Ballard Spahr LLP

Ballard Spahr's

Eighth Annual SLC Fall Employment Law Seminar

NOVEMBER 7, 2018 | SALT LAKE CITY

Agenda

Eighth Annual SLC Fall Employment Law Seminar

Wednesday, November 7, 2018 | 8:30 AM – 1:00 PM MT
The Tower at Rice-Eccles Stadium at the University of Utah
451 South 1400 East
Salt Lake City, UT

8:30 AM	Registration, Breakfast, and Networking
9:00 AM	Employment Law Year in Review *Speakers: Jason D. Boren and Denise M. Keyser*
9:30 AM	Trade Secrets and Restrictive Covenants: Keep Your Secrets Safe and Your Employees Honest *Speakers: Jason D. Boren and Scott A. Wiseman*
10:15 AM	Break
10:25 AM	Paying it Right the First Time: Tiptoeing Your Way Through the Wage and Hour Minefield *Speaker: Steven W. Suflas*
11:10 AM	Discovery Issues in Employment Litigation: Tips to Save You Time and Money *Speakers: Melanie J. Vartabedian and Nathan R. Marigoni*
11:55 AM	Break
12:05 AM	*Lunch Program* Sexual Harassment in the #MeToo Era *Speaker: Denise M. Keyser*
12:50 PM:	Closing Remarks *Jason D. Boren and Steven W. Suflas*

About Ballard Spahr

Ballard Spahr LLP is a national firm of more than 650 lawyers in 15 offices across the country. Our attorneys provide counseling and advocacy in more than 40 areas within intellectual property, litigation, business and finance, real estate, and public finance. We represent a diverse cross-section of clients, ranging from large public companies and privately held corporations to government agencies and nonprofit organizations. Our practices span the life sciences and technology, energy, health care, and other sectors that are driving innovation and growth in today's marketplace.

The firm's mission is straightforward: to provide nothing less than excellence in every legal representation. Our client focus is absolute. We help clients achieve success as they define it. We respect and anticipate their needs, take action to keep them informed, and devise forward-thinking solutions to get the most favorable results. This is Ballard Spahr's pledge.

Practices

- Antitrust
- Bankruptcy, Reorganization and Capital Recovery
- Blockchain Technology and Cryptocurrency
- Business and Finance
  - EB-5
  - Emerging Growth and Venture Capital
  - Investment Management
  - Mergers and Acquisitions
  - Private Equity
  - Securities
  - Transactional Finance
- Consumer Financial Services
- Employee Benefits and Executive Compensation
- Environment and Natural Resources
- Energy and Project Finance
- Family Wealth Management
- Government Relations, Regulatory Affairs and Contracting
- Housing
  - FHA and GSE Financing
  - Government –Assisted Housing
  - Housing Bonds
  - Tax Credits
- Intellectual Property
  - Copyrights
  - Entertainment and Media
  - Fashion
  - Intellectual Property Litigation
  - Internet
  - IP Due Diligence
  - Licensing
  - Patents
  - Post-Grant Proceedings
  - Trademarks
  - Trade Secrets
- Labor and Employment
- Litigation
  - Appellate

- Health Care
  - Class Action Litigation
  - Commercial Litigation
  - E-Discovery and Data Management
  - Professional Liability
- Media and Entertainment Law
- Mortgage Banking
- Municipal Securities Regulation and Enforcement
- P3/Infrastructure
- Political and Election Law
- Privacy and Data Security
- Product Liability and Mass Tort
- Public Finance
- Real Estate
- Real Estate and Construction Litigation
- Real Estate Development and Complex Transactions
  - Construction
  - Eminent Domain
  - Leasing
  - Mixed-Use Development and Condominiums
  - Real Estate Tax
  - Zoning and Land Use
- Real Estate Finance and Capital Markets
  - CMBS Loan Origination
  - Commercial Loan Servicing
  - Distressed Real Estate
  - Insurance Company and Institutional Investments
  - Private Equity Real Estate
- REITs
- Resort, Hospitality, and Timeshare
- Securities Enforcement and Corporate Governance Litigation
- Tax
  - Exempt Organizations
- White Collar Defense/Internal Investigations

Industries

- Banking and Financial Services
- Education
- Insurance
- Life Sciences and Technology
- Manufacturing
- Retail and Fashion
- Sports

Initiatives

- Accessibility
- Climate Change and Sustainability
- Diversity & Inclusion Counseling
- Health Care Reform
- Korea
- Loss Recovery
- Municipal Recovery
- Title IX
- Virtual Currency

Labor, Employment and Benefits Overview

Our Labor, Employment, and Benefits attorneys advise clients in a variety of industries nationwide on compliance with state and federal laws and provide advice, counsel, and training on issues related to:

- Affirmative Action Plans and Federal Contractor Compliance
- Compliance Audits
- Collective bargaining negotiations
- Discrimination
- Diversity and Inclusion
- Drug and Alcohol Testing Policies
- Sexual Harassment
- Employment Counseling
- Employment Litigation and Arbitration
- Executive Compensation
- Health and Welfare Benefit Plans
- ERISA, MEPPAA, and Benefits Litigation
- Executive Agreements and Compensation
- Employee Stock Ownership Plans
- Immigration
- Incentive Compensation Plans
- Labor/Management Relations
- OSHA and Workplace Safety
- Policies, Handbooks, and Trainings
- Trade Secrets, Confidentiality, Non-Competition and Non-Solicitation Agreements, and Litigation
- Restrictive Covenants
- Wage and Hour Audits, Investigations, and Class/Collective Action Litigation
- Workplace Investigations
- Qualified and Non-Qualified Retirement Plans

Office Locations

Labor and Employment

The types of matters our Labor and Employment Group handles regularly include:

- Representation of employers in collective bargaining negotiations; interest arbitration; private and AAA labor arbitration; NLRA and state labor law compliance issues; the labor implications of mergers, acquisitions, and asset purchases; strike prevention and control; union campaigns; union-free training of management and supervisors; and unfair labor practice proceedings before the NLRB and state labor boards
- Employment discrimination advice and defense of claims on grounds of protected class membership, such as age, race, gender, sexual orientation, disability, religion, national origin, and sexual harassment; and Equal Pay Act claims
- Preparation and defense of affirmative action plans under Executive Order 11246 and other federal and state laws, including advice on implementation of monitoring processes; plan analyses and drafting; and advice, counseling, and litigation over OFCCP audits
- ERISA and other employee benefits advice and litigation, including administrative claims appeals; breach of fiduciary duty claims; litigation of benefit claims and interference with protected rights; ERISA preemption; and plan design counseling for litigation avoidance and defense
- Defense of class action and collective action cases, including claims of wage and hour violations brought against employers
- Defense of at-will employment, wrongful discharge, and employment tort claims
- Design and implementation of corporate-wide HR and labor strategies and initiatives
- Preparation of, and advice and litigation concerning, employment agreements, executive compensation programs, restrictive covenants and trade secret agreements, and employment terminations
- Advice and litigation on behalf of public employers such as cities, states, school districts, authorities, and municipalities in traditional labor and employment matters, as well as under specialized labor laws regarding police, fire, and other personnel (e.g., Heart and Lung Act and civil service laws)
- Training of managers and employees on topics such as sexual harassment, EEO compliance, ADA, FMLA, chronic absenteeism, managing the difficult employee, workplace investigations, health and safety compliance, hiring, interviewing, and wage and hour compliance
- Review and legal audit of personnel policies, manuals, and employment forms; formulation of personnel policies, such as FMLA and applicable state leave laws; sexual harassment; drug and alcohol abuse and testing; privacy rights; and ADA compliance
- Advice concerning OSHA and state health and safety laws, including compliance and self-audits; governmental investigations and citations; negotiations with OSHA; and litigation before the OSHRC and the courts
- Wage and hour audits and investigations, including DOL audits on FMLA and FLSA issues

- Reduction in force design, counseling, and litigation, including WARN compliance, early-exit programs, severance pay, and effective use of releases

Diversity and Inclusion

Our Diversity & Inclusion (D&I) team advises employers in a range of industries on the development, enhancement, and implementation of their D&I programs. As attorneys, we offer a perspective that blends D&I consulting and development with a sensitivity to important legal issues—including regulatory compliance, the interplay of equal employment opportunity and affirmative action laws, reverse discrimination risks, and the role of D&I in potential discrimination litigation.

D&I is more than "the right thing to do." It makes business sense. An effective D&I program can help an organization connect with communities, penetrate and capture the U.S. multicultural markets, attract top talent, and drive innovation. For this reason, organizations are embracing D&I as a key business strategy. In addition, organizations appearing before regulatory agencies or state and local governments seeking approval for a transaction often find that having robust D&I programs puts them in a stronger position.

Our D&I team performs assessments, develops D&I strategic plans, advises on existing programs, develops policies and communication materials, conducts training, and assists with the implementation of D&I programs. Our work touches on other areas as well, including board and internal governance entities, human resources and workforce issues, procurement and supplier diversity, and community engagement and philanthropy. When needed, we offer collaborative input from lawyers across the firm's practice areas to provide advice on issues involving government relations, securities, labor and employment, employee benefits, non-profit governance, and investigations.

Accessibility

Ballard Spahr's Accessibility team is fully versed in all areas of the Americans with Disabilities Act (ADA) and other laws designed to protect the rights of people with disabilities. We help clients nationwide to assess their rights and responsibilities under the law, design programs to keep them in compliance, and defend them against claims of discrimination.

The ADA prohibits discrimination and guarantees that people with disabilities have an equal chance to enjoy employment opportunities, purchase goods and services, and participate in government programs. But the scope of what can be considered a disability is increasing—as are the accommodations necessary to comply with the law.

