

THE WEST VIRGINIA STATE BAR  
EMPLOYMENT LAW SEMINAR  
SEPTEMBER 19, 2018  
10:00 a.m. - 1:00 p.m.

**AGENDA**

**Hazards of Joint Employer Relationships**

Presenter: Jack Merinar

**#MeToo Movement: Ethical Considerations for Lawyers**

Presenter: Allison Williams

**2018 West Virginia Employment Law Update**

Presenter: *C. David Morrison*

## **John R. Merinar, Jr.**

John R. Merinar, Jr. is the leader of Steptoe & Johnson's NLRA team, which is focused on the law of labor-management relations. In addition, he practices in the areas of personal injury defense for several of the region's ski areas and libel defense for newspapers. "Jack" has tried approximately 25 cases to verdict before juries, negotiated dozens of labor agreements, tried cases before the Occupational Health and Safety Review Commission, and over the course of 26 years counseled employers in most of the employment-related legal issues that can arise. Jack is a member of the Board of the Association of Ski Defense Attorneys and a member of the Board of the Associated Builders and Contractors of West Virginia. Jack is the current and a past President of the Board of Hope, Inc., an organization devoted to providing assistance to victims of domestic violence.



## The Joint Employer Standard





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
## The Joint Employer Standard In Legalese



- Employee formally employed by one employer (the primary employer) may be deemed constructively employed by another employer (secondary employer) if that secondary employer exercises sufficient control over the employee's terms and conditions of employment.
- If a joint employer relationship exists, the secondary employer is a joint employer of the primary employer's employee over which it exercises sufficient control.



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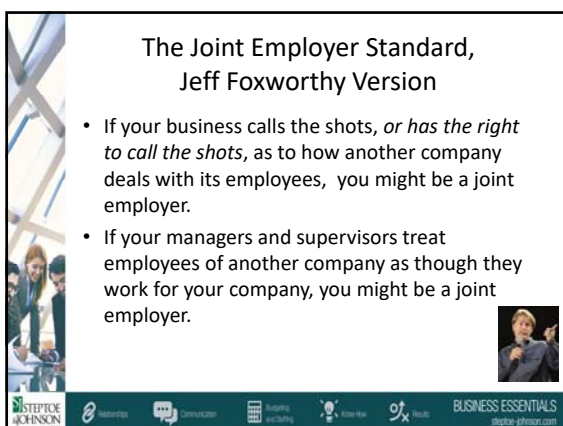
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







## The Joint Employer Standard, Jeff Foxworthy Version

- If your business calls the shots, or *has the right to call the shots*, as to how another company deals with its employees, you might be a joint employer.
- If your managers and supervisors treat employees of another company as though they work for your company, you might be a joint employer.





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**A brief history of the  
Joint Employer Standard**

***NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*  
691 F. 2d 1117 (3d. Cir. 1982)**

- BFI used drivers employed by Brokers
- **TEST:** Do two or more employers share or co-determine those matters governing the essential terms and conditions of employment?
- Control must be actual, direct, and substantial
- Factors considered:
  - BFI could hire and fire drivers
  - BFI established work hours
  - BFI provided uniforms
  - BFI determined compensation along w/Brokers

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 **NLRB Test – 2015**

***NLRB v. Browning Ferris Industries of California, Inc.* 362  
NLRB No. 186 (Aug. 2015)**

**NEW TEST:** We will no longer require that a joint employer not only possess the authority to control employees' terms and conditions of employment, but also exercise that authority. Reserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint employment inquiry. Control can be indirect.

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**NLRB Test – 2015**

**Factors Considered:**

- Leadpoint provided people to sort out recyclables
- Labor Services Agreement gave BFI the right to:
  - Set hiring standards
  - Demand removal of employees
  - Limit Leadpoint employees' wages to not exceed BFI employees' wages

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## NLRB Test – 2017

**Hy-Brand Industrial Contractors, Ltd. 365 NLRB No. 156 (Dec. 2017)**

Back to the OLD *Browning-Ferris* Test:

- Do two or more employers share or co-determine these matters governing the essential terms and conditions of employment? Control must be actual, direct, and substantial.



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






## But Wait... *Wait... what?*

As of February 2018:

- We're back to the 2015 *Browning-Ferris* Test
- Hy-Brand* decision withdrawn due to *appearance* of a conflict of interest for Member Emanuel
- The NLRB asked the DC Circuit to review *Hy-Brand*.
- Three pending cases give the NLRB an opportunity to address (again) the joint employer doctrine
- The NLRB has promised to tackle the issue through a new rule.
  - Rulemaking is rare at the NLRB

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




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## Significance of the NLRB's *Browning-Ferris* Test

- You could incur a duty to bargain.
- You might find that you can be picketed as the "employer."
- You might be pulled into an organizing campaign as the employer.
- You might be liable for discrimination by the other joint employer.
- You might be liable for wage and hour violations by the other joint employer.
- You might be liable for WARN act violations by the other joint employer.

