



2022 LABOR & EMPLOYMENT LAW SEMINAR

RETURN TO THE OFFICE
(YES, WE'RE DOING THIS PRESENTATION VIRTUALLY)

OCTOBER 25, 2022



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CONDUCTING EFFECTIVE WORKPLACE INVESTIGATIONS

PAMELA J. BOURNE
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OCTOBER 25, 2022



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DUNDER MIFFLIN,^{INC}

PAPER COMPANY

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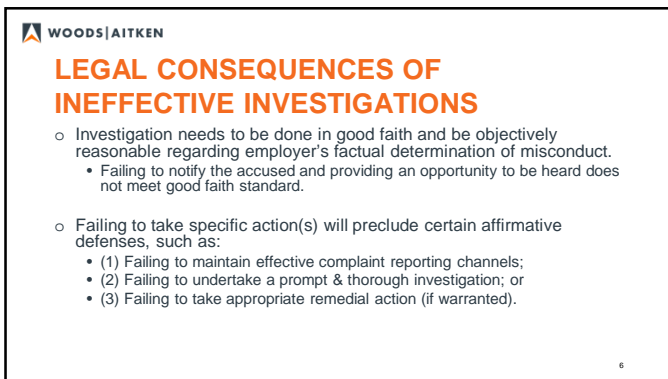
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LEGAL CONSEQUENCES OF INEFFECTIVE INVESTIGATIONS

- o An employer can be held liable under the “cat’s paw” theory.
- o Choosing a competent investigator and promptly addressing the complaint is crucial to an employer’s defense.

INITIATING AN INVESTIGATION

SITUATIONAL ANALYSIS

During Dunder Mifflin’s Annual Christmas Party, Dwight and Angela are caught canoodling in the warehouse.



SITUATIONAL ANALYSIS

- Of the following situations, which warrants the initiation of an investigation?
 - A. Michael caught Dwight and Angela, but no one else complained.
 - B. Michael heard about the situation from Kelly.
 - C. Michael received an anonymous complaint.
 - D. Toby, the HR Representative, received a complaint through the Dunder Mifflin's formal complaint process.
 - E. All of the above.

PRELIMINARY CONSIDERATIONS: THE COMPLAINT PROCESS

- The complaint process should:
 - Be clear, responsive, and open with multiple reporting channels
 - Welcome questions, concerns, and complaints
 - Encourage employees to report potentially problematic conduct early
 - Treat all those involved with respect
- Employees should know, trust, and utilize the complaint system

PRELIMINARY CONSIDERATION: A COMPLAINT IS MADE

- Written complaint will need follow-up conversation with complainant.
- Verbal complaint may sound like:
 - I need to tell you something...
 - I don't want you to do anything about it, but...
 - I want to tell you something, but you have to promise to keep it confidential . . .
 - All I want to happen is...
 - I won't do anything if you agree to...

**PRELIMINARY CONSIDERATIONS:
VERBAL COMPLAINT**

- o If verbal, initial conversation with complainant should cover:
 - Who, What, When, Where, and Why
- o Documentation
 - Remember: A jury may read this!

**PRELIMINARY CONSIDERATIONS
A COMPLAINT HAS BEEN MADE – NOW WHAT?**

- o Internally document the complaint (including date/time received and details provided)
- o Send correspondence to complainant
 - Confirm receipt of the complaint
 - Inform complainant of the Company's process to undertake a prompt and thorough investigation
 - Inform complainant of Company's commitment to no-retaliation
 - Provide contact information for further questions and concerns

**PRELIMINARY CONSIDERATIONS
A COMPLAINT HAS BEEN MADE – NOW WHAT?**

- o Is interim action necessary? (e.g., separate the accused from the complainant).
- o Gather relevant records or data (e.g., schedules, payroll records, notes, email).
- o Review existing Company policies on misconduct.
- o Visit the location of the alleged wrongdoing.
- o Does law enforcement need to be notified?

**PRELIMINARY CONSIDERATIONS
A COMPLAINT HAS BEEN MADE – NOW WHAT?**

- o Who will conduct the investigation?
- o Considerations
 - Internal or External
 - Attorney or Non-Attorney
 - Familiarity with the Company's business, operations, and personnel
 - Knowledge of applicable labor and employment laws
 - Ability to be perceived as neutral and unbiased
 - Experience in conducting workplace investigations
 - Capable of maintaining confidentiality
 - Involvement in the matter
 - Effectiveness at being a witness in court
 - Cost

**PRELIMINARY CONSIDERATIONS
A COMPLAINT HAS BEEN MADE – NOW WHAT?**

- o Most common options for investigators
 - Human resources or employee relations personnel
 - In-house counsel
 - An outside investigator
 - Outside counsel

**PRELIMINARY CONSIDERATIONS
A COMPLAINT HAS BEEN MADE – NOW WHAT?**

- o Consider the Structure of the Investigation
 - List of allegations to be investigated
 - List of witnesses to be interviewed
 - List of the specific allegations each witness will be asked about
- o Identify the order of interviews and consider how you will ensure the integrity of the investigation
- o Remember:
 - Don't interview as a group
 - Consider having two interviewers present and/or recording the interviews

**PRELIMINARY CONSIDERATIONS
A COMPLAINT HAS BEEN MADE – NOW WHAT?**

**Absent extraordinary
circumstances, investigations
should begin within 24 hours
of the initial complaint and
completed within a few days.**

**PRELIMINARY CONSIDERATIONS:
INTERVIEWING**

- o Considerations in Conducting Interviews:
 - Don't be accusatory
 - Don't ask leading questions
 - Keep it simple
 - Use open-ended questions
 - Be patient and don't feel obligated to fill silence
 - Active listening
 - Keep an open mind
 - Non-verbal cues are important too

**INTERVIEWING THE
COMPLAINANT**

INTERVIEWING THE COMPLAINANT

- o Be compassionate while minimizing bias
- o Don't express opinions regarding truthfulness, legal implications, etc.
- o Encourage an open dialogue
- o Actively listen, including watching body language
- o Appreciate that some topics can be difficult to talk about
 - Try to elicit as many details as possible, but don't push too hard

INTERVIEWING THE COMPLAINANT

- o Ask open ended questions
 - Get/Confirm details regarding who, what, when, where, why, and how
- o When asking follow-up questions or for clarification, be thoughtful about your words and tone