Attorney Profiles

Jason D. Boren

Partner

One Utah Center, Suite 800
201 South Main Street
Salt Lake City, UT 84111
Direct: 801.517.6827 | Fax: 801.531.3001
borenj@ballardspahr.com

Areas of Focus

- Litigation
- Construction
- Banking and Financial Services
- Labor and Employment
- Product Liability and Mass Tort
- Commercial Litigation
- Real Estate and Construction Litigation

Jason D. Boren is an experienced litigator at both the trial and appellate levels. His litigation practice focuses on complex civil and business litigation disputes involving a wide variety of matters including corporate governance and control, employment, real estate and construction, receivership litigation, intellectual property and false affiliation claims.

Jason has extensive experience with corporate governance disputes and dissenter's rights cases. Jason has represented officers, directors, corporations and shareholders in cases involving breaches fiduciary duty, breaches of contract, conversion, conspiracy, dissolution and appraisal of shares pursuant to the Utah dissenter's rights statute. Jason is one of a few lawyers in Utah who has handled a dissenters' rights appraisal proceedings through trial.

Jason's employment practice includes representation of employers in actions involving age discrimination, sexual harassment, failure to accommodate, trade secrets, retaliation, FMLA, breach of non-solicitation, noncompetition and non-disclosure agreements, wrongful discharge, employment tort claims, including claims for defamation and emotional distress, and employee benefits and disputes arising under ERISA.

Jason's real estate litigation practice includes representation of clients in disputes involving construction, condemnation, landlord/tenant, premises liability, easements, developer liability, real estate broker and agent liability, foreclosure, and quiet title actions.

Jason represents clients in state, federal, and appellate courts and defends them against administrative charges before the Utah Labor Commission, Equal Employment Opportunity

Commission, Department of Labor, National Labor Relations Board and Occupational Safety and Health Administration. He also represents clients before the Utah Public Service Commission, the Utah Division of Real Estate, the Utah Division of Occupational and Professional Licensing and the Utah Insurance Division.

Jason serves as outside general counsel for Utah to a large medical professional liability insurance company.

Since 2005, Jason has been recognized annually as one of Utah's "Legal Elite" in litigation in Utah Business magazine.

At Ballard Spahr, Jason is Partner-in-charge of the Salt Lake City Hiring Committee and serves on the firm's Western Litigation Partners and Allocation Committees.

Representative Matters

Employment

- Successfully obtained summary judgment on former employee's claims of age, race/national origin discrimination, retaliation in violation of Title VII of the Civil Rights Act of 1964, and retaliation in violation of the Age Discrimination in Employment Act. (*Cruces v. International Down & Feather Testing Laboratory*, 956 F.Supp.2d 1299 (D. Utah 2013), 119 Fair Empl. Prac. Cas. (BNA) 48; 2012 WL 3756867 (D. Utah August 28, 2012)

- Successfully represented defendant in a 10th Circuit appeal affirming summary judgment on claims of promissory estoppel, fraudulent inducement, and negligent misrepresentation. (*Rohr v. Allstate Financial Services*, 529 Fed.Appx. 936 (2013)
- Successfully represented defendant employer against unlawful termination claim by in-house counsel
- Successfully represented hospitality client in trial before the Utah Labor Commission for claims of employment discrimination on the basis of national origin, age, retaliation, and disability. (*Besic v. Ocean Properties* (Marriott)) Utah Labor Commission, Adjudication Division, Case No. 8000205, January 31, 2012)
- *S&S Worldwide, Inc. v. Rohwer et al.* , Case No. 140100100 (First District, Utah). Successfully obtained preliminary injunction restraining former employee from disclosing confidential and trade secret information
- Routinely obtain temporary restraining orders and injunctions for companies whose employees violate confidentiality, non-solicitation and non-compete provisions in their employment contracts

Attorney Profiles

Denise M. Keyser

Partner

210 Lake Drive East, Suite 200
Cherry Hill, NJ 08002
Direct: 856.761.3442 | Fax: 856.761.1020
keyserd@ballardspahr.com

Areas of Focus

- Litigation
- Health Care Reform
- Labor and Employment
- Privacy and Data Security
- Health Care
- Manufacturing

Denise M. Keyser has more than 30 years of experience representing national, regional, and locally based businesses in labor and employment matters, including traditional labor law (such as collective bargaining and arbitrations), OSHA, ERISA, wage and hour, employment-at-will, wrongful discharge, discrimination, management training, executive compensation, and affirmative action.

Denise has served as chief spokesperson and lead negotiator in collective bargaining negotiations for employers in a wide variety of industries, including health care, education, chemical manufacturing, food production, distribution, and public safety. She has long represented several prominent Southern New Jersey hospital systems.

Denise has handled numerous labor arbitrations on disciplinary and contract issues. She has experience before the National Labor Relations Board and has litigated cases involving issues such as discrimination, harassment, wrongful discharge, wage and hour issues, breach of contract, and ERISA in both state and federal courts. In addition, she has worked closely with clients in drafting policies and handbooks, implementing reductions in force, resolving compliance issues, developing labor strategies, and day-to-day employment counseling.

Attorney Profiles

Steven W. Suflas

Partner

1225 17th Street, Suite 2300
Denver, CO 80202
Direct: 303.299.7326 | Fax: 303.296.3956
suflas@ballardspahr.com

Areas of Focus

- Litigation
- Real Estate and Construction Litigation
- Labor and Employment
- Accessibility
- Appellate
- Diversity & Inclusion

Steven W. Suflas is Managing Partner of the Denver office and a nationally recognized thought leader on labor and employment issues. He represents management in all phases of labor and employment matters — from preventative counseling and strategic guidance to collective bargaining, appearances before regulatory agencies, and litigation before courts and administrative agencies. He works closely with employers — both large and small, national, regional, and local — in responding to the daily challenges of the workplace.

Steve is known for his litigation work, defending companies in federal and state courts nationwide in both individual and class action lawsuits. He has first chair jury trial experience and has argued cases before federal and state appellate courts. He also has decades of experience litigating unfair labor practice and representation cases before the National Labor Relations Board. Steve has represented management at scores of union negotiations and labor arbitrations.

On the compliance side, Steve works with employers to devise strategies that preserve the efficiency and productivity of their workforces. He assists in designing, implementing, and enforcing corporate human resources and compensation policies, and developing corporate-wide labor relations strategies. He handles traditional labor law issues, such as wage and hour investigations, and counsels on compliance with state and federal law.

Steve's clients are nationwide and he was Managing Partner of the firm's New Jersey office for nearly a decade, where he still manages an active docket of cases both in the state and throughout the East Coast. He is frequently quoted in *Law360*, *Corporate Counsel*, *Law Week Colorado*, *SHRM*, *The American Lawyer*, *Denver Business Journal*, and the *San Francisco Chronicle*.

Attorney Profiles

Steve was honored to be among the inaugural class of Fellows to the College of Labor and Employment Lawyers. He annually has been rated in the top tier (Band One) for labor and employment by *Chambers USA, listed in Best Lawyers in America* since 1987, and recognized by *Human Resource Executive* magazine as among "The Nation's Most Powerful Employment Attorneys - Top 100" since 2009.

His experience includes:

- Serving as chief spokesman for management in numerous union negotiations
- Serving as lead trial counsel in federal and state court litigation involving the full range of employment issues, including age, gender, and race discrimination; sexual and workplace harassment; whistleblower claims; wrongful discharge; restrictive covenants; and labor injunctions
- Appearing for employers before the National Labor Relations Board in representation and unfair labor practice proceedings, hearings and appeals
- Serving as counsel in labor arbitrations involving disciplinary and contract interpretation issues
- Representing clients concerning the Fair Labor Standards Act and state minimum wage laws, including administrative investigations, federal court, class action litigation, and pre-audit compliance
- Representing clients in withdrawal liability proceedings and litigation under MEPPA
- Developing strategy in HR planning at the corporate level, including reductions-in-force and national labor policy

Attorney Profiles

Melanie J. Vartabedian

Partner

One Utah Center, Suite 800
201 South Main Street
Salt Lake City, UT 84111
Direct: 801.517.6842 | Fax: 801.531.3001
vartabedianm@ballardspahr.com

Areas of Focus

- Litigation
- Consumer Financial Services
- Municipal Securities Regulation and Enforcement
- Distressed Real Estate
- Intellectual Property Litigation
- Securities Enforcement and Corporate Governance Litigation
- Commercial Litigation
- Mortgage Banking

Melanie J. Vartabedian focuses on complex commercial litigation matters, including commercial contract and real estate disputes, securities litigation, and intellectual property litigation.

Melanie has litigated cases in state and federal courts across the country, and also has experience representing clients in arbitrations and government investigations. She represents real estate developers and private and public companies in business disputes relating to land use decisions, and she defends mortgage lenders and servicers in financial services disputes, including foreclosure-related lawsuits. In addition, she has represented accounting firms and auditors in Securities and Exchange Commission investigations, and has worked on cases involving allegations of trademark infringement, achieving preliminary and permanent injunctive relief, seizure of infringing items, and other remedies.

Melanie also has extensive experience with and involvement in Securities and Exchange Commission (SEC) receiverships. She has prosecuted fraudulent transfer actions on behalf of the receiver in SEC receiverships, and has defended numerous clients sued by receivers. Currently, she is representing the receiver in *Securities and Exchange Commission v. American Pension Services et al.,* Case 2:14-cv-00309-RJS-DBP, a receivership involving over $350 million in assets and 5,500 defrauded investors across the country.