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### When Joint Employer Risks Are Highest

- Franchisor-Franchisee relationships.
- General Contractor-subcontractor relationships.
- Use of contract labor.
- Use of temporary staffing agencies.

**HIGH RISK**

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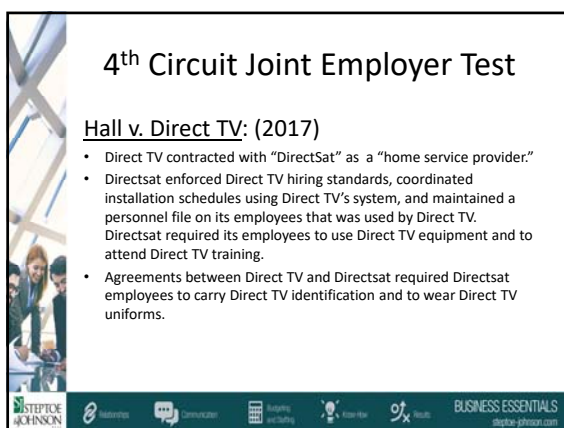
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### 4<sup>th</sup> Circuit Joint Employer Test

Hall v. Direct TV: (2017)

- Direct TV contracted with "DirectSat" as a "home service provider."
- Directsat enforced Direct TV hiring standards, coordinated installation schedules using Direct TV's system, and maintained a personnel file on its employees that was used by Direct TV. Directsat required its employees to use Direct TV equipment and to attend Direct TV training.
- Agreements between Direct TV and Directsat required Directsat employees to carry Direct TV identification and to wear Direct TV uniforms.

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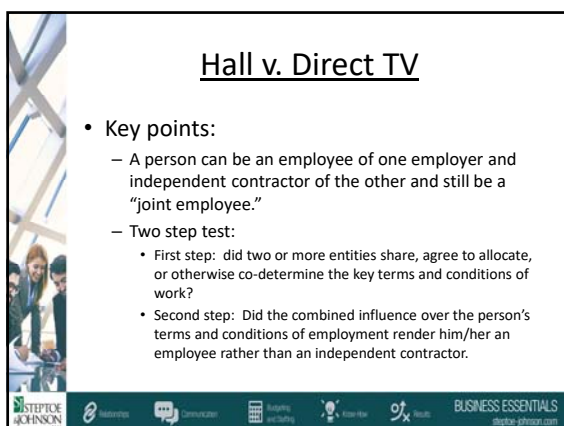
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### Hall v. Direct TV

- Key points:
  - A person can be an employee of one employer and independent contractor of the other and still be a "joint employee."
  - Two step test:
    - First step: did two or more entities share, agree to allocate, or otherwise co-determine the key terms and conditions of work?
    - Second step: Did the combined influence over the person's terms and conditions of employment render him/her an employee rather than an independent contractor.

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## Hall v. Direct TV

“...our two-step test will, consistent with congressional intent, extend FLSA protection to persons who are independent contractors when their work for each entity is considered separately, but employees when their work is considered in the aggregate...”




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## **FLSA Joint Employer Test Applied in Construction**

***Salinas v. Commercial Interiors, Inc. (4<sup>th</sup> Cir. 2017)***

- *Salinas* was employee of a drywall subcontractor.
- The subcontractor worked almost exclusively for *Commercial Interiors*.
- *Commercial Interiors* told the subcontractor how many people it needed at each site.


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## ***Salinas, Con't.***

- *Commercial Interiors* required the subcontractors' employees to fill out time sheets.
- *Commercial Interiors* required the subcontractors' employees to attend scope of work and safety meetings.
- *Commercial Interiors* told the subcontractors' employees to tell anyone who asked that they worked for *Commercial Interiors*.
- Subcontractor employees wore hard hats and vests with *Commercial Interiors* logo.
- A *Commercial Interiors* foreman threatened to fire a subcontractor employee.




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### The *Salinas* Test

- Shared supervision?
- Shared power to hire/fire or change working conditions?
- The degree of permanency of the relationship between the companies
- Shared administration of payroll, workers' compensation, payroll taxes, etc.

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### Another FLSA Joint Employer Test

***Enterprise Rent-A-Car Wage and Hour Employment Practices Litigation*, 683 F. 3d. 462 (3d. Cir. 2012)**

“Economic reality rather than technical concepts”  
*Browning-Ferris* is the starting point. Indirect, but significant control is sufficient.



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### *Enterprise Rent-A-Car Wage and Hour Employment Practices Litigation*

- **Facts:** Enterprise Holdings (Parent Co.) provided human resources support to subsidiaries, including recommendations on policies, compensation, and job descriptions. Enterprise Holdings negotiated on behalf of subsidiaries regarding health insurance, and employees of subsidiaries participated in group plans sponsored by Enterprise Holdings.
- **Result:** Enterprise Holdings not a joint employer.

