

TRIGGER WARNING

2018 Employment Law Update for West Virginia Health Care Employers

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Relationships



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Know-How



Results

TRIGGER WARNING

- **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)
- **USDOL Independent Contractor Guidance – Nurse/Caregiver Registries**
(FAB 2018-4 – July 13, 2018)
- **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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Results

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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Results

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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Results

Business Liability Protection Act

- We are the 22nd 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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Results

Business Liability Protection Act

Is my business covered?

Do you own, lease, control, or maintain a “parking lot?”

- **“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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Results

Business Liability Protection Act

Is my business covered?

Do you have customers, employees, or invitees?

- “**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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Results

Business Liability Protection Act

Is my business covered?

Do you have customers, employees, or invitees?

- “**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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Results

Business Liability Protection Act

Can I require my employees to tell me 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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Results

Business Liability Protection Act

Can I search cars in my 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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Results

Business Liability Protection Act

Is there an exception for gated or secured portions of my 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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Results

Business Liability Protection Act

Can I 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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Results

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 I at least prohibit guns in my 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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Results

Business Liability Protection Act

Can I still prohibit employees from carrying guns on their person while on my 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.”





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Results

Business Liability Protection Act

Can I 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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Results

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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Results

Business Liability Protection Act

If my employee uses a gun unlawfully, am I 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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Results

Business Liability Protection Act

What happens if I refuse 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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Results

Business Liability Protection Act

What should I do now?

- Revise your handbooks and policies to comply with the new law.
- Train your managers on the change in the law.
- Consider training your workforce on the policy change.
- Stop searching employee vehicles for other infractions.





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Results

Wage Payment and Collection Act Amendment

W. Va. Code § 21-5-4(f)

Effective May 15, 2018



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Results

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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Results

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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Results

Wage Payment & Collection Act

When do I 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.
 - **Do it now.**





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Results

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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Results

Wage Payment & Collection Act

How do I 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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Results

Wage Payment & Collection Act

What must I 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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Results

Wage Payment & Collection Act

- What if my 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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Results

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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Results

Wage Payment & Collection Act

- What if my 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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Results

Wage Payment & Collection Act

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





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Results

Immunity for Directors of Volunteer Organizations

W. Va. Code § 55-7C-3

Effective June 5, 2018



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Results

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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Results

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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Results

Volunteer Organizations

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





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Results

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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Results

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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Results

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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Results

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

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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Results

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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Results

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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Results

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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Results



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Results

USDOL Independent Contractor Guidance – Home Care, Nursing, Caregiver Registries

FAB No. 2018-4 (July 13, 2018)



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Results

Nurse, Caregiver Registries

- Trump Administration's first substantive advice on independent contractors
- Guidance to DOL field staff to assist in determining whether Registries are “employers” under FLSA





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Results

Nurse, Caregiver Registries

- Typical Registry Business Model
 - ✓ Matchmaking and Referral
 - Maintains database of qualified caregivers
 - May confirm references, credentials, background checks
 - Interviews caregivers and clients to determine needs and preferences
 - ✓ Administrative Services
 - Recordkeeping
 - Invoicing
 - Collecting/Disbursing Payments



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Results

Nurse, Caregiver Registries

- Typical Registry Business Model
 - ✓ KEY – does not provide the actual home care services





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Results

Nurse, Caregiver Registries

- Employment relationship under FLSA depends on “economic reality” test
 - No single factor is conclusive
 - Who determines the rate and method of payment?
 - Who has the power to hire and fire?
 - Who controls the worker’s schedule?
 - Who sets conditions of employment?



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Results

Nurse, Caregiver Registries

- Registry that only performs referral and payroll services is not the “employer” of the caretakers it refers.
- But Registry that directs and controls caretaker’s work and sets the caretaker’s rate of pay may be an employer.





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Results

Nurse, Caregiver Registries

- Background/reference checks
 - Performing such checks alone does not indicate employment
 - But if the Registry evaluates additional subjective criteria (i.e., interviews the caregiver to evaluate whether he or she is likeable or would work well with a client) may indicate employment.



