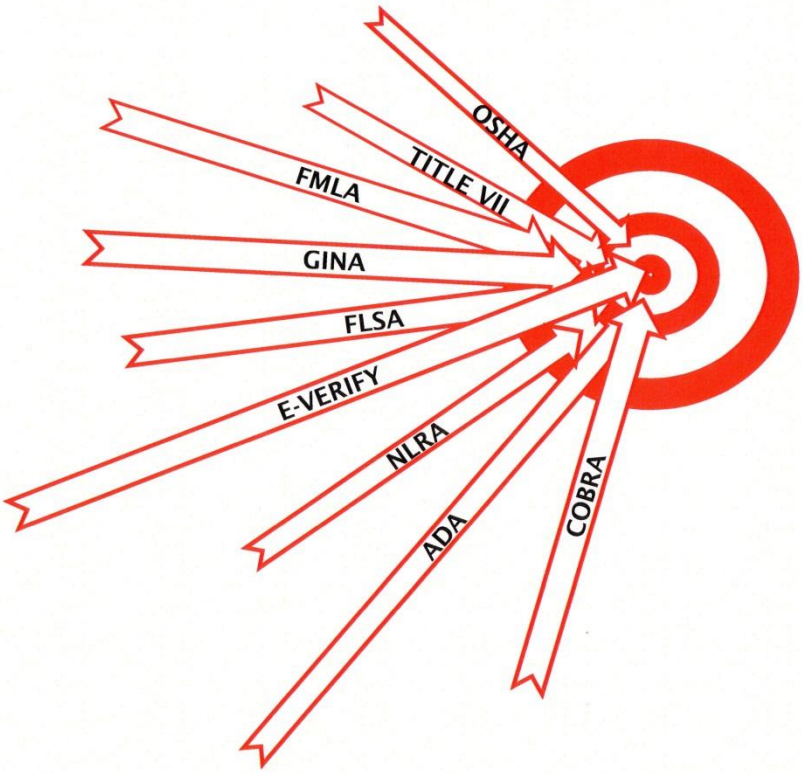

Is Your Organization A Target?

SUPPLEMENT to the
HR & EMPLOYMENT LAW
COMPLIANCE GUIDE
for Arizona Employers

revised: DECEMBER 2015

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IMPORTANT NOTICE – PLEASE READ

The information and data provided and discussed in this document are designed to be accurate and informative regarding human resource (HR) policies and practices appropriate for meeting the compliance requirements of federal and state (AZ) laws and regulations. The compliance requirements of many, but not all, federal and state (AZ) laws are identified.

NOTE: This document is not intended to and does not provide a complete or full description, discussion, or analysis of any law, topic, or issue included herein.

Information and data in this document has been compiled from federal and state (AZ) employment laws and regulations, court decisions, and established HR management policies and practices, but should not be construed or relied upon as legal advice on specific facts.

Information and data in this document has neither the effect of law or regulation, nor constitutes the rendering of legal counsel by Human Resource Partners, LLC (dba HRHelp) or John Perkins.

Business owners or managers and other interested parties should seek the advice of a competent employment law attorney concerning specific legal questions or specific situations to ensure that all legal obligations are addressed or fulfilled.

It is strongly recommended that every business bring its HR policies and practices into compliance with all the applicable federal, state, and local laws with which that business or organization is required to comply.

PART 9: EXHIBITS

A: Why Small and Medium-Sized Organizations *Really Do* Need An HR Function

AN EXCERPT, with comments added by HRHelp

SHRM Information Center

SHRM WHITE PAPER

WHY SMALL AND MEDIUM-SIZED ORGANIZATIONS *REALLY DO* NEED AN HR FUNCTION

By Patricia A. Mathews and Phyllis G. Hartman, SPHR

Introduction

Small (20-100 employees) to medium-sized (101-500 employees) organizations do need an HR function. Statistics related to the effective management and continued growth of an organization support this need. Without professional HR advice from an internal HR professional or an external HR consultant, companies often make costly mistakes that could have been prevented.

Even when legal issues don't arise, fairly common employment-related mistakes result in costs to the organization in terms of lost productivity, efficiency, effectiveness, sales and revenues, and decreased profitability.

