



3.10 | OKC

National Cowboy &
Western Heritage Museum

3.12 | TUL

Renaissance Tulsa Hotel
& Convention Center



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AGENDA

MORNING

7:30–8:25a Seminar check-in and continental breakfast

8:25–8:35a Game Intro and Tipoff

Charlie Plumb

8:35–9:05a The View from the Front Office: Insights from the 2026 WorkTrends “Voice of the Workforce” Study

SPECIAL GUEST Stephanie Phipps, Oklahoma State University

9:05–9:35a Load Management: Handling Accommodation Requests Related to Stress, Burnout, and Mental Health Issues

OKC Nathan Whatley and Brennan Barger **TUL** Jake Crawford and Kathy Neal

9:35–9:50a Break

9:50–10:20a Scouting, Drafting and Roster-Building: Effectively Recruiting and Retaining Top Talent

OKC Phil Bruce and Roberta Fields **TUL** Courtney Bru and Grace DeJohn

10:20–10:50a Developing MVPs: Job Descriptions, Evaluations, and Performance Documentation

OKC Paige Good and Connor Curtis **TUL** Harrison Kosmider and Kirk Turner

10:50–11:05a Break

11:05–11:50a Labor & Employment All-Star “Ask the Experts” Panel

OKC Moderator Michael Lauderdale with Paige Good, Natalie Ramsey, and Kristin Simpsen

TUL Moderator Courtney Bru with Jake Crawford, Kathy Neal and Kirk Turner

11:50a–1:25p Lunch Break (LUNCH NOT PROVIDED)



AGENDA

AFTERNOON

1:00–1:25p Afternoon check-in

1:25–1:30a Second Half Tipoff

1:30–2:00p From Tip-Off to Trophy: Benefits Issues
in Mergers and Acquisitions

Lake Moore and Riley Wren

2:00–2:30p Full Court Responsibility: Fiduciary Basics

Brandon Long and Eric Smith

2:30–2:45p Break

2:45–3:15p Don't Get Dunked On: Vendor Engagement and Contracting

OKC Melissa Cottle **TUL** Judy Burdg

3:15–3:45p Employee Benefits Dream Team "Ask the Experts" Panel

OKC Lake Moore, Melissa Cottle, Brandon Long, and Eric Smith

TUL Lake Moore, Judy Burdg, Brandon Long, and Eric Smith

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The View from the Front Office:
Insights from the 2026 WorkTrends
"Voice of the Workforce" Study



PRESENTED BY
Dr. Stephanie Phipps,
Oklahoma State University



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WorkTrends Study

The study was initiated in 2022 with a dual survey of employers and workforce

The intention of the study is to gain insights into the state of the workforce from both an employer/industry and workforce perspective.

To assist employers in finding talent

To provide data to assist legislators in setting policy

To guide educational programs in universities and career centers

Transition last year to a biennial survey

Employer Insights (odd years)

Voice of the Workforce (even years)



WorkTrends - Voice of the Workforce

Defining Workforce Development

The following pages are structured around the five key focus areas of a workforce survey and demographics:

- 1 Workforce/Skillset Needs (Attract/Retain)**
 - Attracting and keeping skilled employees is vital for a company's success.
 - Attracting Employees means making your company appeal to potential hires. Understanding the needs of your organization and attracting the skillset necessary to be successful.
 - Retaining Employees involves keeping your current staff engaged so they choose to stay.
- 2 Employee Training and Development**

Enables employees to acquire and enhance the skills necessary for their current roles and future career progression. Organizations employ various methods to facilitate this growth while aligning it with the organization's needs.
- 3 Flexibility in the Workplace**

This section examines the various work arrangements your employees utilize, including on-site, hybrid, and remote setups. It will also look at some of the benefits and challenges from these arrangements.
- 4 Technology**

In response to ongoing workforce challenges and labor shortages, organizations are increasingly leveraging technology to automate various work activities. This shift not only streamlines operations but also necessitates the development of new skills among employees to effectively work with new systems.
- 5 Benefits**

Non-wage compensations provided to employees in addition to their regular salaries or wages. These benefits can include health insurance, retirement plans, paid time off, and other perks designed to attract and retain employees.



2026 WorkTrends - Voice of the Workforce

The findings indicate that Oklahoma's workforce remains engaged and supported by strong **organizational culture** and **employee attraction**.

Challenges center on **reducing burnout** and **strengthening education** and **career advancement** to better retain talent and align workforce skills with employer demand.



VOICE OF THE WORKFORCE STUDY

Understanding the needs of Oklahoma's Workforce



WorkTrends- Voice of the Workforce Study

Areas of Strength

Areas of Continued Focus

Areas Needing Improvement

WorkTrends Survey Overview



AREAS OF STRENGTH

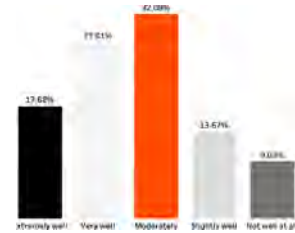
Employee Attraction – 77% Moderately well or better *

More than 60% rank a positive organizational culture among their top criteria

Organizational Culture – 60%+ Top Retention Tool

Organization Employee Alignment – Nearly 60% say they fit it in their organization

Ability to Attract Talent



Retention Tools



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WorkTrends Survey Overview

AREAS OF CONTINUED FOCUS

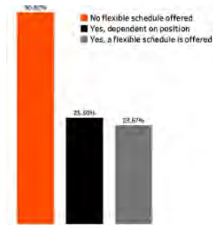


Flexibility – 68% want flexibility, 49% companies offered

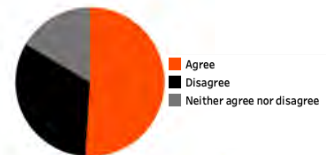
Employee Development – 54% Receive consistent development
12% - data driven

Psychological Safety – 51% say trust and support exist

Workplace Flexibility



Psychological Safety



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WorkTrends Survey Overview

AREAS NEEDING IMPROVEMENT

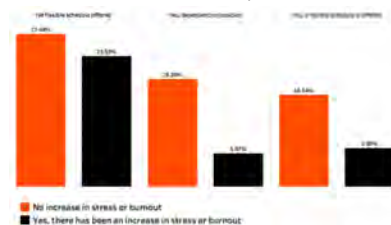


Work Related Stress – More than 50% are experiencing stress and burnout. **Flex Tie-In**

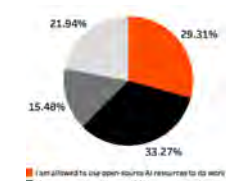
Technology / AI – 40% Identify AI as a critical tool but have limited access and training

Retention Risk – Nearly 50% within 6 Months

Stress w/ Flexibility tie in



Technology



Over 50% of respondents say they are likely to leave their current job within the next six months.

