

Utah Employment Law Update

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Labor & Employment Group

Risk Management

- Counseling (discipline, discharge, discrimination, leave questions, theft, etc.)
- Policies and procedures (sexual harassment, arbitration, discipline, etc.)
- Training management and the workforce

Trial (Age, Disability, Discrimination, Wage & Hour, FLSA, etc.)

- Defending class action and multi-plaintiff lawsuits
- Defending individual lawsuits
- Commercial disputes relating to employment: Trade secrets, breach of fiduciary duty, corporate raiding, breach of contract, usurpation of opportunity
- Defending and prosecuting temporary, preliminary or permanent injunctive relief (post-employment restrictive covenants)
- Defending labor-related claims before the NLRB or other agencies

Labor & Employment Group

Adoption and Implementation of Effective Policies and Procedures

- Interviewing and hiring
- Anti-discrimination and harassment
- Leaves, benefits, compensation
- Discipline and discharge, and severance and separation

Protecting Company Assets

- Examining an employee's obligations to prior employers
- Adopting enforceable post-employment restrictive covenants
- Protection of trade secrets and other proprietary and confidential information
- Enforcing contractual and statutory obligations to employer

Facilitating Corporate Decisions Affecting the Workplace

- Merger and acquisitions and other transactions
- Workforce expansions and reductions in force
- Succession planning

Traditional Labor Law Assistance

Benefits, Compensation & Immigration

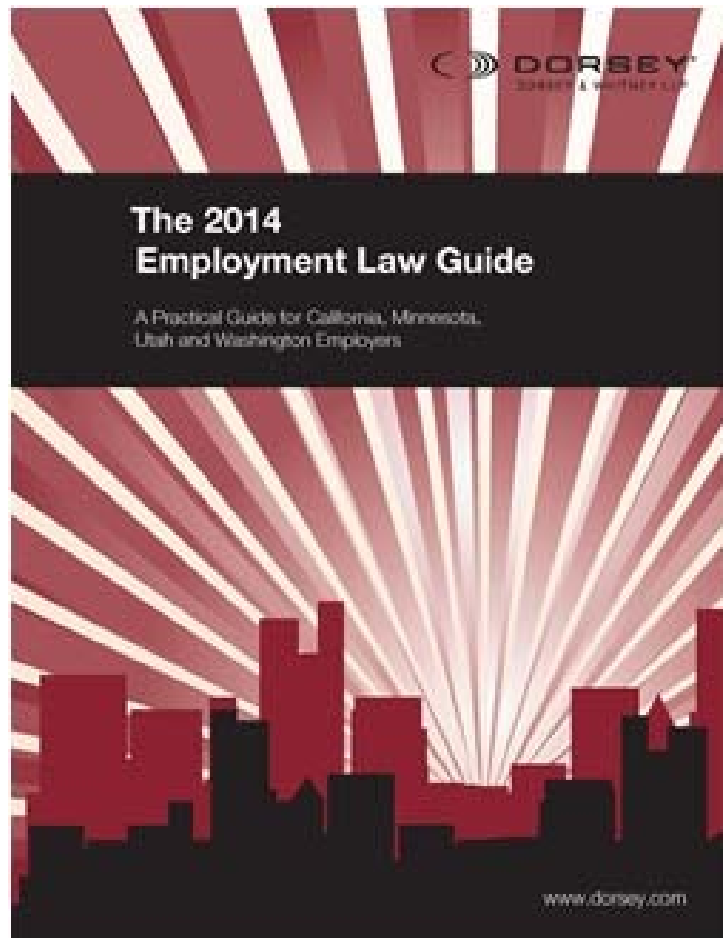
Benefits & Compensation Group

- ERISA compliance
- Retirement plans (401(k), 403(b), 457)
- HSAs, HRAs, disability, life insurance
- HIPAA, COBRA compliance
- Executive compensation
- ESOPs, stock appreciation rights, stock options
- Severance arrangements
- USERRA proposed rules

Immigration Group

- All manner of non-immigrant status and visas
- NAFTA
- B-1 status and visas
- EB-2 & EB-3
- EB-1 petitions
- H-3 trainees
- J-1 exchange visitor trainees
- F-1 foreign students
- EB-5 petitions
- I-9 record keeping advising
- Overseas placement of key personnel

