

LABOR & EMPLOYMENT LAW SECTION  
OF THE STATE BAR OF NEVADA

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# Nevada Practitioners' Journal of Labor and Employment Law



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NEVADA PRACTITIONERS'  
JOURNAL OF LABOR AND  
EMPLOYMENT LAW

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## From the Editors

With the publication of this second volume of the Nevada Practitioners' Journal of Labor and Employment Law, the leadership reins of the Labor and Employment Section's fledgling publication pass to its new Editor-In-Chief, Amy Baker, who along with the other members of the current Section's Executive Committee, are committed to making the Journal a lasting forum for the advancement of labor and employment law in Nevada.

The Journal is one of the important ways in which the Labor and Employment Law Section seeks to fulfil its primary purpose of enhancing the roles and skills of lawyers engaged in the practice of labor and employment law through study, collection, development, and dissemination of materials on subjects of interest to labor and employment law practitioners. It also serves as a professional medium for practitioners to examine and debate unsettled or disputed issues of law.

We hope you will support our ongoing efforts to make the Journal a professional forum for the sharing of ideas and perspectives on both the practical aspects and the broader policy implications of the labor and employment law issues confronted by practitioners, judges, legislators, and agency personnel in Nevada.

Please take the time to read each of the articles and provide us with any feedback you may have. In addition, consider sharing your expertise through the submission of thought-provoking articles for future issues or joining the Journal's volunteer editorial staff.

<i>Amy Baker</i>	<i>Edwin A. Keller, Jr.</i>	<i>William B. Werner</i>
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# Editorial Statement and Submission Guidelines

**Purpose:** The Nevada Practitioners' Journal of Labor and Employment Law is a publication of the Labor and Employment Law Section of the State Bar of Nevada designed to serve as a professional forum for the dissemination of ideas and perspectives on both the practical aspects and the broader policy implications of labor and employment law issues confronted by practitioners, judges, legislators, and agency personnel in Nevada. The goals of the Journal are to advance the areas of labor and employment law, as well as the quality of the professionals involved in the same.

**Concentration:** A particular focus of the Nevada Practitioners' Journal of Labor and Employment Law is on the labor and employment issues litigated before Nevada's state courts, the United States District Court for the District of Nevada, and the United States Court of Appeals for the Ninth Circuit.

**Publication Cycle:** Each annual volume of the Nevada Practitioners' Journal of Labor and Employment Law will typically consist of two issues. The target publication date for each issue will be posted on the webpage of the Labor and Employment Section of the State Bar of Nevada at: <http://nvbar.org/content/labor-and-employment-law-section>.

**Submissions:** Contributions from all interested labor and employment law professionals are welcome for possible publication on a rolling basis. Please submit Journal articles for consideration electronically as an email attachment directed to the Editor-In-Chief: Amy Baker ([abaker@mgmresorts.com](mailto:abaker@mgmresorts.com)).

Articles are selected by the Journal's editorial staff at least four to six months in advance of the target publication date for the issue in which the articles are to appear. Well written articles of any size will be considered, but articles should generally range between 15 and 30 pages (8.5" by 11") with text double-spaced.

**Student Submissions:** The Nevada Practitioners' Journal of Labor and Employment Law will accept submission of articles from law students for publication consideration. Typically, no more than one student article will be selected for any particular issue.

**Author Guidelines:** Articles should be direct, professional in tone, and well-researched. As the Journal is tailored to practitioners, articles are expected to address the current state of applicable law with supporting citation to relevant case authority, statutes, regulations, administrative decisions, advisory opinions, agency procedures, etc. Other legal references useful to practitioners related to the article's topic, such as motions, briefs, annotations, treatises, white papers, agency guidelines, advisory opinions, checklists and webpages, should also be identified.

**Article Format:** Microsoft Word is the preferred word processing format for all article submissions. Articles are to contain an introduction, main discussion and conclusion, as well as utilize text headings in the following format and progression: I., A., 1., a., (1). Authors should strive to use no more than three levels of text headings (e.g., I., A., 1.). Legal authority and other references are to be footnoted with citation conforming to THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION®. Whenever a footnoted citation is preceded by the signals "See" or "See also," the cited reference(s) should include a parenthetical explanation. Quotes of more than a sentence should be in block quote format. Imbedded hyperlinks to source material are permitted. Authors should typically defer to Strunk & White's THE ELEMENTS OF STYLE for grammar and style issues.

**Post-publication Modifications:** The Nevada Practitioners' Journal of Labor and Employment Law reserves the right and discretion to make post-publication modifications to any issue. Requests for post-publication modifications should be directed to the Editor-In-Chief. As a matter of policy, typically only modifications of a technical nature, such as those related to formatting, quotation, citation and grammar will be considered. Any post-publication modifications will be noted in an editorial postscript set forth at the end of the particular issue.

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# Nevada's Special Discrimination Law for Local Government Employees

*By Bruce K. Snyder<sup>1</sup>*

## I. Introduction

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.<sup>2</sup>

These are the words from the Civil Rights Act of 1866, the first federal law prohibiting discrimination based on race.<sup>3</sup> After passage of the Reconstruction Amendments,<sup>4</sup> no further anti-discrimination statutes were passed by Congress for almost a century. However, since 1964 a number of federal statutes have been enacted. The earliest of these was Title VII of the Civil Rights Act of 1964 (Title VII),<sup>5</sup> which prohibits discrimination on the basis of race, color, religion, sex, or national origin.<sup>6</sup>

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<sup>1</sup> Commissioner, Local Government Employee-Management Relations Board (EMRB). The views and conclusions expressed herein are those of the author based upon his review of the law, regulations and decisions of the EMRB, and are not necessarily those of the three-member EMRB. The EMRB, a Division of the Department of Business and Industry, fosters the collective bargaining process between local governments and their employee organizations (*i.e.*, unions), provides support in the process, and resolves disputes between local governments, employee organizations, and individual employees as they arise.

<sup>2</sup> 42 U.S.C. § 1981.

<sup>3</sup> 42 U.S.C. § 1981.

<sup>4</sup> The Thirteenth, Fourteenth and Fifteenth Amendments to the U.S. Constitution are commonly referred to as the Reconstruction Amendments.

<sup>5</sup> 42 U.S.C. § 2000e, *et seq.*

<sup>6</sup> 42 U.S.C. § 2000e-2(a).

Title VII was followed by the Age Discrimination in Employment Act of 1967, which prohibits similar discrimination for those at least forty years old.<sup>7</sup> Congress then passed the Rehabilitation Act in 1973, which prohibits discrimination on the basis of disability for employers who were recipients of federal grants or programs.<sup>8</sup> The capstone of the federal discrimination laws is the Americans with Disabilities Act of 1990, which also prohibits discrimination on the basis of disability, but which extends coverage to countless more employers.<sup>9</sup>

Since the passage of Title VII, not only did the federal government pass a number of laws prohibiting discrimination, but most states passed similar laws, thus creating a patchwork of laws and agencies administering them. Here, in Nevada, chief among the discrimination laws is the anti-discrimination law found in NRS Chapter 613 administered by the Nevada Equal Rights Commission, which not only prohibits discrimination on the same bases as federal law, but also prohibits discrimination on the basis of sexual orientation and gender identity or expression.<sup>10</sup>

Notably, Nevada's general purpose anti-discrimination statute is not the only such statute adopted by the Nevada Legislature. The Local Government Employee-Management Relations Act<sup>11</sup> (EMRA) also has two provisions prohibiting discrimination for certain employees working in Nevada. This paper discusses the EMRA's discrimination provisions, comparing and contrasting them with the more widely known aforementioned statutes. The paper also discusses why an attorney might file a case under the EMRA in lieu of or in addition to other actions under those other statutes.

## **II. The Local Government Employee-Management Relations Act**

The EMRA was originally enacted into law in 1969. Commonly known as the "Dodge Act," after State Senator Dodge, the law was a response to widespread picketing on the Las Vegas Strip by school teachers seeking better wages and working conditions.

### **A. The EMRA's Prohibited Practices**

As originally enacted into law, the EMRA did not contain any unfair labor practices. A number of unfair labor practices were added in 1971 by Assembly Bill 178.<sup>12</sup> The EMRA was significantly

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<sup>7</sup> 29 U.S.C. § 621 *et seq.*

<sup>8</sup> 29 U.S.C. § 704 *et seq.*

<sup>9</sup> 42 U.S.C. § 12101 *et seq.*

<sup>10</sup> NRS 613.310 *et seq.* (first adopted by the Nevada Legislature and signed into law in 1965).

<sup>11</sup> NRS 288.010 *et seq.*

<sup>12</sup> Legislature, State of Nevada, Fifty-Sixth Session (1971) (enacted into law as Chapter 643, the unfair labor practices were called prohibited practices by the statute). *See* NRS 288.270(1). Also enacted were unfair labor practices that could be committed by local government employees and employee organizations. *See* NRS 288.270(2).



amended in 1975 by Assembly Bill 572.<sup>13</sup> Specifically, the 1975 amendments eliminated the bargaining over “wages, hours, and conditions of employment”<sup>14</sup> and instead provided a laundry list of subjects of mandatory bargaining. Another change was the addition of a sixth type of prohibited practice to NRS 288.270(1):

(f) Discriminate because of race, color, religion, sex, age, physical or visual handicap, national origin or because of political or personal reasons or affiliations.<sup>15</sup>

A similar provision prohibiting local government employees or employee organizations from committing acts of discrimination was also passed as part of the same amendments.<sup>16</sup> Unfortunately, there is little legislative history for the bill, with only one reference to this provision:

The committee next discussed the last page of the bill. It was decided that the language should be ‘race, color, religion, sex, age, physical or visual handicap or national origin or because of political or personal reasons or affiliations.’<sup>17</sup>

As currently constituted, there are six types of unfair labor practices affecting local governments and four types affecting local government employees and employee organizations.<sup>18</sup>

## **B. Jurisdictional Issues**

The Local Government Employee-Management Relations Board (EMRB), which administers the EMRA, is a limited jurisdiction administrative agency.<sup>19</sup> NRS 288.110(2) reads in part:

The Board may hear and determine any complaint arising out of the interpretation of, or performance under, the provisions of this chapter by any local government employer, local government employee or employee organization.<sup>20</sup>

Accordingly, any complaint filed with the EMRB must allege that each party to the complaint is either a local government employer, local government employee or employee organization as the agency has no jurisdiction over any other entities. The EMRA defines each of the three entities over which it does have jurisdiction. A local government employer is:

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<sup>13</sup> Legislature, State of Nevada, Fifty-Eighth Session (1975) (enacted into law as Chapter 539).

<sup>14</sup> NRS 288.150(1).

<sup>15</sup> Laws of Nevada, Fifty-Eighth Session, p. 924.

<sup>16</sup> See NRS 288.270(2)(c).

<sup>17</sup> See Minutes of the Assembly Government Affairs Committee, April 23, 1975, p. 3.

<sup>18</sup> For the full list see NRS 288.270(1) for the six types affecting local governments and NRS 288.270(2) for the four types affecting local government employees and employee organizations.

<sup>19</sup> See, e.g., NRS 288.110(2).

<sup>20</sup> NRS 288.110(2).

[A]ny political subdivision of this State or any public or quasi-public corporation organized under the laws of this State and includes, without limitation, counties, cities, unincorporated towns, school districts, charter schools, hospital districts, irrigation districts and other special districts.<sup>21</sup>

The EMRB currently has 170 local governments which annually file with the agency. There is a notable carve-out as the EMRB has held several times that courts are not local government employers.<sup>22</sup> Moreover, unlike various federal and state statutes that include employers who only meet a minimum threshold of employees, there is no minimum employee requirement for a local government employer to be a covered employer. Indeed, a number of Nevada's local governments have less than 15 employees.

A local government employee is “any person employed by a local government employer.”<sup>23</sup> Here it must be noted that the employee need not be a member of an employee organization or even in a bargaining unit and yet not a member. Rather, the person must only be employed by a local government employer. Although there are no known cases involving hourly or part-time employees, the literal definition of local government employee would presumably include such persons. There are more than 80,000 local government employees in Nevada.

Finally, the term “employee organization” (*i.e.*, union) is defined as “an organization of any kind having as one of its purposes improvement of the terms and conditions of employment of local government employees.”<sup>24</sup> Here, it should be noted that the employee organization need not be recognized by the local government employer.<sup>25</sup> The EMRB currently has more than 200 employee organizations which annually file with the agency.

### **C. Procedural Issues**

A complaint must be filed within 6 months from the date of the occurrence which is the subject of the complaint.<sup>26</sup> The respondent then has 20 days to file an answer or dispositive motion once it is

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<sup>21</sup> NRS 288.060.

<sup>22</sup> See, e.g., *Clark Cnty. Deputy Marshals Ass'n. v. Clark Cnty.*, Item No. 793 (2014); *In the Matter of the Petition for Recognition by the Clark Cnty. Deputy Sheriff Bailiff's Ass'n.*, Item No. 504A (2002); *Washoe Cnty. Probation Employees' Assoc. v. Washoe Cnty.*, Item No. 334 (1994); and *Operating Engrs. Local #3 v. Cnty. of Lander*, Item No. 346A (1995).

<sup>23</sup> NRS 288.050.

<sup>24</sup> NRS 288.040.

<sup>25</sup> See *UMC Physicians v. Nev. Serv. Empl. Union*, 124 Nev. 84, 178 P.3d 709 (2008).

<sup>26</sup> NRS 288.110(4). Though outside the scope of this paper, this statute of limitations recognizes several so-called exceptions. Foremost, the limitations period does not run until the complainant receives unequivocal notice of a final adverse decision. *City of N. Las Vegas v. EMRB*, 127 Nev. 631, 261 P.3d 1071 (2011). The EMRB also recognizes the doctrine of equitable tolling, see, e.g., *Frabbiele v. City of N. Las Vegas*, Item No. 680I (2014), as well as forgiveness to a party that brings a timely complaint, but does so before a court that lacks jurisdiction. See, e.g., *Simo v. City of Henderson and Henderson Police Officers Assoc.*, Item No. 796 (2014).

served by certified mail.<sup>27</sup> All parties are then required to file pre-hearing statements 20 days after the filing of the answer.<sup>28</sup> Once all the documents have been filed and any dispositive motions resolved by the EMRB, the case then enters a queue of cases waiting for a hearing date. Once the EMRB decides to hear a case, it must begin the hearing within 180 days.<sup>29</sup> Once a hearing date has been assigned, a Notice of Hearing is issued and a pre-hearing conference held.<sup>30</sup>

The EMRB has no provisions for discovery. It does, however, require parties to exchange proposed exhibits 5 days prior to the pre-hearing conference<sup>31</sup> and the pre-hearing statements that contain lists of witnesses.<sup>32</sup> The EMRB does have subpoena authority and witnesses can be required to bring pertinent documents with them to the hearing.<sup>33</sup>

## **D. Remedies Available**

The EMRB may order any person found to have committed an unfair labor practice to refrain from the action complained of or to restore to an aggrieved party any benefit of which he/she may have been deprived.<sup>34</sup> The former is usually done by requiring the employer to post a notice to its employees. The latter includes restoration of the job and the awarding of back pay and benefits.<sup>35</sup> The EMRB may not go beyond restoring the status quo when ordering a remedy and does not have the ability to issue punitive damages.<sup>36</sup> The EMRB, however, can award attorneys' fees and costs to the prevailing party.<sup>37</sup>

## **III. Bases of Discrimination**

### **A. Traditional Bases of Discrimination**

As previously mentioned, the EMRA prohibits discrimination on the basis of race, color, religion, sex, and national origin.<sup>38</sup> These are the same prohibitions under Title VII and NRS Chapter 613.

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<sup>27</sup> NAC 288.220.

<sup>28</sup> NAC 288.250.

<sup>29</sup> NRS 288.110(2). If the case also has an allegation of bad faith bargaining, then the hearing must begin within 45 days. This is a new requirement contained in Senate Bill 241 (2015).

<sup>30</sup> NAC 288.273.

<sup>31</sup> NAC 288.273.

<sup>32</sup> NAC 288.250.

<sup>33</sup> NAC 288.279.

<sup>34</sup> NRS 288.110(2).

<sup>35</sup> See, e.g., *Reno Police Protective Ass'n. v. City of Reno*, 102 Nev. 98, 102, 715 P.2d 1321, 1324 (1986).

<sup>36</sup> See *Nevada Serv. Emp. Union v. Orr*, 121 Nev. 675, 119 P.3d 1259 (2005).

<sup>37</sup> NRS 288.110(6).

<sup>38</sup> NRS 288.270(1)(e) and NRS 288.270(2)(c).

The EMRA also prohibits discrimination on the basis of age.<sup>39</sup> It must be noted that unlike the Age Discrimination in Employment Act, the EMRA has no definition of age. Presumably the EMRB might follow the dictates of federal law and define discrimination on the basis of age to only affect covered employees forty years of age or older; but to date there has been no decision on point. Thus, the possibility exists for an attorney to make a case that an employee may have been the subject of discrimination because he/she was too young.

Finally, under the traditional bases of discrimination, the EMRA also prohibits discrimination on the basis of some disabilities. Unlike the Americans with Disabilities Act, the EMRA only covers “handicaps” that are physical or visual.<sup>40</sup>

Based upon a prior ruling by the EMRB, discrimination based upon sexual orientation is specifically excluded and not subsumed under the category of discrimination based upon sex.<sup>41</sup> However, as detailed below, a claim for sexual orientation discrimination may possibly be pled as discrimination based on personal reasons.

How do the discrimination provisions of NRS Chapter 288 interact with those of federal and state law? In *Balasquide v. Las Vegas Valley Water District*, the respondent filed a motion to dismiss, claiming the case should instead be heard by the Nevada Equal Rights Commission.<sup>42</sup> The EMRB denied the motion, stating that the claims were made under NRS 288 and that, therefore, the EMRB had jurisdiction to hear the case.<sup>43</sup> The decision noted that the EMRB does not have jurisdiction over federal claims of discrimination, but that the discrimination provisions of NRS 288 are independent of any federal or state claims.<sup>44</sup>

## **1. Standard and Proof**

The EMRB often looks to federal and state law in its decisions, and in particular, to decisions rendered by the courts on the interpretation of those statutes. Nowhere is this more evident than when the EMRB uses the traditional *McDonnell Douglas* framework.<sup>45</sup> Under that framework the complainant must show a *prima facie* case of discrimination. This is done by showing the employee:

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> See *Heitzinger v. Las Vegas-Clark Cnty. Library Dist.*, Item No. 782C (2012).

<sup>42</sup> *Balasquide v. Las Vegas Valley Water Dist.*, Item No. 708 (2009), 1.

<sup>43</sup> *Id.* at 2.

<sup>44</sup> *Id.* at 2 (citing *Kilgore v. City of Henderson*, Item No. 550H (2005) and *Harrison v. City of North Las Vegas*, Item No. 558 (2003) (both supporting the proposition that the EMRB does not have jurisdiction over claims arising out of any other law, but that this does not prevent the EMRB from having jurisdiction over its own statute)).

<sup>45</sup> See, e.g., *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). All of the cases filed with the EMRB have alleged disparate treatment. None have alleged a disparate impact theory of discrimination. See also *Apeceche v. White Pine Cnty.*, 96 Nev. 723, 726, 615 P.2d 975, 977 (1980) (a Nevada Supreme Court decision using the same framework as *McDonnell-Douglas*).