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Oklahoma WorkTrends

Understanding the needs of Oklahoma's Workforce



Demographic and Economic Overview

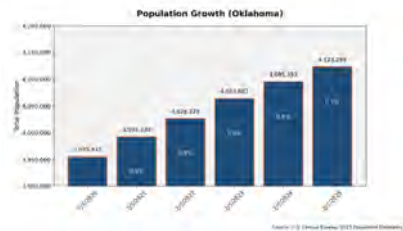


AREAS OF STRENGTH

Population Growth 4.1% growth from domestic in-migration since 2020

Labor Participation – 63% rate continues to exceed US (62.5%)

Major Capital Investment - for Better Jobs
\$13.5B Invested in 2025

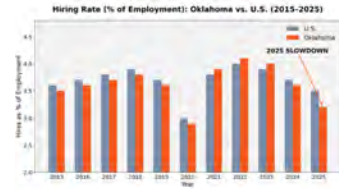


Demographic and Economic Overview

AREAS OF CONTINUED FOCUS

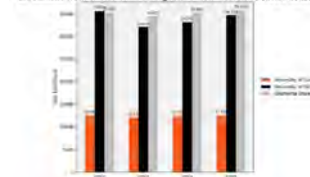


Labor Hiring Trends – OK stable; with low unemployment
- Falls behind US hiring



Workforce Development – Career Tech system growth
Watch for performance metrics

Employment Trends: Oklahoma's Largest Public Universities (2022-2025)



Higher Education – Enrollment continues to rise a largest public universities

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2026 Voice of the Workforce

Demographic and Economic Overview

AREAS NEEDING IMPROVEMENT



Aging Workforce – Projected worker shortfall 20k by 2028



BRAIN DRAIN

Brain Drain / Talent Alignment – Skills mismatch in Engineering, Healthcare & Technology



K-12 Education – Ranked 50th – Change and Opportunities

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VOICE OF THE WORKFORCE STUDY

Understanding the needs of Oklahoma's Workforce



Dr. Stephanie Phipps

Thank you!



Load Management: Handling Accommodation Requests Related to Stress, Burnout and Mental Health Issues



PRESENTED BY

Nathan Whatley and Brennan Barger (OKC)
Jake Crawford and Kathy Neal (Tulsa)

Why does it matter?

- Data from the National Alliance on Mental Illness:
 - Approximately one in five U.S. adults experience mental illness each year
 - Approximately one in 20 adults experience a serious mental illness
 - In March 2022, the World Health Organization (WHO) reported a 25% increase in global prevalence of depression and anxiety
- Thousands of EEOC charges each year:
 - Fiscal year 2021: about 8,400 charges alleging employment discrimination due to a mental health condition or substance use disorder
 - In 2016 alone, the EEOC obtained approximately \$20 million for individuals with mental health conditions for which employers unlawfully denied employment or reasonable accommodations

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Americans with Disabilities Act

- Employers are required to provide a **reasonable accommodation** to the known **physical or mental limitations** of an otherwise qualified individual with a **disability** unless the employer can show that the accommodation is an **undue hardship**

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“Disability”

- Disability = physical or mental impairment that substantially limits one or more major life activity
- An individual with a disability is defined as a person who:
 - 1) has a physical or mental impairment that substantially limits one or more major life activities;
 - 2) has a record of such an impairment; or
 - 3) is regarded as having such an impairment

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Mental impairments as disabilities

- A “mental impairment” is defined as any mental or psychological disorder, such as:
 - An intellectual disability
 - An organic brain syndrome
 - Emotional or mental illness
 - Specific learning disabilities
- Case-by-case decision as to whether a mental impairment “substantially limits a major life activity”

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Mental impairments in EEOC regulations/ guidance

- Major depression
- Post-traumatic stress disorder (PTSD)
- Bipolar disorder
- Schizophrenia
- Obsessive compulsive disorder (OCD)
- Panic disorders
- Personality disorders

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Other examples of mental impairments

- Attention-deficit hyperactivity disorder (ADHD)
- Anxiety disorders
- Social phobia
- Postpartum depression
- Eating disorders
- ✓ An employee cannot establish a mental disability based on a diagnosis alone. Must substantially limit a major life activity.

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Major life activities

- Concentrate
- Interact with others
- Communicate
- Eat
- Sleep
- Care for oneself
- Regulate thoughts or emotions

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Job-induced stress

- Job-induced stress by itself normally does not rise to the level of a mental disability (although it may be related to an underlying mental or physical impairment)
- A condition that limits an individual from performing only one job that happens to be stressful is generally not a disability
 - This is because workplace-specific stress generally does not affect an employee's ability to perform either a class of jobs or a broad range of jobs in various classes
- Stressful components of an employee's job may also be essential functions of the job

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Role of the interactive process

- The term “interactive process” does not appear in the ADA’s statutory language, but it has become an important requirement
- The “interactive process” describes the dialogue engaged in between employer and employee to:
 - a) determine means by which a disabled employee can perform his or her essential job functions, and
 - b) identify reasonable accommodations

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Starting the process

- The process should begin at the earliest of:
 - When the employee requests an accommodation;
 - An accommodation is requested on the employee's behalf; **OR**
 - When the employer is alerted to the employee's need for accommodation
- ✓ Remember: the employee's request need not take any particular form (i.e., writing, specific language)

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What do employee requests sound like?

