

 WOODS|AITKEN

2019 LABOR & EMPLOYMENT LAW SEMINAR

Practical Advice for Your Workplace

OCTOBER 24, 2019

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BEST PRACTICES FOR REASONABLE ACCOMMODATIONS


ASHLEY H. CONNELL

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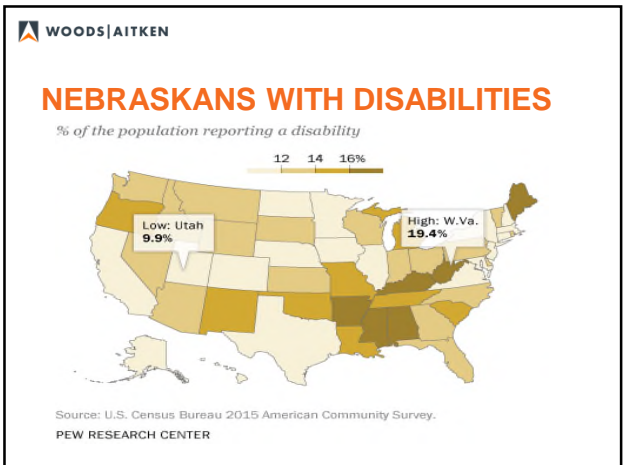
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AMERICANS WITH DISABILITIES

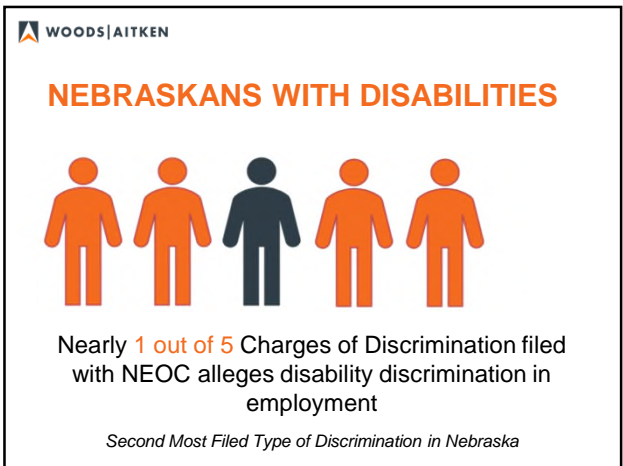


Estimated that more
than **1 out of 8**
Americans have a
severe disability

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GOALS

1. Key Definitions Under the Americans with Disabilities Act
2. Reasonable Accommodations & the Interactive Process
3. Undue Hardship



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AMERICANS WITH DISABILITIES ACT (“ADA”)

- Coverage
 - Private Employers with 15 or More Employees
 - All State & Local Government Employers
- Special Note: Pregnancy Discrimination Act

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KEY DEFINITIONS UNDER THE ADA

- “Disability”
 - A person who has a physical or mental impairment that substantially limits one or more major life activities;
 - A person who has a record of such an impairment; or
 - A person who is regarded as having such an impairment.

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KEY DEFINITIONS UNDER THE ADA

- o Major Life Activities
 - Caring for Oneself
 - Performing Manual Tasks
 - Seeing
 - Hearing
 - Eating
 - Sleeping
 - Walking
 - Learning
 - Reading
 - Standing
 - Sitting
 - Reaching
 - Lifting
 - Bending
 - Speaking
 - Breathing
 - Interacting with Others
 - Communicating
 - Concentrating
 - Bodily Functions

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KEY DEFINITIONS UNDER THE ADA

- o ADA Amendments Act of 2008 (“ADAAA”)
 - Terms are to be construed in favor of broad coverage.
 - “Substantially limits” does not require the impairment to *severely* or *significantly* restrict a major life activity.
 - Do not consider mitigating measures, except eye wear.
 - Whether an impairment exists requires an individualized assessment.

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KEY DEFINITIONS UNDER THE ADA

- o “Qualified Individual”
 - Employee or applicant meets the requisite knowledge, skill, and experience of a position; and
 - Can perform the “essential functions” of the position *with or without* reasonable accommodation.

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KEY DEFINITIONS UNDER THE ADA

- “Reasonable Accommodation”
 - Any change to a job, the work environment, or the way things are usually done that allows an individual with a disability to apply for a job, perform the essential job functions, or enjoy equal access to benefits available to other individuals in the workplace.

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KEY DEFINITIONS UNDER THE ADA

- “Essential Function”
 - The position exists specifically to perform that function;
 - There are a limited number of other employees who could perform the function; or
 - The function is specialized and an individual is hired based on his or her ability to perform it.

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KEY DEFINITIONS UNDER THE ADA

- Essential Functions
 - Courts and EEOC considers employer’s judgment as to what functions of a job are essential.
 - If an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

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GOALS

1. Key Definitions Under the ADA
2. Reasonable Accommodations & the Interactive Process
3. Undue Hardship



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REASONABLE ACCOMMODATION



Employers are required to provide reasonable accommodations to qualified disabled employees or applicants, unless the accommodation would impose an undue hardship.

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REASONABLE ACCOMMODATION

- o The ADA requires:
 - Reasonable accommodations, not *all* accommodations;
 - Effective accommodations, not *preferred* accommodations; and
 - Accommodations must not pose an undue hardship to the employer.

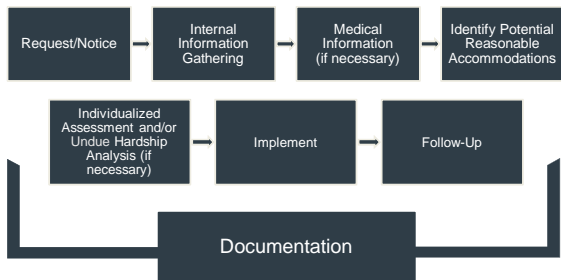
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REASONABLE ACCOMMODATION

- Employers can require that an employee follow an accommodation process*
- Disability Accommodation Policy
 - Administration of the Policy
 - Outline Interactive Process
 - Anti-Retaliation

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INTERACTIVE PROCESS



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INTERACTIVE PROCESS

- Request / Notice
 - It is the employee's responsibility to make a request or put the employer on notice.
 - Orally or In Writing
 - Plain Language
 - No "Magic" Words
 - This can also come from a third party on individual's behalf.
 - If made to supervisor, employee should be directed to contact Human Resources.
 - Employer must respond to an accommodation request in a timely manner.

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INTERACTIVE PROCESS

- Request / Notice
 - **Example A:** An employee tells her supervisor, "I'm having trouble getting to work at my scheduled starting time because of medical treatments I'm undergoing."
 - **Example B:** An employee tells his supervisor, "I need six weeks off to get treatment for a back problem."
 - **Example C:** A new employee, who uses a wheelchair, informs the employer that her wheelchair cannot fit under the desk in her office.
 - **Example D:** An employee tells his supervisor that he would like a new chair because his present one is uncomfortable.

