearly state the reason for the termination.
- Avoid personal references or accusations.
- Make it clear that the employee is terminated and that negotiation is not possible.

- Be prepared for the employee's reaction.
- Discuss all issues that need to be "closed" (e.g., benefits, final paycheck, company property).
- Provide a copy of the separation notice.
- Walk employee to the exit of the building if security is not available.

Guidelines for Termination Meeting

- After the termination meeting:
- Termination Letter
- Information regarding final paycheck, benefits, etc.
- COBRA information under separate cover
- Should Reason for Termination be Reiterated?
 - ➤ Unsatisfactory performance
 - ➤Organizational change
 - **≻**Misconduct



Other Documentation Notations

- Job Description
 - Reviewed and updated annually!
 - Any changes sent to HR
- Employee Handbook
 - Review and understand
 - Communicate expectations to employees
 - Contact HR with questions and any suggested changes, inconsistencies, etc.



OTHER Documentation Notations

- Providing Continuous Feedback is crucial to a healthy employment relationship!
 - Establish milestone dates for periodic monitoring of performance objectives and progress reports in objective terms.
 - ➤ Be aware that goals or objectives may need to be changed or retargeted during the review period.
 - ➤ Maintain open communication channels to ensure that issues are elevated quickly and resolved timely.
 - Coach, assist and/or redirect employees who request assistance and those who are failing to meet standards.

Set Ongoing Goals & Objectives

- Align goals and objectives with the organization's business plan.
- Establish mutually agreed-upon goals between the employee and the supervisor.
- Establish milestone review dates.
- Communicate changes or redirection of goals and objectives in a timely manner.



Know the Difference: Performance Evaluation/ Appraisal vs. Performance Management

Evaluation/ Appraisal:

- ➤One-time event
- ➤ Retrospective
- >Short-term
- >Correction-oriented
- ➤ Assigning ratings

• Management:

- ➤ Ongoing
- ➤ Prospective
- ➤ Long-term
- ➤ Progress steps
- ➤ Planning/ goal-setting



Performance Evaluation Step 1: Evaluation Form

- Notice 2 weeks min. notice to employee
- Specific support each rating with comments
- No surprises! —should not hear of issues for first time at review
- Blank Form —give eval. form to employee to reference as he/she writes self-assessment

- Job Description Reference as you write
- Goal Setting employee should know what is expected next
- Be specific employee should know expectations
- <u>Colleagues</u> *May* ask for feedback on the employee
- HR go to HR for advice/ support any time!

Performance Evaluation Step 2: Giving Evaluation / Meeting

- <u>Documentation</u> have docs from year with you
- Prepare know what you want to say/format of meeting
- Positive may want to focus on positive first/ negative second
- Focus on Improvementshows employee support and employer wants him/her to succeed
- <u>Listen</u> allow employee to respond verbally AND written comments to evaluation document

Final Steps – Performance Evaluation

- Employee Comments –
 Allow employee chance to review, discuss, and comment on eval. doc.
- Sign / Date –
 Manager and employee should both sign the evaluation document.
- Give to HR –
 A copy of the evaluation document and employee comments should be given to HR for Personnel Record.



Common Performance Evaluation Pitfalls

- Lack Communication- employees don't know reviews are annual; don't know when reviews will occur
- Too Much Lecture-only manager speaks; too negative
- Not Forward-thinkingdeveloping employee's skills/abilities; setting goals
- No Manager Accountabilitymanagers must recognize issues/ offer support ALL year long



Common Documentation Pitfalls

- After-the-fact documentation
- Fails on basics unsigned, undated, illegible
- Inaccurate, exaggerates ("always" or "never"), unprofessional
- Vague "Talked to Bob about his behavior"
- Improperly refers to protected class issues (disability, religion, age, etc.) – suggests discrimination



III. WORKPLACE TRENDS TO WATCH: 2022

Trend #1: REMOTE WORK

• <u>LEGAL TIP</u>: Employers should consider feasibility of remote work, depending on industry (and particular job).



Remote Work Challenges

- ND recently ranked 48th in a "best" / "worst" states to work from home study (MT 49th; SD 36th; MN 23rd;) – WalletHub report
- Common Midwest industries =
 agriculture, oil and gas, construction,
 manufacturing, healthcare (i.e., these
 are jobs that simply can't be performed
 at home)
- Some midwestern employers tend to be conservative / traditional



How to improve Remote Work Options?

- ✓ Audit job descriptions for feasibility of remote work
- ✓ Audit cost, equipment needs, etc.
- ✓ Consider Cybersecurity improvement
- ✓ Train employees on cybersecurity, wage/hour tracking, etc. needed
- ✓ Ensure no bias towards employees on sit
- √ Tailor a Policy that works for YOUR business!



Trend #2: WAGE & HOUR ISSUES

• <u>LEGAL TIP</u>: Good <u>Record-Keeping</u> is crucial in defending against wage & hour claims.



Common Wage & Hour Issues

- Improper classification under Fair Labor Standards Act (FLSA) – exempt/salaried OR non-exempt/hourly (and subject to overtime)
- Failure to correctly track remote workers' hours
- Failure to pay overtime hours when employee did not have prior approval

(**All overtime worked must be paid!)



2022: Proposed Overtime Rule Expected Soon!

- To legally qualify as an exempt employee under the Fair Labor Standards Act (FLSA):
 - 1. Salary Basis = paid a salary regardless of hours worked
 - 2. Salary Threshold = paid at least \$684/week (\$35,568/year)
 - 3. <u>Duties Test</u> = work in white-collar exempt position (executive, administrative, professional)
- Expectations of new rule:
 - ✓ Salary threshold *likely* proposed to be as high as \$913 per week (\$47,476/ year) (which was level proposed by administration in 2016)
 - ✓ More emphasis on criteria for "duties test"



Trend #3: LABOR SHORTAGES

• <u>LEGAL TIP</u>: Review employment policies and practices and consider revisions/ updates for the 2022 workforce.



Labor Force Outlook: 2022

- <u>2020-2022</u> unprecedented levels of shortages and turnovers in workforce.
- Common employer complaints:
 - ✓ Not enough applicants
 - ✓ Difficulty retaining employees
 - ✓ Difficulty finding qualified candidates
 - ✓ Difficulty competing with other employers
 - ✓ Difficulty keeping employees happy



Combatting Labor Shortages =: Policies/ Practices to review in 2022

- Pay rates / incentives
- Wooing retirees back to workforce
- Flexible scheduling
- Remote work opportunities
- Partnering with educational institutions
 - training programs/ internships
- Positive culture/ seeking employee input (i.e., making employees feel "heard" and valued)
- Being organized, prompt & responsive



Trend #4: MEDICAL LEAVE

 <u>LEGAL TIP</u>: Know how to respond to employees with Medical Issues & Requests (*particularly* in the aftermath of a pandemic and "long-haul COVID-19")

• FMLA: Family and Medical Leave Act

• ADA: Americans with Disabilities Act

FMLA = 12 weeks' job-protected leave for:

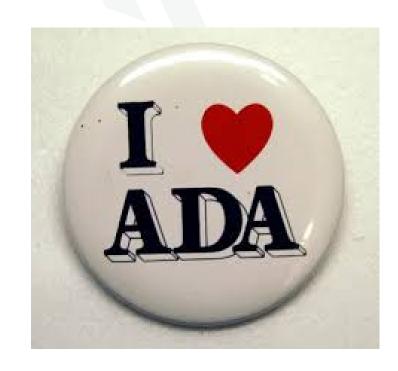
- Employee's own serious health condition;
- Birth, adoption, or foster care placement of minor child;
- Serious health condition of employee's spouse, child, or parent;
- Qualified service member leave; exigencies





ADA Disability =

- ✓ Physical or Mental Impairment that "Substantially Limits" one or more "Major Life Activities"
- ✓ Very <u>Broadly</u> interpreted
- ✓ Must engage in an Interactive Process with employee
- ✓ Must provide <u>Reasonable</u> <u>Accommodation</u>



Common Medical Missteps by Employers

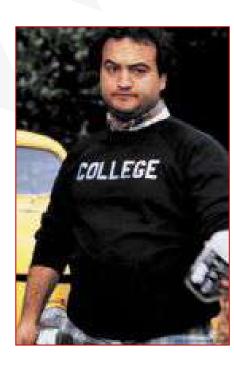
- Not recognizing FMLA notice requirements
- Not recognizing ADA accommodation requests
- Not <u>communicating</u> with employee (interactive process)
- Automatic termination upon FMLA expiration (rather than consideration of extended leave of absence as ADA accommodation)



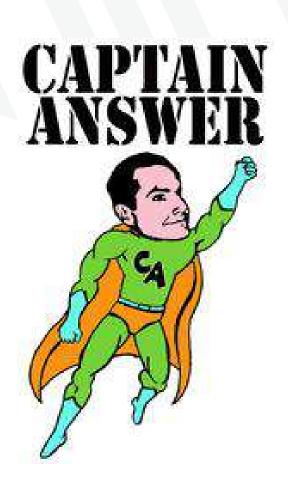
Trend #5: EMPLOYEE COMPLAINTS

• LEGAL TIP: Investigate & Respond to Employee Complaints.

- √ Harassment
- ✓ Discrimination
- ✓ Retaliation
- ✓ Wage and Hour
- ✓ Working Conditions
- ✓ Safety
- ✓ Illegal Activity



Employer Response?