- I have **therapy** every Monday morning and will **need to be off work**.
- I am taking **medication that is impacting my ability to sleep**, and I need to **adjust my work hours**.
- I need **more breaks (or backup during breaks)** to manage **stress flare-ups** due to my chronic health condition.
- I need to **have water at my desk** due to **medication I am taking**.
- I need to **wear noise-cancelling headphones** at my desk to **manage ADHD symptoms**.

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“Reasonable” accommodations

- Employers must usually consider the following as possible accommodations:
 - Change in job methods or equipment (but not required end results)
 - Modified work schedule
 - Transfer to a different (and vacant) job for which the employee is qualified and that meets any restrictions the employee may have
 - Leave of absence or time off
 - Breaks according to individual needs (e.g., more frequent breaks, greater flexibility in scheduling breaks, provision of backup coverage during breaks, and telephone breaks during work hours to call mental health professionals)

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“Unreasonable” accommodation requests

- It is not reasonable to eliminate an essential function of the position
- It is not reasonable to place an employee in a position for which he/she is not qualified
- It is not reasonable to grant open-ended or indefinite leave of absence during which no work can be performed
- It is not reasonable to lower performance and behavior expectations and standards

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Accommodations for mental impairments

- Employers must generally tolerate eccentric or unusual conduct caused by an employee's mental disability if the employee can satisfactorily perform the essential functions of the employee's job
- However, employers may discipline an employee for violating a workplace conduct standard, such as a policy of maintaining a workplace free of violence, even if the misconduct resulted from a mental disability, if:
 - The rule is job-related and consistent with business necessity
 - The employer disciplines employees without a mental disability for engaging in the same misconduct

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Employee not taking medication

- If an employee with a mental disability is engaging in misconduct because the employee is not taking prescribed medication, EEOC guidance recommends that the employer:
 - Focus on the employee's conduct, explaining the consequences of continued misconduct and the employer's uniformly applied disciplinary procedures
 - Leave it as the employee's responsibility to decide about medication and to consider the consequences of not taking medication

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Limitations on requests for accommodations

- Providing a reasonable accommodation does **not** mean:
 - The employee always receives an accommodation
 - The employee receives the exact accommodation requested
 - The employer must tolerate excessive intermittent non-FMLA absences and tardiness (even if due to the employee's medical condition)
 - » Employees with disabilities must meet an employer's reasonable expectations for regular/reliable attendance (but FMLA absences for an employee's own medical condition must be excused as an accommodation)

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Steps in interactive process

- Schedule an initial meeting
 - HR meets with employee to discuss potential accommodations needed for employee's disability
 - Unless the disability is known or obvious, employers can request medical documentation to help determine the employee's disability and what (if any) accommodation may be necessary
 - » Limit documentation to information relevant to the accommodation; do not seek unnecessary medical details
 - Employee should be provided with the appropriate forms as well as a copy of the job description
 - Set a date for the employee to return the medical documentation to HR (if necessary), or for the parties to meet and discuss potential accommodations

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Steps in interactive process *(cont'd)*

- If medical information is not timely received, remind the employee that the Company needs medical documentation to continue the interactive process. This reminder should be written.
- If the employee returns medical documentation, review and ensure that the medical documentation is sufficient. If necessary, seek clarification from the health care provider (with employee's permission).

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Steps in interactive process *(cont'd)*

- Schedule a second meeting
 - Explain the nature of the medical documentation received and what that documentation means in relation to the essential functions of the employee's position
 - Ask the employee if they have any suggestions about how the Company can accommodate the disability
 - » If the employee has suggestions, write them down and tell the employee you will need to consider it further and will meet with them again in a few days
 - » If the employee does not have a suggestion, let the employee know that you are considering potential options and will meet with them again in a few days
 - Following the meeting, consider what accommodations could be offered

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Steps in interactive process *(cont'd)*

- Schedule a final meeting
 - If you are granting the reasonable accommodation request, provide the available options to the employee. Provide a written offer of accommodation.
 - If you are denying the reasonable accommodation request, provide written notice of the denial and explain why you cannot provide reasonable accommodation.

Scouting, Drafting and Roster-Building: Effectively Recruiting and Retaining Top Talent



PRESENTED BY

Phil Bruce and **Roberta Fields** (OKC)

Courtney Bru and **Grace DeJohn** (Tulsa)

Recruiting talent: Overview

- Job postings and advertisements
- (ADA) interview considerations
- Physical Ability Tests ("PAT")
- Hiring considerations

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Title VII hiring considerations

- Title VII protections cover the *whole roster*:
 - Current employees *and* prospective employees
- Title VII makes it unlawful to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's:
 - Race
 - Color
 - Religion
 - Sex (sexual orientation, transgender status, pregnancy)
 - National origin

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Title VII hiring considerations *(cont'd)*

- During the recruitment and interview process, focus on finding the best player for the position. Based on:
 - Qualifications
 - Experience
 - Skills
 - Work product
 - Communication skills
 - Professionalism
 - Job performance (promoting from within)

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Job postings and advertisements

- Title VII protections apply as soon as the job posting goes up!
- Check your job postings and advertisements:
 - Employers may not publish a job advertisement that shows a preference for or discourages someone from applying for a job based on their race, color, religion, sex, national origin, age (40+), disability, or any other protected class
- What does that look like?
 - A job advertisement seeking “females,” “recent college graduates,” or candidates with “no more than 3-5 years of experience” may be a violation of the law if it discourages men or candidates over 40 to apply

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ADA interview considerations

- ✓ Remember: Employers are required to provide reasonable accommodations to a qualified **candidate** to enable them to be considered for a job opening, unless it would cause undue hardship
- Reasonable interview accommodations can take many forms, which may include, but are not limited to:
 - Written materials in accessible formats, such as large print or audio
 - Providing readers or sign language interpreters
 - Ensuring that recruitment, interviews, tests, and other components of the application process are held in accessible locations
 - Providing or modifying equipment or devices
 - Adjusting or modifying application policies and procedures