COMMON HR MISTAKES SMALLER ORGANIZATIONS MAKE

- ***Lack of Knowledge of Employment Laws***

Companies with as few as 14 employees are subject to 15 federal labor laws, not to mention state and local laws. An organization that grows to 50 employees can be covered by 20 federal labor laws! Small employers may believe that most laws only pertain to larger organizations, or they may simply be unaware of current employment law requirements since no one in the organization is actually responsible for assuring legal compliance. For example, many owners of small organizations are not aware of the requirement that I-9 forms be completed by all new hires.

Employment laws are often difficult to understand or interpret; they are subject to frequent change. They can vary from state to state, and new laws appear on a regular basis. Even the best-trained HR professionals are challenged to keep up with changes in employment law.

- ***Failure to Understand Employment-at-Will***

Many believe that they can fire "at will." After all, it's their business and they have control over who does and who doesn't work there. Unfortunately, case law doesn't necessarily work in their favor, and the Equal Employment Opportunity Commission (EEOC) may call to advise them that an ex-employee has filed a complaint alleging wrongful termination based on case laws that override employment-at-will. [**The federal Civil Rights Act, the AZ Civil Rights Act, the Americans With Disabilities Act (ADA), the Age**

Discrimination in Employment Act (ADEA), the Family and Medical Leave Act (FMLA), and most other employment laws override employment at-will.]

To make matters worse, smaller organizations typically do not have the documentation needed to support a termination decision, fail to have a documented termination process in place or fail to document performance or behavior feedback showing that an employee was given an opportunity to improve.

- ***Designating the Initial Days of Employment as a Probationary Period***

Some still use the term "probationary period" for the initial 30, 90 or more days of employment. This can cause problems when that "really good" new hire turns out to be not so great and the company terminates him or her. By identifying the first 90 days as a probationary period, the company has indicated that the new hire is officially "off probation" as of day 91. The business now must show cause in order to terminate. **["Introductory Period", "Get Acquainted Period", or other such titles still mean "Probationary Period."**]

Since small companies may not be adept at evaluating new hires, they delay taking termination action until day 88, even though they knew the new hire was not working out by day 45. This can create legal liability for them if a complaint of wrongful termination is filed. New hires need to know what is expected and must be kept under observation so that they receive timely feedback on how well they are fulfilling these expectations.

> *Example*: A small manufacturing company had a large production order to complete for a major client, and it delayed terminating five unacceptable new hires. Though the company believed it needed the "warm bodies" from a staffing perspective, the poor performers were actually *costing it money* in terms of poor customer service and losses in product quality. They were also having a negative impact on the morale of the employees who were "carrying" the new hires.

- ***Using Another Organization's Employee Handbook***

Writing an employee handbook is a difficult task, and paying to have one written creates additional cost. Therefore, when small business owners identify the need to have written rules and expectations or when supervisors need a tool to "back them up" when enforcing policies and procedures, they may "borrow" an employee handbook used by another organization. The "borrowed" handbook is then revised and distributed.

The small business owner may borrow from an organization that is in a very different business, or is significantly larger, or is subject to unique regulatory controls. Perhaps the "borrowed" handbook was originally "borrowed" from another organization and may be out of date or not in compliance with current employment law. [**This is something I see quite frequently … "borrowed" handbooks that, at best, do not meet the needs of the organization and, at worst, are not in compliance with the laws with which the organization must comply.**]

Sometimes policies and procedures may be difficult to administer, so supervisors either ignore or administer them on a haphazard basis. And employees, perceiving inequitable treatment, may take legal action or even undertake union organizing efforts.

Often there are frequent policy revisions or changes, causing confusion among employees. Employees may not be required to sign an acknowledgment and receipt for the handbook. One former employee sued his small financial services organization for wrongful termination citing that he never received a copy of the current employee handbook or the revised policy upon which his termination was based.

- ***Poor Documentation Practices***

Effective documentation is critical to the employment process. Many employment activities can be the basis for a discrimination charge – from when an employee is interviewed and hired to when the employee is terminated. To be effective, documentation must be accurate, consistent, complete and evaluated.

Lack of documentation, followed by incomplete or inconsistent documentation and poorly worded documentation, can create liability for the organization. [**One client, in order to obtain/collect the documentation required to refute a claim of age discrimination (since there were only 5 pieces of paper in the personnel file of a 23 year employee) paid $14,000 in consulting fees. They "won" the claim; but, doing so was not cost-effective.**]If there is no formal process for documentation, personnel files may contain information on employee behavior or performance issues that have never been shared with the affected employees. Files may contain only commendation memos or recognition for achievements. Supervisors may write notes about poor performance or behavior and, instead of sharing the information with the struggling employee, keep the notes in a private file to use as grounds for termination.