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### Enterprise Test



- Authority to hire and fire
- Authority to promulgate work rules and assignments
- Authority to set conditions of employment (wages, benefits, hours, for example)
- Day-to-day supervision, including employee discipline
- Control of employee records

NOT AN EXHAUSTIVE LIST



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### Title VII Joint Employer Test

*Nationwide Insurance, Inc. v. Darden*, 503 U.S. 318 (1992)

“We consider the hiring party’s right to control the manner and means by which the product is accomplished.”



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### Darden Factors

- The skill required
- The source of instrumentalities and tools
- The location of work
- The duration of the relationship
- The right to assign additional projects
- Extent of discretion over when and how long to work
- Method of payment
- Whether work is regular part of the business
- Benefits
- Tax treatment



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## Dealing with the Joint Employer Doctrine









When you lie down with dogs, you get up with fleas.

— Joan Heiber —

ALQUOTES

- Are your subcontractors and contract labor providers complying with the law?
- Are they keeping up with the differences in each state in which they work?



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## Things You Can Do

1. Don't control or retain the right to control the pay, benefits or discipline of another company's employees.
2. Exercise the minimum feasible degree of control over the schedules and training of another company's employees.
3. To the extent feasible avoid specific direction to another company's employees as to how they are to carry out their responsibilities.
4. Carefully Review Your Contracts
  - Do they disavow intent to be joint employers?
  - Do they include expectation that the parties will comply with applicable laws?
  - Do they state that each employer will control the work of and supervise its own employees?
  - Is there an indemnification clause? Insurance requirement?



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## Things You Can Do

5. Ask the other company questions about:
  - OSHA (a given)
  - WC (a given)
  - EEO Compliance
  - Unfair Labor Practices
  - Retaliation Cases
6. Train Managers, Supervisors, and Foremen
  - They do not supervise or discipline other employers' employees. Instead, they discuss problems about contract compliance with the other employer (safety exception).
  - Rely as much as feasible on the other employer's supervisors to straighten out problem employees
7. Don't Become the Exclusive, Long-Term Source of Work for Your Subs



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### Things You Can Do

- 8. Where Feasible, Don't Transport Employees, Tools, or Equipment of Other Employers to Remote Worksites, Unless Compensated to Do So.
- 9. Where Feasible, Don't Let Employees of Other Employers Use Your Company's Housing, Food Service, Computers, Telephones, etc. Unless Compensated to Do So.
- 10. Train employees of other employers when it is essential to do so, but not more. Ideally the written contract will include some compensation for training provided.



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





THAT CONCLUDES MY TWO-HOUR PRESENTATION. ANY QUESTIONS?

DID YOU INTEND THE PRESENTATION TO BE INCOMPREHENSIBLE OR DO YOU HAVE SOME SORT OF RARE 'POWER POINT' DISABILITY?

ARE THERE ANY QUESTIONS ABOUT THE CONTENT?

THERE WAS CONTENT?

*There are no bad questions!*



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## **Allison Williams**

Allison Williams is a member of Steptoe & Johnson PLLC and practices labor and employment law from the firm's Bridgeport, WV office. She regularly counsels clients on a wide variety of labor and employment issues and has a particular interest in helping employers craft strategies to help avoid, or minimize the impact of litigation. She frequently drafts employee handbooks, employment contracts, and other agreements, as well as provide in-house training for managers on some of the most pressing issues of the day. Allison has experience litigating cases in state and federal courts, as well as before administrative agencies and arbitrators, such as the West Virginia Public Employees Grievance Board, the West Virginia Human Rights Commission, and the Equal Employment Opportunity Commission.



## #MeToo: Ethical Considerations For Lawyers

#MeToo

Allison Williams  
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## Overview

- #MeToo
- What is Sexual Harassment and what is unlawful?
- What special rules apply to lawyers?

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## Sexual Harassment in the News



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## #MeToo is Born

Alyssa Milano

If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet.

Me too.

Suggested by a friend: "If all the women who have been sexually harassed or assaulted wrote 'Me too.' as a status, we might give people a sense of the magnitude of the problem."

18,127 Retweets 16,942 Likes



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## Sexual Harassment in the Legal Profession

- Florida Bar Survey reported that 1 out of every 7 lawyers surveyed had experienced harassment within last three years
  - Only 23% of those who reported the harassment had the issue resolved satisfactorily
- Above the Law "Pink Ghetto" Series published stories of appalling behavior in law firms



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## What Is Sexual Harassment?

- Conduct of a sexual nature in the workplace

And/or

- Unwelcome sexual advances or requests for sexual favors, or verbal or physical conduct of a sexual nature





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## Types of Sexual Harassment

### Quid Pro Quo

- relate to an employee's individual employment or
- are the basis for employment decisions directly affecting the employee.

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## Types of Sexual Harassment

### Hostile Work Environment

- pervasive and regular;
- detrimentally affected the employee;
- would detrimentally affect a reasonable person of the same sex in that position; and
- existence of *respondeat superior* liability."

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## Does a Hostile Work Environment Exist?

### No bright-line test.

The answers to the following questions will be considered:

- How frequent is the conduct?
- How severe?
- Is the conduct physically threatening or humiliating?
- Does the conduct unreasonably interfere with an individual's work performance?