- 1. Listen.
- 2. Investigate.
- 3. Document.
- 4. Produce Report/ Follow up.
- 5. Take action (if required).

WHY is an investigation important?

- <u>Obligation</u>: Employer obligation = investigate & remedy workplace legal violations.
- <u>Federal/State Investigation</u>: Employee may file complaint State or Federal Department of Labor, Department of Justice, or Department of Education's Office for Civil Rights.
- Lawsuit: Employee may file lawsuit.
- Morale: Happy employees = happy (lawsuit-free) workplace.



Overall employer forecast for 2022?

- Change = the only constant.
- Reliability = essential for trust-building.
- Flexibility = new workforce *craves* this.
- <u>Positivity</u> = the only workplace culture that retains and survives.



QUESTIONS?





VOGEL Law Firm

Tips for Hiring and Managing Remote Workers in 2022

Vanessa Lystad

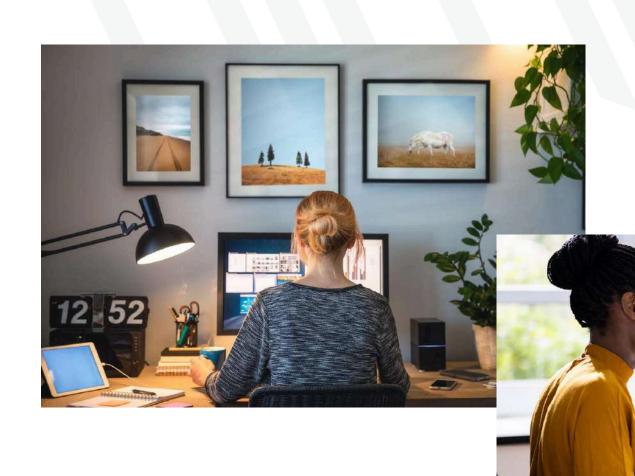
Flashback to 2020...







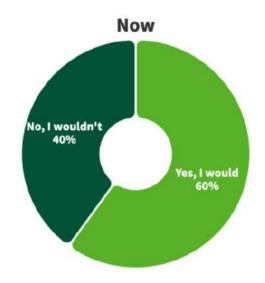
As more time passed . . .

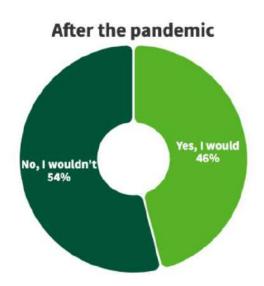




The majority of job seekers say they would prefer to work remotely now, and a large share would like to do so even after the pandemic

% answering that they would prefer to find a job where they can work from home



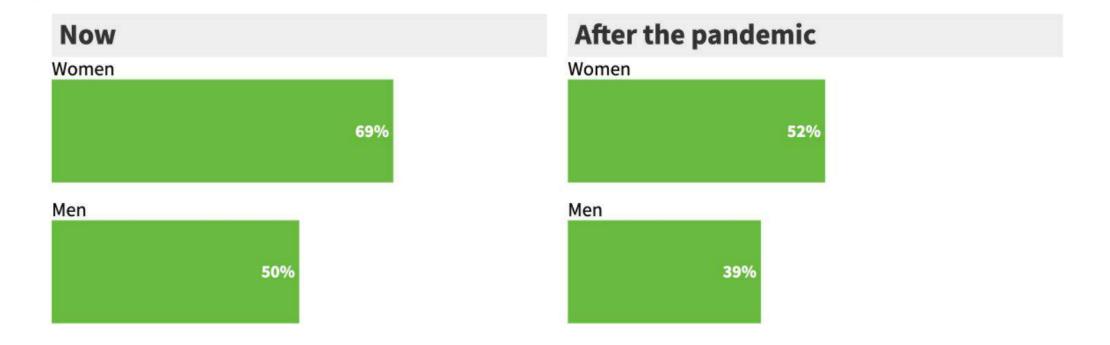


21

ZipRecruiter^{*}

More women than men prefer remote work

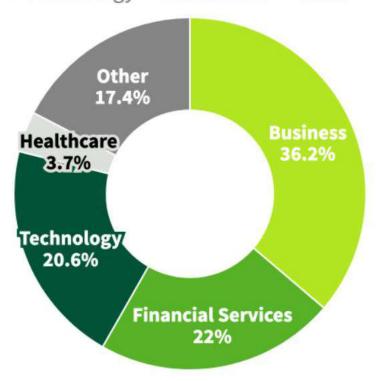
% saying yes, they would prefer to find a job where they can work from home





Most remote jobs are in the business, financial, or technology sectors

■ Business ■ Financial Services ■ Technology ■ Healthcare ■ Other





Going Remote

- 1. Save on overhead and operational costs
 - No more office rent

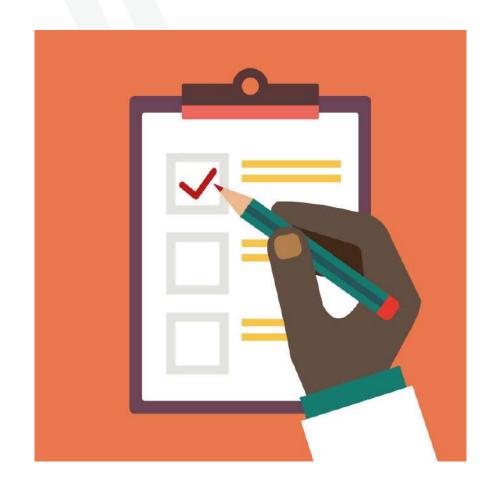


- Remote work allows work from virtually anywhere
- 3. Retain current employees accustomed to work-from-home
 - If you have a good thing going, keep it going



But should we go remote?

- Hiring candidates remotely and in other states
 - Registration requirements
 - Application changes
 - Pre-employment inquiries
 - Update handbook
- Develop a policy
 - What should it include and why
- Managing employees
 - Performance
 - Wage & hour compliance
 - Protection of confidential information



Hiring in Other States?

Legal Considerations When Opening the Applicant Pool





Scenario:

If a North Dakota company has an open position for a remote worker and receives an application from a qualified individual in California, what initial business questions should that company be asking itself before hiring?

If I hire this candidate . . .

- 1. Will I be "transacting business" in that state?
- 2. Do I need to register as a foreign business with the secretary of state?
- 3. Do I need to register with the state taxing authority?
- 4. Which state's taxes do I need to withhold for unemployment insurance?
- 5. Do I need different worker's compensation in that state, and if so, what is it?

Review State Law

 Consult legal counsel and/or tax professional on obligations to register in the state

 Understand proper tax withholdings for this candidate, if the candidate would be hired



Job Postings

- Be aware of any state law requirements for job postings in positions that may be filled by employees in those states
- E.g., Colorado's Equal Pay for Equal Work Act requires inclusion of salary range in job postings that could be performed in Colorado, including remote jobs
 - Law applies to any employer with at least one employee in Colorado



Online Applications

 When applying for a remote job, chances are the application is online

Based on your locations and business, does that application need to include any state-specific items?

 E.g., Maryland employers (someone doing business in the state) must include that they will not require or administer a lie detector test



Additional Application Considerations

- Reference that the company is an equal opportunity employer and will not discriminate based on any protected class
 - State and local laws differ with respect to protected classes
 - Include the catchall "and any other classes protected by law," but consider whether you should be listing specific classes

- Include the process for requesting an accommodation for a disability
 - Absent undue hardship, accommodations under the ADA (and likely state law) extend to job application process for those with a disability



Online Application Accessibility



- Title I of ADA applies to nondiscrimination in *employment* and requires *reasonable* accommodations
- Title III of ADA applies to nondiscrimination for public accommodations and requires effective communications
- Businesses can fall under both
- Department of Justice recently released updated guidance on web accessibility for individuals with disabilities
 - Only guidance, not set standards

Pre-Employment Inquiries

- The state, in which an applicant lives, may restrict which questions you are able to ask before hiring
- Check state or local law to determine if there are restrictions

 If difficult to comply with all of the restrictions, consider whether you need the inquiry at all

Salary History

- Jurisdictions are increasingly prohibiting employers from requesting salary history from applicants
 - 21 states
 - 21 localities
- Laws aim to end pay discrimination
- Laws may differ, so it's important to review their requirements and restrictions



Ban-The-Box

 Jurisdictions also differ as to whether employers may ask applicants about *criminal history* and when in the application/interview process





 13 jurisdictions' laws apply to private employers, including Minnesota

Pre-Employment Drug Testing



- Some states have detailed laws regarding drug and alcohol testing in the workplace
 - These laws may restrict how or whether you are able to perform pre-employment drug tests
- With growing acceptance of recreational marijuana, three jurisdictions (NYC, Philadelphia, and Nevada) prohibit preemployment drug testing of marijuana entirely

Electronic Signatures

 It may be impractical to get hard copies of new hire documents with handwritten signatures

How are you going to handle electronic signatures?



- Look into vendors, software, or technology that will ensure esignatures are unique and verifiable
- Ensure that any documents needing signatures are actually signed by the remote workers
- Review state law where the employee resides to ensure no additional restrictions/requirements

Obtaining and Providing New Hire Information

How are you going to handle new hire orientation for remote workers?