(1) belongs to a protected class; (2) they were qualified for the position and/or were performing satisfactorily; (3) that the employee was subjected to an adverse employment action; and (4) that similarly situated employees not in the employee's protected class received more favorable treatment.<sup>46</sup>

Once the complainant makes the showing of a *prima facie* case, the burden then shifts to the respondent to articulate a legitimate non-discriminatory reason for its actions.<sup>47</sup> This burden, which shifts to the respondent, only requires the respondent to rebut the presumption of discrimination.<sup>48</sup> If the respondent meets this burden, then the burden shifts back to the complainant to show that the proffered reason articulated by the respondent is pretextual.<sup>49</sup>

## **2. Examples of Discrimination Cases Based on Traditional Bases**

In 2005, the Las Vegas Police Protective Association Civilian Employees filed a complaint against the Las Vegas Metropolitan Police Department, alleging that the police department violated NRS 288.270(1)(f) by discriminating against the Law Enforcement Support Technicians (LESTs) by restricting their ability to transfer to another position to a greater degree than that of other civilian employees.<sup>50</sup> The police department filed a motion to dismiss, claiming that the LESTs were not a protected class under NRS 288.270(1)(f).<sup>51</sup> The EMRB agreed that the police department had treated the LESTs differently than other civilian employees, but noted that this was not discrimination based upon any of the enumerated categories in NRS 288.270(1)(f) and the EMRB therefore granted the motion.<sup>52</sup> In essence, the job classification of the LESTs is not a protected class.

In another case, the EMRB addressed the allegations of an individual who did fall within one of the enumerated categories of NRS 288.270(1)(f). There, Officer Boykin was a probationary police officer who worked for the City of North Las Vegas. He was non-confirmed after being accused of violating the department's policy on truthfulness.<sup>53</sup> Boykin made several claims, including that he had been terminated due to his race, African-American. Finding that Boykin had made a *prima facie* case, the burden then shifted to the City to offer a legitimate, non-discriminatory reason for its actions. To that end, the City offered that Boykin had violated the policy on truthfulness, which then

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<sup>46</sup> *Id.* This framework need not be employed when there is direct evidence of discrimination.

<sup>47</sup> *Id.*

<sup>48</sup> See *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089 (1981).

<sup>49</sup> *McDonnell Douglas*, 411 U.S. at 792.

<sup>50</sup> *Las Vegas Police Protective Ass'n v. Las Vegas Metro Police Dep't*, Item No. 620 (2006).

<sup>51</sup> *Id.* at 1.

<sup>52</sup> *Id.* at 3.

<sup>53</sup> *Boykin v. City of N. Las Vegas*, Item No. 674E (2010), 2.

shifted the burden back to Boykin. In that case, the EMRB did “not find credible substantial evidence to support a finding that the City’s legitimate reason was pre-text for racial discrimination.”<sup>54</sup>

In 2013, the EMRB issued an order in the case of *Ajay Vakil v. Clark County* in which Vakil, an engineer, alleged Clark County discriminated against him on the basis of his age, 63, when the County laid him off as a result of the Great Recession.<sup>55</sup> Again applying the burden shifting test, the EMRB found that Vakil made a *prima facie* case of discrimination. Nevertheless, the County offered the legitimate non-discriminatory reason that it laid off employees solely on the basis of seniority and it produced evidence to support that assertion. The EMRB then went on to state that Vakil did not present any evidence refuting the County’s explanation and, thus, found in favor of the County.<sup>56</sup>

Finally, Pamela Vos was a Senior Corrections Officer for the City of Las Vegas. The Senior Corrections Officers (among other employees) were laid off in 2010. At that time, Vos elected not to bump back to her prior Corrections Officer position.<sup>57</sup> After losing her job, Vos then filed a complaint alleging her union breached its duty of fair representation and that the City violated a number of federal and state laws, discriminated against her on the basis of her age and race (white), discriminated against her on the basis of personal reasons, committed bad faith bargaining, and committed breach of contract. With respect to her age and race discrimination claims, the EMRB held Vos did not make a *prima facie* case in that she could not point to any employee in her job classification who was treated more favorably than her. Moreover, the City applied the layoffs according to the contractual terms of using seniority.<sup>58</sup>

## **B. Discrimination Based Upon Personal Reasons or Affiliations**

The EMRA also prohibits discrimination on the basis of “political or personal reasons or affiliations.”<sup>59</sup> This prohibition is unique among both the National Labor Relations Act and other state laws affecting public sector employees. One may question what is meant by the phrase “political or personal reasons or affiliations.” In 1959, the State of Nevada passed a law requiring that all actions concerning personnel are to be based on merit and fitness. This law was expanded over time. Sections 1 and 2 currently state:

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<sup>54</sup> *Id.* at 7-8. It should be noted that Boykin was reinstated to his prior status of suspended with pay pending an investigation, which was based on other counts in the complaint.

<sup>55</sup> *Vakil v. Clark Cnty.*, Item No. 768A (2013), 6.

<sup>56</sup> *Id.* at 7-8.

<sup>57</sup> *Vos v. City of Las Vegas and Las Vegas Peace Officers Ass’n*, Item No. 749 (2014), 2-3.

<sup>58</sup> *Id.* at 9 (the EMRB found all of the other claims were without merit and specifically noted that it did not have jurisdiction over any alleged federal or state law violations).

<sup>59</sup> NRS 288.270(1)(f) (for local government employers) and NRS 288.270(2)(c) (for local government employees and employee organizations).

1. All personnel actions taken by state, county or municipal departments, housing authorities, agencies, boards or appointing officers thereof must be based solely on merit and fitness.
2. State, county or municipal departments, housing authorities, agencies, boards or appointing officers thereof shall not refuse to hire a person, discharge or bar any person from employment or discriminate against any person in compensation or in other terms or conditions of employment because of the person's race, creed, color, national origin, sex, sexual orientation, gender identity or expression, age, political affiliation or disability, except when based upon a bona fide occupational qualification.<sup>60</sup>

Although not explicitly referenced elsewhere one might conclude that this law was the genesis for the EMRA's inclusion of a prohibition of discrimination based on political or personal reasons or affiliations in that the EMRA covers some of the same public sector employees as NRS 281.370 and also includes a prohibition on political affiliations.

Over time, the EMRB has adopted a formal definition of "personal reasons." Noting that the legislative history did not indicate any reasoning or intent behind the 1975 amendment adding discrimination prohibitions, the EMRB then stated "we are left with the task of determining, in the context of this case. . . the meaning of 'personal reasons or affiliations.'"<sup>61</sup> The EMRB then referred to Black's Law Dictionary, stating:

Black's Law Dictionary defines "Personal" to mean "[appertaining to the person; belonging to an individual. . . " Black's Law Dictionary 702 (6<sup>th</sup> ed. 1991). Additionally, the term "political or personal reasons or affiliations" is preceded in NRS 288.270(1)(f) by a list of factors, "race, color, religion, sex, age, physical or visual handicap, national origin," that can best be described as "non-merit-or-fitness" factors, *i.e.*, factors that are unrelated to any job requirement and not otherwise made by law a permissible basis for discrimination. The doctrine of *ejusdem generis* states that where general words follow an enumeration of particular classes of things, the general words will be construed as applying only to those things of the same general class as those enumerated. Black's Law Dictionary 357 (6<sup>th</sup> ed. 1991). Thus, the proper construction of the phrase "personal reasons or affiliations" includes "non-merit-or-fitness" factors, and would include the dislike of or bias against a person

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<sup>60</sup> NRS 281.370(1) and (2).

<sup>61</sup> See *Kilgore v. City of Henderson*, Item No. 550H (2005) (approved by the Nevada Supreme Court in *City of N. Las Vegas v. Glazier*, Case No. 50781 (unpublished 2010)).

which is based on an individual's characteristics, beliefs, affiliations, or activities that do not affect the individual's merit or fitness for any particular job.<sup>62</sup>

Since 2005 this has been the definitive definition of discrimination based upon personal reasons.<sup>63</sup>

## **1. Standard and Proof**

Unlike cases brought for traditional bases of discrimination in which the EMRB has always employed the *McDonnell Douglas* analysis,<sup>64</sup> the analysis of cases brought for political or personal reasons or affiliations has varied over time. As detailed below, the EMRB used to employ the *McDonnell Douglas* test, but since the *Bisch*<sup>65</sup> case in 2013 has used a modified *Wright Line* burden shifting test.<sup>66</sup> In *Bisch*, the EMRB cited to a previous decision in *Reno Police Protective Association v. City of Reno*, in which it concluded that a complainant must first present credible evidence that protected conduct was a motivating factor in the respondent's actions. If so, the burden then shifts to the respondent to prove by a preponderance of the evidence that it would have taken the same action even in the absence of any protected conduct. The employee may then offer evidence that the proffered reason is pretextual.<sup>67</sup> In *Bisch*, the Nevada Supreme Court adopted the same standard for resolution of personal and/or political reasons cases.<sup>68</sup>

Most of the cases brought allege discrimination on the basis of personal reasons or affiliations. These are first discussed below, followed by a discussion of the "political reasons" cases.

## **2. Examples Where Discrimination Was Substantiated**

The first EMRB decision on the basis of personal reasons was not issued until 1988. In that case, three Clark County juvenile officers assigned to Child Haven received written reprimands after two children ran away. One employee, a supervisor, claimed he received a reprimand because he would not go along with the discipline meted out against the other two employees. A second employee claimed there was personal animus against him because he had cooperated with the police in an investigation at Child Haven and that his cooperation had maligned management. A third employee

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<sup>62</sup> *Id.* at 9.

<sup>63</sup> See *Kilgore v. City of Henderson*, Item No. 550H (2005) (approved by the Nevada Supreme Court in *City of N. Las Vegas v. Glazier*, Case No. 50781 (unpublished 2010)).

<sup>64</sup> See *McDonnell Douglas*, 411 U.S. 792.

<sup>65</sup> *Bisch v. Las Vegas Metro. Police Dep't*, 129 Nev. Adv. Op. 36, 302 P. 3d 1108 (Nev. 2013).

<sup>66</sup> *NLRB v. Wright Line*, 662 F.2d 899 (1st Cir. 1981).

<sup>67</sup> See *Bisch v. Las Vegas Metro. Police Dep't*, 302 P.3d 1108 (Nev. 2013) (citing *Reno Police Protective Ass'n v. City of Reno*, 102 Nev. 98, 715 P.2d 1321 (1986)). Notably, the confusion over the standard remains to this day. For instance, post-hearing briefs filed by both attorneys in a case alleging personal reasons discrimination both rely on the (*McDonnell-Douglas*) framework.

<sup>68</sup> *Id.*



claimed he was disciplined because of his association with the second employee.<sup>69</sup> The EMRB employed the *McDonnell Douglas* tripartite analysis.<sup>70</sup> In the end, the EMRB concluded that the proffered reasons as put forth by the County were pretextual, primarily because the children who had escaped were not under the supervision of the employees and that, conversely, those more directly responsible were not disciplined.<sup>71</sup>

The following year, the EMRB decided a case involving Frank Kay, an employee who worked for Lyon County.<sup>72</sup> Kay claimed that he was the subject of personal animus by his supervisor after he traded with his supervisor an alternator that did not work, who then held that action against him.<sup>73</sup> Kay specifically noted, among other things, that his supervisor thereafter refused to talk to him, gave him multiple simultaneous assignments, would not allow Kay to talk at work, and that other employees were not to associate with Kay.<sup>74</sup> At the hearing, witnesses for the County gave conflicting reasons for Kay's termination, including abuse of sick leave, filing a false document, and not following instructions.<sup>75</sup> The EMRB noted that not only was Kay able to show that the reasons were pretextual, but also that the conflicting reasons themselves gave them pause as to their credibility.<sup>76</sup> Note that by finding the reasons pretextual the EMRB was again using a form of the *McDonnell Douglas* test.<sup>77</sup>

In 1991, the EMRB decided a case between the Esmeralda County Classroom Teachers Association and the Esmeralda County School District, in which the school district refused to retain a teacher who submitted her signed contract for the upcoming year to the school district three days late.<sup>78</sup> The teacher claimed that the superintendent first retaliated against her for having testified on behalf of another teacher at an arbitration hearing and for being the chair of the negotiating team and, secondly, that the superintendent discriminated against her for personal reasons as an outgrowth of those actions.<sup>79</sup> With respect to the discrimination allegation, the EMRB noted it was apparent that the superintendent disliked her based on the statements he made about her at the

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<sup>69</sup> *Clark Cnty. Pub. Emps. Ass'n. v. County of Clark*, Item No. 215 (1988), 4-5.

<sup>70</sup> *McDonnell Douglas*, 411 U.S. at 802.

<sup>71</sup> *Id.* at 10.

<sup>72</sup> *Stationary Engrs. Local 19 and Frank Kay v. County of Lyon*, Item No. 231 (1989).

<sup>73</sup> *Id.* at 4.

<sup>74</sup> *Id.* at 4-5.

<sup>75</sup> *Id.* at 5-6.

<sup>76</sup> *Id.* at 5-7.

<sup>77</sup> Likewise in *Fraley v. City of Henderson and Henderson Police Officers Ass'n*, Item No. 547 (2004), the EMRB found the City's reason pretextual and, thus, found in favor of the complainant without ever explicitly referring to *McDonnell Douglas*.

<sup>78</sup> *Esmeralda Cnty. Classroom Teachers Ass'n v. Esmeralda Cnty. Sch. Dist.*, Item No. 273 (1991), 3.

<sup>79</sup> *Id.* at 2-3.

EMRB's hearing, noting he obviously did not approve of her and considered her to be a troublemaker.<sup>80</sup>

In yet another case, Thomas Glazier was a long-term police officer for the City of North Las Vegas. While employed with North Las Vegas, Glazier's wife, Laura, had an affair with Captain Scott who was in Glazier's chain of command.<sup>81</sup> During that time, Glazier applied for the position of lieutenant. However, the appointment process was changed and Scott ended up serving on Glazier's oral examination board.<sup>82</sup> Glazier placed high on the appointment list, but was never hired as a lieutenant.<sup>83</sup> Later Glazier's days off and rate of pay were changed. Scott also participated in a discipline that Glazier received.<sup>84</sup> Testimony revealed that the Chief of Police knew of the affair and yet did nothing to stop it.<sup>85</sup> Ultimately, the EMRB found that Glazier had been denied a promotion based on discrimination for personal reasons.<sup>86</sup> It is important to note that nowhere in the case does it cite the legal standard for personal reasons discrimination. Rather, the decision just declares that the acts recited amount to discrimination based on personal reasons.

### **3. Examples Where Discrimination Was Not Substantiated**

In 1994, the EMRB decided a case filed by the Water Employees Association against the Las Vegas Valley Water District on behalf of Ron Rivero, an employee who had been quite active in the union, including his serving as its President.<sup>87</sup> Rivero claimed he had been terminated both because of his union involvement and for personal reasons.<sup>88</sup> Noting that the complainant made a *prima facie* case, the EMRB then assessed the legitimate, nondiscriminatory reason offered by the employer; namely that Rivero had not received his federally mandated commercial driver's license for one year after first being required to do so and after being offered numerous assistance during that year.<sup>89</sup> The EMRB then noted that the "ultimate burden of persuading the trier of facts that the Respondent intentionally discriminated against the Complainant remains at all times with the Complainant."<sup>90</sup> The EMRB went on to hold that the complainant had not met his burden to prove that the

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<sup>80</sup> *Id.* at 7.

<sup>81</sup> *Glazier v. City of N. Las Vegas*, Item No. 624A (2007), 13.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 13.

<sup>84</sup> *Id.* at 14.

<sup>85</sup> *Id.* at 15.

<sup>86</sup> *Id.* at 14.

<sup>87</sup> *Water Employees Ass'n v. Las Vegas Valley Water Dist.*, Item No. 326 (1994), 1.

<sup>88</sup> *Id.* at 2.

<sup>89</sup> *Id.* at 4.

<sup>90</sup> *Id.* (referencing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993)).

employer's proffered reason was pretextual.<sup>91</sup> The case obviously employed the *McDonnell Douglas* test.<sup>92</sup>

The EMRB decided a key case with respect to alleged discrimination on the basis of personal reasons in 2005.<sup>93</sup> Steven Kilgore, who had been a union President, and who was ultimately terminated, claimed his termination was in violation of both NRS 288.270(1)(a), for his union involvement, and in violation of NRS 288.270(1)(f), for discrimination based upon personal reasons.<sup>94</sup> As mentioned previously, it was here that the EMRB analyzed the legislative history behind the 1975 amendments.<sup>95</sup> The EMRB thereupon applied the *McDonnell Douglas* test and found that the City of Henderson had legitimate, non-discriminatory reasons for its termination of Kilgore. These included leaving the jurisdiction while on duty, repeated tardiness, repeated absences, use of a City vehicle for personal use, unauthorized use of a cemetery prop, failing to respond to calls, unauthorized excuse from mandatory shooting qualifications, etc.<sup>96</sup>

Leon Greenberg, an applicant for an Attorney I position with Clark County, filed two complaints against the County when he was not hired for that position. He claimed several violations of the EMRA, including discrimination based on NRS 288.270(1)(f).<sup>97</sup> Greenberg offered into evidence his "outstanding qualifications," that there had been a delay in grading his application, and that the County continued to recruit for the position after he had submitted his application, among other reasons.<sup>98</sup> The EMRB granted the County's motion to dismiss, noting several times that the complainant failed to allege anything "more than a bare suspicion" that he was not hired for unlawful reasons and that the complaint cannot rest on mere suspicion, but must make a *prima facie* case showing sufficient to support an inference that the employer's conduct was motivated by an unlawful reason.<sup>99</sup>

Another case involving Cynthia Thomas is interesting in that it shows the interplay between grievance arbitration and the resolution of complaints filed with the EMRB. The Las Vegas Metropolitan Police Department discharged Thomas after she made an unauthorized inquiry of criminal history on a politician and for being untruthful about the incident.<sup>100</sup> Her grievance

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<sup>91</sup> *Id.*

<sup>92</sup> See also *Bott v. City of Henderson*, Item No. 560A (2005), in which the decision and order of the EMRB details over two pages on the *McDonnell Douglas* framework, citing a litany of supporting cases involving this framework.

<sup>93</sup> See *Kilgore v. City of Henderson*, Item No. 550H (2005).

<sup>94</sup> *Id.* at 1 (the analysis only covers the claim based upon personal reasons).

<sup>95</sup> *Id.* at 8-9.

<sup>96</sup> *Id.* at 11-18.

<sup>97</sup> *Greenberg v. Clark Cnty.*, Item No. 577C (2005), 3.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 6-7.

<sup>100</sup> *Thomas v. Las Vegas Metro. Police Dep't*, Item No. 588 (2005), 7.

ultimately went to binding arbitration, where she lost. Thereafter, the employer filed a motion to dismiss her separate EMRB complaint, requesting that the EMRB defer to the arbitrator.<sup>101</sup> The EMRB accordingly reviewed the five-factor test as to whether they should defer to the arbitrator and ultimately decided to accept the facts as determined by the arbitrator and then apply those facts to a *McDonnell-Douglas* analysis of Thomas’s personal reasons claim of discrimination.<sup>102</sup> Upon reviewing the evidence as determined by the arbitrator, the EMRB then decided that police department met its burden of production under *McDonnell Douglas* and dismissed the complaint.<sup>103</sup>

Ron Williams was a police officer who worked for the Las Vegas Metropolitan Police Department, which had suspended him for 120 hours for driving a department vehicle after he had been drinking. Williams’ complaint alleged he had a disability—alcoholism.<sup>104</sup> The police department filed a motion to dismiss, claiming that Williams would not be protected under the Americans with Disabilities Act.<sup>105</sup> Williams’ reply brief stated that the discrimination fell under “personal reasons.”<sup>106</sup> The EMRB granted the motion to dismiss, but not on the grounds sought by the police department. The EMRB first noted that it only had jurisdiction under NRS 288 and not under federal law.<sup>107</sup> It then applied the definition of “personal reasons” as anything not related to merit or fitness of duty and determined that Williams had not met his burden because consuming alcohol and then driving an employer’s vehicle adversely affected his ability to carry out his work.<sup>108</sup> This case is important as it shows both the interplay between NRS 288 and federal law, as well as how personal reasons can be used as a “catch-all” category of discrimination.