Attorney Profiles

Nathan R. Marigoni

Associate

One Utah Center, Suite 800
201 South Main Street
Salt Lake City, UT 84111
Direct: 801.531.3022 | Fax: 801.531.3001
marigonin@ballardspahr.com

Areas of Focus •

Nathan R. Marigoni represents clients in matters related to commercial litigation, including employment litigation, complex business and commercial transaction disputes, intellectual property enforcement and defense, and class-action defense. In addition to representing clients in all aspects of traditional litigation up to and including appeals, Nathan advises and assists clients in alternative dispute resolution including negotiated settlements, mediation, and arbitration.

Judicial Clerkships

Judge Carolyn B. McHugh, U.S. Court of Appeals for the Tenth Circuit, 2015-2016

Judge Michele M. Christiansen, Utah Court of Appeals, 2013-2015

Judicial Internship

Justice Jill Parrish, Utah Supreme Court, 2011

Attorney Profiles

Scott A. Wiseman

Associate

One Utah Center, Suite 800
201 South Main Street
Salt Lake City, UT 84111
Direct: 801.531.3025 | Fax: 801.531.3001
wisemans@ballardspahr.com

Areas of Focus

- Litigation

Scott Wiseman works with several diverse civil litigation matters including employment law matters such as restrictive covenant enforcement, misappropriation of trade secrets, and discrimination/wrongful termination; corporate disputes; contract matters; First Amendment cases; real estate, leasing, and landlord/tenant issues; and consumer financial services. Scott has experience with all phases of litigation including discovery, motion practice, alternative dispute resolution, and trial.

Representative Matters

- Defeated $350 million damage claim and obtained complete defense verdict in five week jury trial in favor of clients accused of, among other things, breaching nonsolicitation agreements and misappropriating trade secrets
- Representation of mortgage servicer in lien priority disputes involving constitutional issues
- Successfully represented an elderly pro bono client in the reacquisition of her home, which was taken from her by deceptive and abusive means

Ballard Spahr LLP

Employment Law Year in Review

Jason D. Boren
Partner
Labor and Employment

Denise M. Keyser
Partner
Labor and Employment

#MeToo: Workplace Harassment

"We see this everywhere. This happens to women in workplaces all over the place. You look at the companies that, just last year where the EEOC brought suits. It's food processing plants, a correctional facility, a car dealership, restaurants, agriculture. It's across industries."

EEOC Acting Chair Victoria A. Lipnic

#MeToo: Workplace Harassment

- The #MeToo movement came to prominence in October 2017, in the wake of the allegations against Harvey Weinstein.
- The phrase encourages women to **publicize their experiences** with harassment to demonstrate the widespread nature of offensive, sexist behavior.
- The popularity of #MeToo suggests that:
  - Harassment is more prevalent than many assumed; and
  - *Unreported* harassment is even more prevalent.

#MeToo: Increases in Litigation

- On October 31, the EEOC reported that in fiscal year 2018, 7,609 sexual harassment charges were filed.
  - 13.6% increase from the prior year.
- The EEOC filed 66 lawsuits in FY18, a 50% increase from 2017.
- Harassment and discrimination claims affect Utah employers too!
  - Rocky Anderson was accused of gender discrimination and harassment in his law firm.
  - Piano students at Utah State University have accused a professor of sexual harassment, and have filed suit for at least $300,000.
  - Utah legislators have been accused of sexual harassment.

#MeToo: EEOC Guidance

- The EEOC announced in November 2017 that it would **update its sexual harassment guidelines** for the first time in 20 years.
- The guidelines are currently waiting for OMB approval.
  - As of June 11, 2018, the guidance was still pending clearance.
- EEOC rolled out a **training program** in October designed to help employers reduce workplace harassment.

#MeToo: State Action

- States are acting.
  - California (Signed 2018)
    - Prohibits **confidential settlement agreements** in sexual harassment and sex discrimination cases, unless requested by the claimant
    - Increases liability for discrimination and harassment by **outside contractors and other non-employees**
    - Increases required training
    - Requires female representation on boards of directors
  - New York (Amended July 11, 2018)
    - Prohibits **confidential settlement agreements** in sexual harassment claims
    - **Employer liability for** sexual harassment of **independent contractors**
    - No **mandatory arbitration agreements** for sexual harassment claims
    - Mandatory annual training

LGBT Employees

- Inconsistent Federal Guidance
  - DOJ and EEOC have taken conflicting positions on whether Title VII protects LGBT individuals from discrimination on the basis of gender.
  - EEOC - *Baldwin v. Dep't of Transportation* (July 15, 2015) – the EEOC held discrimination on the basis of sex includes discrimination on the basis of sexual orientation
  - DOJ & EEOC Do Battle:
    - *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) – DOJ filed an amicus brief arguing that Title VII does not prohibit discrimination on the basis of sexual orientation. The EEOC took the opposite position.
    - Transgender Employees - The EEOC has obtained consent decrees where employees allege they have been terminated because of their gender identity.

LGBT Employees in Utah

- In 2015 Utah passed the compromise Antidiscrimination and Religious Freedom bill.
- Discrimination on the basis of **sexual orientation and gender identity** is prohibited.
  - However, employers may adopt reasonable rules and policies to designate sex-specific facilities, including restrooms, shower facilities, and dressing facilities, so long as employees are afforded reasonable accommodations based on gender identity.
- Freedom of expressive association and exercise of religion is protected
  - Employees may express religious or moral beliefs in the workplace "in a reasonable, non-disruptive, and non-harassing way" "unless the expression is in direct conflict with the **essential business-related interests of the employer**."
  - Employers may not take action based on employees' non-workplace expressive acts unless the expression or expressive activity is in direct conflict with the **essential business-related interests of the employer**."
- There has been no clarification of what it means to conflict with the essential business-related interests of the employer.

Religious Freedom: Masterpiece Cakeshop

***Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) .**

In June, the U.S. Supreme Court held that Colorado Civil Rights Commission erred when it rejected a shop owner's religious objection to making a wedding cake for a couple's same-sex wedding.

- The Court did not address whether the couple's protections against public accommodation discrimination trumped a business owner's religious beliefs.
- The Court did not address whether the shop owner's cake design was a form of speech or whether the couple's request was forcing him to "participate" in their wedding.
- The Office of Federal Contract Compliance Programs has promised to issue proposed regulations on protections for federal contractors with religious objections to compliance with certain federal directives.
- Such as prohibitions against federal contractors regarding sexual orientation or gender identity discrimination.
- Proposed regulations may be issued December 2018.

Marijuana in the Workplace

Medical Marijauna

Proposition 2 – Utah's Ballot Initiative for Medical Marijuana

- Did it pass?
- Proposition 2 would legalize medical marijuana for individuals with qualifying conditions.
  - It does **not** authorize the smoking of marijuana.
  - Individuals can purchase small amounts of marijuana, THC, or cannabidiol, or grow up to six marijuana plants for personal use if there are no dispensaries within 100 miles.
- Proposition 2 prohibits landlords from refusing to rent to medical cannabis users, unless the landlord would lose federal funding.
- Prop 2 is **silent** on how employers are affected.

Medical Marijauna

Legislative Compromise

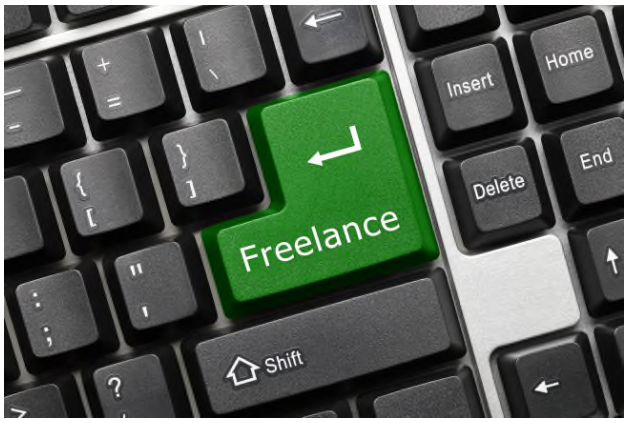
- Regardless of Proposition 2, Utah legislators, supporters, and opponents reached a potential compromise in October. Governor Herbert has called for a special legislative session in November.
- Would ban all home growing.
- Technical tweaks to the forms of marijuana permitted to be sold and the qualifying medical conditions.
- The compromise would allow a set number of privately-operated dispensaries and one publically-operated one, instead of variable numbers based on population.

Medical Marijauna

Impact on Employers?

- Wait and see.
- Courts have held that employers can test employees and make employment decisions based on marijuana use, despite state legalization.
  - New Jersey, Colorado, California, Washington
- Other courts have held that employers cannot discriminate against employees for using medical marijuana, because those state laws have a nondiscrimination provision.
  - Rhode Island, Massachusetts

Gig Economy



Gig Economy

US DOL Study

- On June 7, 2018, the Department of Labor released the results of its study of people working "**contingent jobs**," i.e. workers in the gig economy.
- **10.1 percent** of the nation's workforce. (Other studies estimate percentages as high as 36%.).
- **4 categories of "contingent workers"**:
  - Independent contractors: 6.9%
  - On-call workers: 1.7%
  - Temporary help agency workers: 0.9%
  - Workers provided by contract firms: 0.6%.

Gig Economy: Legislative Changes

- The DOL study may lead to legislative changes.
  - New York State and New York City are expanding employment law protections to independent contractors.
  - Congressional Democrats have proposed federal legislation for pilot programs to provide "portable benefits" for gig workers.
- We are unaware of any Utah changes on the horizon.

Gig Economy: Court Rulings

- Courts are beginning to address the "gig economy," primarily in the context of independent contractor misclassification.
  - *Lawson v. Grubhub, Inc.*, 302 F. Supp. 3d 1071 (N.D. Cal. 2018).
  - Court held Grubhub drivers were **independent contractors and *not* employees**, because GrubHub exercised little control over the details of the workers' work.
- We are unaware of any Utah changes on the horizon.