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INTERACTIVE PROCESS

- Internal Information Gathering
 - Used to determine what, if any, accommodation should be provided
 - Reasonable Accommodation Request Form
 - Must communicate:
 - The precise nature of the problem;
 - How a disability is prompting a need for an accommodation; and
 - Potential accommodations that may be effective in meeting an individual's needs.
 - Consistent and Timely Communication is Key

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INTERACTIVE PROCESS

- Medical Information
 - Only if the requestor's disability and/or need for an accommodation are not obvious or already known
 - Only medical information that is sufficient to explain:
 - the nature of the disability;
 - the individual's need for reasonable accommodation; and
 - how the requested accommodation will assist the individual to apply to a job, perform the essential functions of a job, or enjoy the benefits and privileges of the workplace.

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INTERACTIVE PROCESS

- Medical Information
 - Information may be obtained from:
 - Requestor
 - Appropriate Health Professional (e.g., doctor, psychological, clinical social worker, physical therapist, or rehabilitation counselor)
 - If obtained from health professional:
 - Medical Certification Form with Job Description
 - HIPPA Release
 - GINA Notice

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INTERACTIVE PROCESS

- Identify Potential Reasonable Accommodations
 - Ask employee and/or physician to assist in identifying potential accommodations
 - Employers do not have to eliminate essential functions or reduce performance standards
 - Accommodation must be effective—that is, it must enable the individual to perform the essential functions
 - Individualized Assessments

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INTERACTIVE PROCESS

- Examples of Common Reasonable Accommodations
 - Using assistive technologies;
 - Change in schedule;
 - Change in break times;
 - Work from home;
 - Using job aids;
 - Change in work location;
 - Change in work environment;
 - Change in equipment;
 - Elimination or exchange of marginal job tasks;
 - Re-assignment; and
 - Leave.
- Job Accommodation Network (JAN): Free consultant service that helps employers make individualized accommodations.

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INTERACTIVE PROCESS

- Not Examples of Reasonable Accommodations
 - Indefinite Leave
 - Personal Use Items Needed in Accomplishing Daily Activities Both On and Off the Job
 - Removing Essential Job Functions from the Position
 - Displacing a Fellow Employee

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INTERACTIVE PROCESS

- Reasonable Accommodations?
 - **Example A:** An employee with a hearing disability must be able to contact the public by telephone. The employee proposes that he uses a TTY to call a relay service operator who can then place the telephone call and relay the conversation between the parties.
 - **Example B:** A cashier easily becomes fatigued because of lupus and, as a result, has difficulty making it through her shift. The employee requests a stool because sitting greatly reduces the fatigue.
 - **Example C:** A cleaning company rotates its staff to different floors on a monthly basis. One crew member has a psychiatric disability. While his mental illness does not affect his ability to perform the various cleaning functions, it does make it difficult to adjust to alterations in his daily routine. The employee has had significant difficulty adjusting to the monthly changes in floor assignments. He asks for a reasonable accommodation and proposes three options: staying on one floor permanently, staying on one floor for two months and then rotating, or allowing a transition period to adjust to a change in floor assignments.

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INTERACTIVE PROCESS

- Is Fido a Reasonable Accommodation?

A truck driving applicant requested that his emotional support animal be allowed to ride with him during his trucking routes. The applicant suffered from PTSD and mood disorder, and his psychiatrist prescribed the emotional support animal to help him cope with his disabilities. The trucking company revoked his offer of employment, citing its "no pet" policy.

- Did the trucking company violate the ADA?

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INTERACTIVE PROCESS

- Individualized Assessments
 - **Fitness for Duty Testing:** Medical examination of an applicant or employee to determine whether the employee is physically or psychologically able to perform the job duties.
 - **Pre-Employment:** May only be done after a conditional offer of employment and must be required of all applicants.
 - **During Employment:** Must be job-related and consistent with business necessity.
 - Return to Work
 - On the Job Conduct

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INTERACTIVE PROCESS

- Individualized Assessments
 - **Direct Threat Assessment:** Does employee pose significant risk of substantial harm to the health or safety of self and/or others that cannot be eliminated or reduced by reasonable accommodation?
 - Must be based on reasonable medical judgement and/or best available objective evidence.
 - Factors to be considered
 - Duration of the risk;
 - Nature and severity of the potential harm;
 - Likelihood that potential harm will occur; and
 - The imminence of the potential harm.

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INTERACTIVE PROCESS

○ Individualized Assessment Example

A physician/employee revealed to his employer that he was treating chronic neurological and musculoskeletal problems with legally prescribed drugs. The physician/employee supplied a doctor's note explaining that he was being treated for chronic pain with the prescribed medication, and further explaining that he was subject to urine tests and monitoring by the State Board of Pharmacy to ensure compliance with his treatment plan. The employer/medical center terminated the employee because it assumed the medication rendered him unable to meet his job requirements.

- Did the medical center violate the ADA?

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INTERACTIVE PROCESS

- Implementation and Follow-Up
 - If multiple effective accommodations are available, employers do not have to select the employee's preferred accommodation.

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DOCUMENTATION

- Documentation
 - Overarching and ongoing process.

 - Medical information must be kept confidential and separate from the employee's personnel file.

 - Accommodation information is shared on a need-to-know basis.
 - Including information regarding applicants for positions.

 - Human Resources should securely store all medical information.

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GOALS

1. Key Definitions Under the ADA
2. Reasonable Accommodations & the Interactive Process
3. Undue Hardship



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UNDUE HARDSHIP



Employers are required to provide reasonable accommodations to qualified disabled employees or applicants, unless the accommodation would impose an undue hardship.

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UNDUE HARDSHIP

- Definition
 - Employer would incur significant difficulty or expense in providing a certain reasonable accommodation.
 - Considered in light of statutory factors.
- Determination Made on Case-By-Case Basis

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UNDUE HARDSHIP

- Factors Considered
 - the nature and cost of the accommodation;
 - the overall financial resources of the facility;
 - the number of persons employed at the facility;
 - the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

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UNDUE HARDSHIP

- Factors Considered
 - the overall financial resources of the entity;
 - the overall size of the business of the entity with respect to the number of its employees;
 - the number, type, and location of its facilities;
 - the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; and
 - the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

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UNDUE HARDSHIP

- Cannot Consider:
 - Employees' or customers' fears or prejudices toward the individual's disability
 - Negative impact on the morale of other employees

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UNDUE HARDSHIP

Compare

- Example A: An employee with breast cancer is undergoing chemotherapy. As a consequence of the treatment, the employee is subject to fatigue and finds it difficult to keep up with her regular workload. So that she may focus her reduced energy on performing her essential functions, the employer transfers three of her marginal functions to another employee for the duration of the chemotherapy treatments. The second employee is unhappy at being given extra assignments, but the employer determines that the employee can absorb the new assignments with little effect on his ability to perform his own assignments in a timely manner.