> *Example*: A small printing services company wanted to terminate an employee with two years of service for some abrasive behavior issues. The supervisor had occasionally mentioned some of the issues to the employee, but incidents had not been documented. The employee's personnel file had two memos commending her for her hard work on some specific projects. Although the supervisor wanted to terminate her quickly, the company was advised to place the employee on a "performance improvement plan" and delay termination until the proper documentation was prepared and the employee was given an opportunity to correct her behavior.

B: Employee or Independent Contractor Relationship?

IRS Changes Independent Contractor Rules

Whether someone who works for you is an employee or an independent contractor is an important question. The answer determines your liability to pay and withhold federal income tax, social security and Medicare taxes, and federal unemployment tax.

In general, someone who performs services for you is your employee if you can control what will be done and how it will be done.

The courts have considered many facts in deciding whether a worker is an independent contractor or an employee. These facts fall into three main categories:

Behavioral control

Facts that show whether the business has a right to direct and control how the worker does the task for which the worker is hired include the type and degree of—

- ***Instructions the business gives the worker***. An employee is generally subject to the business' instructions about when, where, and how to work. All of the following are examples of types of instructions about how to do work:
  - When and where to do the work
  - What tools or equipment to use
  - What workers to hire or to assist with the work
  - Where to purchase supplies and services
  - What work must be performed by a specified individual
  - What order or sequence to follow

The amount of instruction needed varies among different jobs. Even if no instructions are given, sufficient behavioral control may exist if the employer has the right to control how the work results are achieved. A business may lack the knowledge to instruct some highly specialized professionals; in other cases, the task may require little or no instruction. The key consideration is whether the business has retained the right to control the details of a worker's performance or instead has given up that right.

- ***Training the business gives the worker.*** An employee may be trained to perform services in a particular manner. Independent contractors ordinarily use their own methods.

Financial control

Facts that show whether the business has a right to control the business aspects of the worker's job include:

- ***The extent to which the worker has unreimbursed business expenses.*** Independent contractors are more likely to have unreimbursed expenses than are employees. Fixed ongoing costs that are incurred regardless of whether work is currently being performed are especially important. However, employees may also incur unreimbursed expenses in connection with the services they perform for their business.

- ***The extent of the worker's investment.*** An employee usually has no investment in the work other than his or her own time. An independent contractor often has a significant investment in the facilities he or she uses in performing services for someone else. However, a significant investment is not necessary for independent contractor status.

- ***The extent to which the worker makes services available to the relevant market.*** An independent contractor is generally free to seek out business opportunities. Independent contractors often advertise, maintain a visible business location, and are available to work in the relevant market.

- ***How the business pays the worker.*** An employee is generally guaranteed a regular wage amount for an hourly, weekly, or other period of time. This usually indicates that a worker is an employee, even when the wage or salary is supplemented by a commission. An independent contractor is usually paid by a flat fee for the job. However, it is common in some professions, such as law, to pay independent contractors hourly.
- ***The extent to which the worker can realize a profit or loss.*** Since an employer usually provides employees a workplace, tools, materials, equipment, and supplies needed for the work, and generally pays the costs of doing business, employees do not have an opportunity to make a profit or loss. An independent contractor can make a profit or loss.

Type of relationship

Facts that show the parties' type of relationship include:

- ***Written contracts describing the relationship the parties intended to create.*** This is probably the least important of the criteria, since what really matters is the nature of the underlying work relationship, not what the parties choose to call it. However, in close cases, the written contract can make a difference.

- ***Whether the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay.*** The power to grant benefits carries with it the power to take them away, which is a power generally exercised by employers over employees. A true independent contractor will finance his or her own benefits out of the overall profits of the enterprise.

- ***The permanency of the relationship.*** If the company engages a worker with the expectation that the relationship will continue indefinitely, rather than for a specific project or period, this is generally considered evidence that the intent was to create an employer-employee relationship.
- ***The extent to which services performed by the worker are a key aspect of the regular business of the company.*** If a worker provides services that are a key aspect of the company's regular business activity, it is more likely that the company will have the right to direct and control his or her activities. For example, if a law firm hires an attorney, it is likely that it will present the attorney's work as its own and would have the right to control or direct that work. This would indicate an employer-employee relationship.