- Provide same information to remote employees as you would others
 - E.g., employee handbook, wage notices, tax forms
- Ensure documents requiring signatures are signed
- If in-person orientation is not feasible, provide virtual training

Tracking Employees

When hired, keep track of your remote employees' locations



- FMLA remote employees are eligible if the office, to which they report and from which assignments are made, has 50 or more employees within a 75-mile radius
- WARN certain notice for "plant closing" and "mass layoff" at a single site; when counting remote employees, look to "home base," where work is assigned, or where they report

Reviewing and Updating Policies

- When hiring remote applicants to work in their home state, determine which state's employment laws apply to that employee
- Keep in mind that multiple state laws may apply
 - E.g., state where the employee resides and state of principal place of business
- Certain city ordinances may also apply to a particular worker

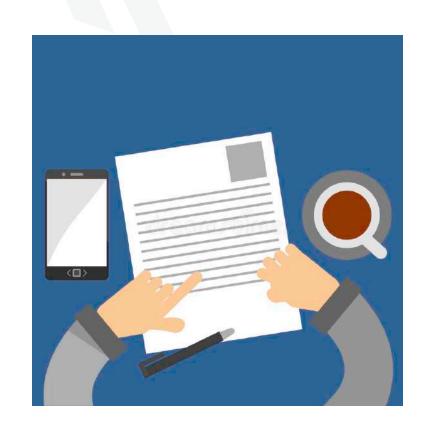


Reviewing and Updating Policies

 After analyzing which laws apply, review your current policies and handbook

Do they comply with the applicable state or local laws for that employee?

What are some laws that may conflict with our current policies?



Paid Sick Leave



Paid sick leave states

 Arizona, California, Colorado, Connecticut, Maryland, Massachusetts, Michigan, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, Washington, D.C.

Paid sick leave cities

- LA, NYC, Duluth, St. Paul, Minneapolis, Chicago, Philadelphia, Seattle, San Diego, San Francisco, etc.
- Many vary in leave duration, accrual, use, reporting

Other Specific Leaves (Paid and Unpaid)

- For example, leave for:
 - Family
 - Pregnancy disability
 - Domestic violence
 - Bereavement
 - School conference
 - Bone marrow
 - Organ donation
 - Quarantine
 - Voting
 - Volunteer emergency responder
 - Drug/alcohol rehab
 - Olympic game training



Vacation/Paid Time Off (PTO)

- Review state and local law to determine:
 - 1. Whether you must provide PTO to employees
 - 2. Whether you can have a "use-it-or-lose-it" PTO policy
 - 3. What the requirements are to pay out PTO at termination



Additional Protected Classes



- States and localities may protect certain classes or characteristics
- These classes may differ from your principal place of business and go beyond classes protected federally
- E.g., marital status, familial status, creed, political affiliation, personal appearance

Pay Amount/Frequency/Methods

Are there any minimum wage requirements?

How often do employees need to be paid in a particular state?

Can we require direct deposit for employees?



Meals/Breaks



When are employees entitled to a <u>meal break?</u> What is the duration?

Are employees entitled to rest breaks? How many and what duration?

Notices

Are there any special notices that employees must have (whether in handbook or separately)?

- For example:
 - Minnesota requires wage disclosure policy in handbook and wage notice



Employee notice

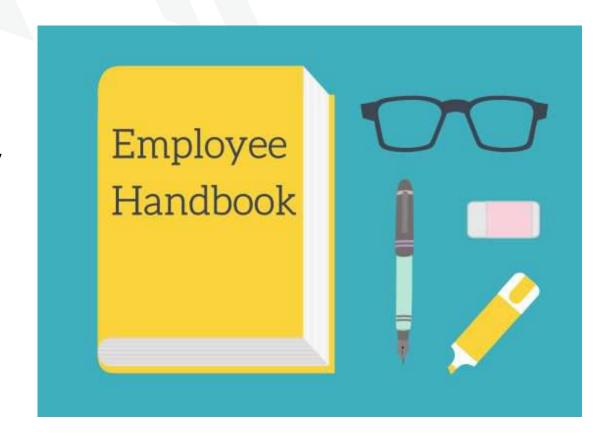
| 1. Employee: | Address: |
|--|--|
| Phone number: | Email address: |
| Date employment began: | |
| 2. Legal name of employer: | Main office/principal place of business address: |
| Phone number: | Email address: |
| Operating name of employer (if different): | |
| Mailing address (if different): | |
| 3. Employment status (exempt or non-exempt) |): |
| ☐ Employee is exempt from: ☐minimum w | rage Overtime Other provisions of Minnesota Statutes 177 |
| Legal basis for exemption: | |
| Employee is non-exempt (entitled to over | time, minimum wage, other protections under Minn. Stat. 177) |
| 4. Rate or rates of pay | |
| Paid by: Hour Shift Day Wee | ek Salary Piece Commission Other method |
| Overtime is owed after: hours | |
| Allowances claimed: | |
| \$ per meal for meal allowance (max = | 60% of one hour of adult minimum wage per meal) |
| \$ per day for lodging allowance (max = | = 75% of one hour of adult minimum wage per day) (or fair market value) |
| 5. Leave benefits available: | |
| Sick leave Paid vacation Other pa | ald time off |
| How benefits are accrued: Number of hours | and the state of t |
| per Quear Comonth Oper pay period C | |
| Terms of use: | Manage protection and approximately control of the |
| Deductions that may be made from employer | ee's pay and amounts: |
| II Walle to the Mood Lot of Light M | |
| 7. Number of days in the pay period: | Regularly scheduled payday: |
| Date employee will receive first payment of | wages earned: |
| 8. Other information relevant to this position: | |
| I, the employee, have received a copy of this no | otice: Yes No |
| Employer signature Dat | 1000 C |
| | |



How to Put it All Together

OPTIONS

- 1. Revise the handbook/conflicting policy to provide the greatest rights to employees
- 2. Note in the **specific policy** what will apply for employees located in states, where there are different requirements
- 3. Have addenda for the states, in which remote employees work, and specifically outline what additional/different rights apply to them
 - Mention these addenda in the disclaimer in the main handbook



Developing a Remote Work Policy

What Should I Include?

Sample Remote Work Policy

This policy applies to employees requesting and being granted permission to work remotely on a regular basis. This policy does not apply to occasional work-from-home arrangements, such as in instances of inclement weather, which employees should discuss with their manager, as needed. This policy further does not apply to requests for reasonable accommodation for a disability under applicable law. Employees requesting to work remotely as a reasonable accommodation for a disability should follow the procedures outlined in the Company's Reasonable Accommodations Policy.

 Address the scope of the policy so that employees understand what the policy is intended to address and not address

Remember ADA Considerations



 Americans with Disabilities Act requires that employers make certain exceptions to policies as a reasonable accommodation

- E.g.
 - Change location for work
 - Modify workplace policies like telework eligibility requirements

Steps:

- ✓ Engage in interactive process to determine whether telecommuting is a reasonable accommodation to enable employee to perform essential functions
- ✓ Do <u>not</u> automatically deny a request because contact is required with others
 - ✓ Can that contact be through calls, emails, virtual means?

Remember:

- ✓ Do not have to remove essential functions
- ✓ If on-site attendance is essential, note in job description
- ✓ If others are able to remote work, there may be less chance of arguing the accommodation is "unreasonable" or an "undue hardship"

The Company may allow regular full-time employees, who have worked for the Company for 12 months and maintained a satisfactory performance record, to work remotely on a regular basis, provided that their essential job functions can be performed remotely. Requests to work remotely should be submitted in writing to your direct supervisor and the Human Resources Department. All remote work arrangements must be approved in advance by both the direct supervisor and HR. The Company reserves the discretion to grant and/or withdraw permission to work remotely at any time.

Determine:

- What type of remote work you allow
- Which types of employees are eligible
- How requests should be submitted



 Note any requirements to be inperson and obligations to report a change in address to ensure compliance with applicable state law

The Company may also require employees granted permission to work remotely to report to work at the Company's office for business meetings and/or trainings. For this reason and to ensure tax and legal compliance, employees must inform their direct supervisor and HR <u>before</u> changing addresses.

Employees permitted to work remotely must abide by the Company's employee handbook and all employee policies, including but not limited to, Anti-Discrimination and Anti-Harassment, Electronic Communications Systems, and Confidentiality policies. Non-exempt employees allowed to work remotely must further comply with the Company's Timekeeping policy and accurately record all hours worked. Non-exempt employees must obtain their direct supervisor's approval prior to working outside their scheduled work hours and prior to working any overtime.

Failure to follow the Company's policies may result in termination of the remote work arrangement and/or disciplinary action, up to and including termination of employment.



- The remote work policy does not replace the employee handbook
- Specifically reference important policies in the remote environment
- Remind non-exempt employees of their obligations to avoid wage and hour issues (i.e. working off the clock)
- Expressly state the consequences for not following company policies

Employees are responsible for making arrangements for childcare or other dependent care during scheduled work hours. Employees must also remain productive, available, and responsible during scheduled work hours.

- Set expectations for availability and whether employees are able to have children or dependents at home on a <u>regular</u> basis
- Set limits on using the company computers for business only and not by others in the home
- Note the company's maintenance only applies to its own equipment, not the employee's

The Company will determine the appropriate equipment and supplies needed for employees approved to work remotely. Any equipment supplied to the employee will be maintained by the Company. Company-provided equipment may only be used by the employee for business purposes and must be returned to the Company upon request or upon termination of employment.