Justice Kennedy's Retirement

Supreme Court: Justice Kavanaugh

- June 27, 2018, Supreme Court Justice Anthony Kennedy announced his **retirement**, effective July 31, 2018.
  - The **critical swing vote** on a variety of issues.
- October 6, 2018, Supreme Court Justice Brett Kavanaugh was sworn in.
  - At 53 years old, Justice Kavanaugh is the second-youngest member of the Court.

Supreme Court: Justice Kavanaugh

- According to the National Review, Kavanaugh has "repeatedly taken conservative stands and fearlessly defended his **textualist** and **originalist** philosophy."
- Kavanaugh's judicial leanings are notably **pro-employer,** deferring to an **employer's judgment** about how to run its business
- Endorses notions of **common sense and practicality** in the workplace.
- Possible impacts include:
  - Less deference to executive agency interpretations (NLRB, EEOC, DOL);
  - A more conservative stance on issues like affirmative action, LGBT rights, immigration, and worker privacy.

Supreme Court: *Epic Systems*

- *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (May 21, 2018).
- Justice Gorsuch authored a 5-4 decision holding that arbitration agreements requiring individual arbitration and waiving participation in class or collective actions are enforceable under the Federal Arbitration Act ("FAA") and do not violate the NLRA.
  - Employees and the NLRB had argued that the NLRA "effectively nullifies" the FAA with respect to class action waivers in employment contracts.

NLRB: Workplace Rules: A Balancing Act

- In December 2017, the Board returned to a more **balanced approach** to whether **workplace rules** might chill protected activity. *The Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017).
- Overturned *Lutheran Heritage* and created a new test for workplace policies, which considers the:
  1. Nature and extent of the potential impact on Section 7 rights
  2. Employer's legitimate justification associated with the rule.

Workplace Rules

- *Boeing* divides rules into **three categories**:
  1. Those that are generally lawful to maintain;
  2. Those warranting individualized scrutiny; and
  3. Those that are unlawful to maintain.
- *Boeing* applies *only* to the maintenance of **facially neutral rules**.
- Rules that expressly ban protected activity or are directly in response to organizing remain unlawful.

Workplace Rules

- When considering a facially neutral work rule, the Board will examine:
  - Nature and extent of any **potential impact** on NLRA rights, and
  - Employer's **legitimate justifications** for the Work Rule.
- In *Boeing*, Board upheld a policy prohibiting cameras in the workplace based on compelling national security interests

GC Memo 18-04

Category 1: Rules that are Generally Lawful to Maintain

- Rules that do not tend to infringe on employee rights
- Example: Rules prohibiting uncivil behavior, such as name-calling, gossip, offensive language or rudeness

Category 2: Rules Warranting Individualized Scrutiny

- Rules that interfere with protected rights, calling for balancing with legitimate business justifications
- Examples: Broad conflict of interest rules that do not specifically target fraud and self-enrichment; confidentiality rules referencing "employer business" or "employee information" broadly; rules prohibiting disparagement or criticism of the employer

Category 3: Rules that are Generally Unlawful to Maintain

- Rules that prohibit or limit protected conduct
- Example: Confidentiality rules on wages, benefits, or working conditions

The Joint Employer Debate

Joint Employers?

- On Dec. 14, 2017, the NLRB (momentarily) overturned its *Browning-Ferris* **joint employer test**.
  - Under *Browning-Ferris*, **mere authority to exercise indirect control** had been sufficient to result in a joint employer relationship.
- In *Hy-Brand Industrial Contractors*, 365 NLRB No. 156 (Dec. 14, 2017), the Board returned to the **direct control standard** for determining joint employer status.
  - Under *Hy-Brand*, employers that exercise **no "direct and immediate control"** over terms and conditions of employment will not be liable as a joint employer for labor law violations committed by a partner employer.

Joint Employers?

- ***Browning-Ferris* Lives to See Another Day:** On February 9, 2018, an NLRB Inspector General report found that Board Member Emanuel should have been disqualified from participating in the *Hy-Brand* decision.
  - Leadpoint, a party in *Browning-Ferris*, is represented by Member Emanuel's former law firm.
- On February 26, 2018, the Board (*sans* Emanuel) issued an order **vacating *Hy-Brand***, as a result of which "the overruling of the *Browning-Ferris* decision is of **no force or effect**."
- At least for now!

Other Developments....

- **Regulatory Front ... NLRB Proposed Rule in the works**
  - In a June 5, 2018 letter to several senators, NLRB Chairman John Ring announced that the **Board intends to propose a rule** to clarify its definition of a joint employer. Expected this summer ...
- **Legislative Front ...**
  - On July 11, 2018, the House Committee on Appropriations approved legislation that would reduce discretionary spending for DOL and the NLRB, and it also included a provision that would **reverse the NLRB's decision in *Browning-Ferris***.
- **And the DOL gets in the action ...**
  - On June 7, 2017, Labor Secretary Alexander Acosta announced the withdrawal of two Wage and Hour Administrator's Interpretations (AIs), including one on **joint employment** which had stated: "[t]he concept of joint employment, like employment generally, should be defined expansively under the FLSA."

State Action to Monitor

- States around the country have been very active in passing employment legislation recently. Areas to watch include:
  - Medical Marijuana
  - Employment Arbitration
  - Minimum Wage Changes
  - Pay Equity
  - Independent Contractor/Gig Economy Laws

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Questions?

Jason D. Boren
Partner
Labor and Employment

Denise M. Keyser
Partner
Labor and Employment

Ballard Spahr LLP

Trade Secrets and Restrictive Covenants: Keep Your Secrets Safe and Your Employees Honest

Jason D. Boren
Partner
Labor and Employment

Scott A. Wiseman
Associate
Labor and Employment

Introduction

- **Post-Employment Agreements**
  - Non-Competition
  - Non-Solicitation
    - Employees
    - Customers
  - Non-Disclosure (Confidentiality)

- **Trade Secrets**

February 2017 – Utah Study

- Conducted by Cicero Group
- Surveyed 2,000 Utah employees
- Surveyed 937 Utah employers

- Goal to analyze employer and employee understanding of and perspective with respect to non-compete agreements

- Available online at https://issuu.com/saltlakechamber/docs/utah_non-compete_agreement_research

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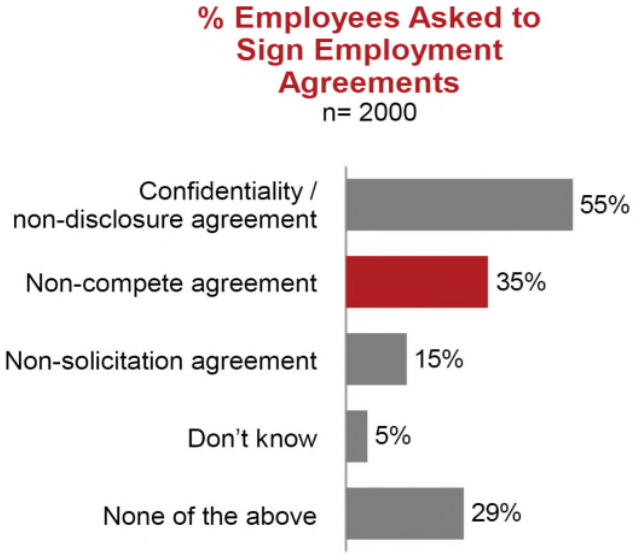
Utah Employees - Overall



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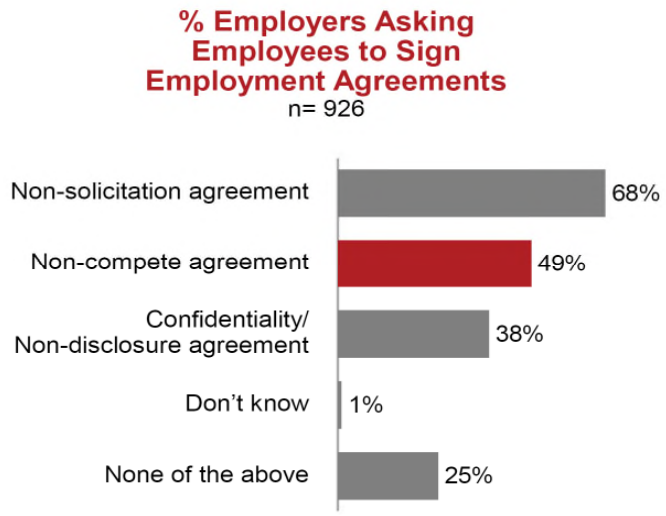
Utah Employers - Overall



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Non-Competition Agreements

- What is a non-competition agreement?
  - An agreement between an employee and employer under which the employee agrees that the employee, either alone or as an employee of another person, will not compete with the employer in providing products, processes, or services that are similar to the employer's products, processes, or services.

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Non-Competition Agreements

- Industries:
  - Management, Information & Technology, Administration & Support
- Position/Level:
  - Managers, executives, and sales professionals
- Occupations:
  - Computer professionals, mathematicians, and human resources
- The larger the employer, the more common the use of non-competition agreements becomes

Non-Competition Agreements

- Why do we have non-competition agreements and how do they protect employers?
  - "[A] covenant not to compete is necessary for the protection of the good will of the business when it is shown that . . . he may likely draw away customers from his former employer, if he were permitted to compete nearby."
    - *Allen v. Rose Park Pharmacy*, 237 P.2d 823 (Utah 1951)
- What is "goodwill"?
  - "Goodwill is the advantage . . . acquired by an establishment . . . in consequence of the general patronage . . . it receives from . . . habitual customers on account of its location, or local position or reputation for quality, skill, integrity or punctuality."