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UNDUE HARDSHIP

Compare

- Example B: A convenience store clerk with multiple sclerosis requests that he be allowed to go from working full-time to part-time as a reasonable accommodation because of his disability. The store assigns two clerks per shift, and if the first clerk's hours are reduced, the second clerk's workload will increase significantly beyond his ability to handle his responsibilities. The store determines that such an arrangement will result in inadequate coverage to serve customers in a timely manner, keep the shelves stocked, and maintain store security.

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UNDUE HARDSHIP

Compare

- Example C: A crane operator, due to his disability, requests an adjustment in his work schedule so that he starts work at 8:00 a.m. rather than 7:00 a.m., and finishes one hour later in the evening. The crane operator works with three other employees who cannot perform their jobs without the crane operator. As a result, if the employer grants this requested accommodation, it would have to require the other three workers to adjust their hours, find other work for them to do from 7:00 to 8:00, or have the workers do nothing.

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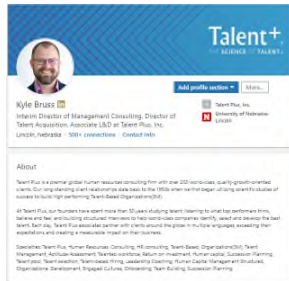
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Talent+

Recruiting Talent in a Tight Labor Market

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Your Guide Today – Kyle Bruss



Kyle Bruss
Talent+
Senior Director of Management Consulting, Director of Talent Acquisition, Associate SVP at Talent Plus, Inc.
Lincoln, Nebraska · 500+ connections

About
Talent Plus is a premier global human resources consulting firm with over 200 offices, quality growth-oriented clients, top engineering and technology talent base in the US and other major offices with a focus of seeking high performing Talent Based Organizations.
At Talent Plus, our founders have spent more than 20 years driving search teams looking to solve top performance firms, but we are here, recruiting qualified talent into high performing companies, identify, assess and develop the best talent. Kyle Bruss has been able to work with clients around the globe in multiple languages, assessing their requirements and creating a successful team for the business.
Specialties: Talent Plus, Human Resources, Consulting, Information, Search Based, Organizations, Talent Management, Applicant Assessment, Technical Consulting, Search and Assessment, Human Capital, Succession Planning, Talent Acquisition, Talent Based Hiring, Leadership Coaching, Human Capital, Managerial and HR Solutions, Organizational Development, Engaged Culture, Onboarding, Team Building, Business Planning

- + 15 Years of Service
- + 9 Years Leading Talent Acquisition
- + 100s of Ads Written
- + 1000s of Reviewed Apps
- + Finder of the Unfindable
- + Talent Freak
- + LinkedIn Super Connector

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The Stats

- + National Unemployment: 3.5% in September 2019
- + Nebraska Unemployment: 3.1% in August 2019
- + Iowa Unemployment: 2.5% in August 2019
- + South Dakota Unemployment: 2.9%



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Great Companies Don't Happen on Accident



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Culture Happens



50

Better Retention Can Beat Better Recruiting



- + How do you compare on salaries and benefits?
- + Do you offer skill-building programs?
- + Do you have a great culture, are you measuring it?
- + Do your managers and leaders regularly recognize achievement?
- + Do employees have a career path?

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Life Happens Too!

- + When do employees start looking around
 - + Birthdays, especially milestones like 40 or 50
 - + Work Anniversaries
 - + After high school reunions (How do I measure up)
 - + Compensation review time
- + And, if someone gets an offer and you counter to keep them around, they have a 50% chance of leaving within 12 months. (Corporate Executive Board)



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WE OFFER 3 KINDS OF SERVICES

GOOD-CHEAP-FAST

BUT YOU CAN PICK ONLY TWO

GOOD & CHEAP WON'T BE **FAST**

FAST & GOOD WON'T BE **CHEAP**

CHEAP & FAST WON'T BE **GOOD**

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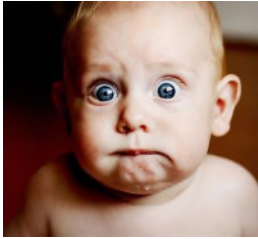
Recruiters Reality

- Time to Fill (Fast)
- Cost per Hire (Cheap)
- Quality of Hire (Good)



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What's Frightening Recruiters Everywhere



- + Low Unemployment
- + Skill Gaps & Shortages
- + Boomers are/will Retire
- + The Gig Economy & The Side Hustle
- + Top Performers Have Options...They get Recruited, Daily!
- + Top Performers Are Hard to SPOT!

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7 ½ Steps to a Better Recruiting Processes

- + Step 1 – Identify the Needs of the Role – Job Description
- + Step 2 – Create an Exhibit A – Best Performer

58

The Best Performer I Have Ever Known



59

The Best Performer I Have Ever Known



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Recruiting for Talent

What most job posting say

- + A Bachelors degree required
- + An M.B.A. is preferred
- + Strong Work Ethic
- + Track record of success
- + Demonstrated responsibility
- + 10 Years of Experience
- + Referred by a current employee or someone you trust

What defines a top performer

- + Positivity
- + Integrity
- + Focus
- + Customer centric
- + A quick and effective problem solver
- + Persuasive
- + Empathetic
- + Driven to achieve

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7 1/2 Steps to a Better Recruiting Processes

- + Step 1 – ID Needs of the Role – Job Description
- + Step 2 – Create an Exhibit A – Best Performer
- + Step 3 – Write an Ad that “Speaks” to Best Performers

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Theme-Based Ads...

Talent Plus is seeking a Senior Software Developer in Lincoln, NE to build and develop web applications, core APIs and third party integration. Design software specifications, delivery timelines, completed applications and participate in the development and support of both commercial and internal business software applications. Lead the development of multiple projects, including: creating and maintaining high quality code documentation, conducting research on emerging technologies and applying them to current initiatives. Requires BS degree in Computer Science or related and 5 years development experience or a Master Degree in same and 2 years development experience. Demonstrated ability in My SQL database and Java Technologies

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Theme-Based Ads...

- + Are you looking to make a difference that dramatically impacts others' lives with the software you develop?
- + Do you prefer programming in languages like Grails or Groovy?
- + When you write code does your work seem to be more efficient and of higher quality than your colleagues'?
- + Do you take the initiative to work independently yet work well with a team?
- + Do you have a talent for removing obstacles from the process?
- + Are you positive and energetic? Do you thrive in an evolving, complex and innovative environment?
- + Do you always live up to your commitments?