Dorsey's 2014 Employment Law Guide



Dorsey's 2013 Employment Law Guide

CHAPTER SUMMARY

THE 2013 EMPLOYMENT LAW GUIDE iii

Chapter Summary

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AGENDA

- 8:00 Employment Law Guide**
- 8:20 Utah Employment Law Update – Part 1**
- 9:00 Immigration Law and Procedures**
- 9:40 Break**
- 9:55 Panel – Employee Discipline / Investigations**
- 10:35 Survey of Current Benefits Issues**
- 11:15 Utah Employment Law Update – Part 2**
- 11:50 Lunch – Keynote Speaker – Todd Emerson**
- 1:00 Adjourn**

Utah Employment Law Update – Part 1

- **Social Media Screening**
- **Handbooks and Policies**
- **Investigations and Employee Discipline**
- **Employment Covenants**



Social Media Screening

Many states are enacting legislation preventing employers from seeking social media user names and passwords from employees and applicants for employment.

- Legislation has been introduced or is pending in at least 39 states relating to social media.**

- At least eleven states have enacted social media legislation:**
 - Arkansas, Colorado, Illinois, Nevada, New Jersey, New Mexico, Oregon, Utah, Vermont, Washington, and Wisconsin.**

Social Media Screening

Utah's Internet Employment Privacy Act

- Prohibits employers from asking employees or applicants to turn over their passwords and user names.

- Exceptions:
 - Communication device supplied or paid for by employer
 - May still monitor, review, access or block electronic data stored on company servers, networks or devices
 - Investigations (reasonable belief) of transfer of its proprietary, confidential or trade secret information

Social Media Screening

“In their efforts to vet applicants, some companies and government agencies are going beyond merely glancing at a person’s social networking profiles and instead asking to log in as the user to have a look around.”



- » James Poulos, Forbes Magazine, *Employers Demanding Facebook Passwords Aren't Making Any Friends*, March 22, 2012.

Social Media Screening

In states where an employer is legally able to collect information about an applicant or employee via social media, is it a good idea?

Would you hire me??