 Peterson v. Jackson, 2011 UT App 113, ¶ 35, 253 P.3d 1096

Non-Competition Agreements

- Requirements for a valid non-compete agreement in Utah
  - Supported by Consideration
  - Negotiated in Good Faith
  - Necessary to Protect Goodwill
  - Reasonable Duration
  - Reasonable Geography
  - Applies only to Special, Unique, or Extraordinary Skills
- "**The reasonableness of the restraints in a restrictive covenant is determined on a case-by-case basis**."
  - *Systems Concepts v. Dixon*, 669 P.2d 421, 427 (Utah 1983)

Non-Competition Agreements

- Recent developments in Utah law regarding non-competes
  - Post-Employment Restrictions Act, H.B. 251 (2016)
    - Codified at Utah Code Ann. § 34-51-101 *et seq.*
    - Effective May 10, 2016
    - Limits durational term of a non-compete agreement to 12 months
    - Does not impact non-solicit or confidentiality agreements
  - Notable Exceptions
    - Certain broadcast employees have special restrictions
    - Does not apply to severance agreements
    - Does not apply to the sale of a business

Non-Solicitation Agreements

- What is a non-solicitation agreement?
  - An agreement between an employee and employer under which the employee agrees that the employee, either alone or as an employee of another person, will not solicit the employer's customers or employees to either (1) engage in a competitive business; and/or (2) discontinue their relationship with employer.
- What does it mean to "solicit"?

Non-Solicitation Agreements

- Advantages of a non-solicitation agreement
  - No requirement for "special, unique, or extraordinary" job skills
  - Not subjected to duration limitations of H.B. 251
    - Although duration of non-solicitation still must be "reasonable" and not unlimited, they are enforceable for more than one year
- Still must meet other "reasonableness" requirements for a valid non-solicitation agreement in Utah
  - "Reasonableness" depends entirely on the facts and circumstances of each employer and employee
  - Must be narrowly tailored to protect employers' interests

Non-Disclosure Agreements (NDAs)

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Non-Disclosure Agreements

- What is a non-disclosure (also known as a confidentiality) agreement?
  - An agreement between an two parties under which the receiving party, will not disclose certain confidential information about the disclosing party to other third-parties.
  - Most common restrictive covenant agreement, as more than 50% of Utah employees have been asked to sign one.
- What is “confidential information”?

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Non-Disclosure Agreements

- Advantages of a non-disclosure agreement
  - Almost never considered unreasonable – therefore the agreement can provide a high level of protection
  - Can restrict disclosure of information other than "trade secrets"
  - No requirement for "special, unique, or extraordinary" job skills – doesn't even have to be an employee
  - Not subjected to duration or geographic limitations
- Still must meet other "reasonableness" requirements for a valid non-disclosure agreement in Utah
  - Best way to be reasonable is to have a clear definition of what is and what is not "confidential information"

Enforcement of Employment Contracts

- How frequently do employees violate non-competes?
  - Estimated 11% of employees
- How frequently do employers address non-competes?
  - Never – 37% of employers
  - Less than Once Per Year – 50% of employers
  - Once Per Year – 9% of employers
  - More than Once Per Year – 4% of employers

Enforcement of Employment Contracts

- Demand letter
- Litigation - Breach of Contract
- Pre-Judgment Relief
  - Temporary Restraining Orders / Preliminary Injunctions
  - Must move fast!
- There must be damages
  - *TruGreen Cos., LLC v. Mower Bros.*, 2008 UT 81, 199 P.3d 929
    - Correct measure of damages is lost profits
    - Restitution or unjust enrichment damages are inappropriate

Trade Secrets

- Utah Uniform Trade Secrets Act – "UTSA"
  - Utah Code Ann. § 13-24-1 *et seq*.
- "'Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:
  - (a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
  - (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy"

Trade Secrets

- Defend Trade Secrets Act of 2016 – "DTSA"
  - 18 U.S.C. § 1836 *et seq.*
- Enacted into law on May 11, 2016
- Allows owners of trade secrets to sue in federal court
- Definition of "trade secret" is nearly identical to the UTSA

Trade Secrets

- When does a document become a trade secret?
- Reasonable efforts to maintain secrecy
  - Non-Disclosure / Confidentiality Agreements
  - Training programs
  - Employee handbooks / Policies & procedures
  - Password encryption
  - VPN / Anti-virus protection software
  - Restricted access on "need-to-know" basis
  - Software to prevent transfers to removable media

Trade Secrets

- Misappropriation of Trade Secrets Under the UTSA:
  - Must establish the existence of
    - A protectable trade secret; and
    - Demonstrate misappropriation
      - Misappropriation may be established upon proof of either;
        - Acquisition; or
        - Disclosure / Use.
  - "Improper means" is theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.

Trade Secrets

- Injunctive Relief
  - Available for actual or threatened misappropriation
    - Utah Code Ann. § 13-24-3
- Damages
  - Actual loss and unjust enrichment (when use is proven); or
  - A "reasonable royalty" (when no use is proven)
    - Utah Code Ann. § 13-24-4
- Attorneys' Fees
  - Available for a "willful and malicious misappropriation"
    - Utah Code Ann. § 13-24-5

Best Practices

- Ask new hires if they are subjected to any restrictive covenant agreements
- Review your current agreements to ensure compliance with H.B. 251 and other "reasonableness" requirements
- Maintain complete and easily accessible employee files
- Control access to confidential information / trade secrets
- Enact policies & procedures re: confidential information
- Mandatory employee education / training sessions
- Conduct exit interviews

Exit Interviews

- It is vital to remind employees of their post-employment restrictions during their exit interview.
- While 61% of employers claim they remind employees at the time of departure, only 15% of employees claim their employer reminded them.
- A stark **66%** of employees said they were <u>never</u> reminded of their restrictions.
- Reminders are important, especially given –
  - Employees oftentimes forget about documents they signed
  - Demonstrates intent to enforce the restrictions

Final Thoughts

- Currently an uptick in employment agreement litigation
- Make sure your employment agreements are up to date
  - Sometimes, a "one-size fits all" agreement will not work for all types of employees
- Protect your confidential information and trade secrets
  - Employee education, password protection, and limiting disclosure to need-to-know basis
- Schedule a productive exit interview
  - Remind employees of their restrictions

Questions

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Trade Secrets and Restrictive Covenants: Keep Your Secrets Safe and Your Employees Honest

Jason D. Boren
Partner
Labor and Employment

Scott A. Wiseman
Associate
Labor and Employment

Ballard Spahr LLP

Paying it Right the First Time

Tiptoeing Your Way Through the Wage and Hour Minefield

Steven W. Suflas
Partner
Labor and Employment

Fair Labor Standards Act

- The Fair Labor Standards Act (FLSA) sets the minimum wage and governs overtime payments for workers
- An employee who works more than 40 hours per week is entitled to overtime compensation at a rate of one and a half times the employee's regular rate of pay
- Certain classes of employees are exempt from the minimum wage and overtime provisions
- State laws can impose additional obligations as can private agreements like collective bargaining agreements and individual employment agreements
- Rights are non-waiveable

Question 1

- A food and beverage company delivery driver:
  - signs an agreement stating that he is an independent contractor
  - decides which assignments to accept or refuse
  - has a background check performed by the company
  - is paid by the trip not by the time he spends making it
  - uses his own devices to navigate and communicate with the company but has to log onto the company's system to get and report assignments
  - has identification issued by the company
  - has to comply with company-imposed standards, including grooming standards
  - is trained on and required to comply with certain company policies

Question 1 (cont.)

- How should the driver be classified?
  - A. Employee
  - B. Volunteer
  - C. Intern
  - D. Independent contractor

Independent Contractors

- There is no single rule or test to define whether an individual is an independent contractor or an employee for all purposes
- Rather, the IRS, the courts, and various federal and state agencies have developed separate but similar tests to evaluate an individual's status

Common Law Test

- An employment relationship exists if the company exercises "control" or has the "right of control" over the individual's performance of the job and how the individual accomplishes the job
- Factors:
  - Extent of control that the company may exercise over the details of the work
  - Whether the worker is engaged in a distinct occupation or business
  - The kind of work and whether it is typically done under the direction of an employer or by a specialist without supervision

Common Law Test

- Factors continued:
  - The skill required in the particular occupation
  - Who supplies the tools and place of work
  - The length of time for which the worker is employed
  - The method of payment (by time or by job)
  - Whether the work is part of the regular business of the company
  - Whether the parties believe they are creating an employer-employee relationship

FLSA – Economic Reality Test

- Consider "whether the individual is economically dependent on the business focusing on 5 factors:
  - The degree of control exerted by the alleged employer;
  - The worker's opportunity for profit or loss;
  - The worker's investment in the business;
  - The permanence of the working relationship; and
  - The degree of skill required to perform the work
- Many courts also look at whether the contractor's service is an integral part of the alleged employer's business

DOL Guidance

- In July 2015, DOL issued guidance that "most workers are employees" under the FLSA
  - The guidance was withdrawn in 2016
- In July 2018, the DOL issued guidance on mis-classification in the home health care industry:
  - Employee background checks or basic training do not make someone an employee
  - Evaluating the quality of the work, directing which assignments to take, directing how the work is performed, and approving time off are all inconsistent with independent contractor status

The ABC Test

- The most restrictive test is the "ABC" test
- It is often used by courts for unemployment compensation determinations
- California and New Jersey Supreme Courts adopted it for state wage and hour claims
  - Massachusetts has done so by statute
- New York recently adopted this test for workers compensation claims involving Uber drivers

The ABC Test

- The "A" Prong
  - Whether the individual is free from control or direction over the performance of his service, similar to the common law test.
- The "B" Prong
  - Is the service performed by the individual either outside the usual course of the business of the employer OR outside of the employer's places of business.
- The "C" Prong
  - The individual is engaged in an independently established trade, occupation, profession or business separate and apart from the relationship with a particular employer.