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EEOC regularly seeks to enforce fair hiring

- ✓ Remember, Title VII applies to everyone!
- It is unlawful to determine a particular role should be open only to a certain sex, gender, race, etc. (no stereotyping)
 - Hiring must be based on merit, not based on sex, gender, race, or any other protected category
- EEOC has been pursuing companies on this premise
- Recent matchups:
 - *EEOC vs. Kickback Jack's*
 - *EEOC vs. Radiant Services*

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EEOC vs. Kickback Jack's

- Last month, Kickback Jack's restaurant chain in North Carolina agreed to settle for \$1.1 million
- EEOC alleged the company systematically failed to hire male applicants for front-of-house roles (servers, bartenders, hosts)
- Across 19 locations, only ~3% of front-of-house employees were male; multiple restaurants had no male servers at all
- EEOC said the company had no legitimate business justification for the hiring pattern and failed to comply with Title VII's recordkeeping regulations

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EEOC vs. Radiant Services

- In 2024, Radiant Services (commercial laundry) settled for \$1.1 million in alleged hiring discrimination case based on race, national origin, and sex
- EEOC alleged that Radiant:
 - Refused to recruit and hire employees for low-skill positions based on their race (Black, Asian, and white) and national origin (non-Hispanic)
 - Assigned jobs based on sex of employee
- In addition to agreeing to pay \$1.1 million, Radiant agreed to:
 - Appoint an internal EEO coordinator
 - Conduct mandatory training
 - Update all anti-discrimination policies and procedures

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Physical ability test (“PAT”)

- Useful when hiring employees for physically demanding positions and can improve workplace safety
- However, be sure the PAT is job related and consistent with business necessity
- Should not be more difficult than the work actually being performed
 - Simulate actual job tasks
 - Test the minimum level of fitness/strength required to safely and effectively perform the job
- Periodically re-evaluate to make sure the test still measures only necessary job skills for the position

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EEOC vs. Walmart

- Walmart agreed to pay \$20 million *and* stop using its pre-employment test to settle a sex-based hiring discrimination lawsuit brought by the EEOC in the U.S. District Court for the Eastern District of Kentucky
- EEOC alleged that Walmart's PAT for order-filler positions at its grocery distribution centers disproportionately excluded female applicants
- EEOC also alleged:
 - Walmart could not demonstrate that the test was job related and consistent with business necessity
 - Less discriminatory alternatives were available

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“Out-of-bounds” interview questions

- **Avoid** questions about race, religion or ethnicity, such as:
 - Are you biracial?
 - Which church do you attend?
 - What language(s) do you speak at home?
- **Avoid** questions about age, unless used to verify that applicants meet any age-related legal requirements for the job
- **Avoid** questions about an applicant's family plans:
 - Are you pregnant?
 - How many kids do you have?
 - Do you plan to have children within the next year?

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“Out-of-bounds” interview questions *(cont’d)*

- ✓ Remember: ADA protections apply throughout the interview process
- **Before** a job offer has been made, employer cannot ask questions about an applicant’s disability or questions likely to reveal the existence of a disability – this is true even if the disability is obvious
- For example, employer should not ask an applicant:
 - Do you have a disability?
 - What medications are you currently taking?
 - Have you filed any workers' compensation claims?

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Retaining talent

- Review policies: ensure your anti-discrimination policies are focused on objective, job-related criteria
- A workplace culture grounded in mutual respect is a slam-dunk for retaining top talent and reducing legal risks

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Trump EO: “Ending Illegal Discrimination and Restoring Merit-Based Opportunity”

- “Illegal DEI...policies not only violate the text and spirit of our longstanding Federal civil-rights laws, they also undermine our national unity, as they deny, discredit, and undermine the traditional American values of hard work, excellence, and individual achievement in favor of an unlawful, corrosive and pernicious identity-based spoils system. Hardworking Americans who deserve a shot at the American Dream should not be stigmatized, demeaned, or shut out of opportunities because of their race or sex.”
 - Revoked EO 11246 (affirmative action, including race, gender)
 - Federal agencies to end DEI-related regulations and guidance
 - USDOJ complaint process

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“DEI-related discrimination”

- *“Are you a white male who has experienced discrimination at work based on your race or sex? You may have a claim to recover money under federal civil rights laws. Contact the EEOC as soon as possible. Time limits are typically strict for filing a claim.”*
 - EEOC Chair Andrea Lucas (December 2025 video)
- “unlawfully using quotas or otherwise ‘balancing’ a workforce by race, sex, or other protected traits”
- “Limiting membership in workplace groups...or other employee affinity groups, to certain protected groups”

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EEOC vs. Coca-Cola

- Focus on fair treatment for all employees to retain top talent ...
- Last month, the EEOC filed a lawsuit against Coca-Cola in U.S. District Court for the District of New Hampshire, alleging it violated Title VII by excluding male employees from an employer-sponsored event
- The event:
 - A two-day trip and networking event
 - Only female employees were invited
 - Women attending were excused from regular work duties while being paid at their normal rate
 - Male employees were not excused from work

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Balancing: Retention vs. “Prohibited DEI”

- Review and equally administer policies and processes:
 - Focus on consistency
 - Stress the importance of objective, job-related criteria
 - Consider documented guidelines and/or trainings
- Articulate/justify non-trait-based reasons for differing treatment of employees

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Developing MVPs: Job Descriptions, Evaluations, and Performance Documentation



PRESENTED BY

Paige Good and **Connor Curtis** (OKC)

Harrison Kosmider and **Kirk Turner** (Tulsa)

Job descriptions

- Utilized as part of recruitment and hiring
 - Setting clear expectations for applicants and evidence of job requirements
 - Objective criteria for evaluating candidates
 - » Qualifications
 - » Education
 - » Proficiencies
 - » Certification/licensure requirements
 - » Physical requirements
 - » Work environment

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Compensation and classification