The *Larramendy* case is an example where an employee did not make out a *prima facie* case of discrimination. In 2005, Jessica Larramendy’s job classification was changed by the City of Las Vegas. When this occurred, the City of Las Vegas did not include in her classification seniority time spent in a prior classification.<sup>109</sup> In 2010, Larramendy noticed the time was not included and thereupon filed a grievance, which the City refused to process, claiming it was untimely.<sup>110</sup> She then filed a complaint with the EMRB, alleging that the City’s refusal to process the grievance was discrimination based on

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<sup>101</sup> *Id.* at 1.

<sup>102</sup> *Id.* at 5-6.

<sup>103</sup> *Id.* at 9 (since the EMRB considered the evidence as determined by the arbitrator it actually treated the motion to dismiss as a motion for summary judgment).

<sup>104</sup> *Williams v. Las Vegas Metro. Police Dep’t*, Item No. 619 (2006), 1.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 1-2.

<sup>107</sup> *Id.* at 7.

<sup>108</sup> *Id.* at 8.

<sup>109</sup> *Larramendy v. City of Las Vegas*, Item No. 741A (2011), 5.

<sup>110</sup> *Id.* at 6.

personal reasons.<sup>111</sup> In its decision, the EMRB stated that all the evidence did not support an inference that discrimination for personal reasons was a motivating factor.<sup>112</sup>

Just as in *Larramendy*, Daniel Jennings also did not make out a *prima facie* case. Jennings was a newly-promoted lieutenant in the Boulder City Police Department who disagreed with the Police Chief as to assigning a certain officer to head up a warrant unit.<sup>113</sup> Unbeknownst to the Police Chief this heated discussion had been surreptitiously taped by Jennings. When this fact came out, Jennings was demoted back to sergeant and suspended.<sup>114</sup> Jennings thereupon claimed personal reasons discrimination. The EMRB disagreed. At the hearing, Jennings stated his claim for discrimination rested on his disagreement over whether a certain officer should head the warrant unit.<sup>115</sup> The EMRB found that the incident was job-related and not based on any characteristic, belief, affiliation or activity unrelated to merit or fitness for duty.<sup>116</sup>

### **C. Discrimination Based Upon Political Reasons or Affiliations**

There have only been two substantive decisions that alleged discrimination based upon political reasons or affiliations. The standard of proof is that modified *Wright Line* standard (see III.B.1 above) that was approved by the Nevada Supreme Court.<sup>117</sup>

The first case was *Bisch v. Las Vegas Metropolitan Police Department and Las Vegas Police Protective Association*.<sup>118</sup> Bisch claimed that her union discriminated against her based on political reasons when it did not provide a representative at an investigatory hearing, despite her having her own private attorney present,<sup>119</sup> and that her union did so because she was a candidate for sheriff and that the union instead was supporting another candidate.<sup>120</sup> The EMRB stated that the union presented substantial evidence that it had been the policy of the union not to provide concurrent representation and that this policy had been uniformly applied. Therefore, it denied the claim.<sup>121</sup>

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<sup>111</sup> *Id.* at. 1.

<sup>112</sup> *Id.* at 7.

<sup>113</sup> *Jennings v. City of Boulder City*, Item No. 780 (2012), 2.

<sup>114</sup> *Id.* at 4.

<sup>115</sup> *Id.* at 5.

<sup>116</sup> *Id.* at 6.

<sup>117</sup> *Bisch v. Las Vegas Metro. Police Dep't*, 129 Nev. Adv. Op. 36, 302 P. 3d 1108 (Nev. 2013).

<sup>118</sup> *Bisch v. Las Vegas Metro. Police Dep't and Las Vegas Police Protective Ass'n*, Item No. 705B (2010). The employee raised a number of claims, but the two relevant ones here are allegations of discrimination based on political reasons against both her employer and employee organization.

<sup>119</sup> *Id.* at 3.

<sup>120</sup> *Id.* at 8.

<sup>121</sup> *Id.*

With respect to her employer, Bisch claimed that she had been disciplined because of her running for sheriff. Here, the EMRB found that Bisch provided sufficient evidence raising an inference of political discrimination.<sup>122</sup> However, the EMRB then concluded that the police department would have issued the same discipline against Bisch regardless of any political activity.<sup>123</sup> The EMRB thereupon also dismissed this claim of discrimination.

The other political discrimination case also involved the Las Vegas Metropolitan Police Department.<sup>124</sup> David O’Leary was a captain who had worked at Metro for almost 25 years with a clean record. In the summer of 2013, he was approached by a friend, DJ Ashba, the lead guitarist for Guns N’ Roses, who was looking for a helicopter ride to the Grand Canyon for part of a marriage proposal to his girlfriend. O’Leary learned that a private company could not do this. However, an employee in Metro’s air unit volunteered a fly-along for this purpose as the department had done a number of fly-alongs for other individuals. A few days after the fly-along, Ashba posted a statement on social media about the event. The story ended up going viral. That same day O’Leary received a telephone call from his immediate supervisor about the posting.<sup>125</sup>

Metro alleged that O’Leary had acted inappropriately in arranging the fly-along, among other things. However, after O’Leary refused requests to resign, the police department only sustained that the fly-along brought discredit to the department and that he used his department vehicle to transport passengers. Nevertheless, in December, O’Leary was again asked to resign or else be demoted. O’Leary thereupon resigned.<sup>126</sup> Later, he claimed a unilateral change and discrimination based on political or personal reasons. The EMRB denied the unilateral change allegation as the police department’s asserted breach was an isolated incident. However, the EMRB agreed that the police department discriminated against O’Leary for political reasons;<sup>127</sup> namely the fallout from the social media posting and how that affected the department’s attempt to get the “More Cops Tax” passed. Specifically, applying the test as enunciated by the Nevada Supreme Court in the *Bisch* case (see III.B.1 above), the EMRB found that the police department had not met its burden of proof to show that it would have taken the same action against the complainant in the absence of the political reasons as detailed in the case.<sup>128</sup> O’Leary was thereupon reinstated with back pay.

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<sup>122</sup> *Id.* at 9.

<sup>123</sup> *Id.* (Bisch had been disciplined for taking a neighbor’s daughter that had been bitten by her dog to an urgent care facility and then claiming to staff that the neighbor’s daughter was her daughter and filing an insurance claim under that false pretense).

<sup>124</sup> *O’Leary v. Las Vegas Metro. Police Dep’t*, Item No. 803 (2015).

<sup>125</sup> *Id.* at 15-16.

<sup>126</sup> *Id.* at 16-17.

<sup>127</sup> *Id.* at 19.

<sup>128</sup> *Id.*

## IV. Why File a Complaint for Discrimination with the EMRB?

Filing a discrimination claim with the U.S. Equal Employment Opportunity Commission or the Nevada Equal Rights Commission does have its advantages. First, both agencies will investigate the allegations, thus giving the complainant (and his/her attorney) an independent opinion on the allegations. Secondly, at the conclusion of the investigation the complainant can receive the investigatory file, thus providing a fair amount of “discovery” on the case. Thirdly, if and when a case is filed in court, the complainant also has the ability to conduct further discovery in the form of interrogatories, requests for admissions, requests for the production of documents, and depositions.

However, there are also significant disadvantages in using the above process. Foremost is the cost. Specifically, filing fees and depositions can run into the thousands of dollars. Also, both the investigation period and the time spent in court can consume years of litigation.

If the client is a local government employee, the EMRB can be a useful alternative. First, there are no filing fees. Secondly, pre-hearing discovery is not allowed; thus there are no depositions or written discovery, thereby reducing the cost. Moreover, cases filed with the EMRB are often heard more quickly. A typical case from the filing of a complaint to resolution by the EMRB usually takes less than a year.<sup>129</sup>

It should be noted that many EMRB cases do not require a lot of discovery as the complainant may already possess needed evidence. Additionally, there are workarounds to the lack of discovery. For instance, needed records may be obtained through the Public Records Act<sup>130</sup> since local governments are public agencies subject to that Act. Also, a number of cases filed with the EMRB also involve the filing of a grievance, which may have ultimately ended in arbitration. Much of the documentary and testamentary evidence can be obtained through the arbitration record.

## V. Conclusion

Nevada local government employees have an additional discrimination law available to them to redress alleged discriminatory actions taken against them by their local government employers. Unique among other laws is the provision allowing for claims based on political or personal reasons or affiliations. Compared to litigating in federal or state court, the process with the EMRB can be both less expensive and also quicker. The process may not be best for a case needing significant discovery. However, attorneys representing local government employees should consider this alternative, especially when a client may have limited funds for litigation.

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<sup>129</sup> The EMRB is under a mandate to conduct a hearing within seven months of the filing of the pre-hearing statement, which takes place about two months after the filing of the complaint. This mandate is set to be reduced by one month per year in future years.

<sup>130</sup> NRS 239.001 *et seq.*

# It Is Time for Nevada Employers to Re-Examine Drug Testing in Order to Maximize Benefits & Minimize Liability

*By Gregory J. Kamer, Esq. and Jody M. Florence, Esq.<sup>1</sup>*

Many things have changed in our culture over the last 20 years that impact labor and employment law – more than many of us care to admit. One of these changes is drug use. When Kamer Zucker Abbott (“KZA”) advocated drug testing for all applicants 20 years ago, we were seeking a non-discriminatory mechanism for screening new hires. The goal was to avoid the applicants who were using cocaine or heroin, so as to protect workplaces from a criminal element and all that such a hire could entail. In implementing drug testing for applicants and employees, we sought to increase safety and decrease loss and liability. Now, however, drug testing too often reveals an applicant’s or employee’s medical conditions by showing which prescription drugs he is taking. This is information that can create liability for an employer under various labor and employment laws.

In addition, Nevada has legalized medical marijuana and requires most employers to accommodate an employee’s use of medical marijuana.<sup>2</sup> With these new laws – and prescription drug use (and abuse) seeming to dominate the landscape of drug testing today – it is time to take a hard look at drug testing for applicants and employees to determine whether and when it still makes sense for your business.

Let’s look at where we were, what has changed, and where to go now. Our goal is to get you thinking about this issue and start the dialogue. We are not advocating a cessation of all drug testing. Instead, we want employers to realize that drug testing can *create* liability – now more than ever.

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<sup>1</sup> Gregory J. Kamer is the founding partner of Kamer Zucker Abbott. He has exclusively represented Nevada employers in labor and employment matters since 1983. A partner with KZA for seven years, Jody M. Florence, currently serves as Of Counsel to the firm. This article expresses our general views on drug testing without regard to the specific needs of any particular employer. It includes some material concerning medical marijuana written by KZA partner, Edwin A. Keller, Jr.

<sup>2</sup> See NRS § 453A.800.



Because of this, it is wise to assess your company's substance abuse policy to determine what kind of testing you truly need to keep your employees, customers, and business safe and sound.

## **I. The Past**

Drug testing dramatically increased among employers in the mid-1980s in response to the “war on drugs.” After a 1986 Executive Order mandated that all federal agencies be drug-free, Congress passed the Drug-Free Workplace Act in 1988.<sup>3</sup> This act requires federal grantees and recipients of federal contracts of \$100,000 or more to maintain a drug-free workplace. Then, in 1991, the Omnibus Transportation Employee Testing Act was passed, which requires that certain employees in safety-sensitive transportation industries (aviation, trucking, railroad, mass transit, merchant mariner, and pipeline) be tested for alcohol and drug use.<sup>4</sup>

As testing methods improved, the belief that drug testing was financially beneficial to employers produced a huge increase in drug testing in many industries and for all types of employees. Employers sought increased productivity and reductions in absenteeism, medical benefit costs, accidents, workers' compensation claims, and turnover. Locally, for example, the Nevada Test Site's requirement that all workers be drug tested was a major impetus for the adoption of drug testing by numerous employers. In many cases, contractors were concerned that applicants who could not pass the Test Site's drug test would instead seek work with local companies who did not drug test. This concern then spilled over into Las Vegas' hotels and casinos.

Nevada law has historically protected an employee's ability to use lawful products such as cigarettes and alcohol. Nevada Revised Statutes 613.333 makes it unlawful for an employer to refuse to hire an applicant or discriminate against any employee because of their lawful use of any product outside the premises of the employer during nonworking hours provided that the use does not adversely affect the employee's ability to perform his job or the safety of others.

When it comes to the current use of illegal drugs, however, labor and employment laws are not protective. In particular, the Americans with Disabilities Act (“ADA”) does not protect current drug users from discrimination.<sup>5</sup> Moreover, the ADA specifically permits an employer to prohibit the illegal use of drugs and alcohol at the workplace and to prohibit employees from being under the influence of alcohol or engaging in the illegal use of drugs at the workplace.<sup>6</sup> While employers are

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<sup>3</sup> Pub. L. No. 100–690 (HR 5210), 102 Stat. 4181 (Nov. 18, 1988).

<sup>4</sup> Department of Transportation and Related Agencies Appropriations Act, Pub. L. No. 102–143, 105 Stat. 917 (1992).

<sup>5</sup> 42 U.S.C. § 12114(a). However, an employee or applicant is protected by the ADA if he: “(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use; (2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or (3) is erroneously regarded as engaging in such use, but is not engaging in such use.” 42 U.S.C. § 12114(b).

<sup>6</sup> 42 U.S.C. § 12114(c).

restricted as to when they can require an employee/applicant medical examination, the ADA provides that “a test to determine the illegal use of drugs shall not be considered a medical examination.”<sup>7</sup>

Additionally, federal and state administrative agencies, such as the Occupational Safety and Health Administration (“OSHA”) and its Nevada counterpart, have generally supported drug testing.<sup>8</sup> While OSHA does not have a specific safety standard related to employee drug and alcohol use, its “general duty clause” requires employers to provide a workplace free from recognized safety and health hazards.<sup>9</sup>

Against this backdrop, we labor and employment lawyers drafted broad substance abuse policies for our employer clients to use. The most aggressive of these policies (such as the one KZA uses) prohibit employees, while on working time or while on company property or in company vehicles, from having present in their bodies, during working hours, detectable levels of controlled substances, illegal drugs, other intoxicants, alcohol and/or their metabolites. Such policies also prohibit employees from unlawfully manufacturing, distributing, dispensing, possessing, or using alcohol or controlled substances, misusing or abusing prescribed or over-the-counter drugs, or violating any federal or state law relating to drugs or alcohol. They often require pre-employment hair testing to determine whether an applicant had ingested illicit drugs within the 90-day period prior to his application. These policies also require random testing and probable cause testing (which includes reasonable suspicion and post-accident testing) – generally accomplished through urinalysis. In the absence of an acceptable explanation, a positive result to a drug or alcohol test resulted in termination and/or a refusal to hire.

This type of substance abuse policy and the efforts of Nevada employers to test employees and applicants received approval in 1996 when the Nevada Supreme Court found that “employers have compelling reasons, both economic and social, to test their employees for drugs.”<sup>10</sup> In *Nevada Employment Security Department v. Holmes*, in which KZA represented the Hotel San Remo, the court approved radioimmunoassay hair analysis (“RIA”) coupled with a confirmatory gas chromatography/mass spectrometry (“GC/MS”) test as “an accepted and reliable scientific

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<sup>7</sup> 42 U.S.C. § 12114(d)(1).

<sup>8</sup> As we will discuss, this is changing. See *infra* Sections II(C), (D). For example, OSHA has recently declared a stance against blanket post-accident drug testing. See *infra* Section II(D).

<sup>9</sup> 29 U.S.C. § 654 In relevant part, section 618.375 of the Nevada Revised Statutes (“NRS”) requires that every employer shall “[f]urnish employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his or her employees; [f]urnish and use such safety devices and safeguards, and adopt and use such practices, means, methods, operations and processes as are reasonably adequate to render such employment and places of employment safe and comply with all orders issued by the Division; . . . [and d]o every other thing reasonably necessary to protect the lives, safety and health of employees.”

<sup>10</sup> *Nev. Emp’t Sec. Dep’t v. Holmes*, 112 Nev. 275, 284, 914 P.2d 611, 617 (1996).

methodology for detecting illicit drug use.”<sup>11</sup> The court then determined that a former slot hostess’ ingestion of cocaine in violation of her employer’s substance abuse policy constituted misconduct rendering her ineligible for unemployment benefits.<sup>12</sup>

Rulings by courts and arbitrators both before and after *Holmes* generally support the policy behind drug testing, especially for safety-sensitive or cash-handling positions, and often upheld discipline and termination decisions. That is not to say legal challenges to testing always failed. Arbitrators have reinstated employees when employers have misapplied their policies, when employees have undergone rehabilitation or sought the employer’s assistance with a drug problem before testing, and when the arbitrator believed termination was too severe a penalty.<sup>13</sup> Juries have likewise ruled against employers on a variety of drug testing issues, including invasion of privacy, false positive results, misapplication of a substance abuse policy, and termination for refusal to take a drug test.<sup>14</sup>

## II. The Present

Drug testing is currently a prevalent practice among Nevada employers. Is it working? Is it providing the benefits we hoped for? Unfortunately, apart from studies performed by drug testing companies, there is not much data to rely upon.

The National Institute on Drug Abuse represents that drug-testing programs have improved employee morale and productivity; decreased absenteeism, accidents, downtime, turnover, and theft;

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<sup>11</sup> *Id.* at 282, 914 P.2d at 615.

<sup>12</sup> *Id.* at 285, 914 P.2d at 617.

<sup>13</sup> See, e.g., *Interstate Brands Co.*, 32 LAIS 570 (2004) (Gregory, Arb.) (reinstating driver with “long, violation-free record” because the company’s policy called for progressive discipline); *Sierra Pac. Power Co.*, 2001 WL 36586197 (2001) (Silver, Arb.) (reinstating employee due to five-day delay in post-accident drug test); *Coca-Cola Bottling Co. of N.Y., Inc.*, 25 LAIS 3446 (1998) (Nadelbach, Arb.) (failure to inform the employee of his right to a re-test constituted a due process violation); *Cincinnati Metro. Hous. Auth.*, 25 LAIS 3108 (1997) (Sergeant, Arb.) (delay in ordering drug test weakened contention that grievant was impaired and discharge for refusing to take test was too severe of a penalty); *Houston Lighting & Power Co.*, 25 LAIS 3387 (1997) (Howell, Arb.) (employer did not have probable cause to test the employee); *Anne Arundel Cnty.*, 1996 WL 34673164 (1996) (Wahl, Arb.) (reinstating employee with exemplary work record who had committed to full and permanent rehabilitation).