If you can answer YES to these questions, we want to speak with you. Talent Plus, a locally owned international human resource consulting firm, is seeking a talented **Senior Grails/Groovy Web Application Developer** to join our quality-focused team. The ideal candidate will have knowledge and skills with Java-based web applications, HTML/CSS and JavaScript. Expert knowledge and experience with Groovy/Grails is also preferred.

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Theme-Based Ads...

- + Get away from boring, traditional job descriptions without needing an expensive creative marketing budget
- + "Speak to" **Top Performers** by describing how a **Top Performer** is likely to think and act in a role
- + Describe **WHY** we need someone with certain strengths
- + Qualify and **Screen-Out** candidates who are less likely to be a strong fit
- + **Enhance** the candidate experience

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7 ½ Steps to a Better Recruiting Processes

- + Step 1 – ID Needs of the Role – Job Description
- + Step 2 – Create an Exhibit A – Best Performer
- + Step 3 – Write an Ad that "Speaks" to Best Performers
- + Step 4 – Maximize your Recruiting Channels – Active & Passive

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Almost all top performers actively seek new career opportunities



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Almost all top performers actively seek new career opportunities

Visiting an online job site is the #1 job search activity for top performers hired

96% of top performers hired within the past year took an action to find a job 6 months prior to being hired. The majority of them used online job sites to find opportunity.

Source: Indeed.com

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What attracts top performers?

Other than competitive pay and health benefits, which of the following would most attract you to a new job?



Do you know what attracted your top performers?

Source: Indeed.com

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Recruiting for Talent

Passive

 CornhuskerHelpWanted.com

 HELP WANTED



Active

 LinkedIn

 Google



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7 ½ Steps to a Better Recruiting Processes

- + Step 1 – ID Needs of the Role – Job Description
- + Step 2 – Create an Exhibit A – Best Performer
- + Step 3 – Write an Ad that “Speaks” to Best Performers
- + Step 4 – Maximize your Recruiting Channels – Active & Passive
- + Step 5 – Create an Efficient, Effective and Consistent Screening Process

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Efficient, Effective and Consistent Screening

- + Applicant Tracking Systems (ATS)
- + Basic Qualifications Scoring Algorithms
- + Online Assessments (Like Talent Plus’ Assessments)
- + Consistent Interviews
- + Automated Processes
- + Mass Communications
- + Don’t forget to be Human – Candidate Experience

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7 ½ Steps to a Better Recruiting Processes

- + Step 1 – ID Needs of the Role – Job Description
- + Step 2 – Create an Exhibit A – Best Performer
- + Step 3 – Write an Ad that “Speaks” to Best Performers
- + Step 4 – Maximize your Recruiting Channels – Active & Passive
- + Step 5 – Create an Efficient & Effective Screening Process
- + Step 6 – Create a Great Candidate Experience

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Candidate Experience

- + Be Human
- + Don't Automate Everything
- + Remember: Your applicants may be your future client, customer, coworker or boss
- + Wow Them When On-Site
- + Leave a Lasting Impression
- + Communicate
- + Communicate Often
- + Communicate Again Just to Be Sure

AWESOME!

Excellent

Very Good

Satisfactory

Marginal

Poor



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7 ½ Steps to a Better Recruiting Processes

- + Step 1 – ID Needs of the Role – Job Description
- + Step 2 – Create an Exhibit A – Best Performer
- + Step 3 – Write an Ad that “Speaks” to Best Performers
- + Step 4 – Maximize your Recruiting Channels – Active & Passive
- + Step 5 – Create an Efficient & Effective Screening Process
- + Step 6 – Create a Great Candidate Experience
- + Step 7 – Track Your Process – Data, Data, Data

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Recruitment Measures

- +Time to Fill
 - + Days from posting to the day you close the role
- +Cost Per Hire
 - + Advertising, Career Sites
 - + Background checks, Skills tests, Assessments
 - + External Recruiters
- +Quality of Hire
 - + 90 days, 6 months, 1 year measures
 - + Do they stick around
 - + Do they perform well

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7 ½ Steps to a Better Recruiting Processes

- + Step 1 – ID Needs of the Role – Job Description
- + Step 2 – Create an Exhibit A – Best Performer
- + Step 3 – Write an Ad that “Speaks” to Best Performers
- + Step 4 – Maximize your Recruiting Channels – Active & Passive
- + Step 5 – Create an Efficient & Effective Screening Process
- + Step 6 – Create a Great Candidate Experience
- + Step 7 – Track Your Process – Data, Data, Data
- + Step 7 ½ – Remember the ABC of Recruiting

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ABCs of Recruiting

ALWAYS
BE
reCRUIT’IN



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Having a Talent Antenna

- + Pay attention to performance and behavior
- + Watch for Excellence
- + Look for Acts of Brilliance
- + Pay attention to the Extra-Ordinary
- + Does an interaction “feel” good, different, better



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Build a Talent Bench



Think Two
Deep For
Every Role

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Recruiting Principles

- + Talent is universal
- + Unless you ask, you don't know
- + Recruiting is always on a great manager's mind
- + Be atypical or unique in your approach
- + Recruiting is a numbers game
- + Recruiting is selling
- + You are only as successful as your next recruit
- + The best security of an organization is the acquisition of talented people
- + Is your Recruiting Antenna tuned?
- + Proactive sourcing

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Great Companies Don't Happen on Accident



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Culture – How We Do Things Around Here

“The organization will never be what the people are not.”

Price Pritchett, *The Ethics of Excellence*

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Recruiting Research – Discovering Talent Pools

- +What were you doing before you joined our organization?
- +How did you hear about us?
- +What convinced you to join us?
- +Why do you stay?
- +What do you like about our organization?

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Recruiting Research – Who do you know?

- +Who do you know outside our organization who works like you do?
- +Who was the best person outside our organization you ever worked with as an associate?
- +Who was the best supervisor to whom you ever reported outside our organization?
- +Who do you know in the community who just seems to know everybody?

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Q & A

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Talent+

Companies are Known by the
People They Keep®

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 WOODS|AITKEN

BREAK

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WAGE AND HOUR UPDATE

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NEW SECRETARY OF LABOR

- Eugene Scalia
 - Previously served as Solicitor of Labor, during the Bush Administration
 - As Solicitor, he pursued initiatives to protect low-wage workers, reduce unnecessary regulatory burdens, and enhance enforcement of workplace safety laws

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OPINION LETTERS ARE BACK

- The Obama administration abandoned the long-standing practice of issuing opinion letters, in favor of more broadly applicable Administrator's Interpretations
- In 2017, DOL announced a return to issuing opinion letters
- The WHD kicked off its return to issuing opinion letters by reinstating 17 Bush opinion letters that were withdrawn by the Obama administration (which was allowed because they were never mailed)

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HOW OPINION LETTERS ARE HELPFUL

- Opinion letters serve as a means by which the public can develop a clearer understanding of what FLSA and FMLA compliance entails
- Opinion letters may be signed by the Wage and Hour Division ("WHD") Administrator or a lower level official
- Opinion letters issued *by the Administrator* may be relied upon as a good faith defense to wage claims arising under the FLSA
- The good faith defense, however, *does not apply* to the FMLA or other statutes enforced by the WHD

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FLSA2018-25

- Whether a guaranteed weekly salary for a professional employee has a "reasonable relationship" with his or her "usual earnings" for purposes of determining whether the employee is paid a salary under 29 C.F.R. § 541.604(b)
 - Executive, administrative, professional exemption
 - Salaried employees may receive additional compensation, including hourly wages for hours worked beyond the normal workweek without losing the exemption in certain circumstances

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FLSA2018-25 CONT.