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### Typically NOT Sexual Harassment

- An isolated inappropriate remark
- Consensual relationships
- Conduct that does not meet the “Reasonable Person” Standard

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### “Reasonable Person” Standard

- Not everyone interprets behavior in the same way.
- In order to be considered “sexual harassment” the conduct must be severely or pervasively offensive to a “reasonable person” in similar circumstances.

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### So what about lawyers?

(hint: special rules apply)

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





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## ABA Model Rule 8.4(g)

- **Rule 8.4 Misconduct**
- It is professional misconduct for a lawyer to:
  - (g) engage in conduct that the lawyer **knows or reasonably should know is harassment or discrimination** on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.
    - Includes participating in bar association, business or social activities in connection with the practice of law

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## ABA Standards of Sexual Harassment

Resolution 302



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## ABA Standards of Sexual Harassment

- Urges law firms to have and implement an anti-harassment policy and procedure for reporting harassment
- Urges law firms to communicate claims/resolutions with executive committees, BODs or other upper level management
- Urges law firms to develop initiatives that foster effective training to address sexual harassment

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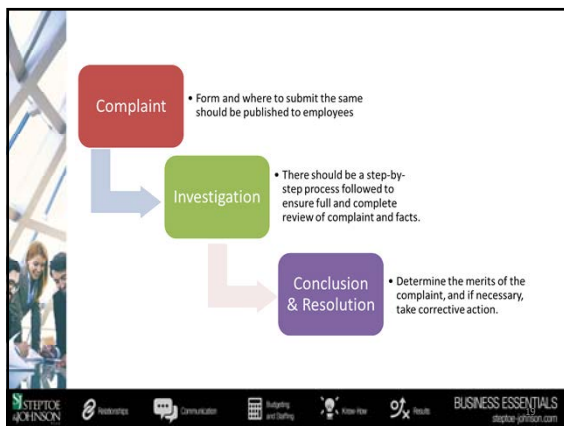
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### So What about West Virginia?

- Although the rules do not expressly prohibit discrimination, the comments to Rule 8.4: Misconduct provide:
  - A lawyer who, in the course of representing a client, **knowingly manifests, by words or conduct**, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status violates paragraph (d) [prohibiting conduct that is prejudicial to the administration of justice] when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not establish a violation of this Rule.

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### RULE 1.8(j)

#### Conflict of Interest: Current Clients: Specific Rules

(j) A lawyer shall not have sexual relations with a client whom the lawyer personally represents during the legal representation unless a consensual sexual relationship existed between them at the commencement of the lawyer/client relationship. For purposes of this rule, "sexual relations" means sexual intercourse or any touching of the sexual or other intimate parts of a client or causing such client to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party or as a means of abuse.

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## Privilege in Company Investigations

- Attorney Client Privilege
  - Communications made in confidence
  - Between a client and his or her attorney
  - For the purpose of obtaining legal advice
- Work Product Doctrine
  - Communications prepared or obtained in anticipation of litigation by or for the party asserting protection, or that party's attorney or other qualifying representative

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## Rule 1.13






### *Organization as Client*

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

\* \* \*

(e) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

\* \* \*

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
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## In-House Counsel

- More likely to be considered privileged but may be considered primary business-related purpose
- *Upjohn* warning
- Ethical duty to clarify that the Company is the client:
  - See Rule 1.13(f), *Organization as Client*
- Waiver of privilege with *Faragher/Ellerth* defense
- Potential for lawyer as witness

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## Outside Counsel

- Strong basis for attorney-client privilege where providing legal advice
  - Engagement letter expressly retaining for legal advice
- Duty to disclose representation of the corporation
- Prepare a factual report separate from legal conclusions and/or recommendations to preserve privilege on advice
- Waiver issue with *Faragher/Ellerth* defense
- Potential for lawyer as witness

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## Rule 3.7

### *Lawyer as Witness*

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

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## Third-party Neutral Investigator

- Viewed as independent
- Duty to clarify he/she is a licensed attorney and does not represent the corporation or any individuals involved in the investigation
  - See ABA Rule 2.4(b), *Lawyer Serving as Third-Party Neutral*
- Waiver issue with *Faragher/Ellerth* defense

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


## Rule 2.4

### *Lawyer Serving as Third-Party Neutral*

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

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## Rule 1.6






### *Confidentiality of Information*

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services

\* \* \*

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## Rule 5.3

### *Responsibilities Regarding Nonlawyer Assistance*






With respect to a nonlawyer employed or retained by or associated with a lawyer:

\* \* \*

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

- (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
- (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

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## Covert Investigations

- False statements or conduct involving dishonesty, fraud, deceit or misrepresentation
  - See Rule 4.1, *Truthfulness in Statements to Others*
  - See Rule 4.4, *Respect for Rights of Third Persons*
  - See Rule 8.4(c), *Misconduct*
  - Investigation exceptions
  - Certain jurisdictions qualify to conduct that “reflects adversely” on fitness to practice law
- Utilizing lawful methods such as tape-recording or private investigators?
- *Upjohn* Warnings
- Ethical obligations likely extend to those who the lawyer supervises