- Pay equity – aligning job, duties, department, pay grade to ensure equity
 - Note: certain states have pay transparency laws, requirements for job postings, etc.
- Market research – are we competitive within this role?
- FLSA compliance
 - Exemption classification
 - Whether supported by job duties, salary basis, and salary thresholds

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Job descriptions: ADA and FMLA

- ADA compliance
 - Identifying essential job functions
 - Becomes important in future interactive process and reasonable accommodations discussions
- FMLA process
 - Can be included with FMLA forms during medical certification phase
 - Helps provider determine type of FMLA needed
- Medical marijuana
 - “Safety sensitive” designation

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Performance documentation

- Overview
 - Timeliness
 - Clear documentation
 - Evaluations – formal and informal
- Performance management process
 - Employees should own their performance
 - Supervisors/managers only manage performance and behavior and help employees succeed
 - HR supports the performance process – as a business partner to leaders (demonstrates fairness and consistency)

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Communicate expectations

- Regularly train managers to accurately and timely discuss what is expected from the employee...
 - ... in terms of job description, duties and responsibilities, performance, metrics, goals, timelines, and objectives
- Not just at time of hire or at annual review – throughout the employment relationship
- Consider check-ins, status reports, 1:1s, etc.
- Advise leaders or assist in documenting discussions – could be notes to the file, follow-up emails, formal document or review form
- Creating “evidence” of accountability to support employer decisions. No surprises!

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Assess and support

- Help to review/monitor performance expectations
- Is the employee on track?
 - Utilize 1:1s to identify red flags (missed deadlines, behavioral shifts) before they become formal disciplinary issues
- Any processes to support goal achievement
 - Resource allocation
- PIP as a support tool and demonstrates clear expectations, opportunity to improve, and consequences

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Feedback and development

- Timely discussion with employee when performance expectations are not being met – 1:1
- Identify areas for opportunity, offer feedback for growth and development
- Communicate with honesty, transparency, respectful tone
- Again – this is an ongoing process, not just at the time of hire or at annual review
- Timely and accurately document the discussion

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Partnership with HR

- Leaders should partner with HR on:
 - Performance and behavior management
 - Performance documentation
 - Corrective action
 - Employment decisions – transfer, demotion, promotion, termination
- HR is a leader's best friend!

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Formal evaluations

- Ensure honest ratings
- Avoid inconsistency (i.e., day-to-day performance issues vs. good rating and pay raise at annual evaluation)
- "Sugar-coated" evaluations that are inconsistent with discipline or performance record. (No good deed goes unpunished!)

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Objective documentation

- Stick to the FACTS
- Avoid personal opinions, protected class comments, emotion, subjective labels, conclusions
- Include specific examples
- Focus only on job-related matters – behaviors, performance, metrics, outcomes
- Contemporaneous documentation: document the issue immediately or as close in time as possible to the performance event

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Ensure consistency

- Across departments/leaders
 - Same type of approach, internal procedure, documentation across organization
- Following and enforcing company policy
- Shows fair treatment and can help prevent disparate treatment claims
- Leaders must be trained

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Legal importance of documentation

- Provides support for defense of legal claims – legitimate, non-discriminatory business reason for employment action
 - Legitimate basis for employment actions includes poor performance, misconduct, violation of company policy, lack of qualifications
 - Protects against claims under Title VII, ADA, ADEA, etc.
 - Helps protect against retaliation claims:
 - » Shows if performance issues were ongoing prior to any protected activity, the employment action following would be because of performance (not retaliation)
 - Creates a performance-based timeline
 - » For example, with respect to LOA – if performance issues pre-dated the request for leave

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Legal importance of documentation *(cont'd)*

- Undermines employee's ability to show pretext
 - Pretext = that an employer's stated reason for an employment action is merely pretext for discrimination
 - Ways to show pretext:
 - » Shifting explanations
 - » Lack of clear objectives/standards
 - » Lack of performance documentation or delayed documentation
 - » Positive reviews
 - » Inconsistent treatment
 - » Suspicious timing

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Takeaways

- ✓ **Job descriptions are your anchor:** they define essential functions for ADA/FMLA compliance and set objective standards for performance
- ✓ **Documentation:** records must be fact-based, specific, and contemporaneous
- ✓ **Consistency:** ensuring a uniform application of policies and avoiding “sugar-coated” evaluations ensures that actions are not perceived as unfair or discriminatory
- ✓ **Performance is an ongoing dialogue:** continuous communication and partnership with HR protect the organization and champion employee success

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Labor & Employment All-Star "Ask the Experts" Panel



PRESENTED BY

Mike Lauderdale with **Paige Good, Natalie Ramsey**
and **Kristin Simpsen (OKC)**

Courtney Bru with **Jake Crawford, Kathy Neal**
and **Kirk Turner (Tulsa)**

**Can you address the overtime changes
as it relates to calculating the premium
amount to be reported on the W-2?**

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What are the non-negotiables for a legally defensible layoff and severance program (especially a group action)?

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From a legal perspective, what risks are created by undertrained frontline managers, and what training investments may actually reduce exposure?

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What should a company do if ICE or CBP shows up at their property?

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What are trends regarding unemployment determination-based violations of company policy? For example, drive time laws, re-hire standard procedures, ADA accommodations.

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What best practices do you recommend for HR workflows and supervisor communication to ensure FMLA cases are handled consistently when discipline or attendance issues are also in play?

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When FMLA ends, does ADA begin – and where does workers' comp fit?

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**Is it legal to ask for an employee's
social media login information?**

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**Have there been any meaningful cases
involving PWFA with implications for
best practices or pitfalls to avoid?**

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How should we properly handle disciplinary action or performance management for an employee who is on FMLA or has recently returned from FMLA, without creating risk of FMLA interference or retaliation claims?

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As more and more states make recreational marijuana legal, should I even continue pre-employment drug testing?