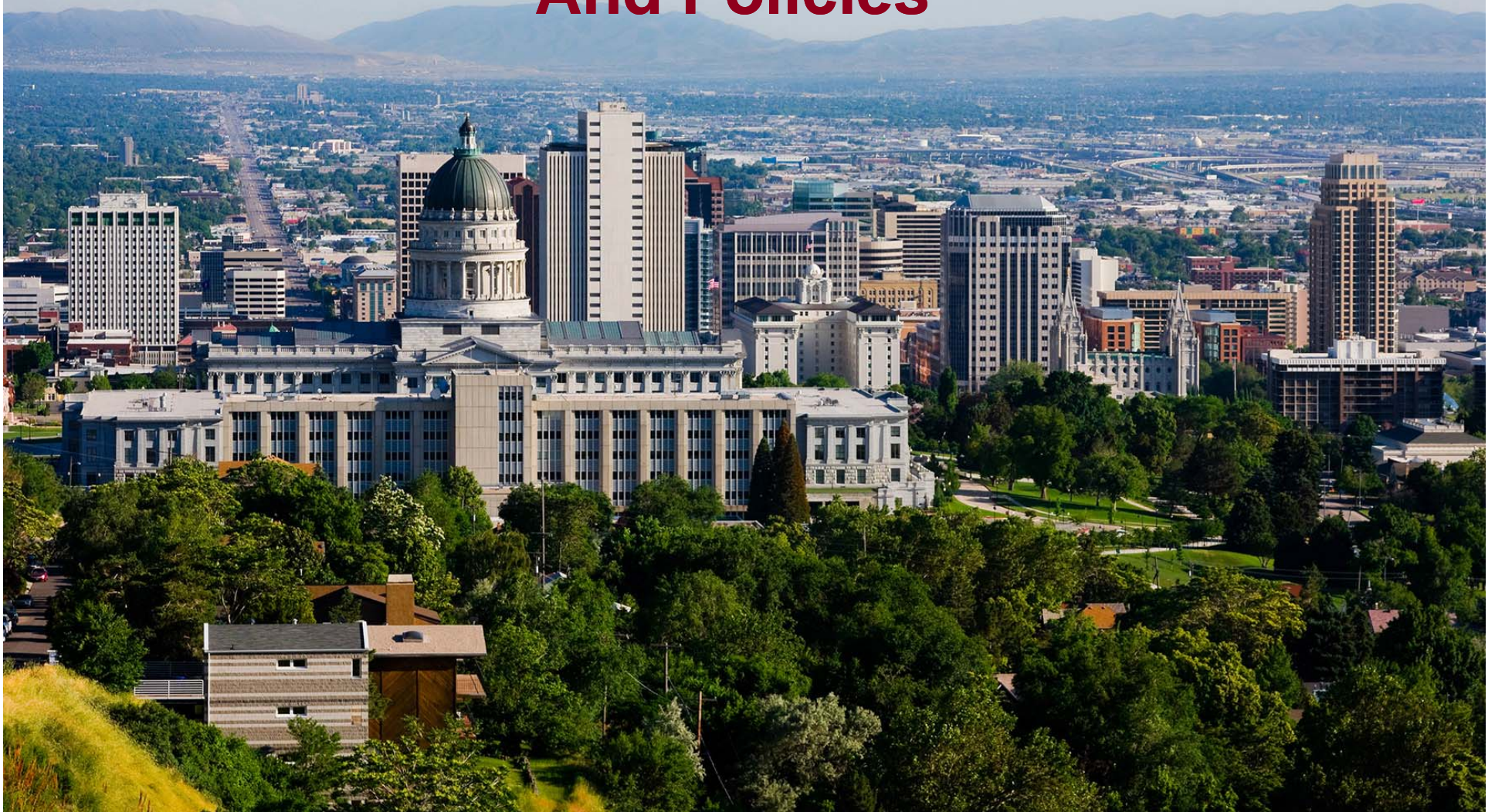
Social Media Screening



Jason Nieman v. Grange Mutual Casualty Company
C.D. Illinois, April 26, 2012

Pro se plaintiff is found to have pled a prima facie case for age discrimination based in part on his allegation that the company viewed his LinkedIn page and knew when he graduated from college.

Employee Handbooks And Policies



Handbooks

- Not required by law
- Useful in establishing policies to govern your employees
- A tool to communicate your expectations to your employees

Employee Review of Handbook

- Require employees to review the handbook
- Require employees to sign affirmation
- Demonstrates the employee's awareness of policies
- Defense against allegedly unknowledgeable employee

Handbook Enforcement Issues

- Handbook policies should be consistently enforced
- Inconsistently applied policies can lead to claims for discrimination and/or retaliation

Handbook Enforcement

Richardson v. Gallagher, 2014 WL 308956 (10th Cir. 2014)

- Mr. Richardson received a written reprimand based upon insufficient performance and complaints from other employees
- Mr. Richardson alleged racial discrimination and retaliation
- “An employee, can demonstrate pretext by producing evidence of such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons.”
- “Evidence that similarly-situated employees received different treatment is also indicative of pretext and pertains to those who deal with the same supervisor and are subject to the same standards governing performance evaluation and discipline.”

Drug Policies

- Medicinal marijuana use is now permitted in 21 states and D.C.
- Recreational use of marijuana decriminalized in WA and CO
- Marijuana use still illegal under federal law and Utah law
- *Effective July 1, 2014* - Limited exception in Utah for “Charlee’s Law” giving individuals with intractable epilepsy medical access to non-intoxicating form of hemp extract
- Most of the states still permit employers to drug test and terminate employees for positive test results
- Given the changing landscape, employers should evaluate their drug policies

Can a Handbook Create a Contract?

- In Utah, it is presumed that employment relationships for an indefinite period of time are at-will
- Implied or express agreements that termination only for cause or satisfaction of another agreed-upon condition
- Handbooks should include disclaimers to rebut an implied relationship and contain specific language reaffirming the at-will status of employees

Disclaimers

Cabaness v. Thomas, 2010 UT 23, 2323 P.3d 486

- City's Employee Manual contained multiple provisions protecting employees against workplace harassment
- Cabaness brought breach of contract and wrongful termination claims
- Cabaness alleged the handbook created an implied contract requiring the employer to protect him from harassment from his supervisors
- The Employee Manual contained a disclaimer stating: "No contract exists between [the city] and its employees with respect to salary, salary ranges, movement within salary ranges, or employee benefits."

Cabaness v. Thomas

- The Utah Supreme Court found the disclaimer was limited
- Disclaimer did not contain broad and conspicuous language
- The disclaimer only disclaims contractual liability “with respect to” a few specifically identified items
- The Utah Supreme Court determined that the employer “intended to create a contract with its employees with respect to the items in the Employee Manual that are not specifically listed in the disclaimer”

At-Will Language & Disclaimers

Tomlinson v. NCR Corp., 2013 UT App 26, 296 P.3d 760

- Shortly after his termination, Tomlinson filed a complaint for wrongful discharge and breach of covenant of good faith and fair dealing
- NCR argued that Tomlinson was an at-will employee and could be terminated at any time
- NCR brought a motion for summary judgment which was granted by the district court.

Tomlinson v. NCR Corp.