For a worker who is considered your employee, you are responsible for:

- Withholding Federal income tax,
- Withholding and paying the employer social security and Medicare tax,
- Paying Federal unemployment tax (FUTA)
- Issuing Form W-2, Wage and Tax Statement, annually,
- Reporting wages on Form 941, Employer's Quarterly Federal Tax Return.

For a worker who is considered an independent contractor, you may be responsible for issuing Form 1099-MISC, ***Miscellaneous Income***, to report compensation paid.

The status of certain workers is specifically determined by law; these workers are known as **statutory employees** and **statutory non-employees.** See Publication 15, (***Circular E) Employers Tax Guide***, for more information. That document is available at: http://www.irs.gov/pub/irs-pdf/p15.pdf

If you would like for the IRS to determine whether or not a worker is considered an employee, please submit Form SS-8, ***Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding***. The form is available at: http://www.irs.gov/pub/irs-pdf/fss8.pdf

C: Eight Reasons Small Businesses Should Use Non-Compete Agreements

Source: the law firm of Fisher & Philips LLP

Small business owners understandably may be reluctant to use non-compete agreements for many reasons. The desire to divert precious resources to paying an attorney to prepare a contract is hardly appealing. Similarly, businesses may feel that such agreements are unnecessary because they have few employees. But as Ben Franklin once wisely advised, an ounce of prevention is worth a pound of cure.

The term "non-compete agreement" technically refers to a contract that preclude a person from engaging in certain acts of competition for a prescribed period of time within a prescribed geographic area. In common usage, however, the term often is used more broadly to refer to any contract by which someone has any type of competitive restrictions, including non-solicit, non-recruit, non-disclosure and confidentiality agreements. Simply put, non-competes come in all shapes and sizes, but the reasons small business owners should use one or more of these covenants are equally diverse.

1. **Enhance the value of your company if you think you may sell someday** – If you think someday you may wish to sell your business, it is important to protect the value of your company by requiring employees to sign restrictive covenants. When someone purchases a business, they want to know that they will get what they pay for. If they believe key employees with access to customers and relationships may not stay on board after a merger or acquisition, they may balk at the price or even walk away. You may think that you can always sign employees up to a non-compete later, but such afterthought covenants present their own challenges. You can protect the value of your company and its assets by using appropriately tailored non-compete agreements.

2. **Qualify for trade secret protection** – Generally speaking, any valuable business information that you try to keep secret from competitors is subject to trade secret protection. But to state the obvious, to be a trade secret, the information must in fact be secret. When determining whether information should be entitled to trade secret protection, courts look at many factors

including the extent to which the owner of the secret took reasonable steps to preserve its secrecy. A widely recognized precaution includes requiring employees to agree not to use or disclose confidential information. In addition, if customer information is a trade secret, a covenant not to solicit customers (i.e., a non-solicitation agreement) may well be appropriate.

3. **Protect your customer relationships** –Small businesses tend to place client relationships in the hands of fewer employees. Consequently, when an employee resigns, the client relationship may walk out the door with the employee. Just as importantly, you may need time to rebuild your clients' confidence and to show that your other employees are equally capable of serving their interests. Clients are the lifeblood of any business; but this is particularly true for small businesses. A small business simply cannot afford to lose its clients.

4. **Enhance client confidence** – Would you do business with a company if you felt your personal financial information was at risk? Of course not. Your clients feel the same way. If your clients entrust their personal or business information to you, they want to know that your employees are not going to take it when they leave. Requiring employees to sign restrictions on their use and disclosure of confidential information is a good way to make your clients confident that their data is safe in your hands.

5. **Protect your investment in training** – Training employees is a worthwhile expense, and the training resources you provide may even help you to attract talented employees. But steps should be taken to prevent your competitors from swooping in to hire your employees after you invest the time and expense to train them. For this reason, courts commonly recognize that employers have a legitimate interest in protecting their investments in specialized training.

6. **Clarify expectations with employees** – Do your employees realize that you expect them to leave behind the information you entrusted to them if they decide to move on to a new job? Do they understand that the relationships you paid them to cultivate and maintain belong to you? The best time to clarify expectations with your employees is before a dispute arises. Doing so may influence a departing employee's conduct and provide you with the leverage you need to protect your company.