- Such employees may also receive compensation on an hourly, daily, or shift basis, without losing the exemption or violating the salary basis requirement if they receive a guaranteed weekly salary of at least the standard salary level for the position and a reasonable relationship exists between the guaranteed amount and the amount actually earned
- A 1.5-to-1 ratio of actual earnings to a guaranteed weekly salary is a reasonable relationship

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FLSA2019-1

- (1) Whether the FLSA guarantees minimum wage and overtime pay to residential janitors despite their exemption from similar state law requirements; (2) whether an employer's noncompliance with FLSA in reliance on this state law exemption demonstrates "good faith," allowing the employer to avoid liquidated damages or the FLSA's 3-year back wage liability period; and (3) how an employer may track and record a residential janitor's hours worked.
- When a federal, state, or local minimum wage or overtime law differs from the FLSA, the employer must comply with both laws and meet the standard of whichever law gives the employee the greatest protection
- The Portal-to-Portal Act generally establishes a 2-year statute of limitations for FLSA minimum wage, overtime, or liquidated damages claims, and a 3-year statute of limitations for an FLSA claim involving a willful violation
 - A willful violation occurs where the employer knew that its conduct was prohibited by the Act or showed reckless disregard for the requirements of the FLSA, including situations where the employer should have inquired further into whether its conduct was in compliance with the Act, and failed to make adequate further inquiry
 - If an employer shows that it acted in good faith, meaning it had reasonable grounds for believing that its act or omission was not a violation of the FLSA, a court may, in its discretion, deny liquidated damages

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FLSA2019-1 CONT.

- An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered to be working all the time he is on the premises
- "Reasonable agreement" determines which hours on the premises are hours worked
 - This agreement must take into consideration all of the pertinent facts
 - Once in effect, the employer's time records will be sufficient so long as they generally coincide with the agreement
 - If the parties find that the recorded hours significantly deviate from the initial agreement, they should establish a new agreement
- Residential janitors are not exempt from the FLSA's minimum wage and overtime requirements
- Relying on a state law exemption from state law minimum wage and overtime requirements is *not* a good faith defense to noncompliance with the FLSA

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FLSA2019-2

- o Whether an employee's time spent participating in an employer's optional volunteer program, which awards a bonus to certain participating employees, is hours worked under the FLSA
 - A volunteer must offer his services "freely without coercion or undue pressure," direct or implied
 - Compensating employees when they volunteer during normal work hours does not jeopardize their status when they volunteer outside normal work hours
 - An employer may use an employee's time spent volunteering as a factor in calculating whether to pay the employee a bonus, without incurring an obligation to treat that time as hours worked, so long as: (1) the volunteering is optional, (2) not volunteering will have no adverse effect on the employee's working conditions or employment prospects, and (3) the employee is not guaranteed a bonus for volunteering

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FLSA2019-3

- o Whether a youth residential care facility may implement an "8 and 80" overtime pay system under section 7(j) of FLSA
 - Employers engaged in the operation of a hospital or an institution primarily engaged in the care of the sick, the aged, or the mentally ill who reside on the premises of the institution may utilize the "8 and 80" overtime system
 - Under the "8 and 80" system, a hospital or residential care institution may, pursuant to a prior agreement or understanding with its employees, compute overtime over a consecutive 14-day period that pays employees overtime for all hours worked over 8 hours in any workday and over 80 hours in a 14-day period

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FLSA2019-3 CONT.

- Residential care institution is defined as an institution primarily engaged in providing domiciliary care to individuals who reside on the premises and who have a disability or, if suffering from sickness of any kind, will require only general treatment or observation of a less critical nature than that provided by a hospital
 - Primarily engaged in means more than 50% of the institution's income is attributable to providing such care
- A private youth residential care facility qualifies as a residential care institution if it retains a qualified physician, psychiatrist, or psychologist, who regularly engages in therapy with adolescents who reside at the facility, and such adolescents constitute more than 50% of the residents at the facility

99

FLSA2019-4

- Whether "Nutritional Outreach Instructors" employed by a land-grant public university are exempt from minimum wage and overtime pay requirements under the FLSA
 - FLSA section 13(a)(1) exempts from minimum wage and overtime any employee employed as a teacher in elementary or secondary schools
 - An employee is an exempt teacher under section 13(a)(1) if his or her primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge and if he or she is doing so as an employee of an educational establishment
 - WHD regulations do not restrict where a teacher may teach or to whom a teacher may impart knowledge
 - An employee who teaches online or remotely may qualify for the exemption
 - Similarly, an agricultural extension agent who travels and provides instruction to farmers and whose primary duty is imparting knowledge also qualifies for the exemption
 - Similar to agricultural extension agents, Nutritional Outreach Instructors qualify for the exemption

100

FLSA2019-5

- Whether a farm's light processing activities, such as cutting or freezing its own agricultural productions, and packing, storing, and delivering those products are primary or secondary agriculture for purposes of FLSA section 13(b)(12)'s exemption from overtime pay
 - Agriculture includes farming in all its branches and any practices performed by a farmer or on a farm as an incident to or in conjunction with such farming operation, including preparation for market, delivery to storage or to market, or to carriers for transportation to market
 - Agriculture is divided into primary and secondary agriculture

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FLSA2019-5 CONT.

- Primary agriculture includes farming in all its branches and the specific farming operations enumerated in section 3(f) of the FLSA, such as the cultivation and tilling of the soil; the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities; and the raising of livestock, bees, fur-bearing animals, or poultry
 - If an employee is employed in any of these activities, he or she is employed in agriculture and qualifies for the section 13(b)(12) agricultural exemption, regardless of whether he or she is employed by a farmer or on a farm

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FLSA2019-5 CONT.