INTERVIEWING THE COMPLAINANT

- Request evidence the complainant may have to support any assertions made
 - Things such as texts, emails, or other correspondence
 - Timesheets, calendars, photographs, logs, travel or meeting agendas/reports
- Ask if there are any corroborating witnesses or others subjected to this type of behavior

INTERVIEWING THE COMPLAINANT

- Discuss Company policies:
 - Complaint Procedure
 - If it has not been followed by the complainant, ask why
 - No-Retaliation
- Do not promise confidentiality
- Ask the complainant how they would like to see the matter resolved
- Advise the complainant that the Company will be conducting an investigation, but don't make promises regarding timing or outcomes

INTERVIEWING THE ACCUSED

INFORMING THE ACCUSED

- o The Company is investigating allegations involving alleged [general description].
- o No conclusions have been reached regarding the merits of these allegations.
- o The Company takes all complaints seriously and is conducting an investigation.
- o During this process, there are a few commitments that I need from you:
 - Confidentiality (if appropriate)
 - Non-Interference with Investigation
 - No Retaliation

INTERVIEWING THE ACCUSED

- o Ensure accused understands the allegations against him or her.
- o Consider how much information to disclose and when.
 - General explanation of the nature of the complaint without identifying the victim → seek initial response.
 - If general allegations are denied or the accused claims ignorance → go into specific allegations.

INTERVIEWING THE ACCUSED

- o If the allegations are denied →
 - Ask for explanation of why the complainant would say such things.
 - Ask about prior relationship with complainant and past interactions.
- o Request evidence the accused may have to support his/her position.
- o Ask whether there are any corroborating witnesses.

INTERVIEWING THE ACCUSED

- o Maintain a neutral and objective tone throughout the interview.
- o Do not express any opinion regarding truthfulness or accuracy.
- o Do discuss interim actions pending the completion of the investigation:
 - Transfers, shift changes, suspensions, leaves of absence, etc.

INTERVIEWING THE ACCUSED

- o What if the Accused Says:
 - I want my lawyer!
 - I want to record this.
 - They're not the one being harassed! I am!
 - This is defamation! I'm going to sue!

INTERVIEWING THE ACCUSED

- o Document the interview
- o Review policies and commitments:
 - Anti-Harassment and Discrimination Policy
 - No-Retaliation
 - Confidentiality (if appropriate)
 - No Interference

INTERVIEWING WITNESSES

INTERVIEWING WITNESSES

- o Manage the investigation to ensure credibility and minimize collusion amongst complainant, accused, and witnesses.
 - Move through the investigation quickly
 - Consider when and where to conduct witness interviews (overlapping witnesses)
 - Reinforce the importance of confidentiality (if appropriate)

SUGGESTIONS WHEN INTERVIEWING

- o Start with the general questions and only move to specific details of the complaint if you must.
- o Inquire into relationships with complainant/accused.
- o Inquire if other witnesses are known.

WHAT IF A WITNESS SAYS...

- I really don't want to get involved...
- I don't want to lose my job...
- The accused will make my life h*ll if I talk.
- Do I have to talk with you?
- Is there any possibility that folks will find out what I say?

ANNOUNCING CONCLUSIONS

COMING TO A CONCLUSION

- Avoid black-and-white conclusions
 - "I find it more likely than not . . ."
- Determine who needs to know
- Determine if remedial training is appropriate
- Determine what other corrective measures need taken

COMING TO A CONCLUSION

- What happens when...
 - You can't substantiate the accusations?
 - A witness lied and/or otherwise interfered with your investigation?
 - The complainant comes to you and says that he/she is being treated differently following the investigation?
 - A second allegation is made against the accused?

OTHER CONSIDERATIONS

- Documentation Issues
 - Witness Statements
 - Recording

QUESTIONS?



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**EMPLOYEE HANDBOOK PROVISIONS THAT
 COULD VIOLATE THE NLRA . . . EVEN IF
 YOU'RE A NON-UNION EMPLOYER**

JERRY L. PIGSLEY
 JOSEPH F. WILLMS

OCTOBER 25, 2022



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**THE NEW RULE
 MAKERS AT THE NLRB**

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NLRB MEMBERS

- o New Chair: Lauren McFerran (D)
 - Appointed by President Obama and replaced Board Member Ring as Chair by President Biden in January 2021
 - Term expires December 16, 2024
- o Member: John F. Ring (R)
 - Term expires December 16, 2022
- o Member: Marvin E. Kaplan (R)
 - Term expires August 27, 2025

NLRB MEMBERS (CONT.)

- o New Member: Gwynne Wilcox (D)
 - Senate confirmed July 28, 2021, and term expires August 2023
 - Started after Republican Board Member Bill Emanuel's term expired August 27, 2021
- o New Member: David Prouty (D)
 - Senate confirmed July 28, 2021, and term expires August 27, 2026
- o August 28, 2021 – First Democrat majority led by Chair McFerran since 2017.

NEW GENERAL COUNSEL (PROSECUTOR)

- o Peter Robb – Fired by President Biden on January 21, 2021, along with Deputy General Counsel Alice Stock the following day
 - Robb's four-year term as General Counsel was not set to expire until November 16, 2021
- o Peter Sung Ohr – Biden appointed Acting General Counsel on January 25, 2021
 - Now serving as Deputy General Counsel
- o Jennifer Abruzzo – Replaced Ohr as General Counsel on July 22, 2021, by a 51-50 vote of the Senate, with Vice President Harris casting the tie-breaking vote

TRUMP-ERA GUIDANCE MEMOS RESCINDED

- o Ohr rescinded several Trump-era Guidance Memos upon taking his position
- o Reasoning: the Memos were either inconsistent with the NLRB's goal of encouraging collective bargaining and protecting workers' rights under or they were no longer necessary

MANDATORY SUBMISSIONS TO ADVICE

- o On August 12, 2021, Abruzzo issued a General Counsel Memo 21-04 regarding cases NLRB Regions need to submit to their Advice Branch to reexamine and determine whether a change is necessary to fulfill the mission of the NLRA
- o The memo includes cases where the Trump NLRB overruled previous legal precedent and areas of the law that are not the subject of a recent NLRB decision, but that Abruzzo would like to reexamine

GC ABRUZZO'S "HIT" LIST

- o Cases Involving Board Doctrinal Shifts
 1. Employer Handbook Rules
 2. Confidentiality Provisions/Separation Agreements and Instructions
 3. What Constitutes Protected Concerted Activity
 4. Wright Line / General Counsel's Burden
 5. Remedial Issues

GC ABRUZZO'S "HIT" LIST (Cont.)