Employees must protect all Company equipment from theft or damage and must further ensure the confidentiality of all Company information, documents, and communications while working remotely. Employees further:

- Must use secure remote access procedures;
- Must use passwords and maintain regular anti-virus protection and computer backup;
- May not download Company confidential information or trade secrets onto a non-secure device; and
- May not share their password with anyone outside of Company.

If any unauthorized access or disclosure occurs, you must inform your direct supervisor or IT immediately.

- Remind employees of their obligation to protect not only equipment, but company information
- Indicate whatever information security policies and procedures you have, which are especially important for remote work
- Cross-reference any other applicable policies

The Company will not reimburse employees for home expenses, such as Internet access, utility bills, or other similar items, unless otherwise required by applicable law.

- Indicate what expenses will/will not be reimbursed
 - Make sure to check state and local law
- Provide expectations for a safe work environment and the procedure to report work-related injuries
 - Work-related injuries likely are covered by worker's compensation and should be recorded in accordance with OSHA if directly related to work

Employees are expected to maintain the home workspace in a safe manner, free from safety hazards and risks. In the event of a job-related injury, employees should report the incident as soon as possible following the Company's Injury Reporting policy. The Company accepts no responsibility for non-work-related injuries or injuries of visitors to the home workspace.

Other Policy Considerations

- One size does not fit all
 - Cater the policy to your needs and state law, as necessary
- Have employees sign an acknowledgment (if a standalone policy) or a separate agreement to memorialize understanding
 - Remind employees the agreement does not modify atwill employment



Policy Administration

 As with all policies, apply in a consistent manner to avoid discrimination claims

- Avoid discrimination claims by:
 - Clearly defining eligibility
 - Considering requests consistent with the policy
 - Reviewing requests with HR
 - Training managers on handling requests



Managing a Remote Workforce

Tips to Keep Remote Workers Productive and Compliant

Challenges of a Remote Workforce



- Difficulties in directly observing performance
- Potential risk with employees not properly following timekeeping procedures and underreporting hours worked

 More opportunities to compromise confidential or sensitive company information

Effectively Managing Conduct/Performance

- Regular, frequent communication between supervisors and employees is important in remote environment
 - Inability to have conversations organically at work
 - Phone, email, instant messaging, video chat
- Communication is also key in setting expectations—both for performance and conduct—for remote employees



Communication of Expectations

1. Inform employees that they are required to abide by the handbook and all policies and failure to do so could result in termination of remote work or disciplinary action

 Communication through trainings, remote work policy and/or agreement



Communication of Expectations

2. Provide all company policies to employees and ensure they acknowledge receipt

 Confirming state/local law to ensure electronic copies and signatures are accepted

| ABC C | ompany's Policies |
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| | Engly |

Communication of Expectations

3. Set goals, provide regular feedback, and communicate frequently to keep engaged, productive employees

 Determine what works best for the supervisors and employees individually and together



Expectation Reminders

- If remote employees are not meeting performance standards, consider performance improvement plan (PIP)
 - Important to apply such plans consistently as those nonremote workers

- If remote employees are engaging in misconduct, consider discipline
 - Again, important to impose discipline consistent with nonremote workers

Employee Monitoring

- If considering monitoring remote employees' activities:
 - Consult state/local law to determine if there are any restrictions
 - 2. Ensure there is an <u>electronic</u> communications systems policy

No expectation of privacy when using systems

Employer may review/monitor information on computers/network

Employees consent to these rights as a condition of use/employment

Ensure Wage/Hour Compliance

 Boundaries between work life and personal life are important

- Employee satisfaction
- Properly recording work time



Wage and Hour Compliance

 FLSA – non-exempt must record all hours worked and be paid for all hours worked

What are my obligations to ensure employees are properly recording time when working remotely?

DOL Field Assistance Bulletin 2020-5





August 24, 2020

FIELD ASSISTANCE BULLETIN No. 2020-5

MEMORANDUM FOR: Regional Administrators

Deputy Regional Administrators Directors of Enforcement

District Directors

FROM: Cheryl M. Stanton

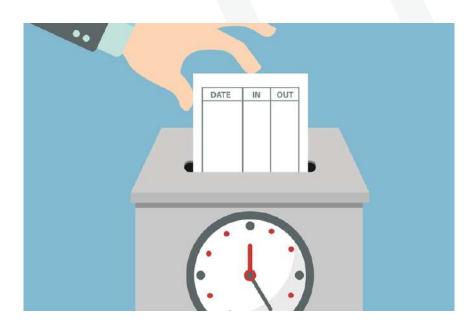
Administrator

SUBJECT: Employers' obligation to exercise reasonable diligence in tracking

teleworking employees' hours of work.

Trust, but Verify

 Employers must compensate employees for hours worked based on the employers' actual knowledge or constructive knowledge



- Constructive knowledge does the employer have reason to believe work is being performed?
- Constructive knowledge may exist if the employer should have acquired knowledge through reasonable diligence
 - What should the employee have known?

Reasonable Diligence

 Employers do <u>not</u> have to undertake impractical efforts to determine hours worked beyond that recorded

 But may exercise reasonable diligence by establishing reasonable procedure for employees to report uncompensated work time



Best Practices



- Develop timekeeping policies and procedures for non-exempt employees
 - ✓ Require that employees proper record all hours worked
 - ✓ Prohibit working "off-the-clock"
 - ✓ Establish reasonable procedure for reporting unscheduled worked
 - ✓ Require advance approval to work unscheduled hours or overtime, if appropriate
 - ✓ Note that falsification of time records is prohibited
 - ✓ Require employees/managers to verify time records regularly

Best Practices

- Supervisors should be trained on exercising "reasonable diligence" if they suspect work off-the-clock
 - E.g., late night emails; completion of a project early in the morning when it was not done late the previous afternoon
- Employees should be disciplined in a consistent manner for failing to follow timekeeping procedures
- BUT ALWAYS PAY FOR HOURS WORKED!

Protecting Confidential Information

- Recent WalletHub survey ranked North Dakota 48th in list of Best States to Work from Home
 - Amount/cost of cybercrimes was contributing factor
 - Average over \$33K
- Highlights need to invest in cybersecurity to protect financial resources and confidential information

Protecting Confidential Information

- Remote work may pose greater risks to security of confidential information than in the office:
 - Multiple people in the home using devices/seeing documents
 - Multiple networks (unsecure)
 - Personal and business devices
 - Less physical security measures



- Require remote employees to use secure remote access only (VPN)
- Require that employees only send sensitive company information via a secured email system
- Train employees on information security procedures and policies





- Require use of passwords for all company devices and locked file cabinets for paper documents
- Establish procedures on proper retention and disposal of sensitive company information (e.g., shredding) and communicating the policies

- Restricting employees from storing information on personal devices not protected by secure network
 - Enable or install remote wiping for personal phones used for business
 - Require that employees consent to use of this technology to wipe device if lost or stolen and hold company harmless for loss of personal information



- Update software on company devices frequently to ensure they are up-to-date and secure
 - E.g., virus protection
- Train employees on phishing attempts
 - Fraudulent message to entice disclosure of sensitive information



Reinforce Through Policies

- Reference these measures in:
 - Electronic communications system policy
 - Confidential information policy
 - Remote work policy



Remote Work Challenges

1. No direct observation

2. Wage and hour compliance

3. Risk to confidential information



Overcoming those Challenges



1. Training

2. Communication

3. Diligence

QUESTIONS?



VOGEL Law Firm

A Year in Review: Labor and Employment Caselaw and Legislative Update

Bailey Fuchs & MacKenzie Hertz

CASELAW UPDATE

VOGEL Law Firm

North Dakota: Potts v. City of Devils Lake, 2021 ND 2, 953 N.W.2d 648

- Detective was an at-will employee with the Devils Lake Police Department.
- Terminated from employment after February 2019 incident wherein he discharged his weapon, striking suspect in the head and resulting in death.
- Detective sued Devils Lake for wrongful termination alleging termination was against public policy.
- Question: Whether there should be a public policy exception to the employment-at-will doctrine for law enforcement officers who act in self-defense?



North Dakota: Potts v. City of Devils Lake, 2021 ND 2, 953 N.W.2d 648

North Dakota Supreme Court

- Recognized other limited public policy exceptions to at-will doctrine.
- Potts argued action is lawful under North Dakota Constitution and North Dakota Statutes.
- HELD: NDSC declined to recognize new public policy exception to at-will doctrine for law enforcement officers acting in self-defense and emphasized resistance to creating new public policy exceptions.



Minnesota: Hall v. City of Plainview, 954 N.W.2d 254 (Minn. 2021)

- Minnesota Supreme Court
- Employee Handbook: Accumulated PTO would be paid to employees after employment ends, up to 500 hours, if sufficient notice is given.
- Disclaimer #1: "The purpose of these policies is to establish a uniform and equitable system of personnel administration for employees... They should not be construed as contract terms."
- Disclaimer #2: "The Personnel Policies and Procedures Manual is not intended to create an express or implied contract of employment."

Minnesota:

Hall v. City of Plainview, 954 N.W.2d 254 (Minn. 2021)

Employee had accumulated 1,778.73 hours of PTO over the course of nearly 30 years.

Employee terminated – did not provide notice pursuant to handbook.

Employer declined to pay PTO to employee based on notice requirement.

Employee sued for breach of contract.

District Court and MN Court of Appeals found that disclaimer language of Employee Handbook did not create an enforceable contract.