7. **Shape ground rules for potential litigation** – Litigation against departing employees can be expensive, but when your business is on the line, you may have little choice but to protect your interests through legal action. Although no contract can eliminate the expense associated with litigation, careful forethought can help to minimize your costs. Restrictive covenants are a perfect opportunity to reach agreement with employees about some of the ground rules that will apply if litigation becomes necessary, such as whether you are entitled to recover attorneys' fees and costs if you prevail, whether lawsuits should be filed in a local forum, and whether you are entitled to certain remedies such as an injunction or liquidated damages.

8. **Deter competitors from hiring your employees** – Deterring competitors from hiring your employees is not a sufficient fact in and of itself to warrant the imposition of a restrictive covenant. In fact, courts will not enforce restrictive covenants if they serve no purpose other than to restrict competition. But assuming you have a legitimate purpose for requiring employees to sign such agreements – such as a need to protect confidential information or customer relationships – sending a message to your competitors that you are prepared to protect these interests is a nice side effect.

In short, there are advantages to using non-compete agreements that may not be apparent until it is too late. Small business owners should think about protecting their business in advance.

D: The Americans With Disabilities Act Amendments Act (ADAAA)

New ADAAA regs: the untold story!!!

By Robin Shea, a partner with Constangy, Brooks & Smith, LLP.

As most people in the Human Resources and employment-law worlds are aware, the U.S. Equal Employment Opportunity Commission recently issued its final rule interpreting the Americans with Disabilities Act Amendments Act.

The ADAAA, which took effect in January 2009, was enacted toward the end of the administration of George W. Bush, with the support of disability rights advocates as well as the U.S. Chamber of Commerce and the Society for Human Resources Management (both of whom were trying to head off a version that would have been worse for employers). The ADAAA dramatically expands the population that is considered "disabled" within the meaning of the ADA but does not change the ADA's provisions on, for example, reasonable accommodation, medical examinations, or confidentiality.

There has been a lot of commentary about the new regulations, but here are some points that I have not seen anywhere else:

1. The 40-or-so pages of dense preamble and regulations, and the EEOC's "Interpretive Guidance," can be summarized in one sentence, as follows: **It is now unlawful to discriminate, not just against individuals with "disabilities," but against *anyone* because of a medical condition, whether actual, past, or perceived.** (Please note that "medical condition" also includes mental/psychiatric conditions and learning disabilities.) The only exceptions might be, for example, a person suffering from the common cold or the flu, or someone who wears eyeglasses or contact lenses. *But not necessarily.* The new definition of "disabilities" in the ADAAA is as loosey-goosey as the definition of "serious health condition" in the Family and Medical Leave Act.

2. Individuals who are "regarded as" being only *impaired* are protected. The only perceived "impairments" that don't count are those that are *both* transitory (duration of less than six months) *and* minor. Because it's going to be so easy to qualify, the EEOC is actively encouraging individuals to always sue under the "regarded as" prong as long as they aren't challenging an employer's failure to provide a reasonable accommodation. (For obvious reasons, reasonable accommodations do not have to be provided to individuals who are only "regarded as" being impaired, so an individual seeking a reasonable accommodation would have to establish either an actual "disability" or a record of a "disability.")

3. Thanks (but no thanks) to this law, I expect to see some class action lawsuits alleging ADAAA violations in connection with post-offer medical examinations and terminations at the end of extended medical leaves of absence. Under the prior version of the ADA, these cases were normally unsuccessful as class actions because an individualized analysis was required to determine who could be a member of the class (that is, who was "disabled"). But now that the determination of who is "disabled" is virtually automatic, disability discrimination cases will be more susceptible of class treatment.

4. Most ADA case law on who is "disabled" is no good any longer. The ADAAA explicitly overruled some excellent Supreme Court decisions, including *Sutton v. United Air Lines* (1999) and *Williams v. Toyota Manufacturing of Kentucky* (2002). However, our court system is slow, and so we are still seeing ADA decisions that take a restrictive view of who is "disabled." This is nothing to be excited about, unfortunately. Be sure to read the fine print: If the facts alleged in the case occurred before January 1, 2009, then the court is applying the old ADA, which really was a pretty good and reasonable law. (On the other hand, if you see a pro-employer decision based on facts that occurred after January 1, 2009, then you may have reason to open a bottle of champagne.)

So, what should an employer do to comply with the ADAAA?

*** *Always* assume that *everyone* has an ADAAA "disability."** You will be right 99.9 percent of the time, and the rest of the time you'll be erring on the right side.