- o Cases Involving Board Doctrinal Shifts (Cont.)
 6. Union Access
 7. Union Dues
 8. Employee Status
 9. Board Jurisdiction Over Religious Institutions
 10. Employer Duty to Recognize and/or Bargain
 11. Deferral

EMPLOYEE HANDBOOK POLICIES ON GC ABRUZZO'S RADAR

STERICYCLE, INC. 371 NLRB NO. 48 (2021)

- o January 6, 2022 – Board (2 Republican members dissenting) decided to invite briefs from the parties and interested amici to consider whether the Board should adopt a new legal standard to apply in cases where an employer's maintenance of a facially-neutral work rule is alleged to violate Section 8(a)(1) of the National Labor Relations Board Act

STERICYCLE, INC. (CONT.)

- o ALJ Michael Rosas found the employer violated the Act by maintaining work rules that addressed:
 - 1) "Personal Conduct"
 - 2) "Conflicts of Interest"
 - 3) "Confidentiality of Harassment Complaints"

STERICYCLE, INC. (Cont.)

- o Employer appealed to the Board.
- o Decision pending.
- o August 10, 2022 – Union’s attorney filed letter with NLRB Executive Secretary complaining about delay in the Board deciding the case which was fully briefed in March.

STERICYCLE, INC. (Cont.)

The "personal conduct" rule provides in relevant part that:

In order to protect everyone’s rights and safety, it is the Company’s policy to implement certain rules and regulations regarding your behavior as a team member. Conduct that maliciously harms or intends to harm the business reputation of Stericycle will not be tolerated. You are expected to conduct yourself and behave in a manner conducive to efficient operations.

STERICYCLE, INC. (CONT.)

Failure to conduct yourself in an appropriate manner can lead to corrective action up to and including termination.

The following are some examples of infractions, which could be grounds for corrective action up to and including termination, however, this list is not all-inclusive . . . Engaging in behavior which is harmful to Stericycle's reputation . . .

STERICYCLE, INC. (CONT.)

The "conflicts of interest" rule provides in relevant part:

Stericycle will not retain a team member who directly or indirectly engages in the following:

- An activity that constitutes a conflict of interest or adversely reflects upon the integrity of the Company or its management.

STERICYCLE, INC. (CONT.)

The "confidentiality of harassment complaints" rule provides in relevant part:

Stericycle strictly prohibits unlawful retaliation against any team member or applicant for employment who reports discrimination or harassment, or who participates in good faith in any investigation of unlawful discrimination or harassment.

What action should you take if you feel you have been a victim of harassment or retaliation?

STERICYCLE, INC. (CONT.)

If you believe you have been the victim of harassment or retaliation of any kind, immediately do the following:

1. If you feel comfortable doing so, we encourage you to tell the person in no uncertain terms to stop; and
2. Report the incident and name of the individual(s) involved to your Human Resources Representative. If you cannot report the issue to your Human Resources Representative for any reason, contact the Team Member Help Line at [phone number]. The Help Line accepts anonymous complaints of any kind.

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STERICYCLE, INC. (CONT.)

All complaints will be promptly investigated.

All parties involved in the investigation will keep complaints and the terms of their resolution confidential to the fullest extent practicable.

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STERICYCLE, INC. (CONT.)

NLRB Invited Parties and Interested Amici to File Briefs Addressing the Following Question:

3. Should the Board continue to hold that certain categories of work rules – such as investigative-confidentiality rules as addressed in *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144, (2019), non-disparagement rules as addressed in *Motor City Pawn Brokers*, 369 NLRB No. 132 (2020), and rules prohibiting outside employment as addressed in *Nicholson Terminal & Dock Co.*, 369 NLRB No. 147 (2020), and *G&E Real Estate Management Services d/b/a Newmark Grubb Knight Frank*, 369 NLRB No. 121 (2020) – are always lawful to maintain?

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CURRENT BOARD LAW ON HANDBOOK / WORKPLACE POLICIES

- o BOEING CO., 365 NLRB No. 154 (2017)
 - Did not change requirement that rules must be facially neutral and must be neutral as applied.
 - New Boeing test requires the Board to evaluate a facially neutral policy to evaluate two things.

BOEING TEST

- o Board evaluates two things:
 1. Nature and extent of the potential impact on NLRA rights; and
 2. Legitimate justifications associated with the rule.

NLRB GC EXPLAINED IMPACT OF BOEING DECISION BY DIVIDING RULES INTO THREE CATEGORIES

1. Rules that are generally lawful to maintain.
(E.g., civility rules)
2. Rules warranting individualized scrutiny.
(E.g., rules prohibiting use of employer's name)
3. Rules that are unlawful to maintain.
(E.g., confidentiality rules regarding pay)

TRUMP BOARD CLARIFIED BOEING

L.A. Specialty Produce Co.,
368 NLRB No. 93 (2019)

GC has burden to prove that a facially neutral rule would be interpreted by a reasonable employee to potentially interfere with the exercise of PCA.

FUTURE OF HANDBOOK RULES

- o GC in its brief for the Stericycle case, advocates for a return to the Lutheran Heritage type standard.
- o Under Lutheran Heritage, employers are not permitted to enact any rule or policy that could be "reasonably construed" by an employee to prohibit the exercise of their NLRA rights, such as the right to join a union.
- o Rule does not need to explicitly prohibit protected activities, be adopted in response to such activities, or be applied to restrict such activities.

CONFIDENTIALITY RULES DURING AN OPEN INVESTIGATION

Apogee Retail LLC, 368 NLRB No. 144 (2019)

Board held that work rules requiring confidentiality during the course of workplace investigations are presumptively valid.