- Secondary agriculture includes activities that are performed by a farmer or on a farm as an incident to in conjunction with such farming operations
 - A farm is defined as a tract of land devoted to farming activities that are primary agriculture
 - A farmer is defined as any employer engaged in activities ordinarily regarded as farming activities, *and includes any employee of the farmer*
- An activity is performed by a farmer or on a farm only if the farmer or farm produces the product on which the activity is performed
 - An activity is generally incident to or in conjunction with such farming operations, and thus secondary agriculture, only if it (1) is more akin to agriculture than manufacturing, (2) is subordinate to the farming operations involved, and (3) does not amount to an independent business
 - This includes preparation for market and delivery to storage or to market, or to carriers for transportation to market

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FLSA2019-5 CONT.

- The farm's activities of cutting or freezing its own fruits, vegetables, and meat, without adding any ingredients, may be secondary agriculture
 - These activities are more akin to agriculture than manufacturing
 - They do not sufficiently alter the raw or natural state of the commodity, changing its chemical composition so as to make it manufacturing
- The farm's activities of packing and storing its own cut or frozen commodities may also be secondary agriculture
- The farm's activity of delivering its own cut or frozen commodities to market may also be secondary agriculture
 - However, any delivery involving travel off the farm generally must be performed by the farmer's employees

104

FLSA2019-7

- Whether the FLSA requires an employer to include a nondiscretionary bonus that is a fixed percentage of straight-time wages received over multiple workweeks in the calculation of the employees' regular rate of pay at the end of each workweek
- The employer must, after paying the bonus, recalculate the regular rate for each workweek in the bonus period and pay the overtime compensation due on the annual bonus

105

FLSA2019-10

- Whether the time spent in a truck's sleeper berth is compensable hours worked under FLSA
 - The time drivers are relieved of all duties and permitted to sleep in a sleeper berth is presumptively non-working time that is not compensable
 - On-duty sleeping time is compensable unless the driver is continuously on-duty for 24 hours or more, which entitles the employer and the employee to set aside 5 to 8 on-duty hours as a non-compensable sleeping period

106

FLSA2019-11

- Whether an employee of a public agency who works for both the agency's fire department and its police department is entitled to any overtime pay "irrespective of the number of hours worked in either position, or cumulatively, provided the hours comply with the exemption under 29 U.S.C. § 207(k).
 - When an employee performs fire protection activities for the fire department and law enforcement activities for the police department of the same public agency, the hours are aggregated
 - No overtime is owed to an employee engaged in fire protection who works 212 or fewer hours in a 28-day work period or that same ratio of hours to days in any work period from 7-27 days
 - No overtime is owed to an employee engaged in law enforcement who works 171 or fewer hours in a 28-day work period or that same ratio of hours to days in any work period from 7-27 days
 - When an employee is engaged in both fire protection and law enforcement, the applicable maximum hours standard is the one which applies to the activity in which the employee spends the majority of work time during the work period

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FLSA2019-12

- Whether volunteer Reserve Deputies who perform paid security work for third parties maintain their status as volunteers or are instead employees under the FLSA
 - An individual who volunteers to perform services for a public agency is not an employee under the FLSA if: (1) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and (2) such services are not the same type of services which the individual is employed to perform for the public agency
 - A volunteer is an individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered
 - Giving the volunteer Reserve Deputies access to extra duty work for third parties is a reasonable benefit for volunteering that did not alter their volunteer status
 - The volunteer Reserve Deputies seemed to be offering their services without any expectation of compensation, and without any pressure or coercion
 - For these reasons, the volunteer Reserve Deputies' performance of extra duty work for third parties did not result in a loss of their volunteer status

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FMLA2018-1-A

- Whether an employer's no-fault attendance policy violates the FMLA
 - The policy effectively freezes, throughout the duration of an employee's FMLA leave, the number of attendance points that the employee accrued prior to taking his or her leave
 - Employees accrue points for tardiness and absences
 - Exceptions for FMLA-protected absences and absences for workers' compensation, vacation, etc.
 - The policy does not violate the FMLA since employees on equivalent types of leave receive the same treatment

109

FMLA2018-2-A

- Whether an organ donation can qualify as an impairment or physical condition that is a serious health condition under the FMLA
 - Yes, so long as it involves inpatient care or continuing treatment
 - Additionally, it would qualify whenever it results in an overnight stay in a hospital
 - Overnight hospitalization alone suffices for the surgery and the post-surgery recovery to qualify as a serious health condition

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FMLA2019-1-A

- Whether an employer may delay designating paid leave as FMLA leave or permit employees to expand their FMLA leave beyond the statutory 12-week entitlement
 - Nothing in the FMLA prevents employers from adopting leave policies more generous than those required by the FMLA. However, an employer may not designate more than 12 weeks of leave – or more than 26 weeks of military caregiver leave – as FMLA-protected.
 - Similarly, an employer may not delay the designation of FMLA-qualifying leave.

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FMLA2019-2-A

- Whether an employee may take FMLA leave to attend a Committee on Special Education (“CSE”) meeting to discuss the Individualized Education Program (“IEP”) of the employee’s child
- An eligible employee of a covered employer may take up to 12 weeks of job-protected, unpaid FMLA leave per year to care for the spouse, son, daughter, or parent of the employee, if such spouse, son, daughter, or parent has a serious health condition
 - Care for a family member includes both physical and psychological care and making arrangements for changes in care
 - A serious health condition is an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a healthcare provider

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FMLA2019-2-A CONT.

- A parent’s need to attend CSE/IEP meetings addressing the educational and special medical needs of his or her children – who have serious health conditions as certified by a health care provider – is a qualifying reason for taking intermittent FMLA leave
 - A parent’s attendance at these meetings is care for a family member with a serious health condition
 - Care includes making arrangements for changes in care, which includes taking leave to help make medical decisions on behalf of a hospitalized parent or to make arrangements to find suitable childcare for a child with a disability
- An employee may make arrangements for changes in care, even if that care does not involve a facility that provides medical treatment

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FMLA2019-3-A

- Whether an employer may delay designating paid leave as FMLA leave if the delay complies with a collective bargaining agreement (“CBA”) and the employee prefers that the designation be delayed
- Once an eligible employee communicates a need to take leave for an FMLA-qualifying reason, neither the employee nor the employer may decline FMLA protection for that leave
- Thus, an employer may not delay the designation of FMLA-qualifying leave as FMLA leave
- This is the case even if the employer is obligated to provide job protections and other benefits equal to or greater than those required by the FMLA pursuant to a CBA or state civil service rules
- An employee’s entitlement to benefits other than group health benefits, such as the accrual of seniority, during a period of FMLA leave is determined by the employer’s established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as relevant)

114

CCPA2019-1

- Whether employers' contributions to employees' health savings accounts ("HSAs") constitute earnings for wage garnishment purposes under the Consumer Credit Protection Act ("CCPA")
- Employer contributions to HSAs are not earnings under the CCPA and are therefore not subject to the CCPA's garnishment limitations
- Generally, as long as an employer does not determine its HSA contributions on the basis of the amount or value of individual employees' services and does not give employees an option of receiving cash in lieu of an employer's contribution, the employer's contributions to an HSA are not earnings under the CCPA and are not subject to the CCPA's garnishment limitations.
- Therefore, the employer should not include its HSA contributions when calculating the employee's disposable earnings for purposes of determining the maximum amount of an employee's pay that may be garnished under the CCPA.