*** Brush up, if you need to, on your legal obligations concerning reasonable accommodations.** You will have to consider reasonable accommodations in many more cases than you did in the past.

*** If you think a "medical condition" disqualifies a person from performing the job, go through the full-blown ADA/reasonable accommodation analysis.** If you think you will be unable to accommodate, consult with counsel before making any irreversible decisions.

*** If you require post-offer medical screening, review what you are doing and make sure that your medical department (or outside physician) is not automatically rejecting everyone who has certain conditions.** All medical rejection decisions should be considered "preliminary" until they have been reviewed and approved by someone in Human Resources and/or a lawyer. (This may require an employee or applicant to sign a HIPAA authorization that will allow the medical department to share relevant information with HR/Legal.)

***Review your medical leave/termination policies and practices, and be especially on the lookout for any provisions that seem to call for "automatic" termination without an individualized assessment or consideration of reasonable accommodation options.**

*** Make sure your managers and supervisors know the laws.** Be sure that your front-line supervisors and other managers know at least that the ADA has been amended and that it will cover significantly more people than before.

E: Extended Unpaid Leave of Absence as "reasonable accommodation" under the ADAAA

The question, "*When can an employer discharge an employee who's FMLA leave has expired?*" is not as simple or straight-forward as you may think or wish.

Below you will find an article from the law firm of VedderPrice; **HRHelp** has hi-lited some portions. Following the article is a ***QUESTION & ANSWER*** section based on some of the content from the article. Craig O'Loughlin, of the law firm Quarles & Brady LLP, has graciously answered the questions submitted to him.

As you will read, if an employee is not released to return to work at the end of FMLA leave, the employer should not summarily discharge that employee. Providing the employee with an extended unpaid leave may be needed to fulfill the requirements of the Americans With Disabilities Act (ADA) and to protect the employer from a claim of discrimination based on the employee's disability.

The only things known for certain are that:

- a "flexible, interactive discussion" (terminology in the ADA) should be conducted before any decision is made to discharge an employee in such circumstances; and,
- every set of circumstances is unique and "fact specific"; there cannot be a "one-size-fits-all" approach without creating risk.

Recent EEOC Lawsuits Reinforce Need for Flexible Extended Leave Policies

From the law firm of VedderPrice

When the ADA Amendments Act went into effect in January of 2009, prudent employers shifted their focus from questioning whether an employee was truly disabled, and thus covered by the ADA, to responding to accommodation requests and engaging in the interactive process.

A recent spate of EEOC-initiated lawsuits involving "extended leave of absence policies" serves as a stark reminder that those employers that fail to routinely explore reasonable accommodations before terminating disabled employees, even employees who have been off work for more than a year, do so at their own peril.

The outer limits are easy to define. Even the EEOC acknowledges that indefinite unpaid leave is not a reasonable accommodation. Beyond that absolute, however, there are no clear-cut answers as to how far employers are expected to go in accommodating employees who are unable to work.

Providing additional unpaid leave beyond the 12 weeks required by the FMLA will, in most cases, be viewed as a reasonable accommodation that employers must grant. Indeed, the EEOC has taken the position that an employer must provide additional leave at the expiration of the FMLA-covered period as a reasonable accommodation unless:

i. there is another effective accommodation that would allow the disabled employee to return to work and perform the essential functions of the employee's position, or

ii. granting additional unpaid leave would create an undue hardship for the employer.

Unfortunately, many employers have, in an effort to manage their way through the complex web of state and federal leave laws, workers' compensation statutes and short-term disability benefit programs, promulgated absence control policies with automatic termination thresholds, often at the one-year anniversary.

Seeking to put an end to, or at least significantly curtail, this approach, the EEOC is issuing probable cause findings and filing lawsuits against employers around the country. Spencer H. Lewis, Jr., director of the EEOC's New York District Office, announcing a lawsuit against the Princeton Healthcare System, explained that "too many companies discriminate against persons with disabilities by strictly applying blanket leave policies."

Chicago District Office Regional Attorney John Hendrickson, announcing a $6.2 million settlement with Sears, warned: "[T]he era of employers being able to inflexibly and universally apply a leave limits policy without seriously considering the reasonable accommodation requirements of the ADA is over. . . . Just as it is a truism that never having to come to work is manifestly not a reasonable accommodation, it is also true that inflexible leave policies which ignore reasonable accommodations making it possible to get employees back on the job cannot survive under federal law."