<sup>14</sup> See, e.g., *Kelley v. Schlumberger Tech. Corp.*, 849 F.2d 41 (1st Cir. 1988) (affirming jury verdict of \$125,000 for violation of privacy and negligent infliction of emotional distress claims premised upon employer’s policy of requiring observation during the collection of urine samples); *Smith v. Fresno Irrigation Dist.*, JVR No. 199955, 1997 WL 372097 (Cal. Sup. Ct. May 1997) (jury awarded \$240,000 to an employee whose random drug test was positive and resulted in his discharge after employee argued that he was improperly tested because he did not hold a safety-sensitive position); *Stegman v. Hunter Health Clinic, Inc.*, JVR No. 223845, 1997 WL 914426 (Kan. Dist. Ct. Jan. 1997) (verdict of \$102,172 in favor of an employee who was terminated for refusing to submit to a drug test after cooperating with an FBI investigation of the employer); *Anderson v. Exxon Coal U.S.A., Inc.*, JVR No. 170093, 1995 WL 796705 (Wyo. Oct. 1995) (sixteen-year employee was awarded \$416,800 after being discharged for a positive drug test where a subsequent test taken the following day was reported as negative); *Luck v. S. Pac. Transp. Co.*, 38 Trials Digest (TD) 10101, 1987 WL 957553 (Cal. Sup. Ct. Oct. 1987) (employee terminated for refusing a random drug test awarded \$485,042; employee argued that the safety of the railroad as a compelling interest for drug testing did not apply to her job).

decreased the use of medical benefits; and qualified employers for incentives, such as decreased costs for workers' compensation and other kinds of insurance.<sup>15</sup> A 2011 pilot study reported that 19% of the employers surveyed experienced an increase in employee productivity after implementing a drug-testing program.<sup>16</sup> This study also found that employers with high absenteeism rates and high workers' compensation incidence rates reported a decrease in those statistics after implementing a drug-testing policy.<sup>17</sup> Finally, the employers surveyed in this study reported a 16% decrease in employee turnover.<sup>18</sup>

There is also some support for the idea that drug testing deters employee drug use. Several studies from the 1990s found a significant negative relationship between workplace testing and drug use.<sup>19</sup> Moreover, a 2007 study by Health Services Research using data from 2000 and 2001 concluded that “[i]ndividuals whose employers perform drug tests are significantly less likely to report past month marijuana use, even after controlling for a wide array of worker and job characteristics.”<sup>20</sup> This study also reported that “[f]requent testing and severe penalties reduce the likelihood that workers use marijuana.”<sup>21</sup>

Nearly all studies conclude that more research is needed. What have your experiences been? What are you spending on drug testing? What benefits do you see from it? As we will discuss below, drug testing today is messy. Thus, it is a good time to take a hard look at these questions and determine whether, where, and under what circumstances drug testing best works for your company.

The time is especially right as some states, like Nevada, have enacted laws to legalize medical and recreational marijuana, while the federal government still classifies it as illegal. Lawmakers crafting medical and recreational marijuana laws are in uncharted waters; as such, the statutes being adopted by many states, including Nevada, are still being refined, making everyone uncertain. The legalization of medical and recreational marijuana, combined with Nevada's lawful use statute, increases the importance of determining whether an employee is under the influence, but drug-

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<sup>15</sup> National Institute on Drug Abuse, DRUG TESTING, *Drug Testing and Workplace Issues*, <http://www.drugabuse.gov/related-topics/drug-testing> (last visited May 24, 2017).

<sup>16</sup> Neil A. Fortner, et. al, Employee Drug Testing: Study Shows Improved Productivity and Attendance and Decreased Workers' Compensation and Turnover, 5 J. GLOBAL DRUG POL'Y & PRAC., Winter 2011, at 9.

<sup>17</sup> *Id.* at 10-11.

<sup>18</sup> *Id.* at 13.

<sup>19</sup> See Christopher S. Carpenter, *Workplace Drug Testing and Worker Drug Use*, HEALTH SERVICES RESEARCH, at *Previous Literature* (2007), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1955359/#> (last visited May 24, 2017) (explaining prior studies, including M. French, M. Roebuck, P. Alexandre, *To Test or Not to Test: Do Workplace Drug Testing Programs Discourage Employee Drug Use?*, SOCIAL SCIENCE RESEARCH, Mar. 2004, at 45-63 and J. Hoffmann and C. Larison, *Worker Drug Use and Workplace Drug-Testing Programs: Results from the 1994 National Household Survey on Drug Abuse*, CONTEMPORARY DRUG PROBLEMS, 1999, at 331).

<sup>20</sup> *Id.* at Principal Findings.

<sup>21</sup> *Id.*

testing technology cannot conclusively prove impairment. Moreover, employers are facing increased liability as federal agencies, such as OSHA and the Equal Employment Opportunity Commission (“EEOC”), are becoming increasingly hostile to blanket drug testing policies. Let’s look at each of these present challenges.

## **A. Nevada’s Legalization of Marijuana**

In 2000, Nevada voters approved a ballot initiative adding the right to access medical marijuana to the Nevada Constitution.<sup>22</sup> Thus, Article 4, Section 38 of the Nevada Constitution now provides the following:

Use of plant of genus Cannabis for medical purposes.

1. The legislature shall provide by law for:

- (a) The use by a patient, upon the advice of his physician, of a plant of the genus Cannabis for the treatment or alleviation of cancer, glaucoma, acquired immunodeficiency syndrome; severe, persistent nausea of cachexia resulting from these or other chronic or debilitating medical conditions; epilepsy and other disorders characterized by seizure; multiple sclerosis and other disorders characterized by muscular spasticity; or other conditions approved pursuant to law for such treatment.
- (b) Restriction of the medical use of the plant by a minor to require diagnosis and written authorization by a physician, parental consent, and parental control of the acquisition and use of the plant.
- (c) Protection of the plant and property related to its use from forfeiture except upon conviction or plea of guilty or nolo contendere for possession or use not authorized by or pursuant to this section.
- (d) A registry of patients, and their attendants, who are authorized to use the plant for a medical purpose, to which law enforcement officers may resort to verify a claim of authorization and which is otherwise confidential.
- (e) Authorization of appropriate methods for supply of the plant to patients authorized to use it.

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<sup>22</sup> Additionally, on November 8, 2016, a majority of voters approved Ballot Initiative 2, legalizing recreational marijuana use in Nevada.

2. This section does not:

- (a) Authorize the use or possession of the plant for a purpose other than medical or use for a medical purpose in public.
- (b) Require reimbursement by an insurer for medical use of the plant or accommodation of medical use in a place of employment.<sup>23</sup>

The 2001 Nevada Legislature implemented this constitutional amendment by enacting NRS Chapter 453A - “Medical Use of Marijuana.” This chapter provides certain exemptions from prosecution for a person who holds a valid registry identification card allowing them to use medical marijuana.<sup>24</sup> It sets forth who can obtain a registry identification card, the process for applying for such a card, and how such a card can be revoked; it further imposes certain requirements upon a holder of a registry identification card.<sup>25</sup>

Originally, one portion of this new law, section 453A.800 of the NRS, expressly provided that an employer was *not* required to accommodate an employee’s medical use of marijuana.<sup>26</sup> This was consistent with the constitutional amendment.<sup>27</sup> In 2013, however, the statute was amended to provide that while an employer does not have to permit an employee to use marijuana in the workplace, it must now attempt to reasonably accommodate the medical needs of an employee using medical marijuana, if the employee holds a valid registry identification card. The amended statute provides as follows:

The provisions of this chapter [Chapter 453A – Medical Use of Marijuana] do not:

- 1. Require an insurer, organization for managed care or any person or entity who provides coverage for a medical or health care service to pay for or reimburse a person for costs associated with the medical use of marijuana.
- 2. Require any employer to allow the medical use of marijuana in the workplace.
- 3. [R]equire an employer to modify the job or working conditions of a person who engages in the medical use of marijuana that are based upon the reasonable business

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<sup>23</sup> NEV. CONST., art. 4, § 38.

<sup>24</sup> NRS 453A.200.

<sup>25</sup> NRS 453A.210–.250.

<sup>26</sup> See NRS 453A.800 (2001) (amended in 2013).

<sup>27</sup> The original form of the statute was also consistent with the decision of the Ninth Circuit Court of Appeals in *James v. City of Costa Mesa*, where the court ruled that because the use of medical marijuana remains illegal under federal law, the ADA does not protect against discrimination on the basis of medical marijuana use, even if that use is in accordance with state laws. 700 F.3d 394, 397 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2396 (2013).

purposes of the employer but the employer must attempt to make reasonable accommodations for the medical needs of an employee who engages in the medical use of marijuana if the employee holds a valid registry identification card, provided that such reasonable accommodation would not:

- (a) Pose a threat of harm or danger to persons or property or impose an undue hardship on the employer; or
- (b) Prohibit the employee from fulfilling any and all of his or her job responsibilities.<sup>28</sup>

This amendment is wrought with problems. First, the revised statute does not define the term “employee” so employers cannot be sure whether it applies to only current employees or whether it also applies to applicants. Second, there is no enforcement mechanism for the statute, leaving an employer unable to predict liability and an employee without a way to challenge an employer’s failure to meet the statute’s requirements. Third, in requiring an employer to accommodate the need for medical marijuana, the statute ventures well beyond any mandate imposed by Article 4, Section 38 of the Nevada Constitution, which means it is subject to serious challenges by employers. Fourth, the statute provides two different accommodation standards by first stating that an employer does not need to modify those “job or working conditions” that are “based upon the reasonable business purposes of the employer,” and then stating that an accommodation is not reasonable if it would prohibit an employee from fulfilling any and all job responsibilities.<sup>29</sup>

Eventually either the legislature or the courts will work out these problems. In the meantime, however, employers are left to make decisions about their substance abuse policies. So far, Nevada’s administrative agencies, such as the Nevada Occupational Safety and Health Administration and the Gaming Control Board, have not taken a position on employees’ use of medical marijuana as it pertains to an employer’s workplace safety or gaming obligations.

At a minimum, if they have not already done so, employers must revise their substance abuse policies to address the legalization of medical and recreational marijuana. Prohibiting “controlled substances” from being present in an employee’s system is now problematic under state law.

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<sup>28</sup> NRS 453A.800. Section 453A.800 of the NRS was also amended in 2015 to provide that law enforcement agencies are not prohibited from adopting policies or procedures precluding employees from engaging in the medical use of marijuana. The term “law enforcement agency” includes: (a) the Office of the Attorney General, the office of a district attorney within Nevada, the Nevada Gaming Control Board and any attorney, investigator, special investigator or employee who is acting in his or her professional or occupational capacity for such an office or the Nevada Gaming Control Board; as well as (b) any other law enforcement agency within Nevada and any peace officer or employee who is acting in his or her professional or occupational capacity for such an agency.

<sup>29</sup> See Edwin A. Keller, Jr. *et. al*, *Stoked About Marijuana Related Accommodations In the Workplace?*, NEVADA LAWYER ONLINE (Feb. 2015), [http://www.nvbar.org/wp-content/uploads/Online%20Article\\_Med%20Marijuana.pdf](http://www.nvbar.org/wp-content/uploads/Online%20Article_Med%20Marijuana.pdf).

Moreover, given the complexity of issues involved with legalized marijuana, employers may want to fully address the subject of marijuana head on in their substance abuse policies.

## **B. Current Drug Testing Technology**

The second issue to consider is that most drug testing does not determine impairment. Instead, it determines if a specific amount of a drug or its metabolite is present in the sample provided. This is especially problematic for lawful substances such as medical marijuana, alcohol, or prescription drugs because a Nevada employer cannot take adverse action without evidence of actual impairment.<sup>30</sup>

The window of time in which marijuana use will produce a positive test result can vary depending on the type of test used, the drug dose and its route of entry, the individual's duration and frequency of use, the individual's metabolism rate, the test sensitivity, and the test specificity.<sup>31</sup> For example, users that smoke cannabis products can start feeling the effects within minutes, reaching the full effect within ten to thirty minutes.<sup>32</sup> In contrast, users who orally ingest cannabinoids may not feel its full effect until up to ninety minutes after ingestion.<sup>33</sup>

Additional issues arise depending on the type of test administered. A urine test can only show prior THC exposure, well past the “window of intoxication and impairment” because the triggering marijuana metabolite can take up to four hours post-use to appear in a high enough concentration to produce a positive test result.<sup>34</sup> While a positive urinalysis test generally indicates the marijuana was used within the past one to three days, “heavy, chronic, use” could extend that timeframe to more than one month before.<sup>35</sup> With regard to blood tests, the National Highway Traffic Safety Administration has stated that:

[i]t is difficult to establish a relationship between a person's THC blood or plasma concentration and performance impairing effects. Concentrations of parent drug and metabolite are very dependent on pattern of use as well as dose.... It is possible for a person

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<sup>30</sup> See *supra* Section I.

<sup>31</sup> See Paul L. Cary, The Marijuana Detection Window: Determining the Length of Time Cannabinoids Will Remain Detectable in Urine Following Smoking, NAT'L DRUG CT. INST., Apr. 2006, at 4.

<sup>32</sup> *Drugs and Human Performance FACT SHEETS - Cannabis/Marijuana*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., <http://www.nhtsa.gov/people/injury/research/job185drugs/cannabis.htm> (last visited May 24, 2017).

<sup>33</sup> See Stacy Hickox, Drug Testing of Medical Marijuana Users in the Workplace: An Inaccurate Test of Impairment, 29 Hofstra Lab. & Emp. L.J. 273, 288 (Spring 2012).

<sup>34</sup> See Nat'l Highway Traffic Safety Admin, *supra* note 32.

<sup>35</sup> *Id.*



to be affected by marijuana use with concentrations of THC in their blood below the limit of the detection method.<sup>36</sup>

While hair testing can show use of marijuana or other drugs within the last 90 days, it will certainly not show current impairment and cannot be used to detect alcohol. The federal government is proposing to add saliva or oral fluids to its testing procedures.<sup>37</sup> Oral fluids are easy to collect with a swab of the inner cheek, are harder to adulterate or substitute, allow collection to occur more quickly than urinalysis, and may be better at detecting specific substances, including marijuana.<sup>38</sup> According to the government, because “[d]rugs do not remain in oral fluids as long as they do in urine, this method shows promise in determining current use and impairment.”<sup>39</sup>

Finally, there is also little consensus in the scientific community as to what limit should be used to identify marijuana impairment. For example, some experts will testify that any amount of “active” marijuana will result in impairment while other experts argue that impairment does not begin until an individual tests at 5-7 ng/100 ml of blood.<sup>40</sup>

All of this means that it is time to reassess how you are drug testing to determine the most efficient way of obtaining the information you need to make employment decisions. It is also now extremely important to train your supervisors and managers how to detect impairment. Without credible documentation of valid signs of impairment, employers will likely be unable to take adverse action against an employee or applicant who tests positive for a lawful substance.

### **C. Americans with Disabilities Act**

The ADA does not protect illegal drug users and still authorizes an employer to test for illegal drugs. Indeed, in 2012, the Ninth Circuit Court of Appeals, which has jurisdiction over Nevada federal cases, ruled that because the use of medical marijuana remains illegal under federal law, the ADA does not protect against discrimination on the basis of medical marijuana use, even if that use was lawful under state law.<sup>41</sup>

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<sup>36</sup> *Id.*

<sup>37</sup> On May 15, 2015, the Substance Abuse and Mental Health Services Administration (SAMHSA) proposed “to establish scientific and technical guidelines for the inclusion of oral fluid specimens in the Mandatory Guidelines for Federal Workplace Drug Testing Programs (Guidelines).” See *Mandatory Guidelines for Federal Workplace Drug Testing Programs*, FEDERAL REGISTER <https://www.federalregister.gov/articles/2015/05/15/2015-11523/mandatory-guidelines-for-federal-workplace-drug-testing-programs#h-8> (last visited May 24, 2017).

<sup>38</sup> *Workplace Drug Testing*, DATIA, <http://www.datia.org/datia-resources/27-credentialing/cpc-and-cpct/931-workplace-drug-testing.html> (last visited May 24, 2017).

<sup>39</sup> *Id.*

<sup>40</sup> See Jared D. Adams, *New Issues In Driving Under the Influence of Cannabis Cases*, ASPATORE, at \*3, 2013 WL 5757943 (Nov. 2013).

<sup>41</sup> *James v. City of Costa Mesa*, 700 F.3d 394, 405 (9th Cir. 2012), cert. denied, 133 S. Ct. 2396 (2013).

However, the reality is that in Nevada, medical marijuana is legal under state law as are the prescription drugs your employees and applicants are using. So the first question under a disability discrimination analysis should be whether you are, and want to be, using a drug test that screens for prescription drugs. Remember that in most cases, the reason an employee is using medical marijuana or a prescription drug is because they have a medical or psychological condition that constitutes a disability under the ADA and Nevada law. As such, an employer that simply applies its drug-testing policy in a manner that results in the discharge or refusal to hire an individual because of a positive test result could still face liability based upon an argument that the employer really made its decision because of the underlying medical or psychological condition.<sup>42</sup>

Moreover, an employer cannot ask an employee what types of prescription drugs he is using.<sup>43</sup> This would constitute a disability-related inquiry prohibited by the ADA.<sup>44</sup> In limited circumstances, however, “certain employers may be able to demonstrate that [such an inquiry] is job-related and consistent with business necessity.”<sup>45</sup> For example, a “police department could require armed officers to report when they are taking medications that may affect their ability to use a firearm or to perform other essential job functions.”<sup>46</sup> Similarly, an “airline could require its pilots to report when they are taking any medications that may impair their ability to fly.”<sup>47</sup>

Despite the limited inquiry allowed under the ADA, many employers are testing for more than the standard five illicit drugs required by the federal government: amphetamines (meth, speed, crank, ecstasy); THC (cannabinoids, marijuana, hash); cocaine (coke, crack); opiates (heroin, opium, codeine, morphine); and phencyclidine (PCP, angel dust).<sup>48</sup> Your company may be using a “typical

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<sup>42</sup> See, e.g., EEOC Press Release, EEOC Sues Owners of Happy Jack’s Casino For Disability Discrimination (Sept. 15, 2016), <https://www.eeoc.gov/eeoc/newsroom/release/9-15-16.cfm> (alleging casino violated the ADA by refusing to hire an applicant when her drug test showed that she was taking legal prescription drugs for her disability); EEOC Press Release, EEOC Sues Randstad for Disability Discrimination (Nov. 3, 2015), <https://www.eeoc.gov/eeoc/newsroom/release/11-3-15a.cfm> (challenging as discriminatory employer’s refusal to hire a recovering heroin addict due to her use of the prescription methadone as part of her treatment); EEOC Press Release, Pioneer Place Assisted Living Settles EEOC Disability Discrimination Suit (May 24, 2012), <https://www.eeoc.gov/eeoc/newsroom/release/5-24-12.cfm> (\$80,000 settlement reached over employer’s refusal to hire applicant after her epilepsy medication showed up on her drug test results).

<sup>43</sup> EEOC, *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)* at B8 (July 27, 2000), <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>.

<sup>44</sup> See, e.g., EEOC Press Release, Dura Automotive Systems to Pay \$750,000 To Settle EEOC ADA Lawsuit (Sept. 5, 2012), <https://www.eeoc.gov/eeoc/newsroom/release/9-5-12.cfm> (\$750,000 settlement reached over employer’s decision to test all employees for 12 substances, including certain legally prescribed drugs, and requirement that those employees who tested positive disclose the medical conditions for which they were taking prescription medications and conditioning continued employment on the employees’ cessation of taking those medications).

<sup>45</sup> See *supra* note 43.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> See DATIA, *supra* note 38.

8-Panel Test” which will also test for: barbiturates (phenobarbital, butalbital, secobarbital, downers); benzodiazepines (tranquilizers like Valium, Librium, Xanax); and methaqualone (Quaaludes).<sup>49</sup> Or you may be using a “typical 10-Panel Test” which will also test for: methadone (often used to treat heroin addiction) and propoxyphene (Darvon compounds).<sup>50</sup> Testing can also be done for: hallucinogens (LSD, mushrooms, mescaline, peyote); inhalants (paint, glue, hairspray); anabolic steroids (synthesized, muscle-building hormones); hydrocodone (prescription medication known as Lortab, Vicodin, Oxycodone); and MDMA (commonly known as Ecstasy).<sup>51</sup>

While a significant presence of prescription drugs, such as Oxycodone, in an employee’s system combined with objective evidence of impairment may certainly be relevant and important to an employer, we urge employers to consider how often a routine drug test is evidencing an employee’s or applicant’s medical or psychological condition—information you do not want to obtain. The reality is many of your applicants and employees are using prescription drugs for medical or psychological conditions that are considered disabilities under the ADA. As such, your drug test results are likely creating liability by providing you with knowledge of a disability you can then be charged with discriminating against.<sup>52</sup>

Indeed, the EEOC has found discriminatory employers’ adverse actions against users of prescription drugs, including methadone. The EEOC is finding the underlying reason for the prescription medication to be a protected disability. Accordingly, the employer’s adverse action in response to a positive drug test has been attributed to either a desire to discriminate against that disability or a failure to accommodate the disability.<sup>53</sup> Moreover, the EEOC is presently focusing its investigative resources on hiring practices for their unlawful effect on protected classes, such as individuals with disabilities.<sup>54</sup> As such, it has challenged the application of drug-testing policies when

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *See supra* note 42.