Legal Implications

- Tax Consequences
- Unpaid Wages and Benefits

Question 2

- A company which provides home health services contracts with a staffing agency for nurse case managers
- The company sets the qualifications for the case managers, has the authority to select which case managers will be assigned and has the authority to have case managers removed from their account for any reason
- The case managers report their hours to and are paid by the staffing agency.

Question 2 (cont.)

- A case manager claims that they were not properly compensated. Who is responsible?
  - A. The staffing company
  - B. The health care company
  - C. Both – they are joint employers
  - D. Neither – the case manager is an independent contractor

Joint Employment

- A joint employment relationship exists when both entities:
  - Have the power to hire and fire;
  - Supervise and control employees' work schedules;
  - Determine the rate and method of compensation; and
  - Maintain employee records
- The impact of FLSA joint employer status can be significant because:
  - Hours worked for one employer will count, for overtime purposes, as hours worked for the other
  - Both are liable for wage and hour violations

Question 3

- A large church operates a cafe and during services, the pastor encourages members to volunteer to work the cafe by announcing that those who do not volunteer will "renounce god" and wind up in hell. Congregants volunteer on a full time basis under threat of eternal damnation.

Question 3 (cont.)

- Did the cafe violate the FLSA by not paying congregants for their full-time work?
  - A. Yes. The work isn't voluntary and they are working full-time.
  - B. Yes. Rights under the FLSA are non-waiveable.
  - C. No. The cafe is owned by the church so the FLSA does not apply.
  - D. No. The cafe is a non-profit and the congregants knew they would not be paid.

Volunteers

- The FLSA exempts volunteers who perform service:
  - For a state or local government agency
  - For humanitarian purposes for private, non-profit food banks or
  - Without anticipation of compensation, for religious, charitable, civic, or humanitarian purposes
- Where volunteers receive a stipend it can bring volunteer status into question
  - Any compensation for a volunteer should be minimal

Volunteers

- Employees can volunteer for their non-profit employers provided that:
  - They provide their services without expectation of compensation
  - They offer their services voluntarily (without coercion) from the employer and
  - They perform services different from those they would otherwise be performing

Question 4

- Holly the HR Manager is asked to determine whether an employee is entitled to overtime after the employee makes a complaint. Holly should:
  - A. Review the employee's job description
  - B. Talk to the employee's manager
  - C. Talk to the employee or observe their work
  - D. Look at how and what the employee is paid
  - E. Do whatever she needs to do to understand the employee's job responsibilities

Evaluating Job Duties

- When looking at job duties, focus on the primary duty
- There is no strict percent of time that must be spent on the primary duty under the FLSA, but it should not be insignificant over time
- Actual job duties, not job titles or job descriptions are important
- Job descriptions that accurately reflect the job duties can be helpful, those that do not are at best useless and can actually be harmful in litigation or a DOL audit

Primary Duty

- To the quality for an exemption, the employee's "primary duty" must be the performance of exempt work
- The "primary duty" is the principal, main, major or most important duty that the employee performs
- Consider:
  - Relative importance of exempt duties compared to others
  - Amount of time spent performing exempt work
  - Freedom from direct supervision

Exempt Employees

- Major Categories of Exemptions:
  - Executive
  - Administrative
  - Professional (Learned, Creative, and Computer)
  - Outside Sales
  - Highly Compensated
- Partial Exemptions:
  - Nurses and other health care employees
  - Fire Fighters and police officers
  - Law Enforcement

Executive Exemption

- Not all managerial and supervisory employees are exempt
- Must supervise two or more employees, but doing so is not enough
- Managing a recognized department or subdivision must be a primary duty
- Employee must have authority to hire, fire, and discipline or be relied upon to give recommendations on such matters
- Litigation frequently focuses on lower level supervisors

Administrative Exemption

- Production v. Administrative
  - What goods or services does your company provide?
  - What is the employee's role in the enterprise?
  - Does the work performed by the employee directly increase company revenues?
- Matters of Significance
  - Is the employee involved in business or strategic planning or similar activities?
- Discretion and Independent Judgment
  - What decisions can the employee make?

Professional Exemption

- Job must require specialized academic knowledge:
  - Almost always means a college or specialized degree in the field (not just a degree in any field)
- Examples:
  - Registered nurses, certified medical technologists, dental hygienists, and physician assistants generally exempt, licensed practical nurses and paramedics/EMTs are not
  - Accountants are generally exempt, bookkeepers are not
  - Lawyers are exempt, paralegals are not
  - Athletic trainers are generally exempt, coaches generally are not unless they qualify as teachers

Computer Professional Exemption

- The computer professional exemption generally applies to:
  - Computer systems analysts
  - Computer programmers
  - Software engineers
- This exemption is not meant to be applied to employees whose work is highly dependent on or facilitated by the use of computers and computer software programs
- "Help desk" activities are not exempt

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Outside Sales Exemption

- Primary duty of making sales or obtaining orders/contracts
- Customarily and regularly engaged away from the employer's place of business in making sales or obtaining orders/contracts
- Need not be paid on a salary basis
- To qualify in Pennsylvania, must customarily and regularly spend more than 80% of work time away from the employer's place of business

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Highly Compensated Employees

- An employee paid on a salary basis at least $455 per week with total annual compensation of at least $100,000 is deemed exempt if the employee customarily and regularly performs duties meeting at least one of the executive, administrative or professional exemption requirements
- When a portion of the compensation is paid through bonuses or commissions or other non-salary, the employer has a window at the of the year to bring the salary above the threshold if necessary
- Pennsylvania has never adopted this exemption

"Fair Reading" of Exemptions

- Traditionally, courts and the DOL have said that exemptions are narrowly construed, and the employer will always bear the burden of proving that it has correctly classified an employee as exempt
- In *Encino Motorcars, LLC v. Navarro*, 16-1362, 584 U.S. ____ (2018), the Supreme Court rejected that principle, finding that it had no textual basis in the FLSA
- Instead, the Court held that there was no reason to give the exemptions anything other than a "**fair reading**"
- This ruling has the potential to significantly shift how courts review claims under the more than two dozen FLSA exemptions

Question 5

- An exempt employee is caught drinking alcohol on the premises, in violation of the company's drug and alcohol policy, and sent home. The employee is also suspended for 3 days. The company wants to make the suspension unpaid. What can the company deduct from the employee's pay?

  A. 1 week pay

  B. 3 days' pay

  C. 3.5 days' pay

  D. Nothing

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Salary Basis

- Most exemptions require employees to be paid a minimum amount of money on a salary basis
- The salary requirement is currently $23,660 annually (at last $455 per week)
  - The salary level is under review by USDOL and likely to increase.
- Salary basis means the required salary is not subject to reduction based on the quality or quantity of work performed
  - You can always make employees non-exempt by paying hourly instead of salaried
- The regulations only permit deductions in limited circumstances
- Additional payments can be made
- Biggest issues and partial day deductions and disciplinary suspensions

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Permitted Deductions

- Can deduct if an exempt employee:
  - Is absent from work for one or more full days for personal reasons
  - Is absent for one or more full days for sickness or disability, if the deduction is made in accordance with bona fide plan for providing compensation for loss of salary occasioned by such sickness or disability
  - Violates important safety rules
  - Breaks a serious workplace conduct rule (e.g., sexual harassment, workplace violence, drug and alcohol abuse) (full day increments only)
  - During initial and terminal weeks of employment or
  - Takes unpaid leave under the FMLA

Question 6

- Company policy requires employees to get approval in advance for any overtime work. Employees are given remote access to work email and computer systems. Employees are told to report any time they do work outside the office and given forms to do so.

Question 6 (cont.)

- During an exit interview, employee claims that she regularly worked at home without compensation. Is the company liable?
  - A. No. The employee did not have permission to work the overtime.
  - B. Yes. The company gave the employee remote access.
  - C. Yes. The company could have monitored the employee's remote access to know when she was working.
  - D. It depends.

Best Practices for Managing Overtime

- Consider adopting policies requiring employees to get approval for overtime in advance and enforce them
  - Employees must be paid for all hours worked that employers know or should have known about, even if unauthorized
  - Send employees home – do not let employees work OT without authorization
  - Employees can be disciplined for unauthorized overtime work in violation of company policy

Capturing Time Outside the Office

- Develop a plan to ensure that all time worked by non-exempt employees is being captured
  - Time tracking methods vary – no particular method required as long as it accurately captures time
    - Consider electronic solutions like time capturing apps
  - Educate employees about the need to report ALL time worked
  - Limit access by non-exempt employees to work tools after hours or have a system to track and pay for this time
  - Educate supervisors about limiting contact with non-exempt employees after hours

The *De Minimis* Rule

- An employer may disregard "insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes"
- This does not give carte blanche to ignore time that you know employees are working or forgive not having a system in place to have employees track and report it

Question 7

- A company determines that an employee is owed back overtime. What should the employee do?
  - A. Nothing. Hope the employee does not complain because the back pay decreases every day that goes by.
  - B. Pay the employee two years back pay in exchange for a release.
  - C. Go to the Department of Labor for them to supervise the back pay.
  - D. It depends.

Settlements and Releases

- Rights are non-waiveable so employers cannot get a release of claims without court approval or DOL supervision
- Statute of limitations is 2 years back from the date the claim is made; 3 if the violation is "willful"
- Knowing about and not correcting a FLSA violation makes it willful

Question 8

- As part of an athletic apparel company's marketing strategy, employees are expected to take Pilates classes at gyms that are not connected to the company (it pays for the cost of the class) and employees are encouraged to purchase its apparel. Is the company required to pay its employees their hourly wage for time spent attending Pilates classes?