Minnesota:

Hall v. City of Plainview, 954 N.W.2d 254 (Minn. 2021)

- QUESTION: Did the employer have a contractual obligation to pay the accrued PTO?
- ANSWER: Yes!
- WHY: Employee Handbook created a unilateral contract as to the PTO program because it contained definite terms and details – not just general statements.

Program Details:

- 1. An overview of the objectives of the program
- 2. A detailed PTO accrual schedule
- 3. Instructions as to how and when employees may use PTO
- 4. Procedures for rolling over PTO year over year. Also, outlines procedure for departing employees to cash out PTO.

Minnesota:

Hall v. City of Plainview, 954 N.W.2d 254 (Minn. 2021)



QUESTION: Did general disclaimers in Employee Handbook prevent a unilateral contract as to the PTO program?



ANSWER: No!



WHY: Language of Disclaimer #1 is ambiguous as to its applicability to the PTO program. Language of Disclaimer #2 is aimed at preserving employer's ability to terminate employee at its discretion – it has no bearing on PTO.

Minnesota: Hanson v. Dep't of Nat. Res., 2022 WL 1021636 (Minn. 2022)

- MN DNR employee (Hanson) was staying at hotel for work conference – series of events with hotel room neighbors
 - Reported baby crying next door
 - Peered down hallways without clothes on
 - Confronted hotel room neighbor then reported them for alleged child abuse
- Bureau of Indian Affairs officer responded found no safety risks and asked Hanson to leave hotel
- Hanson called 911, identified herself as state official and demanded safety escort
- Hanson then called DNR Captain, who arrived at hotel with county official
- Officers suspected Hanson had been drinking, but she refused breathalyzer



Minnesota: Hanson v. Dep't of Nat. Res., 2022 WL 1021636 (Minn. 2022)



- Next day: BIA officer called Hanson's supervisor
 - Hanson had been harassing and abusive toward hotel staff and law enforcement
 - Hanson acted erratically by walking around without clothes on
 - Hanson misused her state title
- DNR investigated, issued report, and terminated Hanson.
- Hanson sued under MN Whistleblower Act
 - Arguing she was terminated for reporting, in good faith, a violation or suspected violation of law.

Minnesota: Hanson v. Dep't of Nat. Res., 2022 WL 1021636 (Minn. 2022)

- DNR responded it had legitimate, nonretaliatory reasons for Hanson's termination. Namely, that it was inappropriate for Hanson to:
 - Appear in public without clothes on
 - Assert position as state official to gain preferential treatment
 - Use DNR resources in personal situation
 - Insist on county officer escort
 - Create a disturbance
- Minnesota Supreme Court agreed Whistleblower claim dismissed



Miller v. Honkamp Krueger Financial Services, Inc., 9 F.4th 1011 (8th Cir. 2021)

- Miller entered into Employment Agreement with employer in 2006
- Agreement included one-year non-compete provision effective after termination
- However, Agreement also had following provision:
 - "Term. Employment is at will; however the parties agree that either party may terminate the Agreement on written notice."



Miller v. Honkamp Krueger Financial Services, Inc., 9 F.4th 1011 (8th Cir. 2021)

- 2020: Miller sent letter informing employer she was terminating not only her employment but also her <u>Employment Agreement</u> pursuant to provision.
- Miller commenced action for declaratory judgment that noncompete provision was also terminated, since she terminated the Employment Agreement.
- On appeal, 8th Circuit held Miller was free to compete
 - Plain language of Agreement: Agreement itself was freely terminable on written notice and non-compete provision did not contain language that it would survive termination of Agreement.
 - 8th Circuit would not rewrite unambiguous provision

- In 2016, a dispute arose between Kempf and her manager.
- Both Kempf and the manager reported the incident that day. Kempf reported that the manager physically threatened her.
- Investigation concluded Kempf committed "a continuing pattern of misconduct." Kempf was suspended for five days without pay.
- Kempf filed an informal complaint challenging the suspension notice's allegations, but it was upheld.
- County then documented several alleged instances of misconduct, placed Kempf on paid administrative leave, and issued a notice of intent to dismiss.



Title VII Claim (Suspension) – Dismissed

- HELD: Kempf failed to show she engaged in a statutorily protected activity, as she did not communicate or report any sexual harassment before her suspension.
 - Kempf never indicated to her employer that the manager's conduct was overtly sexual or gender based.



- Title VII Claim (Termination) –
 Dismissed
 - County provided four legitimate, nonretaliatory reasons for termination:
 - 1) Kempf used her badge to enter the office suite of the Director of the Department of Community Corrections and Rehabilitation without express permission.
 - 2) Kempf approached the Director in the skyway and loudly and aggressively complained about her job.
 - 3) Kempf missed a deadline.
 - 4) Kempf acted "abrasive, disrespectful, and unprofessional" at a client meeting.



- Question: Does a Plaintiff have to produce evidence attacking each of an employer's reasons for an adverse action in order to show the adverse action was pretextual?
 - 7th Circuit Test
- <u>HELD</u>: Applying the 7th Circuit test, the 8th Circuit found that the County's reasons for termination are not "substantially intertwined," and no one reason is so "fishy" to render the other reasons suspect.

Federal: Canning v. Creighton University, 995 F.3d 603 (8th Cir. 2021)



- 57-year old first year internal-medicine resident at Creighton University.
- Various doctors expressed concern regarding Canning's skills and competence.
- Canning could repeat her first year of residency if she was cleared for duty after submitting to a fitness-for-duty evaluation.
 - Passed the evaluation, but continued to struggle in her residency.
- Canning made a patient-safety error and was then dismissed from the residency program.
- Canning sued under the ADEA and ADA.

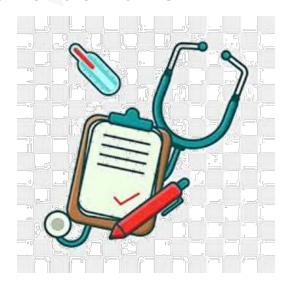
Federal: Canning v. Creighton University, 995 F.3d 603 (8th Cir. 2021)



- Age Discrimination Claim (ADEA) –
 Dismissed
 - Court found that Creighton produced a legitimate, nondiscriminatory reason for terminating Canning – an "egregious" error affecting "patient safety," "despite supervisor and attending efforts."
 - Court found that average performance is not enough to infer the decision was pretextual. Rather, a plaintiff must make a strong showing of employment history.

Federal: Canning v. Creighton University, 995 F.3d 603 (8th Cir. 2021)

- Disability Discrimination Claim (ADA) Dismissed
 - Required element: Plaintiff must be disabled or regarded as disabled.
 - Creighton did not regard Canning as disabled due to successful fitness evaluations.



Federal: Quiles v. Union Pacific R.R. Co., 4 F.4th 598 (8th Cir. 2021)



General Manager of Safety left job for voluntary deployment with Marine Corps in May 2015.

Union Pacific underwent reduction in force while Quiles was deployed.

Quiles' title changed to "Director" upon his return, but he had the same compensation level and benefits and retained managerial duties.

Terminated in March of 2016.

Sued Union Pacific for violation of Uniformed Services Employment and Reemployment Rights Act (USERRA).

Federal: Quiles v. Union Pacific R.R. Co., 4 F.4th 598 (8th Cir. 2021)

- Escalator position principle
 - Exceptions: (1) employer's changed circumstances, (2) undue hardship, or (3) previous employment was for brief, nonrecurrent period and no reasonable expectation of continued employment.
- HELD: Union Pacific followed escalator position principle and attempted to fit Quiles into an appropriate job within its

The Uniformed Services

Employment and Reemployment Relief Act of 1994

reorganized structure.

- Evans was an office assistant for Cooperative Response Center (CRC).
- CRC's Employee Conduct Policy: regular attendance is an "essential job function." Policy includes a point system for unexcused absences.



- Evans was diagnosed with reactive arthritis in 2016. Her doctor advised CRC of time she needed off.
- Evans received 11 absence points for time she either did not request FMLA leave for, was absent due to symptoms unrelated to her diagnosis, or time taken off in excess of that certified by her doctor.
- CRC terminated Evans for excessive absences.
- Evans sued CRC alleging her termination violated the ADA and FMLA.

- ADA Claim Dismissed
 - <u>HELD</u>: Evans was unable to perform the essential functions of her job, as required to establish a prima facie ADA claim.
 - As an office assistant, her duties included answering phones, welcoming visitors, coordinating travel itineraries, and helping the accounting department with check deposits and monthly billing.
 - Attendance was an essential function of Evans' job that Evans was unable to perform.





- FMLA Claim Dismissed
 - HELD: CRC did not deny Evans' FMLA leave to which she was entitled, as it was justified in assessing absence points when she either (i) failed to give required FMLA notification, (ii) sought FMLA leave beyond what her doctor certified, or (iii) sought FMLA leave for medical conditions unrelated to her reactive arthritis.
 - Evans was not terminated for using FMLA leave.



Federal: Vallone v. CJS Solutions Gr., LLC, 9 F.4th 861 (8th Cir. 2021)

- HCI hires consultants to attend "go-live" events to assist with training of medical software.
- Plaintiffs were consultants from Florida and New York, who each traveled to "go live" events in Minnesota.
 - Consultants did not engage in any tasks for HCI while in transit to or from Minnesota, and did not receive compensation for time spent traveling.