FUTURE OF CONFIDENTIALITY RULES

- o Apogee Retail LLC is currently under review in the Stericycle case.
- o Board likely to resurrect the Banner Estrella standard that was overruled by Apogee Retail LLC.
- o Prior rule provided the burden was on the employer to make a compelling case that the special needs of an investigation require confidentiality that trumps the employee's statutory rights to discuss workplace issues of mutual concern.

IMPACT ON SEPARATION AGREEMENTS

- o Baylor University Medical Center, 269 NLRB No. 43 (2020), GC Abruzzo is seeking a reconsideration of this Board decision which found separation agreements containing confidentiality and non-disparagement provisions lawful.
- o International Game Technology, 370 NLRB No. 50 (2020), GC Abruzzo is seeking to challenge this Board decision applying Baylor to a separation agreement requiring departing employees to not make any public statements which are "detrimental" to the employer's business.

DRESS CODE

Home Depot USA, Inc., Case No. 18-CA-273796 (June 10, 2022) (ALJ Decision)

Complaint alleged employer interfered, restrained, and coerced employees in violation of the NLRA by applying its dress code and apron policies from "displaying causes or political messages unrelated to workplace matters" to encompass a prohibition on displaying the messages "Black Lives Matter" and/or "BLM," by disciplining employees who wore such messaging.

HOME DEPOT (CONT.)

- o ALJ dismissed the claim that the employer's nationwide application of its dress code to BLM messaging violated the NLRA.
- o ALJ failed to meet the second requirement for establishing protection – showing that the employees' displays of BLM messaging had a direct nexus to employee efforts to "improve [their] terms and conditions of employment or otherwise improve their lot as employees."
- o GC excepted to the ALJ's failure to find "that BLM and related messages protesting workplace discrimination" were inherently concerted.

WHOLE FOOD MARKETS, INC.
 Cases 01-CA-263079 et al.
 (December 3, 2021, Complaint)

- o In December 2021, the GC issued a complaint against Whole Foods Market alleging that its employees have the right under Section 7 to wear "Black Lives Matters messaging at work," that their doing so is for their "mutual aid and protection," and that WFM's responses to their doing so violated the NLRA.
- o BLM messaging worn by WFM employees was on masks, shirts, pins, necklaces, buttons and a henna tattoo.
- o Case is pending.

TESLA, INC.
 370 NLRB No. 131
 (August 29, 2022)

- o First time the Biden NLRB has overturned precedent and held that an employer policy that interferes in any way with employees' right to display union insignia is presumptively unlawful.
- o To overcome that presumption, the employer must demonstrate "special circumstances" – such as a risk to employee safety or of damage to employer products or equipment, or of unreasonable interference with an established public image – to justify that interference.

UNION ACCESS TO PUBLIC SPACES

LT Transportation Advice Memo (Jan. 4, 2022)

- o Company wrote a letter to the union that was trying to organize the company's drivers, prohibiting the union's representatives from going to stops along the shuttle bus routes to talk to the drivers.
- o GC Advice Memo to Regional Director concluded employer violated Section 8(a)(1) when it barred nonemployee union agents from boarding shuttles.

LT TRANSPORTATION

- o Urged Regional Directors to use such a case to overrule current standard in UPMC, 368 NLRB No. 2 (2019).
- o UPMC Rule: An employer does not have to allow nonemployee access to a public space on employer's property absent discrimination between nonemployee union representatives and other nonemployees.

LT TRANSPORTATION (Cont.)

- o Anticipated New Rule: Employers required to permit nonemployees to engage in promotional / organizational activity in public spaces absent evidence of inaccessibility or activity-based discrimination.

LT TRANSPORTATION (Cont.)

- o GC Advice Memo seeks to overrule Kroger Ltd. Partnership, 368 NLRB No. 64 (2019).
- o Kroger found discrimination against non-employee organizers only where it can be found that other non-employees engage in “similar activity in similar relevant circumstances.” This standard encompasses both the literal activity engaged in, and the purpose of that activity.
- o Employer could ban union organizers from distributing union literature, while allowing non-employee access for other charitable, civil, and commercial activities.

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LT TRANSPORTATION (Cont.)

- o Anticipated New Rule: Employers required to grant access to employer property to non-employee union agents if employer has allowed substantial civic, charitable, and promotional activities by other non-employees.

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SOCIAL MEDIA POLICIES

<p>1</p> <p>The Boeing test, as clarified in <u>LA Specialty Produce</u>, is still technically the law.</p>	<p>2</p> <p>The test categorically upholds non-disparagement provisions in employer social media policies.</p>	<p>3</p> <p>However, Chair McFerran's dissent in <u>Medic Ambulance Services, Inc.</u> will likely become the new rule.</p>
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SOCIAL MEDIA POLICIES (Cont.)

Current Rule: An employer rule should be interpreted from the perspective of

an "objectively reasonable" employee who is aware of his/her legal rights, but who also interprets work rules as they apply to the "everydayness" of their job.



GC must then prove that the objectively reasonable employee would interpret the rule as potentially interfering with the exercise of his/her NLRA rights.

SOCIAL MEDIA POLICIES (Cont.)

Anticipated New Rule: When evaluating an employer's rule:

It must be assumed that employees will be inclined to read the rule as potentially prohibiting protected activity.



It must be determined whether the rule reasonably tends to interfere with employees' exercise of their NLRA rights.

SOCIAL MEDIA POLICIES (Cont.)



Current Rule: If a reasonable employee would view the rule as potentially restricting PCA, the employer's legitimate justifications for the rule must be weighed against its potential restrictions on PCA.



Anticipated New Rule: A rule restricting employees' PCA must be narrowly tailored to serve an employer's legitimate business interests, and not worded more broadly than necessary to do so.

POTENTIALLY UNLAWFUL RULES

o Non-disparagement rules

Employees may not use social media to disparage the company, its associates, customers, vendors, business practices, patients, or other employees of the company.



Paul Liberstein
@PaulLiberstein

Make America a safe work environment again!



Steve Carell
@SteveCarell

shut the hell up Toby

POTENTIALLY UNLAWFUL RULES (Cont.)

o Rules prohibiting inappropriate communications

Inappropriate communications, even if made on your own time using your own resources, may be grounds for discipline up to and including termination.

POTENTIALLY UNLAWFUL RULES (Cont.)

- o Rules limiting use of company's name in social media posts

You may not use the company name to endorse, promote, denigrate, or otherwise comment on any product, opinion, cause, or person.