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## Rule 4.1

### *Truthfulness in Statements to Others*

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

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## Rule 4.4

### *Respect for Rights of Third Persons*

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

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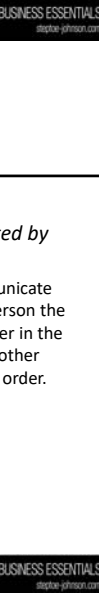






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## Back to Rule 8.4

*Misconduct*

It is professional misconduct for a lawyer to:

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(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

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## Rule 4.2

*Communication with Person Represented by Counsel*

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

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## QUESTIONS?

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### **C. David Morrison**

C. David Morrison has been practicing in the field of employment law for 37 years with Steptoe & Johnson PLLC. He is a Fellow of the College of Labor & Employment Lawyers, a Fellow of the West Virginia Bar Foundation and a Fellow of the ABA Foundation. He is a past President of the Energy & Mineral Law Foundation. Morrison was Chair of Steptoe & Johnson's Labor Department for 16 years, and is a member and Chair of the Membership Committee of the American Employment Law Council. He has represented employers in practically every West Virginia industry, and handled a wide variety of employment and labor lawsuits, administrative proceedings and issues. Morrison has been a lecturer over 100 times on employment law topics, and is an author and co-author of both treatises and scholarly papers.



## West Virginia 2018 Employment Law Update

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- **Business Liability Protection Act**  
(W. Va. Code § 61-7-14)
- **Wage Payment & Collection Act Amendment**  
(W. Va. Code § 21-5-4)
- **Immunity for Directors of Volunteer Organizations**  
(W. Va. Code § 55-7C-3)
- **Immunity for Behavioral Health and Residential Recovery Facilities**  
(W. Va. Code § 55-7K-1)
- **NLRB Employee Handbook Standards**  
(General Counsel Memo – June 6, 2018)
- **Class Action Waivers**  
(*Epic Systems Corp. v. Lewis*, No. 16-285 (May 21, 2018) (U.S. Supreme Court))
- **Sexual Orientation Discrimination**  
(*Masterpiece Cakeshop, Ltd. v. Colorado Civil Rts. Comm'n*, No. 16-111 (June 4, 2018) (U.S. Supreme Court))

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## Business Liability Protection Act

W. Va. Code § 61-7-14  
 Effective June 8, 2018

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Background  
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## Business Liability Protection Act

No owner, lessee, or other person charged with the care, custody, and control of real property may prohibit any customer, employee, or invitee from possessing any legally owned firearm, when the firearm is:

- » (A) Lawfully possessed;
- » (B) Out of view;
- » (C) Locked inside or locked to a motor vehicle in a parking lot; and
- » (D) The customer, employee, or invitee is lawfully allowed to be present in that area.





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Background  
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## Business Liability Protection Act

- Bars businesses from prohibiting guns in vehicles in company parking lots under most circumstances
- Passed with overwhelming support from the Legislature (*House 85-14, Senate 32-1*)
- Opposed by the Chamber of Commerce, Business and Industry Council, Manufacturers Association
- Effective June 8



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Background  
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## Business Liability Protection Act

- We are the 22<sup>nd</sup> state with some version of a guns-at-work law
- Our new statute is broader than many
  - No case requirement
  - No trunk requirement
  - No exception for hazardous industries
  - No disclosure requirement





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## Business Liability Protection Act

- "Parking Lot"** means any property that is:
  - Used for parking motor vehicles
  - Available to customers, employees, or invitees for temporary or long-term parking or storage of motor vehicles
  - Does not include the private parking area at a business located at the primary residence of the property owner.





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## Business Liability Protection Act

- "Employer"** means any business that is a sole proprietorship, partnership, corporation, limited liability company, professional association, cooperative, joint venture, trust, firm, institution, or public-sector entity, that has employees.



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## Business Liability Protection Act

- "Employee"** means any person who is:
  - Over 18 years of age
  - Allowed to possess firearms under state and federal law
  - Works for salary, wages, or other remuneration, or
  - Is an independent contractor, or
  - Is a volunteer, intern, or other similar individual for an employer.
- "Invitee"** means any business invitee, including a customer or visitor, who is lawfully on the premises of a public or private employer.



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## Business Liability Protection Act

Can an employer require its employees to tell it if they have a gun in their car?

**No.**

- The statute prohibits any “verbal or written inquiry . . . regarding the presence or absence of a firearm locked inside or locked to a motor vehicle in a parking lot.
- Such an inquiry would “violate the privacy rights” of customers, employees, and invitees.



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## Business Liability Protection Act

Can an employer search cars in its parking lot to see if there are guns?

**Not unless you’re an on-duty police officer.**

- Motor vehicle searches may only be conducted by on-duty law enforcement personnel in accordance with statutory and constitutional provisions.