Federal: Vallone v. CJS Solutions Gr., LLC, 9 F.4th 861 (8th Cir. 2021)



- Plaintiffs sued HCI seeking wages under the Fair Labor Standards Act (FLSA) for time spent traveling.
- FLSA definitions:
 - **Employee** = Any individual employed by an employer.
 - **Employ** = To suffer or permit to work.
 - Employment Relationship = Requires some activity pursued necessarily and primarily for the benefit of the employer.

Federal: Vallone v. CJS Solutions Gr., LLC, 9 F.4th 861 (8th Cir. 2021)

- FLSA Claim Dismissed
 - HELD: No employment relationship was established when consultants signed contingent offers for at-will employment, therefore they were not "hired" before they traveled.
 - HELD: HCI was not required under the FLSA to compensate the consultants for travel time.
 - Travel did not expedite HCI's business.
 - HCl gained no benefits until consultants started training.





LEGISLATIVE UPDATE



VOGEL Law Firm

2019 LEGISLATION

VOGEL Law Firm

North Dakota: Non-Compete Agreements

- House Bill 1351 (2019)
- Revised North Dakota's Non-Compete Statute (N.D.C.C. § 9-08-06)
- Expanded exception regarding goodwill sale of a business
- Expanded partnership exception to not only the dissolution of a partnership, but also dissociation of one partner from continuing partnership. Also expanded to cover LLCs.



North Dakota: Wage Collection Claims



- Senate Bill 2145 (2019)
- Enforcement efforts of Labor Commission in wage collection claim investigations
- Permits Commissioner to require attendance of witnesses or production of documents at hearing or during investigation and issue subpoenas to compel attendance or production
- Removed sunset provision related to amount of wages State Department of Labor may investigate.

Minnesota: Wage Theft Protection Act

- Passed in May of 2019
- Created civil and criminal penalties for "wage theft"
 - Minn, Stat. Ch. 181
- Went into effect August 1, 2019





Minnesota Labor Standards and the Wage Theft Prevention Act



water til sen gen

Minnesota: Wage Theft Protection Act

-What constitutes "Wage theft"?

Failing to pay an employee all wages, salary, gratuities, earnings, or commissions as required by law;

Directly or indirectly causing any employee to give a receipt for wages for a greater amount than that actually paid to the employee for services rendered;

Directly or indirectly demanding or receiving from any employee any rebate or refund from the wages owed the employee;

Making it appear, or attempting to make it appear, that the wages paid to any employee were greater than the amount actually paid to the employee.

RECENT LEGISLATION

VOGEL Law Firm

North Dakota: Vaccination

- House Bill 1511 Proof of Vaccination Status
- State government may not:
 - Require proof of vaccination status before providing access to state property, funds, or services
 - Require private business to obtain proof of vaccine prior to employment or allowing access to business property, funds, or services
- Private business may not:
 - Require proof of vaccination from customer or patron to access business or services
 - Exception: Certain health care providers
- Not applicable during a declared public health disaster or emergency

Passed House 72-14

Passed Senate 44-3

Signed by Governor on May 7, 2021



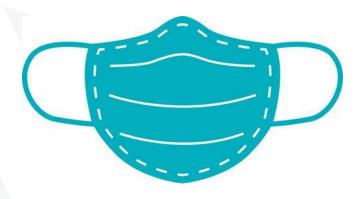
North Dakota: Vaccination

- House Bill 1511 (continued)
- If an employer or contract *requires* vaccination as a condition of employment or a contract, you must allow:
 - Submission of proof of COVID antibodies as an exemption to the requirement (good for 6 months)
 - Periodic tests as an exemption to the requirement
 - Submission of one of these certificates as an exemption:
 - From a N.D. licensed doctor or nurse that immunization endangers life or health; OR
 - From the employee/contractor that the vaccination conflicts with "religious, philosophical, or moral beliefs"



North Dakota: Mask Mandate

- House Bill 1323 Statewide Mask Mandates
 - Prohibits statewide elected official or state health officer from mandating masks
 - "A statewide elected official or the state health officer may not mandate an individual in this state use a face mask, face shield, or other face covering..."



Passed by House and Senate

Vetoed by Governor on April 21, 2021

Legislature overrode Gov. veto on April 22, 2021

Passed: No statewide mask mandates

North Dakota: Business Immunity

- House Bill 1175 Business Immunity
 - Broad immunity for COVID exposure
 - Actual injury requirement in civil actions alleging COVID-19 exposure
 - Premises owner's duty of care Limited liability
 - Safe harbor provision for compliance with state statute, regulation or order
 - Liability of health care providers and health care facilities
 - Supplies, equipment, and products designed, manufactured, labeled, sold, distributed, and donated in response to COVID-19
 - Passed House 79-15
 - Passed Senate 40-7
 - Signed by Governor on April 26, 2021
 - Applies retroactively to January 1, 2020



North Dakota: Business Immunity

- Senate Bill 2278 School District and Employee Immunity
 - Provides school district, boards, employees immunity from civil liability from individuals' contracting or exposure to COVID while at school or on a school bus, except for gross negligence or willful misconduct
 - Passed Senate 44-3
 - Passed House 75-15
 - Signed by Governor on April 1, 2021
 - Current law



North Dakota: Political Subdivisions – Family Leave



- House Bill 1398 Family Leave
- Prohibits political subdivisions from adopting or enforcing an ordinance requiring an employer to provide an employee paid family leave that exceeds federal or state law requirements.
- Passed House 79-14
- Passed Senate 39-7
- Signed by Governor on March 16, 2021

North Dakota: Tax Credit

- House Bill 1405
- Amends N.D.C.C. § 57-38-01.16 which provides income tax credit for employment of individuals with developmental disabilities or mental illness.
- Tax credit of 25% of up to \$6,000 in wages paid annually to individuals with a developmental disability or a mental illness.
- Law effective for first two taxable years beginning after December 31, 2020 and is thereafter ineffective.



Minnesota: Minimum Wage

- Minnesota law permits minimum wage increases based on economic conditions
 - January 1st of each year
- Minnesota Commissioner of the Department of Labor and Industry must determine and announce the inflation-adjusted minimum wage each year by Aug. 31st



- 2021
 - Large Employers (annual gross revenues of \$500K of more): \$10.08 per hour
 - Small Employers (annual gross revenues of less than \$500K): \$8.21 per hour
- 2022 (beginning January 1, 2022):
 - Large Employers: \$10.33 per hour
 - Small Employers: \$8.42 per hour

Minnesota: City-Specific Minimum Wage

Minneapolis Minimum Wage:

- Increased on July 1, 2021
 - \$12.50 for all employees
 - \$14.25 for employers with over 100 employees ("large employers").
- July 2022: minimum wage for large employers will be \$15.00 per hour





• St. Paul Minimum Wage:

- Increased on July 1, 2021
 - \$12.50 for large businesses (over 100 employees)
 - \$11.00 for small businesses (6-100 employees)
 - \$9.25 for micro businesses (5 or fewer employees)
- July 1, 2022: will increase to \$13.50, \$12.00, and \$10.00, respectively
- By July 1, 2023, the minimum wage for large businesses will be \$15.00 per hour.

Minneapolis:

Freelance Worker Protections Ordinance

- January 1, 2021: Enacted by City of Minneapolis
- Written contracts required for businesses that retain "Freelance Workers" working within the City of Minneapolis
- Contracts are required under two circumstances:
 - 1. Charges for the work to be performed are or are expected to be \$600+ for all work performed in a calendar year for a single project or for aggregate projects.
 - Charges for the work to be performed are or are expected to be \$200+ for all work performed in seven (7) consecutive days for a single project or for aggregate projects.





Minneapolis:

Freelance Worker Protections Ordinance

Written contract between business and independent contractors must include the following information:

- (1) The name and address of both the commercial hiring party and the freelance worker;
- (2) An itemization of all material services to be provided by the freelance worker;
- (3) The compensation for the services, including the rate or rates and method of compensation; and
- (4) The date on which the commercial hiring party must pay the agreed upon compensation or the mechanism by which the date will be determined.

Minneapolis: Freelance Worker Protections Ordinance

Penalties for Noncompliance:

Compensatory damages: amount due but unpaid under contract

Liquidated damages: up to double compensatory damages awarded, or \$500 (whichever is greater)

Compensatory damages for a hiring party's retaliatory conduct: amount due but unpaid under contract (up to \$1,000)

Additional penalties for subsequent violations

Violations may also be subject to fines from the Minneapolis Department of Civil Rights

Minnesota: Women's Economic Security Act ("WESA")

- Enacted in 2014
- Law providing protections for women in the workplace
 - Wage Disclosure Protection
 - Pregnancy Accommodations
 - Pregnancy and Parenting Leave
 - Nursing Mothers
 - Sick Leave Benefits; Care of Relatives
 - Unemployment Benefits
 - Equal Pay Certificate
 - "Familial Status" as a New Protected Class in the Minnesota Human Rights Act



Minnesota: WESA



- 2021: Minnesota Legislature passed series of bills amending/expanding WESA protections
- Amendments made to:
 - 1) Nursing Mothers Statute
 - 2) Pregnancy Accommodation Statute
- Amendments took effect January 1, 2022

Minnesota:

WESA - Nursing Mothers Statute

(a) An employer must provide reasonable <u>unpaid</u> break <u>time times</u> each day to an employee who needs to express breast milk for her infant child <u>during the twelve months following the birth of the child</u>. The break <u>time times</u> must, if possible, run concurrently with any break <u>time times</u> already provided to the employee. An employer is not required to provide break <u>time times</u> under this section if to do so would unduly disrupt the operations of the employer. <u>An employer shall not reduce an employee's compensation for time used for the purpose of expressing milk.</u>

- - -

(d) An employer may shall not retaliate against an employee for asserting rights or remedies under this section subdivision.