  A. Yes

  B. No

  C. It depends

Training

- Typically, time employees spend attending training and seminars does not count as working time if all of the following conditions are satisfied:
  - The session is outside of the employee's regular working hours;
  - Attendance is voluntary;
  - The training is not "directly related" to the employee's job; and
  - The employee does not perform productive work during the training.

Question 9

- A product delivery company pays its delivery drivers a flat daily rate no matter how many hours they work. Some of the compensation is for regular hours worked and some is for overtime hours, but they receive the same overall amount per day. Does this violate the FLSA?

  A. Yes

  B. No

  C. It depends what the parties agreed to

Overtime Calculations

- Overtime generally has to be paid at 1.5x the regular rate
- Under the FLSA, non-exempt employees can be paid on a salary which covers all scheduled hours
- Overtime still needs to be paid for hours over 40
- Under the FLSA, can pay on the "fluctuating workweek" method
  - Fixed salary covers all straight time hours, both when more than 40 and less than 40 worked
  - Overtime is paid based on salary divided by hours worked each week times one half times hours over 40

Question 10

- Collective bargaining agreement provides for 30 minute unpaid lunch and two unpaid 15 minute breaks. Some days, employees do not get all their breaks. What has to be paid?
  - A. All time worked during lunch plus all break time
  - B. Only the work time
  - C. Only the missed breaks
  - D. Nothing

Compensable Meal Periods

- "Bona fide" meal periods are not working time and need not be paid
- There are two criteria for a "bona fide" (*i.e.*, unpaid) meal period:
  - The break must generally be at least 30 minutes long, though in exceptional cases it may be shorter; and
  - The employee must be completely relieved of all duties for the purpose of eating a meal

Compensable Rest Periods

- Rest periods of less than 20 minutes must be paid as working time
- Breaks that "break" an employer's rules need not be counted as working time if the employer has expressly and unambiguously communicated limitations on rest breaks and advised employees of the consequences for violating the policy
  - Only the duration of the unauthorized extension may be treated as unpaid, non-working time
- Not paying for missed breaks may lead to state wage payment claims

Question 11

- Company provides employees target bonus amounts under their written bonus plan, which has a formula for calculating payments and a time when bonuses will be paid
- Bonuses are subject to adjustment (up or down) based on employee performance during the bonus year
- Bonus plan says that whether bonuses will be paid any year is wholly in the company's discretion

Question 11 (cont.)

- Company pays a bonus to non-exempt employees. What is the impact on their overtime earnings?
  - A. None. The bonus is discretionary.
  - B. The bonus needs to be included in the overtime for the pay period when it is paid.
  - C. The overtime for the entire period covered by the bonus has to be recalculated to include the impact of the bonus.
  - D. It depends on how the bonus is calculated.

Bonuses and Lump Sum Payments

- Bonuses are generally divided into two categories: discretionary and nondiscretionary.
- Only discretionary bonuses are excluded from the "regular rate."
- A bonus generally will be includable (nondiscretionary) if:
  - an employer announces in advance that it intends to pay a bonus at a specific time;
  - a bonus of a particular amount is promised in advance; or
  - the bonus has been guaranteed to employees by agreement, promise, or contract, including in a collective bargaining agreement.

Bonuses and Lump Sum Payments

- Examples of nondiscretionary bonuses:
  - Bonuses announced to employees to induce them to work more steadily, rapidly, or efficiently;
  - Attendance bonuses;
  - Individual or group production bonuses;
  - Bonuses for quality and accuracy of work; and
  - Bonuses contingent upon the employee's continuing in employment until the time payment is to be made.

Impact on the Regular Rate

- Nondiscretionary bonuses must be included in the regular rate, "apportioned back over the workweeks of the period during which it may be said to have been earned."
- An employer may, however, pay a non-discretionary bonus without having to include it in the regular rate if the bonus itself is calculated as a percentage of the employee's **total** earnings.
  - Bonus must be paid as a percentage of total earnings, **including overtime compensation**, paid over the designated time period.
  - Such bonuses may be tied to employee performance. For example, employer's policy may provide for a bonus of 2% of total compensation for marginal performers, 5% for good performers and 10% for exceptional performers. The key is that the percentage is based on all compensation, including overtime premiums, paid during the operative period.

Final Thoughts

- Don’t neglect payroll rules to ensure salary basis is being followed and overtime calculations are being done appropriately
- Pay special attention to practices for capturing time, whether on or off the property
- Pay on a timely basis
  - Recent uptick of cases alleging delayed payment of wages and overtime seeking liquidated damages

Questions?

THANK YOU FOR JOINING US!

Steven W. Suflas
Partner
Labor and Employment

Ballard Spahr LLP

Discovery Issues in Employment Litigation

Tips to Save You Time and Money

Melanie J. Vartabedian
Partner
Ballard Spahr

Nathan R. Marigoni
Associate
Ballard Spahr

Discovery is (Almost) Inevitable

- Employment cases are difficult to resolve on a motion to dismiss.
- Complaint need not set forth "[s]pecific facts" that "establish a prima facie case," only "some relevant information to make the claims plausible on their face."
  - Khalik v. United Air Lines (10th Cir. 2012).

Discovery is Asymmetrical

- In employment litigation, the employer has most, if not all, of the relevant discoverable information.
- Your records will often be your main defense.
  - Generally, an employer must rebut the Plaintiff's case by showing a legitimate, nondiscriminatory reason for the employment decision.

Discovery is Expensive

- A 2010 survey of Fortune 200 companies revealed an average discovery cost in "major" general litigation cases of $621,880 to $2,993,567.
- Courts are inclined to allow employees discovery even if costly for the employer to produce.
  - Wagoner v. Lewis Gale Med. Ctr., LLC (W.D. Va. 2016) ($45,570 to produce emails allowed even though cost exceeded Pl's damages)
  - Zubulake v. UBS Warburg LLC (S.D.N.Y. 2003) ($300,000 to search backup tapes for responsive emails)

Costs of Discovery

- Discovery Disputes
  - Protective orders, motions to compel
- Searching and Production Costs
  - Data restoration, forensic imaging, data processing and hosting costs
- Sanctions
  - Costs and fees for non-compliance or spoliation
- Expert witnesses
  - Preparation of report and discovery of opponent's witness

Scope of Discovery

- How much information could there be?
- Federal rule: "[A]ny nonprivileged matter that is relevant to any party's claim or defense..."
  - Fed R. Civ. P. 26(b)(1).
- Utah rule: "[A]ny matter, not privileged, which is relevant to the claim or defense of any party..."
  - Utah R. Civ. P. 26(b)(1).

Scope of Discovery

- What's relevant?
- Evidence that has "any tendency" to make a fact of "consequence in determining the action" more or less probable.
  - Fed. R. Evid. 401; Utah R. Evid. 401

Scope of Discovery

- Employee Personnel File
  - Hiring Documents
  - Employment Records
  - Payroll and Time/Wage Records
  - Termination Documents

* Contents and retention requirements for personnel files may be governed by state or local statutes.

Scope of Discovery

- Emails
- Personnel Data
- Policies and Procedures

Discovery Obligations

- Employer's Obligations in Discovery
  - Preserve potentially relevant information
    - Sanctions under Rule 37, spoliation doctrine
      - Gomez v. Cabatic (N.Y. App. Div. 2018) (approving $500,000 punitive damages award for destruction of evidence)
      - Daynight, LLC v. Mobilight, Inc., (Utah 2011) (affirming entry of default judgment against party that failed to preserve laptop)
      - Philips Elecs. N. Am. Corp. v. BC Tech. (D. Utah 2011) (recommending striking of pleadings and entry of default for deleting data from computers on the eve of court-ordered collection of ESI)

Discovery Obligations

- Produce Relevant Documents
  - Documents must generally be produced "as they are kept in the usual course of business." Fed. R. Civ. P. 34; Utah R. Civ. P. 34.
  - Initial Disclosures – Early in Litigation
    - All documents the party may use to support its claims or defenses.
  - Discovery Responses
    - Relevant, non-privileged, documents and information responsive to specific requests propounded by opponent.

Discovery Obligations

- Depositions
  - Individual Depositions of Relevant Persons
  - Rule 30(b)(6) Deposition of Corporate Representative(s)
    - Must prepare to testify as to all "information known or reasonably available to the organization"

Managing Discovery

- How then to manage cost and burden of discovery in employment litigation?

Managing Discovery - Pre-Litigation

- Familiarize yourself with how information is stored and retained by your company.
  - What is your retention/destruction policy for documents and electronically stored information?
    - Is it consistently applied? Can you effectively impose a litigation hold? Fed. R. Civ. P. 37(e).
    - Is it long enough? Title VII claims must generally be filed administratively within 300 days. Section 1981 race-discrimination claims may be brought within four years.

Managing Discovery - Pre-Litigation

- Is your ESI readily accessible and searchable?
  - Wagoner v. Lewis Gale Med. Ctr., LLC, 2016 WL 3893135 (W.D. Va. July 14, 2016) (employer's decision to store data in non-searchable format did not render that information 'not readily accessible.")

Managing Discovery - Pre-Litigation

- Ensure Personnel Files are Up-to-Date and Accessible
  - Are the files electronic or physical? Both?
  - Periodic review or pre-termination review to ensure key files are present.
  - Review any post-employment restrictions at termination or separation.

Managing Discovery - Pre-Litigation

- Ensure Information is Timely Preserved
  - "[L]itigants have a duty to preserve documents or materials—including electronic documents and materials—that may be relevant to ongoing and potential future litigation. In most cases, the duty to preserve is triggered by the filing of a lawsuit, but that duty may arise even before a lawsuit is filed if a party has notice that future litigation is likely."

    Philips Elecs. N. Am. Corp. v. BC Tech. (D. Utah 2011).