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Results

Nurse, Caregiver Registries

- Hiring and Firing
 - Matching a potential caregiver with a client does not indicate employment.
 - But interviewing or selecting the caregiver on behalf of the client, or firing a caregiver for failing to meet industry standards, may indicate employment relationship.



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Results

Nurse, Caregiver Registries

- Scheduling and Assigning Work
 - Where schedules and assignments are determined by client, no employer status exists.
 - But if Registry uses its own discretion and judgment (i.e., by directly assigning specific caregivers to individual clients, or by offering an assignment to caregivers based on a subjective belief that they would be more likable or do a better job) that can indicate employment.



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Results

Nurse, Caregiver Registries

- Controlling caregiver work indicates employment relationship
 - Instructing how to provide care
 - Supervising in client homes
 - Evaluating performance
 - Setting performance standards by policy
 - Disciplining caregiver
 - Prohibiting work with clients outside of registry
 - Prohibiting caretaker from working with more than one Registry



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Results

Nurse, Caregiver Registries

- **Setting the pay rate**
 - Registry can give advice about appropriate pay rates and may relay offers and counteroffers.
 - But if Registry designates a wage range or sets price for services, may denote an employment relationship.
- **Charging Method**
 - Upfront fees for matchmaking, fees for administrative functions (i.e. payroll) do not show employment.
 - Fees based on hours worked may show employment relationship.



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Results

Nurse, Caregiver Registries

- Other factors that may indicate employment relationship
 - Tracking caregiver hours
 - Independently verifying hours worked
 - Purchasing equipment for caretakers
 - Requiring caretakers to purchase specified equipment
 - Paying for training, licenses, insurance



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Results

NLRB Employee Handbook Rules



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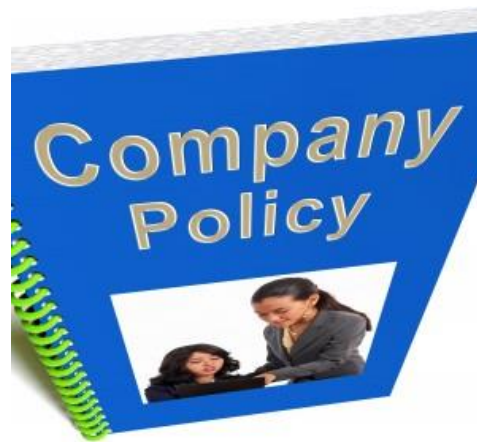
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Results

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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Results

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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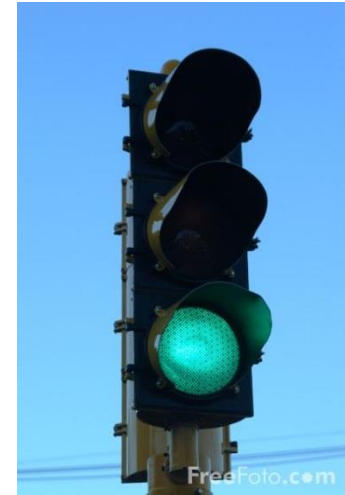


Results

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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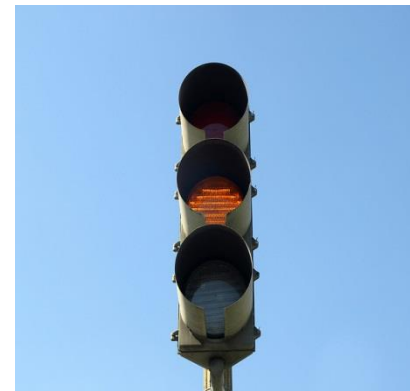
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Results

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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Results

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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Results

Significant Case Law



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Results

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.



Are arbitration agreements containing class action waivers right for your company?



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Results

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

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.”



Relationships



Communication



Budgeting
and Staffing



Know-How



Results

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



Relationships



Communication



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Know-How



Results

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



Relationships



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Know-How



Results

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.



Relationships



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Know-How



Results