POTENTIALLY UNLAWFUL RULES (Cont.)

- o Rules prohibiting posting photos of coworkers
Do not use or post photos of coworkers without their express consent.

Employees must not post pictures of company-owned equipment or other employees on a website without obtaining written permission.

POTENTIALLY UNLAWFUL RULES (Cont.)

- o Rules prohibiting the sharing of employee compensation information

Only human resources can give out any information on current or former employee compensation.

PROPOSED JOINT EMPLOYER RULE



The NLRB proposed a new joint employer rule on September 6, 2022.



Proposed Rule: Two or more employers are joint employers if they share or codetermine matters governing employees' essential terms and conditions of employment.

PROPOSED JOINT EMPLOYER RULE (Cont.)

- o Can be considered joint employers by **having the authority or exercising the power** to control the employees':

wages, benefits,
and other
compensation;

hours of work
and scheduling;

hiring and
discharge;

PROPOSED JOINT EMPLOYER RULE (Cont.)

discipline;

workplace health
and safety;

supervision;

assignments; or

work rules and
directions governing
the manner, means,
or methods of work
performance.

PROPOSED JOINT EMPLOYER RULE (Cont.)



Possessing the authority to control the employees' essential terms and conditions of employment, *even if you never exercised it*, would make you a joint employer.



Exercising the power to control the employees' essential terms and conditions of employment *indirectly* would make you a joint employer.



Control exercised through an intermediary would make you a joint employer.

QUESTIONS?



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SEXUAL HARASSMENT IN THE DIGITAL AGE: IT WAS JUST A MEME!

ERIN L. EBELER
SARAH K. MIELKE

OCTOBER 25, 2022



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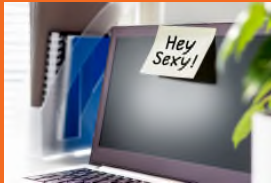
GOALS

- o Understand the Issues Presented by Remote / Hybrid Work Environments
- o Explain What Sexual Harassment Is (and What it is *Not*)
- o Know What Obligations You Have as an Employer
- o Develop Policies and Procedures that **Avoid Problems** and **Improve your Organization**

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SEXUAL HARASSMENT IN REMOTE / HYBRID WORK ENVIRONMENTS



THIS IS ALMOST THE ONLY IMAGE THAT CLEARED THE VETTING PROCESS AS SUITABLE FOR USE DURING THIS PRESENTATION. SORRY. THERE ARE EXAMPLE MEMES OUT THERE, BUT OUR LAWYERS SAID NO.

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SEXUAL HARASSMENT IN REMOTE / HYBRID WORK ENVIRONMENTS

o 2022 Survey by Deloitte:

- 59% of women reported experiencing **harassment** and/or **microaggressions** during 2022 (52% in 2021)
- Microaggressions are much less likely to be reported than acts of harassment, but they're real issues. (If you can't report, you are more likely to leave.)
- LGBT+ or minority groups face greater challenges

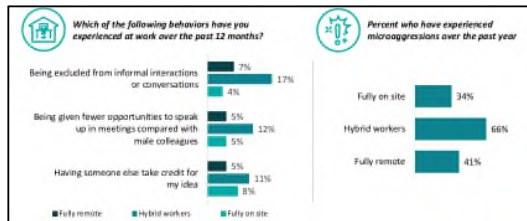
Deloitte, "Women @ Work 2022: A Global Outlook," available at <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/deloitte-women-at-work-2022-a-global-outlook.pdf>; see also New York Times, "Workplace Harassment in the Age of Remote Work," June 8, 2021, available at <https://www.nytimes.com/2021/06/08/us/workplace-harassment-remote-work.html> (analyzing a 2021 version of the survey results).

SEXUAL HARASSMENT IN REMOTE / HYBRID WORK ENVIRONMENTS

o 2022 Survey by Deloitte:

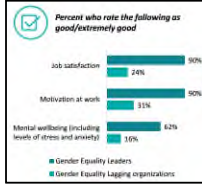
- 93%** of women fear retaliation and believe speaking up will negatively impact their careers
- Most felt their employers wouldn't take proper action if a report was made
- Again: If you can't report, you are more likely to leave. (See a theme yet?)

SEXUAL HARASSMENT IN REMOTE / HYBRID WORK ENVIRONMENTS



SEXUAL HARASSMENT IN REMOTE / HYBRID WORK ENVIRONMENTS

- o All of this Matters: "Women who work for Gender Equality Leaders report far higher levels of wellbeing and job satisfaction."



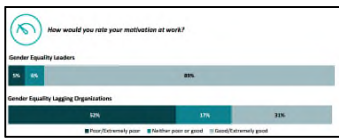
SEXUAL HARASSMENT IN REMOTE / HYBRID WORK ENVIRONMENTS

- o Gender Equality Leaders have employees that agree with all three of these statements:
 - I feel confident to report when I encounter non-inclusive behaviors and microaggressions, without concern about career impact or reprisal.
 - I feel supported by my employer in my efforts to balance my work responsibilities with other commitments.
 - My career is progressing as quickly as I would like.

SEXUAL HARASSMENT IN REMOTE / HYBRID WORK ENVIRONMENTS



There is a return on investment for getting these issues RIGHT!



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UNDERSTANDING SEXUAL HARASSMENT

WHAT IT IS
WHAT YOUR OBLIGATIONS ARE

SEXUAL HARASSMENT
"IT WAS JUST A JOKE."

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UNLAWFUL HARASSMENT

- o Conduct that:
 - Is based on a protected category;
 - Is unwelcome;
 - Is severe or pervasive; and/or
 - Has an unlawful consequence (is either made a condition of employment or creates a hostile work environment).

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PROTECTED CATEGORIES

- o Race, Color, National Origin, or Ethnic Origin
- o Sex
 - Sexual in Nature
 - Pregnancy
 - Marital Status
 - Gender
 - Sexual Orientation/Identity
 - Caregiver Status
- o Religion
- o Age (over 40)
- o Disability
- o Genetic Information
- o Veteran Status

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“BASED ON” PROTECTED CATEGORIES

- o Usually directed at a person who is in the protected category, but not necessarily.
- o An employee who is not in the protected category could be the victim of harassment.