<sup>53</sup> *Id.*; *see also* EEOC Press Release, New Hanover Regional Medical Center to Pay \$146K to Settle EEOC Disability Discrimination Suit (Oct. 3, 2012), <https://www.eeoc.gov/eeoc/newsroom/release/10-3-12c.cfm> (\$146,000 settlement reached over employer’s prohibition against employees working while taking legally prescribed narcotic medications); EEOC Press Release, Product Fabricators to Pay \$40,000 to Settle Disability Discrimination Suit (Feb. 15, 2012), <https://www.eeoc.gov/eeoc/newsroom/release/2-15-12a.cfm> (\$40,000 settlement reached over employer’s termination of an employee taking a prescribed narcotic for back pain and employer’s purported practice of requiring all employees to disclose prescription medications); EEOC Press Release, Hussey Copper To Pay \$85,000 To Settle EEOC Disability Discrimination Lawsuit (Feb. 11, 2011), <https://www.eeoc.gov/eeoc/newsroom/release/2-11-11.cfm> (\$85,000 settlement reached over employer’s withdrawal of job offer after discovering that applicant was taking methadone; EEOC argued that as a former addict, and not a current illegal drug user, the employee was protected under the ADA).

<sup>54</sup> The EEOC’S Strategic Enforcement Plan for Fiscal Years 2013-2016 specifically identifies a decision to “target class-based intentional recruitment and hiring discrimination and facially neutral recruitment and hiring practices that adversely impact particular groups” such as “[r]acial, ethnic, and religious groups, older workers, women, and people with disabilities [who]

they have been applied in a manner to exclude an applicant on the basis of his disability, especially when the policy has been applied in a blanket, one-size-fits-all approach.<sup>55</sup>

In light of the EEOC's stance on these issues, employers can no longer apply blanket, zero-tolerance drug testing policies to all employees and applicants without incurring some liability. Instead, it is becoming increasingly necessary for employers to take a different approach in deciding when to test and how to respond to a positive test result.

## **D. OSHA's New Position**

In 2016, OSHA issued a new rule requiring employers to begin electronically reporting injury and illness data.<sup>56</sup> This recordkeeping rule also seeks to "ensure that the injury data on OSHA logs are accurate and complete" by strengthening worker's compensation laws against retaliation towards employees who report injuries and illnesses.<sup>57</sup> The new rule also "prohibits employers from discouraging workers from reporting an injury or illness" by: (1) requiring employers to inform employees of their right to report work-related injuries and illnesses free from retaliation; (2) clarifying the existing implicit requirement that an employer's procedure for reporting work-related injuries and illnesses must be reasonable and not deter or discourage employees from reporting; and (3) incorporating the existing statutory prohibition on retaliating against employees for reporting work-related injuries or illnesses.<sup>58</sup>

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continue to confront discriminatory policies and practices at the recruitment and hiring stages." See EEOC, *Strategic Enforcement Plan FY 2013-2016* at 9 (Dec. 18, 2012), <https://www.eeoc.gov/eeoc/plan/upload/sep.pdf>.

<sup>55</sup> See, e.g., EEOC Press Release, Kmart Will Pay \$102,048 to Settle EEOC Disability Discrimination Lawsuit (Jan. 27, 2015), <http://www.eeoc.gov/eeoc/newsroom/release/1-27-15b.cfm> (describing a \$102,048 settlement with Kmart which denied an alternative testing method to an applicant with kidney disease); EEOC Press Release, Fort Worth Center of Rehabilitation to Pay \$30,000 to Settle Disability Discrimination Lawsuit (June 26, 2014), <http://www.eeoc.gov/eeoc/newsroom/release/6-26-14.cfm> (describing a \$30,000 settlement with a Texas health care facility that denied accommodation for an applicant who could not produce concentrated urine).

<sup>56</sup> Improve Tracking of Workplace Injuries and Illnesses, 81 Fed. Reg. 29623 (May 12, 2016) (codified at 29 C.F.R. Part 1902 and 29 C.F.R. Part 1904). On May 17, 2017, OSHA announced its plan to extend the July 1, 2017 date by which covered employers are required to electronically submit injury and illness data. OSHA acknowledges the same on its website and further advises that "OSHA is not accepting electronic submission of injury and illness logs at this time." See <https://www.osha.gov/recordkeeping/index.html> (last visited May 24, 2017). Currently, there is no word as to whether OSHA also intends to also alter the new rule's anti-retaliation provisions.

<sup>57</sup> 29 U.S.C. § 660(c)(1) currently provides that "[n]o person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter." Under this provision, an employee who believes he has been discriminated against for reporting a workplace injury or illness or for filing a worker's compensation claim may file a complaint with OSHA. After an investigation, OSHA can then file a lawsuit against the employer in federal court seeking "all appropriate relief," including reinstatement and back pay. 29 U.S.C. § 660(c)(2).

<sup>58</sup> Improve Tracking of Workplace Injuries and Illnesses, 81 Fed. Reg. at 29669. In October 2016, OSHA issued a memorandum to all of its regional administrators providing, in part, additional detail concerning the anti-retaliation rule as it pertains to alcohol and drug testing. Memorandum from OSHA Deputy Assistant Secretary Dorothy Dougherty (Oct. 19, 2016)(available

It is the third prong of this requirement that creates a new and difficult problem for employers. In seeking to "target[] employer programs and policies that ... have the effect of discouraging workers from reporting injuries and, in turn leading to incomplete or inaccurate records of workplace hazards," OSHA has determined that blanket post-accident drug testing policies will now be considered retaliatory. Despite the decades in which employers have relied on post-accident testing to improve safety, OSHA now categorizes this form of testing as only "nominally promoting safety."

OSHA clarifies that it will not penalize employers who conduct post-accident testing pursuant to state or federal laws that apply to their industry or certain types of employees. The agency also maintains that its new rule does not ban all drug testing and explains its position as follows:

Although drug testing of employees may be a reasonable workplace policy in some situations, it is often perceived as an invasion of privacy, so if an injury or illness is very unlikely to have been caused by employee drug use, or if the method of drug testing does not identify impairment but only use at some time in the recent past, requiring the employee to be drug tested may inappropriately deter reporting. . . . To strike the appropriate balance here, drug testing policies should limit post-incident testing to situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use. For example, it would likely not be reasonable to drug-test an employee who reports a bee sting, a repetitive strain injury, or an injury caused by a lack of machine guarding or a machine or tool malfunction. Such a policy is likely only to deter reporting without contributing to the employer's understanding of why the injury occurred, or in any other way contributing to workplace safety. Employers need not specifically suspect drug use before testing, but there should be a reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness in order for an employer to require drug testing. In addition, drug testing that is designed in a way that may be perceived as punitive or embarrassing to the employee is likely to deter injury reporting.<sup>59</sup>

OSHA is asking employers to make an individualized inquiry before requiring a post-accident drug test. Yet this individualized inquiry subjects an employee to potential discrimination from supervisors and puts employers at risk for claims of discrimination. Many commentators and employers disagree with OSHA's stance on post-accident testing, and a lawsuit has been filed in a Texas federal court challenging OSHA's new rule.<sup>60</sup> If this challenge is unsuccessful, however, employers will soon face civil liability under the worker's compensation statute for continuing to use blanket post-accident drug testing policies.

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at: [https://www.osha.gov/recordkeeping/finalrule/interp\\_recordkeeping\\_101816.html](https://www.osha.gov/recordkeeping/finalrule/interp_recordkeeping_101816.html)). It remains to be seen if the Trump Administration will take steps to reassess the scope of OSHA's anti-retaliation rule.

<sup>59</sup> *Id.* at 29672-73.

<sup>60</sup> *TEXO ABC/AGC, Inc. v. Perez*, No. 3:16-cv-1998 (D. Tex. 2016).

### III. Where to Go Now?

Before we look at the options available to Nevada employers, let's take a quick look at the statistics on drug use and abuse. The 2012 National Survey on Drug Use and Health: Summary of National Findings by the Substance Abuse and Mental Health Services Administration provides the following data:

- In 2012, an estimated 23.9 million Americans aged 12 or older (9.2% of the population) were current illicit drug users, meaning they had used an illicit drug during the month prior to the survey interview. This is an increase from 8.1% in 2008.
- Marijuana was the most commonly used illicit drug. In 2012, there were 18.9 million current users. Between 2007 and 2012, the rate of current use increased from 5.8 to 7.3%, and the number of users increased from 14.5 million to 18.9 million.
- Daily or almost daily use of marijuana (used on 20 or more days in the past month) increased from 5.1 million people in 2007 to 7.6 million people in 2012.
- In 2012, an estimated 22.2 million people aged 12 or older (8.5% of the population) were classified with substance dependence or abuse in the past year based on criteria specified in the *Diagnostic and Statistical Manual of Mental Disorders*, 4th edition (DSM-IV). Of these, 2.8 million were classified with dependence or abuse of both alcohol and illicit drugs, 4.5 million had dependence or abuse of illicit drugs but not alcohol, and 14.9 million had dependence or abuse of alcohol but not illicit drugs.
- The specific illicit drugs with the largest numbers of people with past year dependence or abuse in 2012 were marijuana (4.3 million people), pain relievers (2.1 million people), and cocaine (1.1 million people). The number of people with marijuana dependence or abuse did not change between 2002 and 2012. Between 2004 and 2012, the number with pain reliever dependence or abuse increased from 1.4 million to 2.1 million, and between 2006 and 2012, the number with cocaine dependence or abuse declined from 1.7 million to 1.1 million. Conversely, the number of people with heroin dependence or abuse in 2012 (467,000) was approximately twice the number in 2002 (214,000).
- 67.9% of all adult illegal drug users are employed full or part time, as are most binge and heavy alcohol users.<sup>61</sup>

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<sup>61</sup> Substance Abuse and Mental Health Services Administration, *Results from the 2012 National Survey on Drug Use and Health: Summary of National Findings*, 2013, <http://www.samhsa.gov/data/NSDUH/2012SummNatFindDetTables/NationalFindings/NSDUHresults2012.htm#ch2.10> (last visited on May 24, 2017).

Clearly, drug and alcohol abuse is still an issue of significant concern in our country and testing remains a necessary component of a Nevada employer's policies and practices. What has changed is the way applicants and employees are using drugs, the types of drugs being used, and some of the laws impacting such use.

In the past, employers had more leeway in prohibiting the use of illegal drugs. As such, many substance abuse policies prohibited employees from reporting to work with detectable levels of illegal drugs in their systems and provided that any positive test result for illegal drugs would result in a refusal to hire and/or termination. Now, however, Nevada employers must wrestle with legalized medical marijuana and prescription drugs. A zero tolerance approach to a positive test result is no longer the answer. Employers must instead be able to determine whether an employee is impaired at work or whether an applicant's positive drug test should result in a refusal to hire.

We urge employers to consider the following questions. What was your original goal in implementing drug testing? Why do you test pre-employment, post-accident, based upon probable cause, or randomly? If testing has been ongoing for some time, examine the rate of positive tests versus negative tests. What is the evidence that drug users or drug abusers have been eliminated from the workforce? Is there evidence that workers' compensation costs, or those related to employee accidents causing personal injury or property damage, have diminished since the implementation of pre-employment or post-accident testing? Is there evidence of increased productivity or decreased absenteeism since the implementation of testing? What has been the cost to the employer of this testing, from out-of-pocket costs paid to testing laboratories to the effect upon employee morale? Have the benefits of employee drug testing to the company exceeded the costs, or vice versa?

In some workplaces, the full complement of drug testing must continue. If you are a federal contractor or employ individuals in safety-sensitive or cash-handling positions, you may not have much flexibility in terms of who and how you test. If this is the case, we urge you to use a medical review officer as the only recipient of test results who can maintain confidentiality and shield decision makers (supervisors and managers) from information they do not need (such as which prescription drugs the applicant or employee is taking).

Other employers have the flexibility, however, to decide to alter their approach to substance abuse – a decision that may save money and reduce liability, while still protecting your workplace. In short, we recommend that you become less reliant on testing and more proficient at recognizing impairment. Specifically, we offer the following recommendations:

1. Revise your substance abuse policies to address medical marijuana and to create objective standards for drug and alcohol impairment.



2. Continue to monitor the status of OSHA's rule against blanket post-accident testing. Consider revising your substance abuse policies to provide for post-accident testing only when there is a reasonable possibility that drug or alcohol use was a contributing factor in the accident.
3. Invest in training your supervisors and managers on how to recognize impairment, how to apply your objective impairment standards, how to determine if post-accident testing should be conducted, and how to document their decisions.
4. Limit non-probable cause testing (pre-employment and random) to a panel that screens for the five illicit drugs discussed above. For probable cause testing (post-accident and reasonable suspicion), continue to test for all substances. If an employee is bold enough to report for work under the influence of alcohol or a substance, he is putting others and himself at risk. Moreover, the employee likely has a problem you want to know about. Nevada recently amended its workers' compensation law to provide that an employee will not receive benefits for an injury that occurred while the employee is intoxicated or under the influence of a controlled or prohibited substance (unless the employee proves by clear and convincing evidence that his intoxication was not the cause of the injury).<sup>62</sup>
5. Work with your drug-testing vendor to determine which method of testing gives you the best evidence of impairment and can be carried out as quickly as possible. Nevada law now provides that an employee is "intoxicated or under the influence of a controlled or prohibited substance" whenever the employee exceeds the limits set forth in Nevada's driving under the influence laws.<sup>63</sup>
6. Work with any unions representing your employees to adjust the substance abuse testing provided for in your collective bargaining agreements.

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<sup>62</sup> See NRS 616C.230.

<sup>63</sup> NRS 616C.230 (1)(c), (d).



# Five Myths About Public Sector Labor Law in Nevada

By Ruben J. Garcia \*

## Introduction

As the 79<sup>th</sup> Session of the Nevada Legislature draws to a close, now is a good time to reexamine the previous legislative session and some of the myths about public sector labor law that predominated two years ago. The 78th Session of the Nevada Legislature began February 2, 2015 with some hoping for long-awaited reform of collective bargaining laws. The Nevada Policy Research Institute (NPRI) published a ten-point wish list of public sector labor law reforms it hoped for in the session.<sup>1</sup> Although NPRI did not get everything it hoped for, several of its wishes were granted by the Republican-controlled legislature.<sup>2</sup>

The 2015 legislative session took place in a national political climate that was and continues to be increasingly hostile to public sector labor unions. Before dropping out of the Republican presidential primary race, New Jersey Governor Chris Christie was quoted as saying “the national teachers union” deserves a “punch in the face.”<sup>3</sup> In the last four years, Midwestern states such as Indiana, Michigan and Wisconsin, which in years past formed the cradle of the labor movement, rolled back collective bargaining rights and made the public sector “right to work,” meaning that employees who are represented by a union have no duty to pay any dues to that union in return. Then, in June 2015, the United States Supreme Court agreed to hear *Friedrichs v. California Teachers Association*,<sup>4</sup> which

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<sup>1</sup> Geoffrey Lawrence, *Top 10 Labor Reforms for 2015: Steps to a Sustainable Prosperity*, NEVADA POLICY RESEARCH INSTITUTE (Nov. 25, 2014), <http://www.npri.org/issues/publication/top-10-labor-reforms-for-2015>.

<sup>2</sup> Kyle Roerink, *Battle Lines: Why Unions are Preparing for Assault*, LAS VEGAS SUN, <http://lasvegassun.com/news/2014/dec/17/battle-lines-why-unions-are-preparing-assault-legi/>.

<sup>3</sup> Valerie Strauss, *Chris Christie Wants to Punch the Teachers Union in the Face*, WASH. POST (Aug. 3, 2015), <https://www.washingtonpost.com/news/answer-sheet/wp/2015/08/03/chris-christie-wants-to-punch-the-teachers-union-in-the-face-but-he-isnt-the-only-candidate-attacking-educators>.

<sup>4</sup> No 14-915, cert. granted (June 30, 2015).

challenged union security agreements as violations of the First Amendment rights of nonmembers. Oral argument in the case revealed an obviously polarized Court and the case could have made all states “right to work” as a matter of constitutional law.<sup>5</sup> This would mean that no employee in either public or private sector who receives the benefits of collective bargaining would be obligated to pay any dues to the union. Following the unexpected death of Justice Antonin Scalia on February 13, 2016, the case ended in a tie, leaving in place agency-shop laws in the 25 states that have them.<sup>6</sup>

A different result in *Friedrichs* would have had no impact in Nevada, which has been a “right to work” state in both the public and private sectors since 1962. In Nevada, collective bargaining is available in the public sector only to those who work for local governments — state employees are prevented from collective bargaining.<sup>7</sup> Although Nevada has one of the highest percentages of workers covered by collective bargaining agreements in the country (16.4 percent in 2014 compared to 6.7% nationally), its percentage of public sector workers covered by collective bargaining agreements is slightly below average (37.8 percent in 2014 compared to 39.4 percent nationally).<sup>8</sup> This discrepancy must be due in part to the large number of state employees who cannot engage in protected collective bargaining.

As in all other states, public sector labor law in Nevada is wholly created by state law, as the National Labor Relations Act excludes any “state or political subdivision thereof” from the definition of “employer.”<sup>9</sup> Like the federal National Labor Relations Board, Nevada’s Employee Management Relations Board may hear complaints “arising out of the the interpretation of, or performance under, the provisions of this chapter by any local government employer, local government employee, or employee organization.”<sup>10</sup> The Nevada Employee Management Relations Act similarly applies only to employees of political subdivisions of the State, such as counties, cities, school districts, charter schools and hospital districts, but not to state employees. As with most public sector labor laws, local government employees forego the right to strike in favor of binding interest arbitration.<sup>11</sup>

The forces of collective bargaining reform in the 78th Nevada Legislative Session primarily set about to: (1) make it *easier* for employees **not** to pay anything to the unions that are required to

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<sup>5</sup> *Friedrichs v. California Teachers Assn.*, official transcript (Jan. 11, 2016), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/14-915\\_e2p3.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/14-915_e2p3.pdf).

<sup>6</sup> *Friedrichs v. California Teachers Assn.*, No 14-915 slip op. (Mar. 29, 2016).

<sup>7</sup> NEV. REV. STAT. § 288.033 (2015)(defining “collective bargaining” as between “local government employers” and “employee organizations”).

<sup>8</sup> Union Membership, Coverage, Density, and Employment by State and Sector, 1983-2015, UNION MEMBERSHIP AND COVERAGE DATABASE FROM THE CPS (2014), [www.unionstats.com](http://www.unionstats.com).

<sup>9</sup> 29 U.S.C. § 152(2) (2016).

<sup>10</sup> NEV. REV. STAT. § 288.110(2) (2015); See Bruce K. Snyder, *Nevada’s Special Discrimination Law for Local Government Employees*, 2 NEV. PRAC. J. LAB & EMP. L. 4 (2017).