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From Tip-Off to Trophy: Benefits Issues in Mergers and Acquisitions



PRESENTED BY
Lake Moore and Riley Wren

401(k) Plans

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Severance from employment

- Distribution of elective deferrals generally limited to (i) severance from employment, death and disability, (ii) age 59½ in-service withdrawals, (iii) hardship withdrawals, and (iv) plan termination
- Severance from employment means participant is no longer employed by employer (controlled group basis) that maintains the 401(k) plan

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Severance from employment *(cont'd)*

- **Asset transaction:** Generally, Seller employee has a severance from employment for Seller 401(k) plan if he or she becomes a Buyer employee
 - Exception: Unless Buyer assumes and continues Seller 401(k) plan
- **Equity transaction:** Generally, no severance – change in ownership of employer, but no change in employer
 - Sale of subsidiary exception:
 - 1) the plan maintained by the subsidiary prior to the sale is no longer maintained by the subsidiary in the hands of its new owner;
 - 2) no assets from the original parent's plan are transferred to a plan maintained by the acquired subsidiary; and
 - 3) the subsidiary is no longer part of seller's controlled group.

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Coverage transition rule

- Assume Buyer's plan is not terminated pre-equity transaction or is assumed in asset transaction
 - Sometimes the business desires to keep benefits the same for a period of time post-closing
 - Buyer and Seller 401(k) plans running side-by-side
- **Rule:** If a company becomes, or ceases to be, a member of the controlled group, coverage is deemed to be satisfied during a transition period. Two conditions:
 - The plans must pass coverage immediately before transaction
 - There can be no significant change under the plan during the transition period other than a change directly resulting from the acquisition or disposition

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Coverage transition rule *(cont'd)*

- Significant change
 - Neither the Code nor the regulations define "significant change"
 - Includes significant changes to plan benefits
 - Example:
 - » Amendment during the transition period to exclude hourly paid employees = violates rule – not directly related to the acquisition or disposition.
 - » Amendment to include acquired employees = no violation – change would be a direct result of the acquisition
- The transition period runs from date of controlled group change through the last day of the next plan year beginning after the change
- No relief from other nondiscrimination testing – only coverage! But can test separately since plans are deemed to pass coverage

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Successor plan rule

- Distributions are not available upon termination of a 401(k) plan if there is another 401(k) plan in the controlled group during the 12-month period beginning after termination and distribution of all plan assets
 - Equity Transaction: Buyer will want to require Seller to terminate its 401(k) plan no later than the day before the closing – allows distributions
 - If the plan is not terminated before the closing = plan merger
 - The successor plan rules do not apply in an asset transaction, unless Buyer assumes and continues Seller 401(k) plan
- Transaction agreement typically addresses disposition of 401(k) plans at issue

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Plan loans

- Issues arise when (1) plan is terminated or (2) participants experience a severance from employment
- Loans may go into default
- Possible solutions:
 - Allow repayments to continue after severance from employment (outside of payroll withholding)
 - Group rollover – requires coordination among recordkeepers

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Controlled group issues

- ERISA and the Code contain “controlled group” rules that treat multiple businesses as a single employer
 - Parent-subsidiary, brother-sister, or affiliated service group
- Members of the controlled group are jointly and severally liable for various purposes:
 - Multiemployer plan withdrawal liability
 - Plan termination liability
 - Minimum funding obligations
 - Excise taxes for failure to make minimum required contributions
 - PBGC liens for unpaid contributions greater than \$1,000,000
 - PBGC premiums
- In addition, there can be issues if some members of Seller controlled group were not included for plan testing requirements

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Health & Welfare Plans

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Nondiscrimination testing

- Buyer sometimes wants to keep benefits for acquired employees as-is through end of year
- For qualified plans, the coverage transition period helps
- No similar "official" rule for H&W plans – proceed at own risk!
- Seems reasonable to apply this rule to self-insured medical plans and cafeteria plans – between 12 and 24 months to ensure the plans satisfy nondiscrimination requirements
- If mid-year transaction, and Seller's medical plan is terminated, consider whether to credit accumulators in Buyer's plan

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Cafeteria plans – Asset purchase

- Termination of employment
- Potential forfeiture of FSA balance in Seller's plan. Two ways to handle:
 - Transferred employees continue to participate in Seller's health FSA for an agreed-upon period (for example, through the end of the plan year)
 - More common: Buyer agrees to cover the transferred employees under its health FSA for the remainder of the plan year
 - » Employees' account balances (whether underspent or overspent) rolled to Buyer's health FSA
 - » All claims for reimbursement after the asset sale are submitted to the buyer's health FSA
 - » Salary reductions continue for the balance of the plan year under the buyer's plan
 - » Buyer's plan must be amended to allow for balance transfers
- No mid-year election change in either scenario – never lost eligibility for a health FSA

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Cafeteria plans – Equity purchase

- If the acquired business maintains its own cafeteria plan and the plan is continued following the transaction, employees' health FSA elections would continue uninterrupted
- If target is participating in affiliate's plan, and will not participate post-closing, IRS guidance indicates balances can be transferred in same manner with asset sales

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COBRA – Which plan is liable?

- **General Rule:** If selling group maintains any plan after the sale, it must cover M&A qualified beneficiaries
 - Same for stock and asset transaction
 - Parties may always contract for different outcomes – rules are default
- **Stock Sale:** The buying group is liable for COBRA if selling group terminates all plans in connection with sale
 - “In connection with the sale”: No concrete IRS guidance
 - Applies even if seller plan terminates “shortly before” the asset sale. This is not an automatic rule – **depends on all the relevant facts and circumstances.**

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COBRA – Which plan is liable? *(cont'd)*

- **Asset Sale:** The buying group is deemed a “successor employer” and liable for COBRA to M&A qualified beneficiaries if:
 - the seller “ceases to provide any group health plan to any employee”;
 - the cessation occurs “in connection with the sale”; and
 - the buying group “continues the business operations associated with the assets purchased...without interruption or substantial change.”