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SALARY LEVEL INCREASE

- Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees
- To qualify for the exemption, employees must be paid on a salary basis at not less than \$684 a week (\$35,568 a year) beginning on January 1, 2020, in contrast to the previous amount of \$455 a week (\$23,660 a year)

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SALARY LEVEL INCREASE CONT.

- May count non-discretionary bonuses, incentives, and commissions toward up to 10 percent of the salary level as long as paid at least annually
- Salary threshold to be considered a "highly compensated employee" increases to \$107,432 or more in annual compensation (including at least \$684 a week paid on a salary or fee basis) on January 1, 2020
- The minimum wage is also increasing to \$10.80 an hour for federal contractors and subcontractors

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**RECAPPING 2019 LABOR & EMPLOYMENT
TRENDS AND DEVELOPMENTS**

How to Prepare Your Workplace for 2020

JERRY L. PIGSLEY

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AGENDA

- Sexual Orientation and Gender Identification Discrimination under Federal Law
- Equal Employment Opportunity Commission (“EEOC”) Standards for Background Checks
- Service Animals and Emotional Support Pets as Reasonable Accommodations under Americans with Disabilities Act (“ADA”)
- National Labor Relations Board (“NLRB”) Update
- Other Federal and Nebraska State Law Update

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SEXUAL ORIENTATION & GENDER IDENTIFICATION DISCRIMINATION

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DISCRIMINATION ON THE BASIS OF "SEX"

- o Title VII expressly protects individuals from discrimination in employment on the basis of "sex."
- o Issue for Employers—
Does the term "sex" include protections for sexual orientation and gender identification?

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SIGNIFICANT SUPREME COURT DECISIONS

1. *Price Waterhouse v. Hopkins*
 - The term "sex" in Title VII "encompasses both sex—that is, the biological differences between men and women—and gender."
 - Employers cannot discriminate based on gender stereotypes.
 2. *Oncale v. Sundowner Offshore Services*
 - Title VII prohibits same-sex harassment.
 - Statutory protections go beyond "principal evil" Congress intended to combat "to cover reasonably comparable evils."
- o Currently a Circuit Split Between Federal Courts of Appeal

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SPLIT AUTHORITY FROM ADMINISTRATIVE AGENCIES

- Equal Employment Opportunity Commission
 - Commission has held that sexual orientation and transgender discrimination are both discrimination on the basis of sex.
 - Discrimination against these individuals results from “his or her perceived gender non-conformity.”

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SPLIT AUTHORITY FROM ADMINISTRATIVE AGENCIES

- Equal Employment Opportunity Commission
 - Examples of LGBT-Related Sex Discrimination Claims:
 - Failing to hire an applicant because she is a transgender woman.
 - Firing an employee because he is planning or has made a gender transition.
 - Denying an employee equal access to a common restroom corresponding to the employee’s gender identity.
 - Harassing an employee because of a gender transition, such as by intentionally and persistently failing to use the name and gender pronoun that correspond to the gender identity with which the employee identifies, and which the employee has communicated to management and employees.

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SPLIT AUTHORITY FROM ADMINISTRATIVE AGENCIES

- Equal Employment Opportunity Commission
 - Examples of LGBT-Related Sex Discrimination Claims:
 - Denying an employee a promotion because he is gay or straight.
 - Discriminating in terms, conditions, or privileges of employment, such as providing a lower salary to an employee because of sexual orientation or denying spousal health insurance benefits to a female employee because her legal spouse is a woman, while providing spousal health insurance to a male employee whose legal spouse is a woman.
 - Harassing an employee because of his or her sexual orientation, for example, by derogatory terms, sexually oriented comments, or disparaging remarks for associating with a person of the same or opposite sex.

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SPLIT AUTHORITY FROM ADMINISTRATIVE AGENCIES

- Department of Justice
 - DOJ has argued in amicus briefs to court of appeals that:
 - The “essential element of sex discrimination” is that employees of one sex must be treated less favorably than similarly situated employees of the other sex.
 - DOJ reasoned that this necessary element of sex discrimination is not present when discussing discrimination because of sexual orientation and gender identification.

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2019 TERM OF SUPREME COURT


- Three Important Cases Before Supreme Court During 2019 Term
 1. *R.G. and G.R. Harris Funeral Homes v. EEOC*
 2. *Altitude Express, Inc. v. Zarda*
 3. *Bostock v. Clayton County*
- Supreme Court heard oral arguments earlier this month
- Joint decision expected around June 2020

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WHAT'S NEXT IN 2020?

- Congressional Intervention
 - The Equality Act
 - Proposes to Amend the Civil Rights Act to “prohibit discrimination on the basis of the sex, sexual orientation, gender, identity, or pregnancy, childbirth, or a related medical condition of an individual, as well as because of sex-based stereotypes.”
 - Passed by House of Representatives in May 2019
 - Pending before Senate

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 **EEOC STANDARDS FOR CRIMINAL BACKGROUND CHECKS**


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 **EEOC STANDARDS FOR BACKGROUND CHECKS**

Consideration of Arrest and Conviction Records in Employment Decisions (EEOC, April 2012)

- EEOC does not have authority to prohibit employers from obtaining or using arrest or conviction records.
- However, data suggests that blanket bans on hiring individuals with criminal records disproportionately impacts minorities.
- EEOC Guidance was issued to prevent blanket exclusions and ensure the background check information was not used in a discriminatory way.

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 **EEOC STANDARDS FOR BACKGROUND CHECKS**

EEOC adopted *Green* factors to justify targeted exclusions

- Used to rebut statistical evidence of disparate impact
- Demonstrates how challenged practice is job related to the position and consistent with business necessity

Green Factors

1. The nature and gravity of the offense or conduct;
2. The time that has passed since the offense or conduct and/or completion of the sentence; and
3. The nature of the job held or sought.

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EEOC STANDARDS FOR BACKGROUND CHECKS

Following targeted exclusion, EEOC encourages employers to perform individualized assessments.

- **Step 1:** Employer informs applicant that he/she may be excluded due to past criminal conduct.
- **Step 2:** Employer provides applicant the opportunity to demonstrate that the targeted exclusion policy should not properly apply to him/her.
- **Step 3:** Employer considers whether individual's additional information shows that the policy as applied is not job related and consistent with business necessity.