Managing Discovery - Pre-Litigation

- What might cause you to anticipate litigation?
  - Nature of termination or resignation
  - Prior formal or informal complaints
  - Protected classes
    - Race, Sex, Religion, Age, Disability
  - If difficult termination is anticipated, involve counsel before action is taken to ensure relevant information is documented and preserved.

Managing Discovery - Litigation

- Get relevant information to counsel early
  - Basic facts of claim
  - Key documents
  - Identity of relevant witnesses/custodians of records
  - Data preservation policies and systems
    - Identify relevant parties to whom litigation hold should be addressed, i.e., IT Management, HR, etc.

Managing Discovery - Litigation

- Protective Orders
  - Courts have significant discretion to enter orders to protect parties or avoid undue burden or expense. Utah R. Civ. P. 37(a)(7); Fed R. Civ. P. 26(c).
  - If you anticipate that confidential or sensitive information may be sought, an early protective order can protect that information and prevent discovery disputes down the road.

Managing Discovery - Litigation

- Preparing for Disclosure and Discovery
  - Allow counsel access to documents "as they are kept in the usual course of business."
    - The relevance of documents is often only apparent in context.
    - Err on the side of overproduction to counsel. Counsel needs to make the final call on whether documents are discoverable, relevant, and responsive.
    - Emails forwarded to counsel cannot be produced without additional review and redaction; provide native access.

Managing Discovery - Litigation

- Preparing for Disclosure and Discovery
  - Ensure counsel understands acronyms, jargon, or terms of art to identify search terms and key words for review.
  - If corpus of documents is large, eDiscovery software may result in less costly review that offsets data processing/hosting costs.

Managing Discovery - Litigation

- Discovery Disputes
  - Keep dialogue open with counsel regarding the costs and burdens of discovery requests, particularly if requested discovery is inaccessible.
    - Costs of producing inaccessible ESI may be shifted to requesting party.
  - Specificity is required to object on the basis of undue burden and lack of proportionality. Failure to explain burden or cost may result in waiver. Fischer v. Forrest (S.D.N.Y. 2017).

Managing Discovery - Litigation

- Discovery Disputes
  - Pick your battles. Cost of production may be less than cost of discovery motions.
  - Even with streamlined discovery motions under Utah and local federal rules, discovery disputes remain expensive.
  - Attorney-fees may be awarded to prevailing party:
    - Fed. R. Civ. P. 37(5)(A) (court must award costs and attorney fees to prevailing party).
    - Utah R. Civ. P. 37(a)(7), (a)(8) (party may request, and court may award, costs attorney fees incurred in bringing motion).

Post-Termination Covenants

- Special Consideration for Trade Secret, Solicitation, and Non-Compete Claims
  - Third-party discovery against your employee's new employer is often critical.
    - Discovery disputes are nearly inevitable, as the new employer has every incentive not to cooperate.
    - New employer is also a competitor and will fight most requests.
  - Claims against former employees will also expose your company's financials and other confidential information to discovery.

Questions?

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Sexual Harassment in the #MeToo Era Hypotheticals and a Panel Discussion

Moderator
Denise M. Keyser
Partner
Labor and Employment

Panelists

Steven W. Suflas
Partner
Labor and Employment

Melanie J. Vartabedian
Partner
Labor and Employment

Jason D. Boren
Partner
Labor and Employment

Agenda

- #MeToo
  - Overview
  - Reaction
- Hypotheticals and Panel Discussion
- Things to Consider
- Q&A

#MeToo – In the Spotlight...

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Hypotheticals and Proactive Measures in Practice

Scenario #1

- Everyone in the office regards Alice, who is the youngest employee, as the most fashionable and friendliest person around the office.
- Alice typically wears skirts and dresses to work, which often are very short. The company instituted an office dress code policy three years ago that prohibits "overly suggestive" and "offensive" apparel. The dress code policy has never been enforced and HR has been planning to talk to Alice about her outfits.

Scenario #1

- Alice often takes a selfie of her work outfit in the office in her best Kim Kardashian pose, and posts it to her Instagram account, with captions like "Check me out" and "Rockin' the Jimmy Choos today!" Many of her followers are coworkers.
- Alice reports to her supervisor, Jeff, that a coworker, Steve, keeps complimenting her outfits and asking her out. She reports that Steve frequently tells her "you look nice today" and "that is a beautiful outfit," making her feel uncomfortable at work.

Scenario #1

- Alice has been friends with a coworker, Mark, in the past, and they went out for lunch at local restaurants on many occasions. Mark works in a different department.
- Mark asks Alice to go out to dinner with him after work on Friday. Wanting to be polite, Alice goes with him to dinner. At dinner, they mostly talk about work-related topics, like a project they are working on together as part of a team consisting of employees from several departments. The next time Mark asks Alice out for dinner and a movie, she turns him down. Mark starts pressuring Alice to spend time with him outside the office. Alice refuses but Mark keeps asking her.
- Mark later stops including Alice on some project-related meeting invites. When she asks him about it, he apologizes and forwards the invites to her.
- Alice reports this situation to Jeff.

Scenario #1

- To Jeff, neither the situation involving Steve, nor the situation involving Mark, sounds particularly concerning.
- Jeff thinks Alice is being overly sensitive and exaggerating both situations. He asks her if she really wants to make such a big deal out of either situation, especially since she has to work with Mark and Steve every day and it might make everyone uncomfortable. She reluctantly says maybe not.

Discussion Point #1

What are Jeff's responsibilities, if any?

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Scenario #2

- Alice's job includes providing good customer service to the company's clients. One of Alice's key client accounts is Howard's company.
- Howard is the second top client – an important account – and has been doing business with the company for over 20 years.
- Whenever Howard comes to the office, which is usually once or twice a month, he wanders around chatting with the female employees in the office. He has a reputation for being very social.
- Howards tends to hang around Alice's work area for prolonged periods of time, since she is responsible for his account. Alice laughs nervously at his jokes and appears a bit anxious when Howard is around.
- Alice has not shared any concerns with coworkers or her manager. You have witnessed this behavior.

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Discussion Point #2

As the HR Professional, could you and should you do something?

Scenario #3

- Alice develops an attraction to her supervisor, Jeff. She posts about him on social media, sharing how much she wants to ask him out since they are both single.
- At the encouragement of her social media followers, some of whom are other employees of the company, Alice asks Jeff out.
- Jeff declines at first. But after multiple asks, Jeff consents. They go out for after-work drinks a few times. After a few dates, Alice voluntarily begins a sexual relationship with him.
- Most employees are aware that they are dating. At work, they sometimes share a peck on the cheek, but otherwise all of their interactions in the office are professional.

Scenario #3

- A few months after their relationship began, Alice was transferred to report to a new supervisor, Eric. Eric immediately notices that Alice's performance does not meet expectations and he starts the counseling process by delivering a verbal counseling to Alice.
- As Alice's annual review approaches, Eric solicits feedback from Jeff about her performance. Jeff gives Alice a glowing performance review for the 9 months he supervised her.
- Eric, however, ranks Alice's performance as not meeting expectations and recommends that she be put on a performance improvement plan.
- After Alice receives her annual review, Alice complains to HR about the rating that Eric gave her. She alleges that Eric is jealous of her relationship with Jeff and is trying to get rid of her.

Discussion Point #3

Have any company policies been violated?

Scenario #4

- Eric believes that the low performance rating is justified. Alice's performance does not improve, and he places Alice on a PIP.
- Alice again comes to HR, alleging that she recently tried to break off her relationship with Jeff, but now is fearful of losing her job because she saw Jeff and Eric whispering and overheard her name. She thinks Jeff is encouraging Eric to criticize her performance.
- To back up her claims, Alice has screen shots of emails between Eric and Jeff that she took off Jeff's company phone, since she knows his password, and texted to her personal phone.
- Alice also brings up her previous issues about her coworker Steve who commented on her appearance, as well as her concerns about Howard.

Scenario #4

- Shortly after Alice leaves the HR department, Joey, Alice's coworker, stops by HR to request FMLA paperwork for an upcoming surgery. While chatting with the payroll clerk, who is his buddy from high school, Joey mentions that he is sick of being treated unfairly by Jeff, who is his supervisor.
- Joey shares with the clerk that Jeff has warned him about his tardiness while Alice has not been spoken to about her lateness. Joey also shares that he believes that Alice gets preferential treatment at work because of her relationship with Jeff.
- Joey asks his buddy not to tell anyone what he said, since he does not want anyone to get in trouble.

Discussion Point #4

What are the factors and/or issues to consider here?

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Scenario #5

- You begin investigating the various claims raised. You ask Alice for her Facebook, Instagram and Snapchat passwords. She declines to provide it.
- An anonymous note ends up on your desk the next day that gives Alice's social media passwords. You test them out, and they work. You discover that Alice made suggestive posts about Jeff on her social media accounts for months before the relationship began. She has troves of photo-shopped pictures of him and her in compromising poses.

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Scenario #5

- You also find out from other employees that Jeff has had romantic relationships with two other subordinates. By all accounts, those relationships were mutually desired by the consenting adults involved and ended without any fanfare. There were no complaints.
- One of the women is still employed by the company. The other was fired 6 months ago after Jeff discovered she was overbilling customers and diverting the excess money to her own personal bank account. A forensic investigation by the company's external auditors confirmed Jeff's suspicions.

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Discussion Point #5

Who would you interview first and why?

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Discussion Point #6

Would you instruct interviewees to keep the investigation confidential?

Discussion Point #7

What can an employer do to prevent these situations?

Things to Consider

Effective harassment prevention requires a multi-faceted approach:

- Leadership Commitment
- Policy & Procedures
- Workforce Training
- Reporting
- Investigations
- Remedies & Accountability
- No Retaliation

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Questions

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