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COBRA – Which plan is liable? *(cont'd)*

- **Springing liability:** Buying group must provide COBRA coverage on the later of:
 - (1) the date that the selling group “ceases to provide any group health plan to any employee,” or
 - (2) the date of the asset sale
- When the selling group and buying group each maintain a group health plan, a COBRA obligation could “spring” back if the selling group later ceases all its group health plans
- If the buying group has no group health plan on the date of the asset sale but later establishes, the buying group's liability may begin on that date, if the buying group is a successor employer

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COBRA – M&A qualified beneficiaries

- Qualified beneficiaries whose qualifying event occurred prior to sale
- Qualified beneficiaries whose qualifying event occurs “in connection with the sale”
 - **Stock Sale:** Employees continuing employment with acquired corporation after stock sale have no qualifying event – no termination of employment
 - **Asset Sale:** Where Buyer is not a successor employer, employees losing plan coverage after asset sale have qualifying event even if employed by Buyer
 - **Asset Sale:** If Buyer is successor employer, employees continuing with Buyer after asset sale have no qualifying event

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Full Court Responsibility: Fiduciary Basics



PRESENTED BY
Brandon Long and Eric Smith

Who is a fiduciary?

- Generally, a person is a fiduciary with respect to a plan to the extent he or she:
 - exercises discretionary authority or control respecting management of the plan or the management or disposition of plan assets,
 - renders investment advice for a fee or other compensation, direct or indirect, with respect to plan assets, or has any authority or responsibility to do so, or
 - has any discretionary authority or responsibility in the administration of the plan.

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Who is a fiduciary? *(cont'd)*

- A person's title does not control his or her status as a fiduciary. It is the function a person performs with respect to a plan that makes him or her a fiduciary
- ERISA requires benefit plan documents to provide for one or more named fiduciaries who have authority to control and manage the operation and administration of the plan
- A fiduciary may delegate his or her responsibilities for administration, such as to a committee, and may appoint an investment manager to manage the plan's assets
- A person who performs purely ministerial functions (application of eligibility rules, maintaining participant records, calculating benefits) is generally not a fiduciary to the extent the person does not exercise discretion

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What are the fiduciary duties?

- Duty of loyalty
- Duty of prudence – procedural and substantive
- Diversify investments
- No prohibited transactions
- Follow plan terms

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What's at stake?

- A plan fiduciary who breaches ERISA's fiduciary rules is personally liable for losses resulting from the breach, including:
 - Personal liability for losses caused to the plan
 - Personal liability to restore to the plan any profits that the fiduciary made through the use of plan assets
- A fiduciary may also be subject to civil penalties imposed on amounts recovered in a DOL action

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Practical suggestions

- Establish a committee
- Have regular meetings
- Set agendas
- Take minutes
- Hire service providers to help you – use RFPs, ensure they are not conflicted, review their contracts, make sure all comp is reasonable and disclosed
- Review cybersecurity practices

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More comments regarding compensation

- There is substantial regulatory attention to disclosure of plan fee and expense information
 - Certain plan service providers are required to provide disclosures to plan fiduciaries regarding compensation and conflicts of interest relating to the provision of services to the plan. (Latest = PBM disclosure requirements)
 - Plan administrators are required to provide participants a detailed disclosure regarding plan investments and fees and expenses. This disclosure must be provided when the participant first becomes eligible to direct investments and annually thereafter.

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Common fiduciary claims

- A particular investment was imprudent
 - Fund's performance underperformed its peers
 - Fund's expenses were too high
 - Fund was not the least expensive share class
 - Fiduciaries should have offered one type of investment over another (e.g., passive v. active; stable value v. money market)
- Plan fiduciaries' conflict of interest impacted decisions in a way that benefited the plan sponsor rather than participants

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Common fiduciary claims *(cont'd)*

- Expenses paid by the plan (and participants) were too high
 - Fiduciaries failed to investigate, understand and communicate the fee structure applicable to plan investments
 - Fiduciaries failed to benchmark fees and perform regular RFPs
 - Fiduciaries failed to utilize bargaining power resulting from increasing asset size
 - Fiduciaries failed to understand all forms of compensation received by the vendor

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New type of retirement litigation

- August 2025 lawsuit against Empower regarding use of participant data
- Empower allegedly (a) harvested participant data for those close to retirement and (b) used that data to reach out to participants and sell their managed account product (via suggested rollover) that was/is allegedly very expensive
- Highlights the importance of understanding all participant outreach by vendors – and how the vendors will or could get paid

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Forfeitures – common type of litigation

- Since September 2023, ERISA plaintiffs' firms have filed more than 75 lawsuits challenging plan sponsors using plan forfeitures to offset their employer contributions
- Federal district courts have issued substantive rulings on motions to dismiss in 20+ forfeiture cases
- District courts granted motions to dismiss in at least 18 cases, and there are multiple appeals pending in four federal appellate courts

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Forfeiture litigation *(cont'd)*

- Typically, large 401(k) plans with significant forfeiture balances are targeted
- Plaintiffs allege that using forfeitures to offset contributions is a breach of ERISA's fiduciary duties of prudence and loyalty, a prohibited transaction, and violates ERISA's anti-inurement clause
- Common defenses
 - Employer contribution amount is a non-fiduciary decision. If the employer decides to contribute less, fiduciaries are forced to use forfeitures to make the difference
 - No harm - plan is in the same position regardless of how forfeitures are used
 - No prohibited transaction because the forfeiture does not go back to the employer

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New type of health & welfare plan litigation

- On December 23, 2025, four similar lawsuits were filed in federal district courts in Illinois and New York against different employers – as well as their large consulting firms
- Allegation is that the defendants, as fiduciaries, violated their duties with respect to the management and administration of accident, critical illness, and hospital indemnity insurance programs, which allegedly resulted in participants paying excessive and unreasonable premiums
- Are these benefits employer sponsored – and why do we care?

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Predicting the future: Health & welfare plans

- Expected types of lawsuits
- How to mitigate your risk?