<sup>11</sup> NEV. REV. STAT. § 288.200 – § 220 (2015).

represent them in negotiations and grievance handling and (2) eliminate the kinds of agreements and practices that purportedly have caused financial turmoil to the state as it emerges from the depths of the Great Recession. Unfortunately, many of these “reforms” were based on misconceptions about the role and effects of public sector collective bargaining in Nevada and in American society generally. In this article, I describe five of these prevailing myths and show that they lack basis in the realities of collective bargaining and public sector unions today. I also describe the legislation that was enacted in the 78<sup>th</sup> session and its impact on public sector collective bargaining in Nevada. Then, I look ahead to the lessons that the last two years may hold for the 2017 legislative session.

## **Myth #1: Collective Bargaining Results in Overpaid Public Employees**

The argument that collective bargaining leads to overpaid public workers is made in many states, but a cause and effect relationship is lacking between collective bargaining and government employee salaries. In states where there is virtually no collective bargaining at all in the public sector, personnel costs still make up the largest share of government expenses. A 2012 report by the Center for Budget and Policy Priorities pointed to the reason for this: “Because providing services is the primary business of states as well as school districts, cities, counties, and other local governments, labor costs — i.e., wages and benefits — make up a significant share of their annual spending.”<sup>12</sup>

The question of whether public sector collective bargaining exerts inordinate costs on local governments has been the subject of study by economists and legal scholars alike. Recently, Kenneth Dau-Schmidt and Mohamed Khan persuasively noted that the right to collectively bargain is limited in 34 states, and the right to strike is even more constricted. “It seems a gross exaggeration,” they argue, “to say that public sector unions in the United States establish a labor cartel that dictates wage and benefit increases.”<sup>13</sup> Because government is a monopsony — the only provider in the market for government services — it has the power to dictate wages more than a private sector employer in a competitive labor market. Those who want to be police or firefighters, then, can work only for the local government; thus, employees’ bargaining power and power to exit is limited.<sup>14</sup>

The costs of collective bargaining on public employers have been examined primarily with national data. During the legislative session, however, professor Jeffrey Keefe of Rutgers University testified before the Assembly Committee on Commerce and Labor that Nevada public employees are

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<sup>12</sup> Elizabeth MacNichol, *Some Basic Facts on State and Local Government Workers*, CENTER FOR BUDGET AND POLICY PRIORITIES REPORT, June 25, 2012, <http://www.cbpp.org/research/some-basic-facts-on-state-and-local-government-workers> at 3.

<sup>13</sup> Kenneth Dau-Schmidt and Mohamed Khan, *Undermining or Promoting Democratic Government? An Economic and Empirical Analysis of Two Views of Public Sector Collective Bargaining in American Law*, 14 Nev. L.J. 414, 423 (2014).

<sup>14</sup> Id.; see also Albert O. Hirschmann, *EXIT, VOICE AND LOYALTY* (1970) (where options for exit are limited, employees will more likely resort to voice mechanisms).

paid lower than the national average.<sup>15</sup> Keefe said that Nevada local government employees earn 5% less in total compensation per hour than comparable full-time employees in the private sector. And Nevada local governments pay college-educated employees 22% less in annual compensation on average than private employers.

On the other side, James Sherk of the Heritage Foundation testified to the Assembly Committee on Government Affairs that mandatory collective bargaining unnecessarily inflates state and local spending by \$300 per resident, and that limiting collective bargaining enabled Wisconsin to close its budget deficit and reduce taxes at the same time.<sup>16</sup> National data since the beginning of the Recession tells us that public sector employment decreased by about 27,000 jobs across the board.<sup>17</sup> Again, these national examples, if accurate, tell us little about what the savings would be in Nevada if public sector collective bargaining were further curtailed.

With the goal of saving government funds, the Legislature eliminated so-called “evergreen clauses” in Senate Bill 241, which was approved and effective on June 1, 2015.<sup>18</sup> First of all, the use of the term “evergreen contract” to describe what the bill was trying to reform is misconceived. Generally, when a labor contract expires, some provisions may be maintained in the interim between contracts, but pay increases in the agreement may not necessarily be one of them. The myth behind these clauses is that unions have an incentive to drag out negotiations and delay reaching a new agreement. No union, however, wants to work under an expired agreement indefinitely because many of the terms of the agreement do not continue with the expiration of the agreement, such as the requirement that the employer continue to deduct union dues. Delays are just as often because of the unwillingness of the employer to engage in negotiations, or the difficulty in scheduling a fact-finding hearing. Now, SB 241 prevents the “granting of any compensation” to employees when the collective bargaining agreement has expired. In contrast, the same action might be legally required in private sector collective bargaining. This includes even the operation of the regular step increases that are not cost of living adjustments at all. These are not the government giveaways that they were made out to

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<sup>15</sup> *Are Nevada Local Government Employees Over-Compensated?*: Hearing on AB 182 before A. Comm. on Commerce and Labor, 2015 Leg., 78<sup>th</sup> Session, Exhibit E (Nev. 2015)(statement of Jeffrey Keefe)  
<https://www.leg.state.nv.us/App/NELIS/REL/78th2015/Bill/1559/Exhibits>.

<sup>16</sup> Testimony of James Sherk, *Hearing on AB 182 before A. Comm. on Government Affairs*, 2015 Leg., 78<sup>th</sup> Sess., 19-24 (Nev. 2015).

<sup>17</sup> See David Lewin, *Effects of Deep Recession on Public Sector Pay, Benefits, and Employment*, in PUBLIC JOBS AND PUBLIC AGENDAS: THE PUBLIC SECTOR IN AN ERA OF ECONOMIC STRESS, 13-40 (Daniel J.B. Mitchell, ed. 2012); Steven Greenhouse, *More Workers Face Pay Cuts, Not Furloughs*, N.Y. TIMES, Aug. 4, 2010,  
<http://www.nytimes.com/2010/08/04/business/economy/04paycuts.html>

<sup>18</sup> S.B. 241, 2015 Leg., 78<sup>th</sup> Sess., (Nev. 2015), *codified at* NEV. REV. STAT. § 288.170  
<https://www.leg.state.nv.us/App/NELIS/REL/78th2015/Bill/1699/Overview>

be during the session. Their elimination will lead to more difficulties in negotiations, and less labor peace as has already been the case.<sup>19</sup>

Most of the examples of excessive compensation are for firefighters and law-enforcement employees—what most people consider to be essential public services. Those workers are paid higher salaries than other government workers, including copious amounts of overtime hours. In the wake of tragedies such as 9/11, emergency first responders occupy a celebrated position in popular culture. As Bob Dylan sang earlier in this century, however, “things have changed.”<sup>20</sup> In Nevada, recent scandals involving the abuse of sick pay by firefighters in Clark County made the public more critical of their pay and benefits.<sup>21</sup>

However, states that have no public sector collective bargaining were not spared the worst of the recession or the ensuing hit on state budgets. In fiscal year 2013, for example, North Carolina had the third highest budget deficit, though collective bargaining for public employees is banned by state law.<sup>22</sup> Meanwhile, states with some of the highest levels of public sector collective bargaining – New York, California and Illinois – have enjoyed some of the highest levels of economic growth for the same period. Thus, low levels of collective bargaining do not automatically translate to economic prosperity. While it is hard to see the economic effect of public sector unionization on the private sector, several private business groups and chambers of commerce also testified in the legislature in favor of SB 241 and other attempts to change Nevada public sector labor law during the 2015 session.

## **Myth #2: Public Sector Unions Make It Difficult to Quit the Union or Withdraw from Political Activities**

The U.S. Constitution and statutory labor laws provide several protections to those who would rather not be members of a union, even if those employees receive the benefits the union has negotiated. The most obvious statutory examples in the private sector are the 25 states, including Nevada, that are so-called “right to work” states. In these states, the union has a duty to fairly represent all workers in its bargaining unit even if they refuse to join the union or pay any fees for the services they receive. As in the private sector, Nevada local government employees cannot be required to be a member of the union that represents them or to pay any of the costs of representing them.

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<sup>19</sup> See Neal Morton, *Obstacles Slow CCSD Labor Talks*, LAS VEGAS REV.-J., July 5, 2015, at B1.

<sup>20</sup> Bob Dylan, “Things Have Changed,” from THE WONDER BOYS Original Motion Picture Soundtrack (Columbia Records, 2000).

<sup>21</sup> See, e.g., Ben Botkin, *Firefighter Fired, Rehired in Clark County Sick Leave Probe Fights for Disability Pay*, LAS VEGAS REV.-J., Mar. 15, 2015; Jamie Munks, *Las Vegas Approves Three Year Contract with Firefighters*, LAS VEGAS REV.-J., Nov. 3, 2016 at B5.

<sup>22</sup> Center on Budget and Policy Priorities, *Projected budget shortfalls of states in the U.S. for fiscal year 2013 (in million U.S. dollars)*, STATISTA, <http://www.statista.com/statistics/247323/budget-shortfalls-of-states-in-the-us/>.

In the 2015 Legislative Session, there were attempts to allow Nevada teachers and other government employees the ability to withdraw from the union at any time, instead of during the window period that is currently available for union members to renounce their membership. These window periods are common in labor law and they exist to give some stability to the bargaining relationship.

Fortunately for the public sector unions, these bills that would bring havoc to the system did not get very far in the session. It seems sensible to require employees to pay enough attention to know when they are able to resign the union. NPRI certainly does its best to remind teachers when the window period is, by creating a web site called "teacherfreedom.com," advertising the window period on billboards around Clark County, and e-mailing teachers individually with the bulk email address database that Nevada Supreme Court recently held was a public record that the School District was required to produce as a public record.<sup>23</sup>

In many "at-will" states, represented employees may still be required to pay the costs of the benefits they receive from grievance administration and contract negotiation. In Nevada, there is already a free rider problem created by the right to work law. But there is no evidence that government employees' dues are being used for improper political purposes, because to do so would be a violation of federal election law, and there have been no reports of election misconduct by unions.

### **Myth #3: Public Sector Collective Bargaining Lacks Transparency**

Many – but not all – government actions are freely available for the public to see, whether in public hearings or on the Internet.<sup>24</sup> Other meetings, such as disciplinary hearings, hiring meetings, interviews are closed to the public for good reasons. Government could not function if it had to send notice of all its actions, especially in personnel matters.

Groups such as NPRI have long advocated for greater transparency of union activities and collective bargaining negotiations. Union and local government negotiations are currently exempt from the open meeting requirements.<sup>25</sup> Transparency in negotiations is important, says NPRI, so the taxpayers can elect governments which do not give away too much in salaries and benefits to unions. Others have argued that for the political process to be responsive and reliable, citizens must have knowledge of the issues, their implications and alternative proposals.<sup>26</sup>

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<sup>23</sup> *Nevada Policy Research Inst., Inc. v. Clark Cty. Sch. Dist.*, No. 64040, 2015 WL 3489473 (Nev. May 29, 2015) (unpublished order).

<sup>24</sup> See, e.g. [www.leg.state.nv.us](http://www.leg.state.nv.us).

<sup>25</sup> NEV. REV. STAT. § 288.220 (2015).

<sup>26</sup> See, e.g., Bruce Ackerman & James Fishkin, *WHEN THE PEOPLE SPEAK* (2004); James Fishkin, *DEMOCRACY AND DELIBERATION* (2001).

In fact, public sector negotiations are much more open than most private sector labor negotiations. Hardly a day goes by when the media in Las Vegas, particularly the *Las Vegas Review Journal*, does not run a story on union negotiations. Even before the legislative session, many stories were run about the drawn out negotiations between Clark County and members of Service Employees International Union Local 1107, perhaps in part because of the extended scrutiny that the negotiations receive. By contrast, private sector unions and employers can agree to news blackouts and gag orders during negotiations, essentially eliminating all transparency in the process.

In the 2015 legislative session, bills proposed to open up all government-labor negotiations to the public were not passed in favor of a requirement in SB 241 giving the public three-days notice of a pending vote on a collective bargaining agreement. While there seems little wrong with this requirement, it does not add much to the information that is already available to the public. We will have to see if this innovation leads to a more engaged citizenry over collective bargaining matters. Thus far, little seems to have changed. Even if the public was more involved, there would seem to be little incentive at that point to change the tentative agreement negotiated and very little time to try.

#### **Myth #4: Collective Bargaining Hands Disproportionate Political Power to Public Sector Unions**

An ongoing theme of attacks on collective bargaining is that reform is needed to “restore the balance of power” between unions, government and citizens.<sup>27</sup> But the case has not been made that there is an imbalance, and certainly that case is hard to make in Nevada. As discussed above, few public employees in Nevada even have collective bargaining. Public sector unions have been called the “special interest with the most power” over local governments.<sup>28</sup> It is certainly the case that personnel costs are the largest part of government expenses, but that is true for nearly all public sector employers.

Ironically, collective bargaining is itself the only thing that brings balance to the employer-employee relationship, because otherwise the government as employer would have unilateral power that no other employer has — to set terms and conditions of employment and the regulatory landscape in which the work is done. For example, if the Nevada legislature wanted to exclude all public employees from the coverage of state overtime laws, it could do so. Collective bargaining and political pressure are the employees’ only defense against such exemptions – provided that the collective bargaining by government employees is not abolished completely, as the states of North Carolina, South Carolina and Virginia have done.

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<sup>27</sup> See, e.g., Victor Joecks, *Collective Bargaining Reforms Will Create a Better Balance of Power*, Mar. 25, 2015, <http://www.npri.org/issues/publication/collective-bargaining-reforms-will-create-a-better-balance-of-power>.

<sup>28</sup> Daniel Disalvo, *GOVERNMENT AGAINST SELF: PUBLIC UNION POWER AND ITS CONSEQUENCES* (2015).



The main concern in the 2015 Session involved release time — the time spent on union business that was negotiated in some agreements. This was seen as a way for union officials to spend time on political causes, even though it would be illegal for the union to do so. Instead, release time was used as a way to level the playing field between unions and management. If management can negotiate and administer collective bargaining agreements on the public dime, it seems unfair for unions not to be afforded that opportunity as well. Moreover, for every public labor contract provision that the public finds distasteful, there had to be agreement by the public entity to the provision. Perhaps the employer and the public got something valuable in return, but it would be very hard for the public to evaluate the whole agreement in three days.

Much of this has been about trying to clip the power of public-sector unions. But the need to do so assumes that they have disproportionate power. The legislative session itself showed that public sector unions were unable to stop much of the legislation that they opposed. While unions and their allies were able to stop some of the worst aspects of the collective bargaining bills, they had to support bills like SB 241 in lieu of something worse being passed – such as AB 182. AB 182 did much of the same things that were eventually passed in different bills, but would have also eliminated interest arbitration and prevented governments from agreeing to dues deductions. After several unions and community groups rallied at the legislature, AB 182 failed to make it out of committee.<sup>29</sup> Thus, the legislative endgame was more of a negotiated settlement than policy that was broadly favored. This is not the posture that a "special interest" with power to write its own legislation typically has to take.

## **Myth #5: Public Employee Unions Receive Special Treatment Compared to Other Private Organizations**

Public employee unions *are* different than other private organizations. They have a statutory role that other private organizations do not have. In a 1983 First Amendment case, the United States Supreme Court recognized that the certified bargaining representative has special access to non-public forums (employee mailboxes, in that case) that other associations do not have.<sup>30</sup> The certified bargaining representative should also have the ability to deduct dues from the payroll checks of workers. Laws that purport to bar such voluntary deductions, while allowing other kinds of deductions, say for health care companies or the United Way, discriminate against and disfavor state sanctioned employee organizations.

Several bills aimed to prevent unions from using state funds to conduct union activities. These bills were based on a false division between public employees and taxpayers. There is no dispute that public employees are also taxpayers, but there is often a political benefit in framing issues as “us versus them.”

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<sup>29</sup> <https://www.leg.state.nv.us/App/NELIS/REL/78th2015/Bill/1559/Overview>.

<sup>30</sup> *Perry Educ. Ass’n v. Perry Local Educators Ass’n*, 460 U.S. 37 (1983).



Since the session ended, it has been clear that the goals of the most radical legislation – making it harder for unions to collectively bargain and serve their members – have been met even with the compromises that were ultimately enacted. Recent news stories described one union president being ordered back to work until a new agreement is negotiated which has the union reimbursing the County for the union president's release time or providing for an equivalent amount of concessions in the contract.<sup>31</sup> Or, in that same negotiation, there was a dispute about whether the contract has really expired and thus the employer is no longer required to pay scheduled salary increases.<sup>32</sup> While groups like NPRI said that the session was a disappointment in terms of the "reform" that could have happened, SB 241 had much of their wish list realized if the goal was to make collective bargaining more difficult and perhaps to cause more employees to become disillusioned and withdraw from the union.

## Conclusion

Unlike what happened in many states after Republicans took control of state legislatures and governor's offices, Nevada did not see the upheaval that took place in Wisconsin and Ohio when changes were made to public sector bargaining. This is because collective bargaining in Nevada was already limited more than in those other states. Perhaps some hoped that in the 2015 session the collective bargaining that does exist would be further minimized. Instead, the new law seemed to create more disputes and questions, rather than streamlining processes and minimize conflicts. Perhaps this confusion will continue to be litigated through the Nevada Employee Management Relations Board (EMRB) and the courts.

Disputes over the new law will likely lead to more labor unrest and probably more long-term costs to the government, whether through the litigation of complaints in the EMRB or in the courts. It is not clear how that will save state resources, but it will certainly tie up the unions involved when they could be organizing, bargaining or representing employees. To some, perhaps this was the point of the 2015 Nevada legislative session. The results of the November 2016 elections tell us much about the direction that labor policy will take in the next session. As with every law passed in 2015, the next legislative session in 2017 presents the opportunity to renew the purposes of public sector collective bargaining in Nevada – labor peace and fair working conditions – and based upon legitimate evidence and supportable assumptions.

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<sup>31</sup> Ben Botkin, *County Orders Union Boss to Work, Citing New Law*, LAS VEGAS REV.-J., Jun. 8, 2015, <http://www.reviewjournal.com/politics/government/county-orders-union-boss-work-citing-new-law>.

<sup>32</sup> Ben Botkin, *EMRB Hands County Union a Win*, LAS VEGAS REV.-J., Nov. 18, 2015. The Court recently affirmed part of the Nevada Employee Management Relations Board order and remanded the case back to the EMRB. See <http://www.seiunv.org/seiu-nevada-wins-partial-victory-as-judge-restores-some-raises-withheld-by-clark-county/>.

# An Attorneys' Guide to Workplace Investigations

*By Justin Kochan<sup>1</sup>*

It is Friday night and you are finishing up at the office. The phone rings. You answer. On the other end of the line is the Human Resources Director of one of your law firm's largest clients. He is in a panic, having just received an email from his company's Vice President of Marketing claiming the company's Chief Executive Officer sexually harassed her at last week's company retreat. While the Human Resources office typically handles these types of investigations in-house, your client says he wants nothing to do with this. He tells you that the allegations are far too serious, and he would not feel comfortable investigating his boss. He asks you to take the lead on the investigation.

Anyone who has conducted a workplace investigation will acknowledge that it is not an easy task. The issues are challenging, the legal guidance sparse, and the stakes can be high, particularly in a C-Suite investigation like this one. And for attorneys accustomed to advocacy, it can be challenging to distinguish between the roles of impartial investigator and attorney.

This article summarizes the major issues an attorney is likely to encounter when undertaking a workplace investigation. It includes a discussion of when an investigation should be conducted, the benefits of a workplace investigation, who should be retained as the investigator, and how to conduct investigations of this kind.