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## Business Liability Protection Act

Is there an exception for gated or secured portions of an employer’s parking lot?

**No.**

- All parking lots on company property are affected by this statute.
- Any parking lot within the secured area must also allow for firearms on the parking lots in accordance with the law.



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**Business Liability Protection Act**

Can an employer refuse to hire an applicant who plans to leave a gun in his or her car?

**No.**

- No employer may condition employment upon either:
  - The fact that an employer or applicant has a license to carry a firearm
  - An agreement with an employee or applicant prohibiting him or her from keeping a legal firearm locked inside or locked to a motor vehicle in a parking lot for lawful purposes.

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**Business Liability Protection Act**

Does the gun have to be locked inside the vehicle?

**No.**

- "**Locked inside or locked to**" means:
  - The vehicle is locked; or
  - The firearm is in a locked trunk, glove box, or other interior compartment; or
  - The firearm is in a locked container security fixed to the vehicle; or
  - The firearm is secured and locked to the vehicle itself by the use of some form of attachment and lock.



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**Business Liability Protection Act**

Can an employer at least prohibit guns in its Company vehicles?

**Yes.**

- "**Motor vehicle**" excludes "vehicles owned, rented, or leased by an employer and used by the employee in the course of employment."



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## Business Liability Protection Act

Can an employer still prohibit employees from carrying guns on their person while on its property?

**Yes.**

- Any "owner, lessee, or other person charged with the care, custody, and control of real property may prohibit the carrying openly or concealing of any firearm or deadly weapon on property under his or her domain."

**NOTICE**  
**NO FIREARMS**  
**ALLOWED**  
**ON PREMISES**

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## Business Liability Protection Act

Can an employer take action if a customer or employee has threatened gun violence?

**Yes.**

An employer may not take any action against an employee (e.g., search or ejection) based upon verbal or written reports of a third party **UNLESS** the statements relate to unlawful purposes or threats of unlawful actions involving a firearm.

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## Business Liability Protection Act

Is there an exception for schools?

**Well . . .**

- The statute does not apply to the premises of primary or secondary educational facilities.
- But, it carves out the existing provisions already in state law under W. Va. Code § 61-7-11a(b)(2)(A) through (I).

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## Business Liability Protection Act

Is there an exception for schools?

- Any person, twenty-one years old or older, who has a valid concealed handgun permit may possess a concealed handgun while in a motor vehicle in a parking lot, traffic circle or other areas of vehicular ingress or egress to a public school: Provided, That:
  - (i) When he or she is occupying the vehicle the person stores the handgun out of view from persons outside the vehicle; or
  - (ii) When he or she is not occupying the vehicle the person stores the handgun out of view from persons outside the vehicle, the vehicle is locked, and the handgun is in a locked trunk, glove box or other interior compartment, or in a locked container securely fixed to the vehicle.

W. Va. Code § 6-7-11a(b)(2)(I).

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## Business Liability Protection Act

If an employee uses a gun unlawfully, is the employer legally responsible?

**No.**

The employer or owner of the property is not liable in a civil action for money damages based on the actions of an employee or guest who is not in compliance with the law and acts in an unlawful manner.

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## Business Liability Protection Act

What happens if the employer refuses to comply?

**Bad things.**

- The Attorney General can sue the employer and obtain:
  - Injunctive relief;
  - A civil penalty of up to \$5,000 per violation;
  - Attorneys' fees and costs.
- An aggrieved party may sue and recover the same relief.
  - Fee shifting.

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## Wage Payment and Collection Act Amendment

W. Va. Code § 21-5-4(f)  
Effective May 15, 2018

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## Wage Payment & Collection Act

An employer may “withhold, deduct or divert an employee’s final wages” to cover the replacement cost of employer-provided property.

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## Wage Payment & Collection Act

What is “employer-provided property?”

- Provided to the employee in the course of, and for use in, the employer’s business
- Includes, but is not limited to, equipment, phone, computer, supplies, uniforms
- Does not include “replacement tools” – equipment provided by employer to replace lost equipment provided by employee
- Has a value exceeding \$100
- Identified in a written agreement between the employer and employee

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## Wage Payment & Collection Act

When does the employer and the employee enter into the written agreement?

- The agreement must be signed "contemporaneous with the obtaining of the employer provided property."
- There is an exception for property that had been provided to employees prior to the effective date of the amendment (May 15) that allows a signed, ratified agreement to be deemed effective.

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## Wage Payment & Collection Act

What information must be in the agreement?

- Must itemize the employer provided property
- Must specify the replacement cost for each item
- Must state clearly that items are to be returned immediately upon discharge or resignation
- Must state clearly that, should employee fail to timely return the specified items, the replacement cost may be recovered from the employee's final wages
- Employee must acknowledge and agree

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## Wage Payment & Collection Act

How does the employer figure an item's "replacement cost?"

- It is the actual cost paid by the employer for the property, or for the same or similar property, if the original property no longer exists
- Must include any vendor discounts

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## Wage Payment & Collection Act

What must an employer do before withholding?