“UNWELCOME” CONDUCT

- o Offensive (not wanted and not invited).
- o As perceived by the person being harassed.
- o Using a standard of reasonableness.*

* Generally must be viewed as unwelcome and offensive by a reasonable person standing in the shoes of the individual being harassed.

IS THE CONDUCT “UNWELCOME”?

- o Nature of the Conduct
- o Victim’s Behavior:
 - Invited, solicited, encouraged it?
 - Objected to or resisted it?
 - Post-harassment behavior
- o Harasser’s Behavior and History
- o Witness Observations
- o Credibility of Parties

“SEVERE OR PERVASIVE”

- o Workplaces do not need to be perfect. The law does not guarantee total civility.

- o Must be a certain amount of unwelcome behavior before it is considered unlawful.

“SEVERE OR PERVASIVE”

- o General guidelines (but no fixed rules):
 - Severe = At least one very serious incident.

 - Pervasive = A pattern of two or more reasonably frequent incidents (must permeate the workplace).

“UNLAWFUL CONSEQUENCE”

One of the following:

1. Harassment is Made a Condition of Employment (“*Quid Pro Quo*”); or

2. Harassment Creates Hostile Work Environment.

“CONDITION OF EMPLOYMENT”

A “tangible” job consequence or condition imposed by a *supervisory* harasser:

1. Favorable employment action (reward)
...if employee submits to or tolerates the harassment; or
2. Unfavorable employment action (punishment)
...if employee refuses to submit to or tolerate the harassment.

“HOSTILE WORK ENVIRONMENT”

- o Imposed by any harasser (supervisor, co-worker, client, vendor, third party):
 - Intimidating, abusive, offensive, hostile, uncomfortable, or disgusting behavior; or
 - Behavior that unreasonably interferes with employee’s work performance (quality, quantity, concentration, etc.).

FORMS OF HARASSMENT

- Physical
- Spoken
- Written
- Visual
- Auditory
- Direct or Indirect

EXAMPLES OF WHAT MIGHT BE UNLAWFUL HARASSMENT

1. Touching of a sexual nature.
2. Sexual advances or propositions.
3. Requests for dates after being repeatedly rejected.
4. Flirtation, suggestive comments, innuendo.
5. Locker room talk or sexual jokes.
6. Labeling based on any protected category.
7. Jokes based on any protected category.
8. Stereotyping based on any protected category.
9. Derogatory comments about a protected category.

INAPPROPRIATE BEHAVIOR (INCIVILITY)

- o **Behavior you think might be unlawful may not be.**
 –Whether it’s unlawful harassment depends on many factors.
 –It’s a complex analysis.
- o But...even if not unlawful, it may still be inappropriate and a violation of an employer’s expectations for appropriate workplace behavior (e.g., bullying)

EXAMPLES OF INCIVILITY

- o **Things That May Be Unfair or Inappropriate, But Normally Are Not Unlawful Harassment:**
 –Verbal abuse or disrespectful communications;
 –Offensive or derogatory comments about non-protected characteristics, bullying;
 –Disparaging and/or deceitful gossip;
 –Excessive use of profanity; or
 –Misuse or abuse of position (favoritism or grudges).

EXTRA CHALLENGES WITH REMOTE/HYBRID WORKPLACES

- “Jokes” don’t transmit the same way through instant message or email as they do in person.
- Fewer witnesses overhear inappropriate phone calls or observe a complainant’s reaction to wrongful behavior.
- Casual, at-home environments may lead people to forget they’re in the workplace.
- Remote/Hybrid employees may not feel as comfortable in reporting misconduct.

EMPLOYER OBLIGATIONS

- **Prevention:**
 - Take reasonable steps to prevent harassment (e.g., policy, training).
- **Intervention:**
 - Promptly address complaints
 - Examples: Investigate and take appropriate action if warranted.

EMPLOYEE OBLIGATIONS

- **Do not engage in harassment.**
 - Don’t engage in harassing behavior.
 - Treat others with respect.
 - Pay attention to how others receive your behavior.
- **Report harassing behaviors.**
- **Use reasonable care and take steps to avoid being harassed.**

USING REASONABLE CARE TO AVOID HARASSMENT

- **Don't be a victim! Protect yourself by using reasonable care:**
 - Politely confront harasser.
 - Don't mislead others when you feel offended.
 - Don't actively participate (responding in kind).
 - Don't passively participate (laughing, playing along, or being silent).
- **Report harassment without delay and without conditions.**

REPORT HARASSMENT

- Immediately.
- To one of the individuals listed in the employer's Complaint Policy.


NO CONDITIONAL REPORTING

- An employer likely cannot honor requests for total confidentiality, for no investigation, or not to take action against the alleged harasser:
- **Supervisors must report the matter.**
 - Relevant info may need to be shared with the alleged harasser and witnesses.
 - Confidentiality can't be guaranteed, but will normally be preserved to the extent possible.
- **Employer is likely required by law to address the matter.**
 - An investigation may be necessary.
- **Employer is likely required by law to take appropriate action.**
 - Discipline or other action may be imposed.

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KEY POLICIES IN CONNECTION WITH SEXUAL HARASSMENT CLAIMS

- Equal Employment Opportunity Clause
- Anti-Harassment Policy
- Anti-Retaliation Policy
- Complaint Procedures



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EQUAL EMPLOYMENT OPPORTUNITY CLAUSES

- o Sets the baseline that the employer:
 - **Won't** discriminate on a protected class basis
 - **Will** comply with anti-discrimination laws
 - **Will** treat people fairly with regard to the terms and conditions of employment
 - Hiring/Firing
 - Training
 - Promotion
 - Discipline
 - Compensation/Benefits

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ANTI-HARASSMENT POLICY

- o All unlawful harassment on a protected class basis should be prohibited, with a special call out for sexual harassment.
- o State clearly what is prohibited:

"All employees, representatives, vendors, customers, and visitors are prohibited from engaging in harassment of anyone based on that individual's sex or gender (including pregnancy and transgender status) and regardless of the harasser sex or gender."