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EEOC STANDARDS FOR BACKGROUND CHECKS

Individualized Assessment Factors

1. The facts or circumstances surrounding the offense or conduct;
2. The number of offenses for which the individual was convicted;
3. Older age at the time of conviction, or release from prison;
4. Evidence that the individual performed the same type of work, post conviction, with the same or a different employer, with no known incidents of criminal conduct;
5. The length and consistency of employment history before and after the offense or conduct;
6. Rehabilitation efforts, e.g., education/training;
7. Employment or character references and any other information regarding fitness for the particular position; and
8. Whether the individual is bonded under a federal, state, or local bonding program.

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TEXAS CHALLENGE TO EEOC BACKGROUND CHECK STANDARD

- Texas state agencies had policy not to hire applicants convicted of certain categories of felonies.
- Texas sued EEOC, seeking declaratory and injunctive relief.
- 5th Circuit Court of Appeals held:
 - EEOC failed to undergo notice-and-comment rulemaking.
 - EEOC and Attorney General are barred from relying on Guidance as binding for any purpose against Texas.

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EMPLOYER'S PLAN FOR 2020

- 5th Circuit's injunction is limited to Texas, but the court's analysis will most likely be utilized as a roadmap to defend challenges by the EEOC.
- Nebraska is part of the 8th Circuit and decision is merely persuasive authority.
- Nebraska employers must still be mindful of EEOC's Guidance and obligations under the Fair Credit Reporting Act.

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SERVICE ANIMALS & EMOTIONAL SUPPORT PETS AS REASONABLE ACCOMMODATIONS

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SERVICE ANIMALS & EMOTIONAL SUPPORT PETS AS REASONABLE ACCOMMODATIONS

- Americans with Disabilities Act
 - Title III—Public Accommodations
 - Limited to “service animals”
 - Service animal is “any **dog** that is individually trained to do work or perform tasks for the benefit of an individual with a disability.”
 - “Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition.”
 - Does not cover “emotional support pets”
 - “the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks.”

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**SERVICE ANIMALS & EMOTIONAL SUPPORT
PETS AS REASONABLE ACCOMMODATIONS**

- o Americans with Disabilities Act
 - Title III—Public Accommodations
 - Verification Limitations
 - Is the animal required because of a disability?
 - What task is the animal trained to perform?
 - Cannot ask for documentation to verify license or certification

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**SERVICE ANIMALS & EMOTIONAL SUPPORT
PETS AS REASONABLE ACCOMMODATIONS**

- o Americans with Disabilities Act
 - Title I—Employment
 - Employers are required to provide reasonable accommodations to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless the accommodation would impose an undue hardship.
 - No definitions or limitations regarding service animals or emotional support pets.
 - No guidance on scope of verification documentation.

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EMPLOYER’S PLAN FOR 2020

- o Adopt an ADA Reasonable Accommodation Policy
- o Follow the Policy and Engage in the Interactive Process
- o Treat It like Any Other Request for a Reasonable Accommodation
- o Medical Information
 - Limit information that must be provided to other employees and customers

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NATIONAL LABOR RELATIONS BOARD UPDATE

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NATIONAL LABOR RELATIONS BOARD UPDATE

- o NLRB has continued to issue numerous pro-employer decisions
 - Board affirmed its return to the traditional common-law agency test for determining independent contractor status. *SuperShuttle Inc. DFW, Inc.*, 367 NLRB No. 75 (January 25, 2019)
 - Employer does not have to allow non-employees to use their cafeterias or similar public spaces for promotional or organizational activities. *UPMC Presbyterian Hospital*, 368 NLRB No. 2 (June 14, 2019)

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NATIONAL LABOR RELATIONS BOARD UPDATE

- o NLRB has continued to issue numerous pro-employer decisions
 - Employers do not violate the NLRA solely by misclassifying its employees as independent contractors. See *Velox Express Inc.*, 368 NLRB No. 67 (August 29, 2019)
 - Employers do not violate the NLRA by removing union organizers from their parking lots. See *Kroger Limited Partnership I Mid-Atlantic*, 368 NLRB No. 64 (Sept. 6, 2019)

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OTHER FEDERAL LABOR & EMPLOYMENT LAW UPDATES

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SUPREME COURT RULING ON DEFERENCE TO AGENCY'S INTERPRETATION

- *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019)
 - Supreme Court held that courts are to give deference to an agency's interpretation of their own rule when a regulation is ambiguous.
 - Even if regulation is ambiguous, the agency interpretation must be reasonable.
 - If the regulation is not ambiguous, then the court is to interpret the regulation as it would any other law.

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SUPREME COURT RULING ON ADMINISTRATIVE PROCEDURES

- *Fort Bend County v. Davis*, 139 S. Ct. 1843 (2019)
 - Courts are not to consider Title VII's requirement that a party exhaust administrative remedies as a non-waivable jurisdictional requirement.
 - Instead, courts are to treat the exhaustion requirement as a waivable defense.

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OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION REPORTING

- OSHA removed the requirement that workplaces with 250 or more employees need to electronically submit Forms 300 and 301.
- Employers are still required to maintain these forms on site.

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DRUG TESTING & CBD

- Federal Controlled Substances Act classifies marijuana as a Schedule I controlled substance.
- 2018 Farm Bill Act legalized “industrial hemp” as an agricultural commodity and removed it from the definition of marijuana.
 - Industrial hemp is any part of the Cannabis sativa L. plant with a delta-9 tetrahydrocannabinol (THC) concentration of not more than 0.3% on a dry weight basis.

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DRUG TESTING FOR MARIJUANA

- U.S. Food and Drug Administration must first promulgate regulations before industrial hemp can legally be sold in interstate commerce.
 - The only hemp-derived products that the FDA has approved is hulled hemp seed, hemp seed protein powder, and hemp seed oil, which do not contain cannabidiol (CBD).
 - Without oversight from FDA, it is nearly impossible to determine sourcing of CBD products and whether CBD contains THC in acceptable percentages.

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DRUG TESTING FOR MARIJUANA

- o **Bottom Line:**
 - Any product containing cannabitol (CBD) is still currently classified as a Schedule I controlled substance and would be considered illegal under Nebraska law.
 - Employers may still hold applicants and employees accountable under its Drug Free Workplace policies.
 - State laws vary; proceed with caution if operating in multiple states.

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NEBRASKA SPECIFIC UPDATES

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NEW NEBRASKA LEGISLATION

- o **LB217**—Prohibits employers from discriminating against applicants or employees for discussing wages or benefits
- o **LB418**—Prohibits collection of a debt incurred from treatment of a work-related injury while the matter is pending in the Nebraska Workers' Compensation Court
- o **LB254**—Proposed Bill would require an employer that asks an applicant to disclose his or her criminal history to afford the applicant the opportunity to explain a past conviction or other criminal history


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