## I. When To Conduct An Investigation

As a general rule, an employer should initiate a workplace investigation when it has reason to believe that one or more of its employees is engaging in conduct that violates the employer's policies and/or the law. This could include minor issues like tardiness, or major issues like harassment, discrimination, retaliation, theft, or workplace violence. The goal of an investigation is to address

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allegations of misconduct, resolve disputed issues of fact, and make relevant policy findings. The scope of the investigation is entirely dependent on the seriousness of the allegations. An investigation into tardiness may be limited to a conversation with the employee, while an investigation into a disparate impact case may involve dozens of interviews and the retention of a statistician.

While the initiation of an investigation is a sound response to a complaint, it is important to note that there are instances where an investigation may not be necessary. One example would be when an employee brings allegations that have already been addressed in a prior investigation. While an employee may disagree with the investigator's findings, the employer is under no obligation to reinvestigate identical allegations. However, should the employee's complaint include additional allegations that were not addressed in the prior investigation or provide relevant evidence that was not previously known, the employer should initiate an investigation limited in scope to the new allegations or evidence.

Another example is when an employer receives a complaint from an employee where the allegations, even if sustained, would not violate the employer's policies or the law. These types of complaints often include personal and professional disagreements with colleagues, differences in opinion with management, and frustration over low staffing and heavy workloads. While it would be wise to speak with complaining employees in an attempt to address their concerns, these types of allegations do not warrant an investigation unless the employer has reason to believe they may be based on a protected characteristic or activity. Decisions of whether or not to investigate allegations must be consistent and not discriminatory themselves and should be documented in either event. While the matter being investigated may not directly lead to liability, it may become evidence of equal treatment in a subsequent matter.

## **II. Why Conduct An Investigation?**

Workplace investigations are disruptive, time consuming, and expensive. Despite the downsides, when faced with an employee complaint, a workplace investigation may be one of the best investments your client can make.

### **A. It is Required**

The Equal Employment Opportunity Commission ("EEOC") is the federal agency responsible for the processing and investigation of harassment, discrimination, and retaliation complaints made by employees against employers. The EEOC requires employers to initiate an investigation when they become aware of allegations of harassment, discrimination, or retaliation, regardless of how the employer became aware of the complaint.<sup>2</sup> EEOC Guidance explicitly states: "When an employee

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<sup>2</sup> EEOC, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS § V.C.1 (1999), <https://www.eeoc.gov/policy/docs/harassment.html>.

complains to management about alleged harassment, the employer is obligated to investigate the allegation regardless of whether it conforms to a particular format or is made in writing.”<sup>3</sup>

The EEOC’s position is consistent with federal courts, which have held that employers have a duty to investigate when they know, or should know, of allegations of harassment, discrimination, or retaliation.<sup>4</sup> For example, in *Malik v. Carrier Corp.*, the plaintiff alleged his employer was negligent in its decision to investigate allegations of sexual harassment that had been brought against him by a female colleague who later decided she did not want the allegations further pursued.<sup>5</sup> The Court held that the employer’s decision to pursue the investigation was warranted, given that an employer’s investigation of a sexual harassment complaint was not a “gratuitous or optional undertaking.”<sup>6</sup> Indeed, the Court stated that under federal law, an employer’s failure to investigate “may allow a jury to impose liability on the employer.”<sup>7</sup>

## **B. Limit Damages and/or Avoid Liability**

Even when a workplace investigation is not required by law, in some situations the employer can use the investigation as a tool to limit damages and even establish a defense to liability.

In *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth*, the Supreme Court held that employers are subject to vicarious liability for the unlawful sexual harassment undertaken by their supervisors.<sup>8</sup> However, the Court also held that when the supervisor’s harassment does not culminate in a tangible employment action, the employer may avoid liability or limit damages by asserting what has become known as the “*Faragher- Ellerth*” defense.<sup>9</sup> A tangible employment action includes “discharge, demotion, or undesirable assignment.”<sup>10</sup> Although both *Faragher* and *Ellerth* focused on allegations of sexual harassment, lower courts have extended the defense to apply equally to other forms of harassment, like race, color, creed, religion, and national origin.<sup>11</sup>

The *Faragher- Ellerth* defense has two elements. First, the employer must have “exercised reasonable care to prevent and correct promptly any sexually harassing behavior.”<sup>12</sup> Second, the

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<sup>3</sup> *Id.*

<sup>4</sup> See, e.g., *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001); *Fuller v. City of Oakland*, 47 F.3d 1522 (9th Cir. 1995); *Bator v. State of Haw.*, 39 F.3d 1021 (9th Cir. 1994).

<sup>5</sup> *Malik v. Carrier Corp.*, 202 F.3d 97, 105 (2d Cir. 2000).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See, e.g., *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 186 n.9 (4th Cir. 2001).

<sup>12</sup> *Faragher*, 524 U.S. at 807; *Burlington*, 524 U.S. at 745.

complaining employee must have “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”<sup>13</sup> The standards are meant to both to encourage employers to prevent and correct harassment and to encourage employees to limit the harm from harassment.<sup>14</sup>

What is considered “reasonable care” to prevent and correct harassment depends upon the particular factual circumstances. What might be reasonable for a relatively trivial issue might be far too casual for a more serious allegation. But generally, the EEOC has interpreted “reasonable care” to require that the employer establish, disseminate, and enforce an anti-harassment policy, maintain a complaint procedure, and take reasonable steps to prevent and correct harassment.<sup>15</sup> While there are multiple components to an effective complaint procedure, industry standards require a prompt, thorough, and impartial investigation into complaints of harassment.<sup>16</sup>

What constitutes a “prompt”, “thorough”, or “impartial” investigation is case-specific. Courts typically expect an employer to initiate an investigation immediately upon becoming aware of the allegations, and for the investigation to be completed within a reasonable time.<sup>17</sup> A prompt investigation demonstrates that the employer takes potential policy violations seriously, provides the employer the opportunity to address the allegations directly, and prevents further harm against the complainant.

Further, the less time that passes between the complaint and the investigation, the less likely it is that relevant evidence – like digital files and witnesses’ memories – will become unavailable.

A thorough investigation typically includes in-depth interviews with the complainant, respondent, and relevant witnesses, as well as the collection and analysis of any and all relevant

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<sup>13</sup> *Id.*

<sup>14</sup> See *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1007 (8th Cir. 2006) (a cursory investigation focused on the complainant’s performance rather than the harasser’s conduct does not establish an affirmative defense); *Montero v. AGCO Corp.*, 192 F.3d 856, 861-64 (9th Cir. 1999) (affirming summary judgment for the employer on Title VII claim where the company had a policy prohibiting sexual harassment and acted promptly to address the harassment complaint).

<sup>15</sup> EEOC, *supra* note 1 at § V.C.

<sup>16</sup> EEOC, *supra* note 1 at § V.C.1.

<sup>17</sup> See *Swenson v. Potter*, 271 F.3d 1184, 1193 (9th Cir. 2001) (investigation just three days after management learned of alleged grabbing incident constituted prompt action); *Montero v. AGCO Corp.*, 192 F.3d 856, 863 (9th Cir. 1999) (employer took only 11 days to complete its investigation and thereby exercised reasonable care to promptly correct sexually harassing behavior.); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994) (failure to seriously investigate the complaint until after a charge is filed with a state agency is inadequate); *Sorlucio v. N.Y. City Police Dep’t*, 971 F.2d 864, 865-73 (2d Cir. 1992) (interview of the complainant and witnesses four months after the complaint and interview of the respondent eight months after the complaint is insufficient); *Bennett v. N.Y. City Dep’t of Corrs.*, 705 F. Supp. 979, 987-88 (S.D.N.Y. 1989) (four week delay before interviewing complainant and co-worker not deemed prompt).

documents.<sup>18</sup> What constitutes a thorough investigation depends entirely on the severity of the allegations and the availability of the evidence.

An “impartial” investigator is one who has the skill and experience to objectively gather and analyze all of the evidence, and come to a fair and well-reasoned conclusion. Any overt conduct by the investigator that suggests bias necessarily undermines the impartiality of the investigator. It is also important to consider the potential conflicts of interest and the perception of bias, particularly when the investigator reports directly or indirectly to either of the parties.<sup>19</sup>

### **C. Positive Impact on the Workplace**

Aside from the legal benefits of an effective investigation, the resulting investigative report can be a valuable tool in the employer’s decision-making process.

Once the employer conducts an investigation and reaches factual findings, it can take action. If the investigator sustains the allegations, the employer can discipline the respondent appropriately and take steps to prevent future misconduct. If the investigator does not sustain the allegations, the respondent can be exonerated and employees can feel confident that the employer responded appropriately to the complaint. In the end, whatever the findings, the employer has put its managers, supervisors, and employees on notice that it takes its policies seriously.

As an ancillary benefit, other issues affecting the culture and climate of the workplace may come to light through the investigative process. A skilled investigator will establish rapport with interviewees, whose statements can provide a window into the workplace. The employer can then use this information to proactively address conflicts that might be bubbling under the surface, thereby increasing employee morale and reducing costly turnover. Likewise, an investigation may reveal other potential legal liabilities and provide an opportunity to address these problems.

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<sup>18</sup> See *Pollard v. E.I. DuPont De Nemours Co.*, 213 F.3d 933, 942-43 (6th Cir. 2000) (investigation inadequate when the employer formed a list of questions answerable by yes or no, and when each employee denied knowledge of the incidents, no further questions were asked), rev’d on other grounds, 532 U.S. 843 (2001); *Smith v. First Union Nat’l Bank*, 202 F.3d 234, 245-46 (4th Cir. 2000) (investigation inadequate where investigator failed to ask whether accused made sexually harassing remarks, had never previously investigated a sexual harassment claim, investigation focused on complaints about management style and ignored allegations of sexual harassment); *Heelan v. Johns-Manville Corp.*, 451 F. Supp. 1382, 1390 (D. Colo. 1978) (company failed to investigate plaintiff’s complaints of sex discrimination other than to call the accused for verification or denial).

<sup>19</sup> *Gee v. Principi*, 289 F.3d 342, 346-47 (5th Cir. 2002) (if the ultimate decision-maker was influenced by others who had retaliatory motives, the investigation was not impartial); *Quela v. Payco-General Am. Credits, Inc.*, No. 99 C 1904, 2000 WL 656681, at \*2 (N.D. Ill. May 18, 2000) (investigation of sexual harassment allegations was tainted by personal bias and self-interest where the investigator held a high managerial position and the person who aided in the investigation was the business partner of accused).

### III. Who Should Conduct the Investigation?

Several considerations inform the selection of the investigator. To ensure impartiality, the investigator should have no stake in the outcome of the investigation.<sup>20</sup> This standard can be met internally by assigning the investigation to a Human Resources Officer, an EEO Officer, a manager in a different department, or the employer's in-house counsel.<sup>21</sup> However, an actual or perceived conflict of interest may result in a finding that the investigator was not impartial at the outset. When there is not an impartial investigator within the company, or where an internal investigation may negatively impact the workplace, it is advisable to engage either an outside attorney or other private investigator. It is therefore critical to consider the different laws applicable to each.

#### A. The Nevada Private Investigators Act

Like many states, Nevada regulates private investigators and limits their activities, including workplace investigations, to those licensed by the state.<sup>22</sup> The licensing of private investigators is managed by the Nevada Private Investigator's Licensing Board. While this statute is restrictive, it does contain an exemption for an "attorney at law in performing his or her duties as such."<sup>23</sup> This exemption is often referred to as the "attorney exemption" and is a common feature of most state private investigator licensing laws.<sup>24</sup>

Under Nevada's Private Investigators Act, the attorney's status as an attorney alone is not enough to exempt them from the statute's requirements. Instead, the attorney must be functioning as "an attorney at law [who is] performing his or her duties as such."<sup>25</sup> For this reason, it is incumbent upon the attorney to establish that although they are not operating in an advocacy role, they are still providing legal services that are limited in scope to an impartial investigation. The attorney should express this clearly in his or her engagement letter.

The repercussions of violating the Private Investigator's Act make it important for both the employer and the investigator to follow it closely. For the employer, retaining an unlicensed investigator to conduct the investigation could result in the opposing party challenging the investigation itself or a court finding the investigation inadmissible because the employer conducted

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<sup>20</sup> EEOC, *supra* note 1.

<sup>21</sup> The Nevada Private Investigators Act, discussed below, provides an exception for internal investigators employed by the employer. See NRS 648.018.

<sup>22</sup> NRS 648.060.

<sup>23</sup> NRS 648.018.

<sup>24</sup> See, e.g., Ariz. Rev. Stat. § 32-2409; Cal. Bus. & Prof. Code § 7522(e); Wash. Rev. Code § 18.165.020.

<sup>25</sup> NRS 648.018.

it unlawfully. For the investigator, conducting an investigation without a license is a misdemeanor punishable by a fine of up to \$1,000 and/or imprisonment up to one year.<sup>26</sup>

## **B. Choosing the Investigator**

When an employer decides to retain an outside party to conduct a workplace investigation, it has two choices. The first choice is the retention of a non-attorney investigator, like a human resources consultant or a licensed private investigator. The second choice is the retention of an attorney-investigator – either its regular outside counsel or an attorney who specializes in workplace investigations. Of these options, employers should always consider retaining an outside attorney who specializes in workplace investigations for the reasons outlined below.

### **1. Non-Attorney Investigators**

Employers often utilize their in-house Human Resources team to conduct workplace investigations, and rightfully so. Human Resources employees typically have both skill and training to competently conduct workplace investigations. However, there is no exemption within the Nevada's Private Investigator's Act that permits external Human Resources consultants to conduct workplace investigations. As noted above, an employer's unlawful use of an unlicensed and nonexempt investigator could result in the investigation being found inadmissible, thereby losing the *Faragher-Ellerth* defense.

Retaining a licensed private investigator to conduct a workplace investigation, as opposed to an attorney, also presents several disadvantages. First, workplace investigations are often legal in nature and require an understanding of complex employment laws. EEO issues, for example, have certain legal elements and burden shifting that are important to fully understand when one is navigating a harassment, discrimination, or retaliation claim. It is unlikely that a licensed private investigator will have the familiarity necessary to competently navigate these issues as they arise. Second, investigative reports are legal documents that must be able to withstand scrutiny in a legal proceeding. While most licensed private investigators have experience in law enforcement, the skills of an attorney – including writing and analysis – will translate into a stronger and more defensible report. Finally, investigations conducted by licensed private investigators, which includes the Investigative reports, will not be protected under the attorney-client privilege or the work product doctrine.

### **2. Attorney Investigators**

When an internal complaint necessitates an outside investigator, employers have long turned to their regular outside counsel to conduct the investigations. However, as laws and best practices have

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<sup>26</sup> NRS 648.210; NRS 193.150.



evolved, there has been a strong shift towards the retention of an outside attorney who specializes in workplace investigations for the following reasons.

First, if the complaint were to escalate to litigation, the attorney who conducted the investigation would be unable to represent the employer. The Nevada Rules of Professional Conduct (“NRPC”) prohibit an attorney from acting as an advocate at a trial in which the attorney is likely to be necessary as a witness.<sup>27</sup> An employer would be in a difficult position if its defense attorney was disqualified from representing them because he or she was likely to be called as a fact witness to support the investigation.

Second, an employer who uses its regular outside counsel to conduct an investigation risks waiving the attorney-client privilege. When an employer retains an attorney to conduct a workplace investigation, they often do so with the expectation that their conversations, the evidence, and the investigative report are cloaked under the attorney-client privilege.<sup>28</sup> However, should the complainant turn plaintiff, it would likely be in the employer’s best interests to raise the *Faragher-Ellerth* defense in its responsive pleadings and argue that it promptly initiated a thorough and impartial investigation into the plaintiff’s allegations. The investigation would then become the cornerstone of the employer’s “prompt remedial action” defense, the attorney who conducted the investigation would become a critical defense witness, and the employer would need to waive the attorney-client privilege.<sup>29</sup>

Finally, there is an understandable perception of bias when an employer uses its regular outside counsel to conduct an investigation. When the employer raises the *Faragher-Ellerth* defense, the plaintiff is likely to attack the integrity of the investigation in an attempt to have the investigation excluded from evidence. In doing so, the plaintiff would argue that it is impossible for the employer’s regular defense counsel to conduct a fair and neutral investigation because no matter what they claim, they are the employer’s advocate. They would further argue that rather than providing an unbiased assessment of the evidence, the investigator’s goal was to protect the employer by focusing on the evidence in its favor and finding against the complainant.

Given the three drawbacks described above, the trend has shifted towards the employer or their counsel retaining a separate attorney for the limited purpose of conducting workplace investigations. These attorneys often specialize in workplace investigations and have both the training and

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<sup>27</sup> NRPC R. 3.7.

<sup>28</sup> See *U.S. v. Rowe*, 96 F.3d 1294, 1297 (9th Cir. 1996) (fact finding which pertains to legal advice is considered “professional legal services”); *Harding v. Dana Transp., Inc.*, 914 F. Supp. 1084, 1091 (D.N.J. 1996) (outside counsel conducting a workplace investigation is acting in their legal capacity and therefore the attorney-client privilege and work product doctrine apply).

<sup>29</sup> See *Brownell v. Roadway Package Sys., Inc.*, 185 F.R.D. 19, 24-25 (N.D.N.Y. 1999) (the employer waived its right to invoke the attorney-client privilege by asserting the adequacy of its investigation as a defense to the plaintiff’s allegations of sexual harassment).

experience that comes from conducting hundreds of investigations. With a limited-scope agreement and no-stake-in-the-outcome impartiality, their work is more difficult to challenge and there is less concern with waiving the attorney-client privilege should the employer need to use the report as a defense.

Furthermore, an employer who retains a separate outside attorney who specializes in investigations ensures that their defense counsel will not be disqualified by being pulled into trial as a witness.

## **IV. How Should The Investigation Be Conducted?**

Once an employer decides that conducting an investigation is necessary and it has selected the appropriate investigator, the next question is, how the investigation should be conducted? When an attorney-investigator is preparing to conduct an investigation, they must consider multiple factors. These factors, discussed below, include: understanding how his or her ethical obligations as an attorney intersect with the investigative process; the proper method to notify the parties of the investigation; the relevant statutory deadlines; whether issuing confidentiality admonitions would be appropriate; proper interviewing techniques; and how best to draft the investigative report.

At the outset, it is important to emphasize that while there are standard practices, there is no “right way” to conduct an investigation. For that reason, the tips and techniques discussed below should be viewed as guidelines, rather than the rule. Because each and every investigation is unique, it is critical to approach them as such and remain flexible.

### **1. Ethical Considerations**

Although an attorney-investigator is functioning as an investigator during the course of the investigation, they are also necessarily acting as attorney – albeit with a limited scope. Given this unique role, it is important to understand how the Nevada Rules of Professional Conduct for Lawyers (“NRPC”) apply in the contexts of a workplace investigation.

First and foremost, it is prudent to consider the NRPC requirements that focus on the client-attorney relationship – client communication, competence, maintaining confidentiality, and representing organizations – and how these rules come into play during a workplace investigation.

1. ***Communicating With The Client.*** The NRPC requires that attorneys keep their clients “reasonably informed about the status of the matter” and “[p]romptly comply with reasonable requests for information.”<sup>30</sup> As attorneys, we are a service-oriented profession. However, as investigators, we must walk a fine line by advising on issues related to the

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<sup>30</sup> NRPC 1.4.

investigation, including the investigative process, our scope, and the protections of privilege, while remaining vigilantly impartial and refraining from offering any information or legal advice that could negatively impact our impartiality.