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Duty of prudence: Fiduciary-friendly outcomes

- Courts have issued a series of substantive, fiduciary-friendly decisions in response to allegations of duty of prudence breaches:
 - *Walder v. Natixis* (D. Mass. June 26, 2025)
 - *Spence v. American Airlines, Inc.* (N.D. Tex. Jan. 10, 2025)
 - *In re Quest Diagnostics* (D.C.N.J. Sept. 25, 2024)
 - *Silva v. Evonik* (D.C.N.J. June 28, 2024)
 - *Nunez v. B. Braun* (E.D. Pa. Aug. 18, 2023)
- Courts pointed to specific steps (e.g., conducting meetings, investment policy statements, receipt of market and investment information, maintenance of a watch list, receipt of fiduciary education, engaging a fiduciary advisor and/or ERISA counsel, meeting minutes) reflecting prudence

Don't Get Dunked On: Vendor Engagement and Contracting



PRESENTED BY
Melissa Cottle (OKC)
Judy Burdg (Tulsa)

Overview

- Presentation gives a high-level overview of some legal and practical considerations when engaging vendors for or related to employee benefit plans
- Some types of engagements have specific guidance (e.g., selecting an annuity provider for a pension plan), so it's always best to contact ERISA legal counsel before you begin the RFP or engagement process

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Legal considerations – ERISA

- The selection of service providers for a plan is an exercise of discretionary authority or control over the management and administration of a plan within the meaning of Section 3(21) of ERISA and is therefore a fiduciary act subject to the general fiduciary standards

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Legal considerations – ERISA *(cont'd)*

- ERISA requires fiduciaries to:
 - Act solely in the interest of plan participants and their beneficiaries
 - Discharge their duties with the exclusive purpose of providing benefits to participants and their beneficiaries
 - Carry out their duties prudently
 - Diversify plan investments
 - Administer the plan in accordance with the plan document
 - Avoid causing the plan to engage in prohibited transactions

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Legal considerations – ERISA *(cont'd)*

- More on prohibited transactions
 - Prohibited transactions fall into two general categories:
 - » Prohibiting fiduciaries from causing a plan to directly or indirectly enter into transactions with certain persons, defined as parties in interest
 - » Prohibiting various acts of fiduciaries that could lead to a conflict of interest between a fiduciary and the plan to which the fiduciary owes a duty
 - ERISA also exempts certain activities from the prohibited transaction rules
 - Recent SCOTUS decision in *Cunningham v. Cornell University* makes it significantly easier for plaintiffs to plead certain prohibited transactions claims

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Legal considerations – ERISA *(cont'd)*

- Is it an ERISA plan?
- Employee welfare benefit plan
- Employee pension benefit plan
- You should make this determination; don't blindly rely on vendor classifications
- Consequences of being an ERISA plan

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Legal considerations – HIPAA

- Vendors contracted to perform plan functions who have access to PHI for the performance of those functions are known as business associates
- HIPAA privacy rule allows disclosure of PHI to business associates and allows business associates to create or receive PHI for certain purposes, if there is a business associate agreement
- HIPAA security rule allows business associates to create, receive, maintain, or transmit electronic PHI, if there is a business associate agreement
- Specific content requirements

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Legal considerations – ACA

- Applies to group health plans
- Group health plans are employee welfare benefit plans that provide medical care to employees or their dependents directly or through insurance, reimbursement or otherwise
- ACA imposes a broad array of requirements on group health plan
 - E.g., prohibits annual and lifetime limits on essential health benefits; requires coverage of preventive health services; cost-sharing limitations; etc.

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Practical considerations – Identifying potential vendors

- Ask around – who are your peers using, who does your broker, consultant or other advisor recommend, who has been in the news lately (for good or bad reasons), etc.
- Once you have a pool of potential candidates, decide how many you want to solicit proposals from

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Practical considerations – RFP process

- Consider having your consultant, advisor or attorney manage the RFP process
- Ask the same questions and for the same information from each provider
- Provide the same information to each provider
- Review sample contracts and ask about modifications at this stage
- Call references

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Practical considerations – RFP process *(cont'd)*

- Identify any potential conflicts of interest
- Compare fees
- Confirm transition timelines
- Score the responses
- Narrow the field of candidates and do second round presentations/ interviews
- Create a paper trail (document the process) and make a meaningful comparison and selection

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Practical considerations – Engagement process

- Comon “sticking points” for vendor agreements
 - Scope of services and reasonableness of fees
 - Acknowledgment of ERISA fiduciary status (if applicable)
 - Indemnification and liability caps
 - Subcontracting and use of affiliates assignment provisions
 - Ownership of data and records
 - Audit rights
 - Renewal and termination provisions
 - Choice of law and venue

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Practical considerations – Monitoring

- Ongoing duty to monitor your vendors
- Establish a process
- Document the process
- Report back to leadership

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Practical considerations – Red flags



Services that sound too good to be true or are promoted as a win-win



Vendors who say they have legal options, but either won't share or will only share if you sign an NDA



Vendors who aren't willing to indemnify you

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Employee Benefits Dream Team "Ask the Experts" Panel



PRESENTED BY

**Lake Moore, Brandon Long, Eric Smith and
Melissa Cottle (OKC) and Judy Burdg (Tulsa)**

**Given all the litigation on the health and
welfare plan side, what practical steps
should we take to properly meet our
fiduciary duties?**

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What should we do if a COBRA Election Notice is returned as undeliverable?

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Our 401(k) plan recordkeeper frequently asks us about adding a “managed account” option to our plan.

What should I be considering about this offering?

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**We're being sold something called a
"FICA savings plan," and it seems
too good to be true.**

Is it?

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**What are some practical issues plan
administrators are having complying
with the new Roth catch-up contribution
requirement?**

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Can our 401(k) plan accept a small estate affidavit for a deceased participant with no beneficiary designation?

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I've heard that the amendment deadlines for CARES, SECURE, and SECURE 2.0 have been pushed back a few times.

When do we need to complete these amendments, and are there other amendments that are needed?

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**I just learned we accidentally
created a MEWA.**

What is it exactly, and what do we do now?

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**Can we offer extra compensation to an
employee with high health plan expenses
so that they can buy an individual health
insurance policy on the exchange?**

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**Are employer-provided snacks
a taxable benefit?**

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