Compensation cannot be reduced for time used for purpose of expressing milk

Employers must provide multiple paid breaks

Narrowed to first 12 months following birth of child

Minnesota:

WESA - Pregnancy Accommodation Statute

- Requires employers to provide accommodations to pregnant workers
 - More frequent restroom, food, and water breaks
 - Seating
 - Limits on lifting over 20 pounds
- Original statute was part of Minnesota Parental Leave Act
 - Act's definitions of "employer" and "employee": Arguably limited application to employers with 20 or more employees and employees who worked at least halftime for one year

- <u>CHANGE</u>: Minnesota Legislature moved statutory text to a new subdivision under the Minnesota Nursing Mothers Statute
 - Minnesota Nursing Mothers Statute does not define "employee"
 - New pregnancy accommodation subdivision defines "employer" as employers with 15 or more employees
 - Pregnancy accommodations provision only applies to employers with 15 or more employees
 - Definition of "employer" is limited to the pregnancy accommodation subdivision – therefore the Nursing Mothers Statute applies to <u>all</u> employers



MINNESOTA: PROPOSED LEGISLATION



Minnesota Human Rights Act: Proposed Amendments



- H.F. 1315 would add definition of "Race" to MHRA
 - "Race' is inclusive of traits associated with race, including but not limited to hair texture and hair styles such as braids, locks, and twists."
 - Passed House, currently before Senate.
- H.F. 1404 would also add same definition of "Race" to MHRA, and would prohibit employers from inquiring into, considering, or requesting pay history of applicants for employment.
 - Currently before House.
- H.F. 3270 would remove two sections of MHRA that allow for discrimination based on sexual orientation.
 - Currently before House.



Earned Sick and Safe Time

H.F. 41 – would establish earned "Sick and Safe Time" requirements for employees who work more than 80 hours per year for an employer in Minnesota.

Employees would earn, at a minimum, 1 hour of earned sick and safe time for every 30 hours worked, up to 48 hours per year.

Passed the House, currently before Senate.

Earned Sick and Safe Time

- If H.F. 41 passes, employees would be able to use earned sick and safe time for:
 - 1. The employee's mental or physical illness, injury, other health condition, diagnosis, care, treatment, or preventative care;
 - 2. Care of a family member with a mental or physical illness, injury, other health condition, or who needs medical diagnosis, care, treatment, or preventative care;
 - 3. Absence due to domestic abuse, sexual assault, or stalking of the employee or the employee's family member, provided the absence is to seek medical attention, obtain services from a victim services organization, obtain psychological or other counseling, seek relocation, or seek legal advice or take legal action;
 - 4. Closure of the employer's business due to weather or public emergency or closure of a family member's school or care facility due to weather or public emergency; and
 - 5. A determination by a healthcare provider that an employee or their family member is at risk of infecting others with a communicable disease.

Paid Family and Medical Leave

- H.F. 1200 would create stateadministered mandatory paid family and medical leave insurance program
- Enrolled individuals would receive up to 12 weeks of paid medical leave, <u>and</u> up to 12 weeks of paid family leave
- Currently before House

Wage Theft Protection Act



- H.F. 2062 would amend Wage Theft Protection Act (enacted in 2019)
- Modifies required timing for employee's first earnings statement
- Clarifies related notice requirements
- Provides cap on penalties for not paying wages and commissions within 10 days of demand for payment
 - Penalty capped at employee's average daily earnings not exceeding 15 days in all
- Currently before House

Covenants Not to Compete

- Covenants not to compete = currently enforceable in Minnesota
 - Unlike North Dakota
- H.F. 999 would prohibit covenants not to compete in employment agreements
 - Limited exception where employer agrees to pay employee's salary during restricted period in certain circumstances.
- Covenant not to compete = "An agreement between an employee and employer that restricts the employee, after termination of the employment, from performing: (1) work for another employer for a specified period of time; (2) work in a specified geographical area; or (3) work for another employer in a capacity that is similar to the employee's work for the employer that is party to the agreement."
- Currently before House



Criminal History Checks



- Current law: law enforcement may not disseminate criminal history data for background checks for employment with a city or county
- H.F. 2945 would remove this restriction and would permit law enforcement to release criminal history data for city and county employment purposes
- Passed House, currently before Senate



Sexual Harassment or Abuse Settlements and Severance



- H.F. 3010 would create new law:
 - In sexual harassment or abuse cases where there is a financial settlement between employer and employee, financial settlement <u>cannot</u> be provided as wages or severance pay if settlement includes nondisclosure agreement
- Currently before House



FEDERAL LEGISLATION

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Arbitration of Sexual Assault and Sexual Harassment Actions

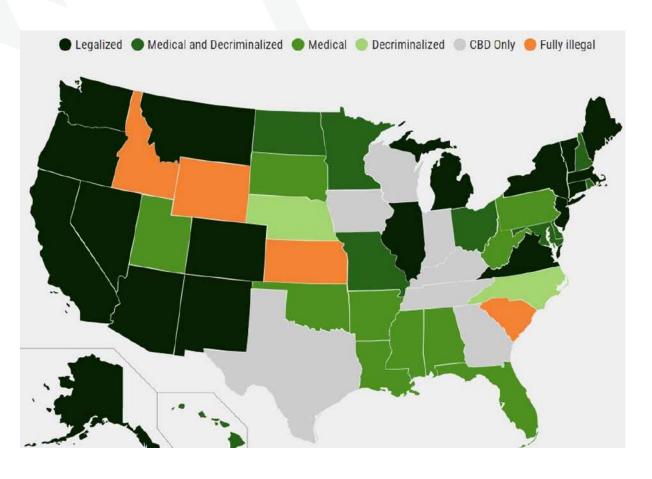
- H.R. 4445 Invalidates employer/employee arbitration agreements in sexual harassment and sexual assault cases at the election of the alleging employee
 - Arbitration agreement may be in employer policy or employment contract
- Congress passed in March of 2022



Marijuana Opportunity Reinvestment and Expungement Act



- H.R. 3617 would decriminalize marijuana use at federal level
 - Would remove marijuana from scheduled substances under Controlled Substances Act
- Would also eliminate criminal penalties for those who manufacture, distribute, or possess marijuana
- Passed House, currently before Senate
- <u>NOTE</u>: States would still be able to regulate marijuana use.



Build Back Better Act

- Would create a national paid leave program providing employees four weeks of paid family and medical leave.
 - Would allow paid leave benefits for eligible workers and their qualifying family members.
 - Employees could receive paid leave benefits for many reasons (birth of child, adoption or fostering of a child, the employee's health condition, a qualified family member's health condition, etc.).
 - Would apply to private sector workers, including employed and self-employed workers, and the employee need not be employed for any minimum length of service to be eligible.
 - Would apply to all employers regardless of size.



- Passed House on November 19, 2021.
- No vote by Senate to date.

QUESTIONS?



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Promoting Diversity, Equity, and Inclusion in the workplace while reducing legal risk

Meredith Larson



Meredith Larson, J.D. Vogel Law Firm Employment Attorney

Diversity and Inclusion



What is Diversity, Equity, and Inclusion?

Diversity:

- Diversity refers to the range of human differences, social identities, and social groups. This includes, but is not limited to, race, ethnicity, gender, gender identity, sexual orientation, age, social class, physical abilities or disabilities, religion, and national origin.
- Diversity means the different characteristics that make each of us unique.

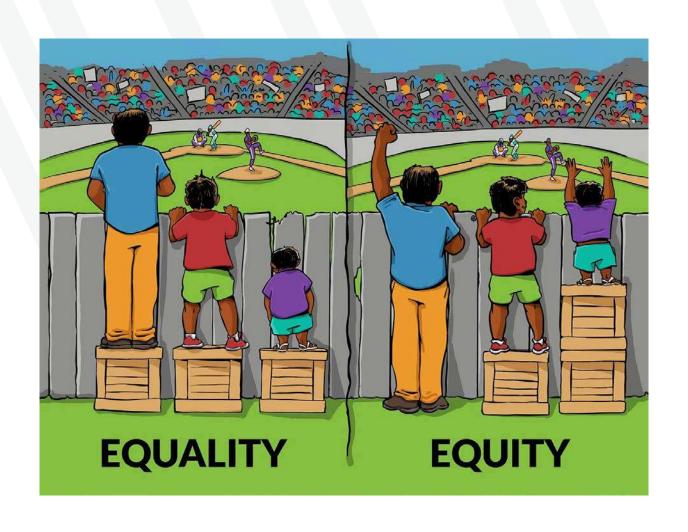
Inclusion:

 Inclusion means involvement, empowerment, belonging, and recognition. Creating an environment where everyone can feel a sense of belonging.

Equity:

• Equity means equal access to opportunities, status, and rights. Equity inherently takes into account systemic inequalities to ensure equal access. Equity is not the same as equality. Equality is the concept that all people are treated equally. Equity is recognizing that people have different circumstances or backgrounds and may need different resources or opportunities to ensure they can obtain equal outcomes. Simply put, equity is treating people based on what they need.

Equality vs. Equity



Why does it matter?

 Diversity, Equity, and Inclusion policies (DEI) are initiatives that organizations can implement to not only ensure legal compliance, but to transform workplaces into high-performing environments where employees feel valued, included, and heard.