- No general disclaimer or an at-will statement in the introduction
- Two disclaimers:
 - “Policies *may* provide for varying degrees of flexibility depending upon the specific linkage to company plans and objectives. If flexibility is not explicitly indicated in a policy, it is required that the policy be executed as defined.”
 - Regarding misconduct and performance: “These guidelines are not intended to be contractual in nature, nor should they be interpreted as strict rules for responses to individual activity. The appropriate response to each unique situation may differ. For example, some circumstances may call for immediate action, either in the way of written warning or termination, depending upon the frequency or the severity of the offense.”
- Only the policies regarding the tactical workforce and part-time employees contained at-will statements

Tomlinson v. NCR Corp.

- NCR's limitation of its at-will statement to tactical employees and a subset of core employees raises a reasonable inference that NCR intended to terminate full-time, core employees only for cause
- While NCR may be free to deviate from the discipline policy, it does not negate the inference that full-time, core employees must be terminated for cause
- This matter is now on appeal to the Utah Supreme Court

Disclaimers

Johnson v. City of Murray, 909 F.Supp.2d 1265 (D.Utah 2012)

- The City’s Handbook stated “This Handbook is provided to inform and acquaint employees with the City's policies, procedures, and practices. Neither this Handbook, employment with the City, nor the maintenance of supervisory or other policies or procedures shall be construed as constituting a promise from or contract of any kind with the City, either express or implied, regarding any of the matters addressed in any such handbook or policies.”
- Johnson signed a disclaimer stating “I understand that this employment application and any other City documents are not contracts of employment and that any oral or written statements to the contrary are hereby expressly disavowed and should not be relied upon by any prospective or existing employee.”
- The court found the disclaimers were not limited and therefore did not create an implied contract

Broad Disclaimers

Williams v. FedEx Corporate Services, 2013 WL 4500431 (D.Utah 2013)

- FedEx’s handbook said “The policies and procedures contained herein are intended solely as a guide for management and employees during employment. It is not a contract of employment, and no such contract may be implied from its provisions. Nothing contained within these policies and procedures shall be construed to abrogate the employment agreement signed upon application for employment preserving the Company's and the employee's right to terminate this relationship at the will of either party.”
- The court did not find an implied contract because the disclaimer (1) stated it was meant for a guide, (2) specifically stated it is not a contract, and (3) specifically stated that no such contract may be implied from its provisions

Employee Discipline and Investigations

- **Documentation**

- **Most effective tool for managing personnel issues and reducing legal risks.**
 - Improves performance – better than oral warnings
 - Employee less likely to feel that he/she was treated unfairly
- **Provides powerful evidence that employer acted reasonably and for a permitted reason.**
 - Juries want to see documentation



Employee Discipline and Investigations

- **Employee Disciplinary Memos**
 - **Contemporaneous**
 - **Be accurate, factual and complete**
 - **Use plain language**
 - **Provide remedial measures for the employee**
 - **Remember you are preparing for a jury**
 - **Employee acknowledgement**



Employee Discipline and Investigations

- **Investigations**
 - **Determine who will be the investigator**
 - **Gather policies and evidence**
 - **Be thorough, open-minded, fair and prompt**
 - **Interviews**
 - **Do not promise confidentiality**
 - **Share anti-retaliation policy**
 - **Take notes**
 - **Consider including additional employer representative**
 - **Investigation Report**
 - **Follow up Memoranda**

Non-Competition Agreements

Four types of covenants:

- Non-compete
- Non-disclosure
- Non-solicitation
- Anti-raiding provisions



Non-Competition Agreements

- **General Rule**

In order to be enforceable, a covenant not to compete must protect a *legitimate interest* of the employer, be ancillary to a *valid contract*, be *reasonable* in scope, and not produce an *undue hardship* on the former employee.

Legitimate Interests

- Trade secrets
- Confidential information
- Customer lists and relationships
- Goodwill
- Tortious Interference
- Special training and skills



Issues In Enforcement

Reasonableness

- **Varies widely by state**
- **Typically requires geographic and time restrictions**
- **Some state statutes require specific terms in the agreement, i.e. duration, the particular interest being protected, specific geographic areas, activity prohibited**

Issues In Enforcement

- **Judicial modification**
 - **Blue Pencil Rule**
 - **Unreasonable terms may be modified only if clearly severable**
 - **Reasonable modifications**
 - **Court will enforce covenant to the extent it is reasonable and will modify unreasonable provisions**
 - **Other common requirements**
 - **Must be in writing**
 - **Must contain statutory requirements**
 - **No judicial modification in some states**



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