- Give employee written demand at separation of employment
  - In person at time of separation, or by certified mail as soon thereafter as practicable
- Identify property and state replacement cost
- Demand return by a certain date not to exceed 10 days from notification





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## Wage Payment & Collection Act

- What if the employee disputes the replacement value?

- Employee may object in writing by the employer's deadline for return of the property
- Employer then must place the withheld money into an interest-bearing escrow account
- Employee has three months to bring a civil action against employer
- If employee does not sue within three months, he or she forfeits the money in escrow to the employer



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## Wage Payment & Collection Act

- What if the employee returns the property in poor condition?

- If the employee returns the property by the deadline in "a condition suitable for the age and usage of the items," the employer must relinquish the withheld sums
- Uniforms returned within three years of their issuance are deemed acceptable in current condition at time of separation



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## Wage Payment & Collection Act

- What if the workforce is organized?

The amendment does not apply to employer-employee business relationships that are subject to, and governed by, collective bargaining agreements.




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## Wage Payment & Collection Act

- Does the employer have to use this complicated new option, or can it just keep using the old wage assignment agreement?
- If the employee is willing to sign a wage assignment agreement, the employer may continue using it.
- The employer also still has the same alternative options as they have always had (i.e., magistrate court action against the employee)




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## Immunity for Directors of Volunteer Organizations

W. Va. Code § 55-7C-3

Effective June 5, 2018


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## Volunteer Organizations

A “qualified director” of a “volunteer organization” is not personally liable for negligence, either through act or omission, in the performance of managerial functions on behalf of the entity.”




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## Volunteer Organizations

A “qualified director” is not personally liable for the torts of a volunteer organization, or the torts of its agents or employees, unless he or she “approved of, ratified, directed, sanctioned, or participated in the wrongful acts.”


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## Volunteer Organizations

No grant of immunity for injuries or damages caused by operation of a motor vehicle.




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 Bookmarks  
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## Volunteer Organizations

- Who is a “qualified director?”
  - Officer, member, or director of a board, commission, committee, agency, or other non-profit organization which is a volunteer organization
  - Serves without compensation
  - May be reimbursed for expenses, meals, lodging


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## Volunteer Organizations

- What is a “volunteer organization?”
  - The State or a Political Subdivision
  - Non-profit corporations that promote benevolent interests
  - Trade and business groups
  - Armed services veteran associations
- Does not include non-profit hospitals with 150 or more beds


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## Volunteer Organizations

- Can a qualified director still be liable for gross negligence?

**Yes.**

Gross negligence is the conscious and voluntary disregard of the need to use reasonable care, which is likely to cause grave injury to persons, property, or both. It is conduct that is extreme when compared to ordinary negligence, which is a mere failure to exercise reasonable care.


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## Immunity for Behavioral Health and Residential Recovery Facilities

W. Va. Code § 55-7K-1

Effective June 8, 2018

Applies to causes of action accruing after July 1, 2018

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## Behavioral Health

Licensed behavioral health facilities and certified residential recovery facilities, as well as their directors, officers, and agents, are immune from certain potential civil liabilities related to:

- Short-term crisis stabilization
- Drug and alcohol detox services
- Substance abuse disorder services
- Drug overdose services
- Withdrawal services



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## Behavioral Health

To qualify for immunity:

- Behavioral Health Facility** must be
  - Licensed by the state;
  - Licensed by another state;
  - Operated by the state; or
  - Operated by a political subdivision
- Residential Recovery Facility** must be
  - Certified by or meet the standards of a national certifying body

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 Goals

## Behavioral Health

To qualify for immunity:

- Services must be offered “in good faith”;
- Facility may not require payment;
- Injuries or damages must not be caused by “gross negligence or willful or wanton misconduct of the facility, or its directors, officers, employees, or agents.”

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## Behavioral Health

Injuries or damages must arise from an individual's:

- Refusal of services;
- Election to discontinue services;
- Failure to follow orders or instructions; or
- Voluntary departure, elopement, or abandonment from a facility

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## NLRB Employee Handbook Rules

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## Employee Handbooks

- GC memo issued June 6 explains how NLRB will enforce new employee handbook standard
- Significant changes from Obama-era





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## Employee Handbooks

- Creates a spectrum of legality
- Three categories
  - Legal in most cases** – can't reasonably be interpreted to interfere with workers' rights
  - Legal in some cases** – depends on application
  - Always illegal** – interfere with workers' rights in a way not outweighed by business interests



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## Employee Handbooks

- Legal in most cases**
  - Civility rules
    - Inappropriate, rude, condescending conduct
    - Disparaging other employees
    - Offensive language
  - No photography/recording rules
  - Rules against insubordination, non-cooperation, or on-the-job conduct that adversely affects operations
  - Disruptive behavior rules
  - Rules protecting confidential, proprietary, and customer information
  - Rules against defamation or misrepresentation
  - Rules against using company logo or intellectual property
  - Rules requiring authorization to speak for company
  - Rules banning disloyalty, nepotism, or self-enrichment