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ANTI-RETALIATION POLICY

- o **Prohibit unlawful retaliation based on:**
 - Filing a claim in good faith (complainant doesn't have to be right or "proven" correct)
 - Participating in the complaint process (e.g., providing evidence or a statement of support for the complainant)
- o **Key Issue:** Would the action "dissuade a reasonable employee from raising a concern about a possible violation or engaging in protected activity?"
- o Retaliation claims can be more problematic than underlying complaint.

COMPLAINT PROCEDURE

- o Set forth a process with multiple avenues for an employee to raise a concern.
- o Train employees on the procedures.
- o Set time frames for action by employee and employer (employees likely won't be strictly held to them).
- o Following the procedures protects everyone – the employee, the employer, and the accused wrongdoer.

The process is important and can help manage difficult situations calmly.

FINAL POINTS

FINAL POINTS

- **No One's Perfect.**
 - Some actions have ill intent, but sometimes people just don't think.
 - Misunderstandings can occur.
 - Some people don't think about how their actions may be perceived or the affect they can have on others.
 - In a virtual space, misunderstandings may be more common.
 - Other times, there's a genuine problem that needs to be handled.

FINAL POINTS

- **Address Issues when Raised (and when Observed).**
 - Employers can only address known issues.
 - Employees should feel able to reach out to whom he or she feels comfortable.
 - If you don't think a matter is being properly addressed, push the issue upstream.
 - Employers want to address problems earlier rather than later. If addressed early on, it will likely be easier to develop solutions.

FINAL POINTS

- **Document.**
 - Defending these claims REQUIRES documentation.
 - Be detailed. Write down the bad words and be descriptive even if you're uncomfortable.
 - Be timely. The ability to admit documentation into evidence depends on it.
 - Get signed witness statements (notarized if serious).
 - Explain why decisions were made and discipline was or wasn't implemented against an alleged harasser.
 - These complaints can take years. Memories fade, people die, and witnesses change jobs.

FINAL POINTS

o ***Remote/Hybrid Work Will Present New Challenges***

- Ensure hybrid/remote workers have access to leaders and feel comfortable reaching out to those leaders.
- Strive to be a "Gender Equality Leader."
- Remind employees that out of the office work does not mean out of the office behaviors are permitted.
- Be cognizant of microaggressions (e.g., interruptions, idea theft, etc.) on virtual calls and elsewhere.

QUESTIONS?



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**Strategies for a Tight Labor Market:
Getting Creative with Employee Benefits**

Julia Vander Weele
October 25, 2022



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Presenter



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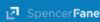
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Agenda

- How Did We Get Here? The Great Resignation
- What Do Employees Want?
- How Can Benefit Strategies Help?
 - PTO Cash-outs
 - Health Plan Opt-outs
 - Special Bonuses
 - 401(k) Enhancements
 - Student Loan Payments
 - Educational Assistance

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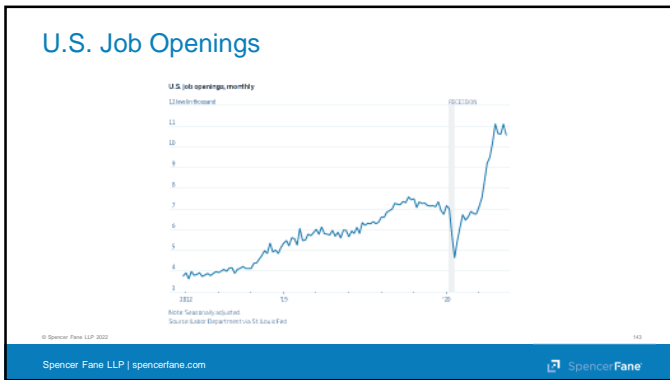
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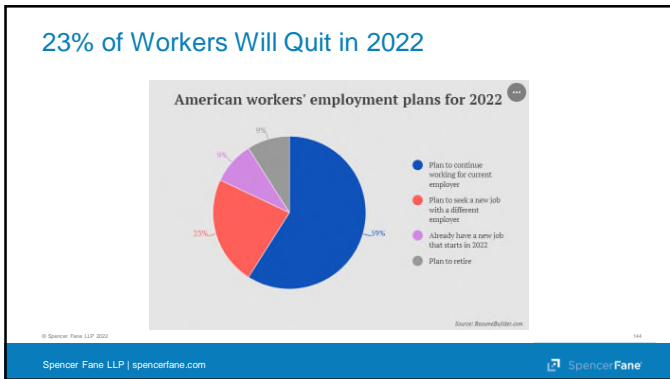
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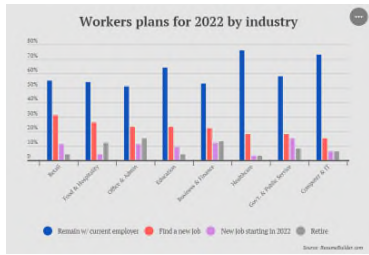


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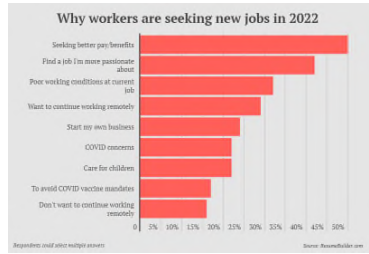
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By Industry ...



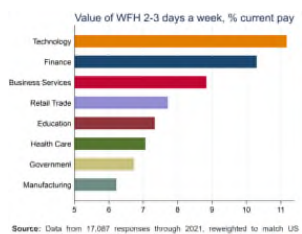
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Why Quit?



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Employees Value Flexible Work Arrangements



Source: Data from 17,087 responses through 2021, reweighted to match US population. Industries with 100+ respondents. Details on <https://www.spencerfane.com>

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What Will Entice / Keep Workers?