Applying DEI Principles in the Workplace.

Diversity: Attracting, recruiting, and hiring a diverse workforce. Valuing current diversity in the workplace.

Equity: Ensuring non-discrimination and equal opportunity employment.

Inclusion: Building respectful, supportive, and inclusive environments that allow all employees to thrive at work.

Progress in the workplace is achievable... look how far we have come...

<u>'I'm not a cat': lawyer gets stuck on Zoom kitten filter during court case</u>



Progress in the workplace: Making a case for DEI...

- The pandemic has caused the landscape of workplaces to change dramatically. Employers are dealing with what is being called the "Great Resignation".
- Implementing a DEI program can help organizations improve employee recruitment and retention, while also reducing legal risk and financial exposure. An intentional DEI policy can directly impact the ability to and the success of managing risk in an organization.
- Implementing a DEI policy has moved from the "right" thing to do, to an essential component of reducing risk and creating high performing workplaces.

What is Legal Risk?

 Legal risk is the risk of loss to an organization due to a failure to comply with legal obligations. Assessing or evaluating risk in an organization is critical.



Aren't non-discrimination and EOO policies enough?

- Nondiscrimination and EOO policies- mandates for legal compliance
 - Title VII, GINA, ADA, ADEA
- Diversity, Equity, and Inclusion move employers and organizations from the bare minimum of legal "compliance" to a method of education, support, and progressive workplace change. An intentional DEI policy is intended to progress beyond tolerating the differences in others to embracing and valuing the various characteristics of employees and colleagues, as well as the world around us.



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What DEI Policies can do for Employers

- Employees who feel that the workplace is equitable, who feel included, and who see that diversity is important to an employer are less likely to leave workplaces and/or file complaints. Employers who are educated about topics, beyond overt discrimination and compliance, avoid complaints based on unconscious biases they may hold and increase profitability and productivity of their employees, as well as improve employee satisfaction
- DEI can reduce legal risk through:
 - Education
 - Inclusivity
 - Intentionality

- Does discrimination look the same as it did 20-30-40-50 years ago?
- Diversity training can help employers understand how cultural differences can impact how people work and interact at work. It can provide awareness to employees and employers to foster greater inclusivity among diverse individuals. According to the EEOC, harassment is more likely to occur where there is a lack of diversity in the workplace. Individuals who are considered "different" (in that they depart from the standard norms), are more likely to be targets of workplace harassment.

- Implicit or Unconscious Bias: Attitudes or stereotypes that adversely impact or influence our understanding, actions, and decisions in an unconscious way.
 - Ex: Mistaking individuals from a certain ethnic or cultural background as custodial staff.
 - Ex: A workplace that was traditionally male-dominated, does not carry uniforms in traditional female sizing, causing a female employee to have to miss out on historic opportunities (NASA).
 - Ex: Repeatedly designating a female co-worker to take notes at a team meeting because women are "better" at that type of thing

- **Affinity Bias**: A specific type of implicit bias. Favoring those who have a similar interest or background as you do.
 - Happens when a boss spends more time deepening work relationships with employees who share the same background, identity, or characteristics as they do.
 - As a result, that boss may find the employees they spend time with as more credible, their complaints more valid, and gives those employees more access to give the boss feedback or criticism about other employees. Other employees who are dissimilar to the boss do not foster that same relationship, are not given the benefit of the doubt, and do not have the same type of access. The boss may not understand their personality as well or have a relationship with the boss that the boss values or protects.

- Microaggressions: verbal or nonverbal slight that impacts an individual who might identify as being from a marginalized or nonmainstream community
- Microaggression can even come in the form of an organizational process that was designed to keep specific groups from advancing
- Some may not be intentional, may not rise to the level of substantiated discrimination in the workplace, but certainly creates stress in the workplace, detracts from an inclusive culture, and could create legal risk or financial loss to the organization

DEI promotes inclusivity which can reduce legal risk

- •Establish an environment where all employees, from all different backgrounds, feel important and included. Celebrate or create an opportunity to celebrate different religions, backgrounds, and holidays of all cultures.
- •Handbooks and written policies and procedures are a great way to promote an inclusive culture and demonstrate to an employee what the priorities are for the organization. Using gender-inclusive terms, leave policies that are family-friendly, non-discriminatory dress code and hair policies, and procedures that encourage an interactive process in search of accommodations that respect a worker's religious, disability, or lactating needs. Presenting such options can help employers consider practices that can help reduce the risks of litigation for employment discrimination claims in the future.

DEI can promote the practice of empathy and intentionality, which can reduce legal risk

- Intentionality: requires leaders (and all employees), to be self-aware and to reflect on a person's
 own unconscious bias. This requires deliberate action of slowing down and challenging our thought
 process before making any employment-related decisions to ensure unconscious bias is not
 impacting those decisions.
- <u>Empathy</u>: Employers who foster empathy as a priority in the workplace often create environments where leaders and employees learn to listen more effectively and internalize the perspective of others. When employees feel they are being heard, are valued, and their feelings are respected, they feel more included and productivity and retention increases.

A workplace that could benefit from DEI

Inclusion & Diversity- How Not To Do It



Example 1: Age Discrimination?

- Employer X has a software company. The CEO is a young male, 32 years of age. Most employees at the company are young, the average age is 28 years old. Every Friday at 4 p.m., Mr. CEO goes to happy hour and invites all the younger employees with him. The company has 5 employees who are 40 years of age or older. Those employees have never been invited. During these happy hour endeavors, Mr. CEO and the younger employees talk about work and the younger employees have occasion to complain about Employee Z, who happens to be 45 years old. On Monday, Mr. CEO calls Employee Z into his office to discuss "anonymous" complaints about Employee Z and ultimately gives Employee Z a warning about Employee's Z's productivity at work.
- Employee Z files a complaint with the Department of Labor. Mr. CEO is aware of Title VII and ADEA as well as the workplace non-discrimination policy and feels that he has a specific non-age-based reason to take adverse action against Employee Z, specifically the reports of his coworkers. The Department of Labor ultimately finds that the employer has a non-age-based reason-specifically performance, that justified the adverse employment action. However, the legal fees were astronomical and the complaint itself, as well as responding to the complaint, were disruptive to the company, negatively affected productivity, and were terrible for employee morale.
 - •What could a DEI policy do for this employer?

Example 2: Religious Discrimination? Lack of Inclusivity?

- •Employer X's software company has a policy manual. The policy manual provides descriptions of paid holidays, all of which appear to be consistent with Christian Religious holidays. The company has three Muslim employees. The policy manual's dress code also appears to potentially prohibit traditional Islamic clothing. The manual additionally provides for breaks for hourly employees but does not address any option for breaks for prayers for these employees.
- •The Muslim employees do not feel seen or that they belong in this workplace, which has caused them to reflect on other incidences in which they were treated differently than the other employees. They also feel that they may have a claim for discrimination based on religion.
- •What could a DEI policy do for this employer?

Example 3: Sexual Orientation/Gender Identity

- Employer X's software company has two bathrooms, and they are labeled, "Men" and "Women". When Sarah, a transgender woman, attempted to use the "Women's" bathroom, she was stopped by her employer who told her she had to use the "Men's" bathroom. This employer has also frequently referred to her as "he" even though she has repeatedly explained to the employer that "he" is inconsistent with her gender identity.
- Sarah is aware that the EEOC has advised against both of the actions that the Employer has taken against her. Transgender employees should be allowed to use the bathroom consistent with their gender identity and the intentional use of improper pronouns could be considered sexual harassment.
- Sarah is considering filing a complaint with the Department of Labor.
- What could a DEI policy do for this employer?

How can you support DEI policies in your workplace?

See something, Say something.

- This phrase is often used in the context of "safety" at work. But how do we define "safety"? Inarguably, safety includes feeling free of discrimination or being marginalized in the workplace. If we are to create an inclusive workplace, it is incumbent upon all employees and leaders to report instances of discrimination, even those that are unintentional.
- Creating a culture where employees are trained on and feel comfortable politely addressing (and/or reporting where necessary) microaggressions and implicit biases is essential in effectuating change consistent with the goals of a DEI policy.

How can you support DEI policies in your workplace?

Employment manuals

- Be sure to create updated employment manuals so they are consistent with the environment you are trying to cultivate. For example:
- ADA: Be sure to highlight the interactive process.
- LGBTQ+ inclusive policies: Gender-neutral language, EEOC compliant bathroom policies.
- <u>Dress Code</u>: Gender-neutral, sensitive to various religious needs.
- Breastfeeding policies
- Harassment free workplace policies
- Grievance policies: Ensure your grievance policy is robust and well-understood.
- Retaliation: Ensure your policy manual prohibits retaliation for reports of discrimination.

Closing argument: Making the case for DEI policies to reduce legal risk

- Employees who feel that the workplace is equitable, who feel included, and who see that diversity is important to an employer are less likely to leave workplaces and/or file complaints.
- Employers who are educated about topics, beyond overt discrimination and compliance, avoid complaints based on unconscious biases they may hold, can reduce microaggressions in the workplace and can increase profitability and productivity of their employees, as well as improve employee satisfaction

QUESTIONS?





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Panel Discussion - Q & A



QUESTIONS?



Door Prize Time!!!!



THANK YOU! VOGEL Law Firm

With locations in North Dakota (Fargo, Bismarck, Grand Forks) and Minnesota (Moorhead and Apple Valley)

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