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 Tools

## Employee Handbooks

- Legal in some cases**
  - Broad conflict-of-interest rules that do not specifically target fraud and self-enrichment and do not restrict union membership
  - Confidentiality rules broadly encompassing “employer business”
  - Prohibiting disparagement of the employer
  - Prohibiting use of employer’s name
  - Barring speaking to media
  - Off-duty conduct
  - False or inaccurate statements





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## Employee Handbooks

- Always Illegal**
  - Rules barring workers from discussing wages, employment contracts, benefits, working conditions
  - Rules barring disclosure of employee performance or identity of company employees
  - Rules against joining outside organizations or voting on matters concerning the employer





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## Significant Case Law



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## Class Action Waivers

*Epic Systems Corp. v. Lewis*, No. 16-285 (May 21, 2018) (U.S. Supreme Court)

**Class or collective action waivers contained in employment arbitration agreements do not violate the National Labor Relations Act.**

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## Sexual Orientation Discrimination

*Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, No. 16-111 (June 4, 2018) (U.S. Supreme Court)

**DID NOT** resolve whether an individual can lawfully claim an exemption from laws prohibiting sexual orientation discrimination based on his or her sincerely held religious beliefs.

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## Sexual Orientation Discrimination

*Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, No. 16-111 (June 4, 2018) (U.S. Supreme Court)

**Court ruled in favor of the bakery owner primarily because Colorado Civil Rights Commission had demonstrated hostility toward his religious beliefs.**

**Colorado Civil Rights Commission violated its duty under the First Amendment not to base laws on hostility to religion or a religious viewpoint.**

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## Sexual Orientation Discrimination

***Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission, No. 16-111 (June 4, 2018) (U.S. Supreme Court)***

“I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.” -- Colorado Civil Rights Commissioner



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## Sexual Orientation Discrimination

***Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission, No. 16-111 (June 4, 2018) (U.S. Supreme Court)***

“To describe a man’s faith as “one of the most despicable pieces of rhetoric that people can use” is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere. The commissioner even went so far as to compare Phillips’ invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado’s anti-discrimination law—a law that protects discrimination on the basis of religion as well as sexual orientation.” -- Justice Neil Gorsuch



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## Sexual Orientation Discrimination

***Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission, No. 16-111 (June 4, 2018) (U.S. Supreme Court)***

- Expect state agencies to proceed with increased care and consideration in similar claims
- Employees may misunderstand and misinterpret holding
- Advocates on both sides of the issue may be looking for test cases



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## Social Media

**Day. v. W. Va. Dep't of Military Affairs and Public Safety, No. 17-0281 (May 14, 2018) (W. Va. Supreme Court)**

- Facebook post by Capitol police officer
- Referenced a public rally related to a chemical spill that had contaminated a water supply





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## Social Media

**Day. v. W. Va. Dep't of Military Affairs and Public Safety, No. 17-0281 (May 14, 2018) (W. Va. Supreme Court)**

“If there was anytime (sic.) I despised wearing a Police uniform, it was yesterday @ the Capitol during the water rally. There was an incident involving a fellow concerned citizen, all of my friends out there know which incident I refer (sic.). I was embarrassed to be in the uniform during that episode. A girl I know who frequents the Capitol for environmental concerns looked @ me and wanted me to participate with her in the event. I told her I have to remain unbiased while on duty @ these events, she responded by saying, “You’re a person are’nt (sic.) you?” That comment went straight through my heart!”



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## Social Media

**Day. v. W. Va. Dep't of Military Affairs and Public Safety, No. 17-0281 (May 14, 2018) (W. Va. Supreme Court)**

- Upheld discharge
- Public employees have right to free speech spoken as citizens on matters of public concern
- Comments did not address a matter of public concern
- “While the contamination of the area’s water supply may certainly be characterized as a ‘public concern,’ petitioner’s comments, at best, tangentially touched on that event. Rather, his comments were concerned with criticizing his fellow officers’ conduct at the rally and professing his embarrassment ‘to be in the uniform’ that day.”



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## Wage and Hour

*Goff v. Williams Holdings, LLC*, No. 17-0408 (May 14, 2018) (W. Va. Supreme Court)

- Van driver was required to keep van clean and properly maintained
- Claimed employer failed to pay him for time he spent cleaning and maintaining van



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## Wage and Hour

*Goff v. Williams Holdings, LLC*, No. 17-0408 (May 14, 2018) (W. Va. Supreme Court)

- Driver claimed he spent 4-5 hours a week cleaning the van
- Submitted detailed time sheets that did not include cleaning time
- Employer claimed van was to be cleaned during driver's paid waiting time

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## Wage and Hour

*Goff v. Williams Holdings, LLC*, No. 17-0408 (May 14, 2018) (W. Va. Supreme Court)

- Court held driver's "guesstimate" of the number of hours he spent washing the van was conjectural and speculative.
- To "suffer" and "permit" an employee to work, employer must have actual or constructive knowledge of the work.

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