2. ***Acting Competently As An Investigator.*** Attorneys are required to provide “competent representation to a client,” which requires “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>31</sup> An attorney who conducts investigations must be required to understand the elements of a strong investigation – prompt, thorough, and impartial – and incorporate these standards into each of their investigations. Other more detailed best practices and industry standards for conducting a competent workplace investigation can be found in the Association of Workplace Investigators’ Guiding Principles.<sup>32</sup>
3. ***Confidential Information of a Client.*** The NRPC also requires that attorneys “not reveal information relating to representation of a client unless the client gives informed consent [or] the disclosure is impliedly authorized in order to carry out the representation.”<sup>33</sup> This requirement is broad, and includes any information related to the representation of the client, regardless of its source. When an investigation is conducted under privilege, the attorney-investigator should treat the investigation and the evidence gathered the same as other information related to the attorney-client representation. However, investigations are usually conducted with the expectation that waiver of the attorney-client privilege will be necessary to support the investigation. Therefore, it is important for the attorney-investigator to remind the client that while they will do everything in their power to maintain confidentiality, any conversations between them, in-house counsel, human resources, and/or executives within the organization are not necessarily confidential and may be discoverable or disclosed at a later date.
4. ***The Organization Is The Client.*** When an organization retains an attorney to conduct a workplace investigation, it is important for the attorney to keep in mind that they have been retained to represent the organization as a whole, and not any of its individual employees.<sup>34</sup> This rule underscores the importance of providing the organization with an

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<sup>31</sup> NRPC 1.1.

<sup>32</sup> See: <http://www.aowi.org/assets/documents/guiding%20principles.pdf>

<sup>33</sup> NRPC 1.6.

<sup>34</sup> NRPC 1.13.

impartial and accurate investigation, regardless of the outcome. Even if an attorney is investigating allegations of misconduct against the organization's highest ranking officer, their obligation to the organization requires them to provide it with a well-reasoned investigative report that includes an honest and unbiased assessment of the allegations and potential liabilities.

5. ***Communicating With An Unrepresented Witness/Party.*** During a typical investigation, the majority of witnesses and parties are not represented. According to NRPC 4.3, when an attorney is “dealing on behalf of a client with a person who is not represented by counsel,” that attorney cannot state that they are “disinterested.” Further, the NRPC states, “When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.”<sup>35</sup> This rule is critical to consider when conducting a workplace investigation. While an attorney-investigator may be functioning in an impartial role, they are not “disinterested” as investigators. Their interests are aligned with that of their client, which is to provide an unbiased investigation and an accurate assessment of the facts. For this reason, the attorney-investigator must make it clear to both parties and witnesses at the outset who they represent and the scope of that representation.
6. ***Communicating With a Represented Witness/Party.*** Occasionally, parties or witnesses are represented by counsel. Under the NRPC 4.2, an attorney cannot communicate “about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.” This prohibition applies to witnesses as well as parties. Therefore, when a complainant, respondent, or witness notifies the attorney-investigator that they are represented related to the investigation, the attorney-investigator is required to end the conversation and speak directly with their attorney. In order for the interview to proceed, their attorney must be present or consent to proceed with the interview in their absence. The attorney-investigator should obtain the attorney’s consent in writing and include it as an attachment in the investigative report.

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<sup>35</sup> NRPC 4.3.

## **2. Pre-Investigation Considerations**

As soon as the employer has decided to initiate an investigation, it is important for the investigator to begin developing an investigative plan. This plan does not need to be overly detailed or exhaustive. Instead, it should be thought of as a roadmap for the how the investigator envisions the investigation proceeding. At a minimum, the investigative plan should include the following:

1. The date of the initial contact.
2. The scope of the investigation.
3. The allegations.
4. The relevant policies.
5. A list of potential witnesses, including the interview order and allotted interview times.
6. A list of potentially relevant documents and/or files.
7. A timeline for anticipated events.

The investigator should update the investigative plan throughout the investigation, and may eventually build it into the investigative report.

## **3. Notice and Timing In Public Workplace Investigations**

Investigations conducted in the private and public sector are similar in many respects, but do have nuanced differences. In an at-will employment state such as Nevada, a private employer can terminate an employee for any reason, unless that reason violates a state or federal statute or the employee's contract.<sup>36</sup> However, the majority of public employees have a property interest in their job, which affords them due process rights. These rights provide employees with a host of protections, some pertaining to the investigative process.

One such protection under the Nevada Revised Statutes ("NRS") requires that public employees responding to allegations of misconduct in an internal investigation be provided with written notice of the allegations and the opportunity to have a representative present during the investigative interview.<sup>37</sup> Specifically, it states:

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<sup>36</sup> See *Am. Bank Stationery v. Farmer*, 106 Nev. 698, 701 (1990) ("We note that all employees in Nevada are presumed to be at-will employees"); *Vancheri v. GNLV Corp.*, 105 Nev. 417, 420-21 (1989) (Nevada courts have consistently employed the at-will presumption as a civil disputable presumption).

<sup>37</sup> NRS 284.387(1)(b).

1. An employee who is the subject of an internal administrative investigation that could lead to disciplinary action against the employee pursuant to NRS 284.385 must be:
  - (a) Provided notice in writing of the allegations against the employee before the employee is questioned regarding the allegations; and
  - (b) Afforded the right to have a lawyer or other representative of the employee's choosing present with the employee at any time that the employee is questioned regarding those allegations. The employee must be given not less than 2 business days to obtain such representation, unless the employee waives the employee's right to be represented.<sup>38</sup>

Additionally, this statute requires that within 90 days of notifying the respondent of the allegations, the investigation must be completed and the employee notified of the disciplinary action.<sup>39</sup> If the investigation cannot be completed within the allotted 90 days, the investigator can request an extension of not more than 60 days upon a showing of good cause for the delay.<sup>40</sup> No further extension may be granted unless approved by the Governor.<sup>41</sup>

#### **4. Confidentiality Considerations**

Traditionally, during a workplace investigation, the investigator has instructed witnesses to keep their participation in the investigative process confidential and not to discuss the investigation with others for the duration of the investigation. This instruction protected the privacy rights of the parties and witnesses, particularly when the allegations were embarrassing or had the potential to negatively impact the professional reputation of those involved. This instruction also protected the integrity of the investigative process by preventing witnesses from comparing notes and aligning stories prior to their interview with the investigator.

However, a 2012 decision by the National Labor Relations Board, *Banner Health Systems*, prohibits private employers from issuing blanket confidentiality admonitions.<sup>42</sup> In *Banner*, the NLRB held that a private employer's efforts to protect the integrity of its internal investigations by instructing witnesses to retain confidentiality violates an employee's right to engage in protected concerted activity.<sup>43</sup> Thus, investigators can no longer issue "blanket" confidentiality admonitions to witnesses in a private sector investigation.

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<sup>38</sup> *Id.*

<sup>39</sup> NRS 284.387(2).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Banner Health Sys.*, 362 N.L.R.B. No. 137 (June 26, 2015).

<sup>43</sup> *Id.*

Under *Banner*, in order to issue a confidentiality admonition, an employer must show that it has a legitimate business justification that outweighs an employee's right to engage in protected concerted activity.<sup>44</sup> According to the NLRB, to justify an admonition, the employer is required to make an individualized assessment of each investigation to determine whether:

1. Any witnesses need protection;
2. Evidence is in danger of being destroyed;
3. Testimony is in danger of being fabricated; or
4. There is a need to prevent a cover up.

In 2014, the Public Employee Relations Board ("PERB"), which governs public sector employees, came to a similar ruling.<sup>45</sup> While PERB adopted the *Banner* ruling prohibiting blanket confidentiality admonitions, it did not explicitly adopt *Banner's* four prong test nor did it provide examples of situations in which the employer would be permitted to require confidentiality.<sup>46</sup> Although PERB acknowledged that employers may have a right to require confidentiality during an investigation under certain circumstances, it stated that the burden is "is squarely on the employer to demonstrate that a legitimate justification exists for a rule that adversely impacts employees' protected rights."<sup>47</sup>

It is important to note that it is not the outside investigator's decision whether confidentiality admonitions are warranted. Instead, the investigator must work closely with the employer and the employer's counsel, and provide them with the information necessary for them to determine whether confidentiality admonitions would be appropriate.

Because confidentiality is a two-way street, it is common for parties and witnesses to ask the investigator whether the information they share will be kept confidential. It is important for the investigator not to overstate the limits of their ability to keep witness information confidential. The investigator should never guarantee confidentiality. Instead, the investigator should emphasize that during the investigative process, the information shared by parties and witnesses will be provided to others strictly on a need-to-know basis. It is also helpful for the investigator to explain that they will likely draft an investigative report that they will present to the decision-makers within the organization, that this report will summarize the evidence relied upon, that the decision-maker may decide to release some or all of its contents, and that this decision is outside of the investigator's control.

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<sup>44</sup> *Id.*

<sup>45</sup> *L.A. Community College District*, P.E.R.B. No. 2404, at 6-13 (2014).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 13.

## 5. The Interview Process

One of the most challenging aspects of a workplace investigation is the interview process. In preparing to conduct witness interviews, it is important to consider the logistics of scheduling the interviews, how to manage represented parties and witnesses, and how to conduct the interviews themselves.

When scheduling interviews with parties and witnesses, the investigator should meet with each interviewee individually and in a private location. Individual interviews make it more difficult for parties and witnesses to align their stories, allows those who may disagree with their colleagues to speak freely, and increases the confidentiality of the investigative process. With respect to interview location, interviews should be scheduled in a private location, consistent with the confidential nature of the investigation. This could include the investigator's office, an out of the way office at the employer's place of business, or a rented conference room.

In unionized environments, employees often request that a union representative attend their investigative interview. In *NLRB v. J. Weingarten, Inc.*, the Supreme Court held that under National Labor Relations Act, an employee is entitled to a representative during an investigative interview that the employee reasonably believes could result in disciplinary action.<sup>48</sup> Therefore, under the letter of the law, only the respondent is entitled to a representative. However, practically speaking, the majority of union representatives understand the investigative process and provide minimal if any disruption.

Therefore, as the investigator, there is little reason to deny a request for representation and run the risk of a claim that you have violated an employee's *Weingarten* rights. It is also important to note that an employee who does not make a clear request for representation waives their *Weingarten* rights. But again, practically speaking, asking an employee during the scheduling process whether they will have a representative present avoids last minute *Weingarten* requests that could disrupt the interview schedule. Because the employee's right to representation arises from the threat of disciplinary action against the employee, it does not apply to witnesses and other employees who are not subject to discipline on account of the event under investigation.

Additionally, it is not uncommon for a complainant, respondent, or even a witness to be represented by an attorney. As attorneys, we have an ethical obligation not to communicate with a represented person about the subject of their representation without that person's attorney being present. Practically, this means that a party or a witness who has retained an attorney has the right to have their attorney present during the investigative interview. Most attorneys understand the investigative process and are cooperative – even helpful – during the investigative interview. However, an attorney who represents a party or a witness must understand that an investigative

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<sup>48</sup> *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).



interview is not a deposition. For this reason, they cannot object to the investigator's questions, speak for their client, or otherwise obstruct the investigative process. If an attorney continues to obstruct the investigative process after the investigator reminds them of their role, it is within the investigator's rights to terminate the interview.

With respect to conducting the interview, attorneys who are functioning as investigators are often accustomed to adversarial proceedings and may mistakenly treat the investigative interview like a deposition. The investigator should approach the interview from a collaborative perspective. Their role is to assist the parties and witnesses offer their version of events and not to build a case for one side or the other. During this process, it is important to ask open ended questions and let the interviewee talk. For reticent witnesses, silence can be an effective tool to elicit information. It is also important to be flexible during the interview process and follow the facts where they lead you. For example, if witnesses express concerns of retaliation, explore the source of these concerns. Towards the end of the interview, it is appropriate to ask more closed-ended questions to sew up discreet issues like names, dates, witnesses, and documents.

At the interview's conclusion, it can be useful to ask each interviewee several open ended questions to obtain any information they may not have had the opportunity to share. These questions might include, for example:

1. Is there anything I did not ask about that you feel would be relevant considering your understanding of the scope of the investigation?
2. Are there any documents you feel might be relevant to the allegations?
3. Are there any witnesses you feel it would be helpful for me to speak to? What information do you anticipate them providing?
4. What is the best way to reach you if I have follow-up questions?

## **6. Drafting the Report**

After the witnesses have been interviewed and the documents collected, the investigator turns to the final phase of the investigation: drafting the investigative report. There is no concrete rule on what to include in the investigative report. Given the variety of allegations brought by complainants, each report is necessarily unique in both structure and content. However, the following elements are common to most reports.

1. **Introduction.** The introduction is typically brief, and provides general background information. For example, it might include the date of the complaint, the date of

retention, a sentence summarizing the allegations, the names of the parties, and the scope of the investigation.

2. ***Summary of the Findings.*** The Summary of Findings outlines both the allegations and the findings with some degree of specificity. It is a valuable tool for the employer because it distills what could be 100 pages of dense information down to one or two pages.
3. ***Investigative Background.*** The Investigative Background summarizes the procedural aspects of the investigation. It typically includes include a list of witnesses, a list of attachments, the policies considered, the evidentiary standard, and an explanation of any delays in the investigative process.
4. ***Factual Background.*** The Factual Background, while not essential, is helpful to provide relevant context to the allegations. This could include employment histories, the complaint history, prior investigations, or a timeline of relevant events.
5. ***Allegations.*** The allegations will be obtained from the written complaint and/or the complainant's interview. When drafting this section, it is important to include as much information as possible, including dates, witnesses, and relevant details. How the allegations are organized sets the structure for the remainder of the report. There are multiple ways to organize the allegations, which range from chronologically, by incident (i.e. inappropriate touching, termination, etc.), or by type of allegation (i.e. retaliation, discrimination, harassment, etc.).
6. ***Responses.*** It is critical to provide the respondent with the opportunity to respond to each of the allegations made by the complainant(s). This should be clear from the investigative report, as a well-organized report will make any gaps in responses apparent.
7. ***Additional Evidence.*** In almost every investigation, there is some evidence aside from the allegations and the responses that can be useful in determining whether the allegations have merit. For allegations of harassment or discrimination, it may be helpful to speak with similarly situated employees to determine whether the respondent may have subjected them to similar treatment. For allegations of financial fraud, it may be relevant to review financial records and email communication to determine whether the evidence is consistent with a finding of fraud.
8. ***Analysis and Findings.*** One of the most important aspects of the Investigative Report is the Analysis and Findings. This is the part of the report where the investigator has the opportunity to "show their work," so to speak. A well-reasoned and thoughtful analysis is the hallmark of a thorough investigation. While not every reader may agree with the

findings, they should agree that the investigator was fair, impartial, and considered each perspective.

It is rare that we are hired as attorneys to investigate the proverbial “slam dunk” investigation. This might be an investigation where there is video evidence, email evidence, or the facts are undisputed. Employers typically – and reasonably so – conduct these investigations in-house. For that reason, party and witness credibility will generally be at issue to some extent.

## 7. Analysis

According to EEOC Guidelines, it is permissible for the investigator assess the credibility of parties and witnesses in determining whether the alleged conduct occurred.<sup>49</sup> When assessing credibility, factors to consider include:

1. **Direct corroboration.** Is there eye-witness testimony of the incident? Is there physical evidence, like written documentation, that directly corroborates the party’s testimony? For example:

*“Six witnesses observed...”*

*“There is no direct evidence to corroborate her version of events.”*

2. **Circumstantial corroboration.** Is there testimony from witnesses who saw the person soon after the alleged incidents? Is there testimony from witnesses who discussed the alleged incidents with him or her around the time the incidents occurred? Is there physical evidence that indirectly corroborates either of the party’s testimony? For example:

*“The complainant contemporaneously documented the event.”*

*“The complainant immediately thereafter told her two closest friends what had occurred.”*

*“The email exchanges between the two of them suggest that the two have a closer relationship than respondent would admit.”*

*“No other witness, including the females interviewed, attributed any sort of gender bias to him. To the contrary, they believed he treated them fairly.”*

*“The timing suggests a connection between the complaint and the disciplinary action. Supervisor issued it within one calendar week of his complaint to Human Resources.”*

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<sup>49</sup> EEOC, *supra* note 1.

3. **Inconsistencies.** Is the testimony consistent with other witnesses' testimony? Is the testimony consistent with the interviewee's prior testimony? For example:

*"The two witnesses at the meeting saw it differently...."*

4. **Inherent plausibility.** Is the testimony believable on its face? Does it make sense? For example:

*"The conduct could easily have occurred as described. The floor area measured 5 feet 11 inches at the point nearest the desk, allowing for her 5 feet 6 inch frame to lie down fully extended as alleged."*

*"Two witnesses described behavior directed at them that was similar in nature."*

5. **Bias, interest, motive.** Did the party or witness have a reason to lie? For example:

*"The respondent was unable to explain why the complainant would fabricate charges against her."*

*"Every witness believed the respondent to be credible, but raised significant concerns about the complainant's motives."*

*"This witness may be motivated to share facts more favorable to the complainant, who is by her own admission, her best friend."*

6. **Past record.** Did the alleged harasser have a history of similar behavior in the past? For example:

*"The evidence demonstrates that this is the first complaint of this nature that Human Resources has received against the respondent in his 21-year career."*

*"The record demonstrates that the complainant has received negative performance evaluations even before her complaint to Human Resources."*

7. **Comparator information.** Have other witnesses experienced similar treatment? For example:

*"Similarly-situated witnesses likewise believed they were treated unfairly based upon their age."*

8. **Statistics.** Do the relevant statistics lend support to the testimony? For example:

*“As a whole, the employer employs a proportionate number of individuals who are over the protected age of 40.”*

*“Of the last five employees terminated in the department, four were under the age of 40, and one was over the age of 40.”*

9. **Legitimate business reasons.** Can the respondent provide a legitimate business reason that explains the motive behind the allegedly improper action? For example:

*“Respondents articulated legitimate business reasons for the decision to terminate the complainant. Specifically...”*

The EEOC notes that no one factor is determinative as to credibility.<sup>50</sup> The EEOC writes, “For example, the fact that there are no eye-witnesses to the alleged harassment by no means necessarily defeats the complainant’s credibility, since harassment often occurs behind closed doors. Furthermore, the fact that the alleged harasser engaged in similar behavior in the past does not necessarily mean that he or she did so again.”<sup>51</sup> The investigator should be wary, however, of relying on physical cues to determine credibility. While cues like sweating, stammering, fidgeting, and looking up to the right could be interpreted as signs of dishonesty, the opposite may be true. Witnesses might simply be nervous about being questioned by an attorney, or they could have a medical condition of which the investigator is unaware. Further, the majority of investigators are not experts in behavioral analysis and would have difficulty supporting these assessments when testifying to support their findings.

Finally, in discussing the investigative report, it is worth noting that the investigator almost always uses the preponderance of the evidence standard to make his or her findings.<sup>52</sup> This standard requires only that the conduct more likely than not occurred and is sometimes described as a “50% and a feather” standard. Such a low standard of proof is useful in “he said, she said” cases, where it is uncommon for there to be direct or conclusive evidence.

## V. Conclusion

Despite every employer’s best intentions, people are people, and conflict is often inevitable. This conflict could manifest as sexual harassment, race discrimination, or simply a personality conflict between coworkers. The laws and best practices for how employers manage these conflicts are complex and constantly evolving. However, despite the challenges, a skillfully conducted workplace

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<sup>50</sup> EEOC, *supra* note 1.

<sup>51</sup> EEOC, *supra* note 1.

<sup>52</sup> EEOC, *supra* note 1.

investigation continues to be a valuable tool for employers and provides benefits well beyond a defense in litigation.

## Editorial Postscript

The following changes have been made to this publication after the Nevada Practitioners' Journal of Labor and Employment Law, Vol. 2, Issue 1, was initially published in May 2017. Changes are listed in chronological order.

Date of Change	Article/Section	Page	Description
(none to date)			

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