Worker Objectives	Potential Benefit Strategies
Flexible Work Environment	PTO Policies, PTO Cash-outs
Higher Pay	Health Plan Opt-outs, Bonuses, 401(k)
Career Enhancement	Student Loan Payments, Education Assistance

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PTO Cash-outs

- Attractive feature to deal with staffing shortages
- Sticky constructive receipt issues if offered with carryover feature

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PTO Cash-outs – What Doesn't Work

- Sale of already accrued PTO with PTO carryover feature
- All employees would be taxed on the amount that they could have sold, even if they didn't choose to sell

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PTO Cash-outs – What Works

- Irrevocable election in advance of PTO that will accrue in the following year
- Sale of accrued vacation with no carryover (forfeit or cash out at year end)

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Opt-Out Incentives

- Appealing to younger, healthier workforce
- Sometimes also referred to as “cash in lieu” programs
- Can create several potential legal issues

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Opt-Out Incentives – Potential Issue #1 ACA “Employer Payment Plan”

- Reimbursement of premiums for *individual* insurance that is explicitly conditioned on proof of insurance might violate the ACA
 - Establishes a “group health plan”
 - By its very terms, cannot comply with ACA prohibition on annual and lifetime limits for essential health benefits or preventive care mandates
- Solution: after-tax reimbursement of other *group* coverage OR unfettered right to cash (not conditioned on other coverage)

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Opt-Out Incentives – Potential Issue #2 ACA “Affordability”

- If unfettered right to cash, the amount of the opt out incentive must be added to the premium in the calculation of “affordability” for purposes of the ACA employer shared responsibility mandate
- Applies to employers with 50 or more employees
- “Conditional” opt out incentive does not need to be included in calculation of ACA affordability

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Opt-Out Incentives – Potential Issue #3 Medicare Secondary Payer

- MSP rules dictate that group health plan pay primary to Medicare for “working aged”
- MSP rules prohibit employer from offering financial inducement to waive primary employer coverage in favor of Medicare
- Employer opt-out incentives should not reimburse individual Medicare premiums

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Opt-Out Incentives – Potential Issue #4 Cafeteria Plan Elections

- The election of an opt out incentive is a choice between a taxable and non-taxable benefits (cash vs. health plan coverage)
- In order to avoid “constructive receipt” issues, such an election must be made through a Section 125 cafeteria plan
- If it is not, all employees could be taxed as if they had chosen the cash option

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Special Bonuses (Cash is King)

- Deductible by employer and taxable to employees
- Potential for retirement plan errors
 - Is bonus "compensation" for retirement plan purposes?
 - If yes, elective deferrals must be taken from bonuses, absent special election
 - If yes, must be included in matching contribution calculation
 - Error correction for missed deferrals/match under IRS's EPCRS program
 - Off-cycle payments create risk for being late on deferral remittances
 - DOL's VFCP program to correct late remittances

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Enhanced 401(k) Contributions

- Approximately 16% of large and mid-size employers plan to increase or reinstate match in 2022 (another 8% are considering it)
 - Callan LLC
- Most are increasing match by 1% to 2% or adding a one-time profit sharing contribution
- Some attempt to target select groups (e.g., nurses)

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Enhanced 401(k) Contributions

- Employer matching contributions
 - Reinstate suspended match
 - Increase matched amount
 - Increased percentage
 - Fixed dollar amount, up to a maximum
- Issues:
 - Nondiscrimination rules (for enhancements targeted to select groups)
 - Notice requirements
 - Plan amendments

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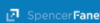
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Enhanced 401(k) Contributions

- Examples (Wall Street Journal Jan. 19, 2022):
 - **Meta** (Facebook parent)
 - In 2022, \$ for \$ match (100%) up to \$10,250
 - Previously matched 50% on first 7% of compensation
 - **KMPG** (global consulting firm)
 - In 2022, replaced match with nonelective profit sharing contribution between 6% and 8% of compensation (including bonuses)
 - Previously matched 25% on first 5% of compensation

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Enhanced 401(k) Contributions

- Other options:
 - Relaxed eligibility rules to allow earlier (or immediate) participation
 - Relax or eliminate vesting rules
 - Permit contributions of unused vacation balances

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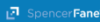
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Employer Payment of Student Loans

- CARES Act expanded flexibility under Code § 127 educational assistance programs to permit tax-free employer payment of student loans
- Up to \$5,250 total benefit (including any other EAP benefits)
- Must be pursuant to a written and compliant § 127 plan document
- Originally limited to loan repayments between 3/27/2020 and 1/1/2021
- CAA extended through 12/31/2025

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Potential Student Loan Match in 401(k) Plans

- Proposed "SECURE Act 2.0" could permit employers to provide 401(k) match based on employees' payment of student loan debt
 - Match would be tied to student loan payments, even absent employee elective deferrals to 401(k)
 - Loan-tied matching contributions must vest under same schedule as regular match
- Current law prohibits conditioning match on anything other than elective deferrals
- Would permit earlier savings opportunity for loan-burdened employees
- Bipartisan legislation introduced in House in 2021 ("Securing a Strong Retirement Act"), currently stalled

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Back-Door Student Loan/401(k) Incentives

- Abbott Labs Private Letter Ruling (May 22, 2018)
- IRS blessed student loan benefit tied to employer nonelective contribution (*not match*) in 401(k)
 - Employer allowed to link nonelective contribution to employees' loan repayment
 - Key attributes of program:
 - Voluntary participation; employees still permitted to make elective deferrals and get match
 - True-up match at year-end
- Caution: Other employers cannot rely on PLR
- No statutory basis

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Educational Assistance Programs

- Qualified educational assistance programs (Code § 127)
 - Tax-free employer assistance up to \$5,250 per calendar year
 - Broad range of educational expenses, including expenses for graduate-level courses and for courses that are not job-related
 - Written plan required; nondiscrimination restrictions

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Educational Assistance Programs

- Working condition fringe benefits (Code § 132)
 - Work-related educational expenses
 - Education must either maintain or improve required skills or meet express requirements of individual's employer or law
 - Expenses **not** excludable if course required to meet minimum educational requirements of current trade or business or part of a program that will qualify the individual for a new trade or business
 - No \$ limit

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Educational Assistance Programs

Feature	§ 127 Qualified Educational Asst.	§ 132(d) Working Condition Fringe
Written Plan Required?	Yes	No
Undergrad & Grad Courses?	Yes	Yes
Must be Job-Related?	No	Yes
Courses Qualifying Eee for New Trade/Business?	Yes	No
Courses to Meet Min. Job Requirements?	Yes	No
Nondiscrim. Requirement?	Yes	No
\$ Limitation	\$5,250	None
Tuition, Books, Supplies, Equipment?	Yes	Yes

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Benefit Strategies

- Identify what will engage your workforce
- Engage consultants and counsel
- Remember your current employees
- Don't forget the details
- Have an exit strategy for new benefits

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Thank You!

Questions?



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