The common thread running throughout these class actions is an allegation that the employer's extended leave of absence policies were unlawfully inflexible and prevented engagement in the interactive process required by the ADA.

Also noteworthy is the fact that the EEOC has recently sought nationwide discovery regarding the employer's extended leave of absence policies in a number of cases initially brought on behalf of individuals, as opposed to a class of employees.

Employers are well-advised to treat seriously any claim involving such a policy, lest they be caught unprepared, devoting minimal resources to what is perceived as an insignificant single party claim, only to end up facing a pattern or practice class action lawsuit by the EEOC.

Reducing Risk

Proactive employers should consider the following options:

- Amend your leave of absence policies that call for automatic termination following a specified leave term; instead it should provide that termination will only occur if no reasonable accommodation is available to assist the employee in returning to work.
- Eliminate any policy or practice requiring that the employee be 100% released for full duty before allowing the employee to return to work.
- Assign a dedicated HR representative, or team of HR representatives, trained on ADA issues and reasonable accommodations, to handle leave of absence returns and the associated return to work and accommodation process.
- Consider extending an unpaid leave of absence for a reasonable period if the employee represents he or she will soon be able to return to work. Other accommodation options that should be considered include allowing the employee to return to modified duty, part-time work, reassignment to a different position (with or without a reasonable accommodation) and assistive devices.
- Notify an employee that he or she is approaching the end of the leave period and invite the employee to engage in the interactive process to discuss whether reasonable accommodations are available to assist the employee in returning. Importantly, employers should document every communication with the employee during the interactive process, including every offer of a reasonable accommodation and every response from the employee.

■ No termination decision should be made unless the employer has a documented record of attempting to engage the employee in an interactive process to explore reasonable accommodations, and has fairly exhausted all reasonable efforts to assist the employee in returning to work.

QUESTIONS & ANSWERS

NOTE: the answers below have been provided by Craig J. O'Loughlin, of the law firm of Quarles & Brady LLP

Even the EEOC acknowledges that indefinite unpaid leave is not a reasonable accommodation. Beyond that absolute, however, there are no clear-cut answers as to how far employers are expected to go in accommodating employees who are unable to work.

Question: Is it true that all such situations are "fact-specific" and that no specific length of time (an additional 4 or 6 or 8 or 12 weeks) will be appropriate for or should be applied in all such situations?

Answer: Yes, it is true that each request for additional time off has to be considered on its own as to whether it creates an undue hardship on the employer. There is no specific length of time that should be uniformly applied. Employers that determine that a specific request for additional time off creates an undue hardship should be prepared to prove through documentation not only evidence of the undue hardship, but also that the employer interactively engaged the employee in reaching that determination.

The common thread running throughout these class actions is an allegation that the employer's extended leave of absence policies were unlawfully inflexible and prevented engagement in the interactive process required by the ADA.

Question: So if there is a "flexible, interactive discussion", as defined in the ADA, with an employee at or near the time his/her FMLA leave is expiring, is that the "first prong" of an affirmative defense? Is finding that an accommodation either cannot be made or is unreasonable the "second prong" of an affirmative defense?

Answer: The first line of defense is having an ADA policy that specifies that a reasonable accommodation will be considered at any time the employee requests, including during or at the conclusion of FMLA leave. Prior to an employee's expected return, a proactive employer will send a letter inviting the employee to let the employer know of any accommodations the employee may need upon returning to work, and to request that the employee inform the employer as soon as possible if the employee will not be able to return to work on the anticipated date. This begins the interactive process.

A finding by the employer that a requested accommodation creates an undue hardship should only occur after:

- the interactive process (potentially including several back and forth letters with the employee) is well-documented,
- the employer has had the need for the accommodation medically certified,
- the employer has suggested alternative accommodations, and
- the employer can prove objectively (through actual numbers or hard facts - not speculation) that in the given case, no reasonable accommodation is available.

Question: So any employee who is out on a medical leave of absence (under FMLA or the company's own leave policy) is considered to be a person with a disability under the ADA if he/she cannot obtain a release to work statement from his/her health care provider? AND,

The employer, in order to avoid an ADA claim, should conduct a "flexible, interactive" discussion with said employee?

Answer: No, a person is disabled under the ADA only if he/she meets the specific definition of disability under that statute. While an employee's inability to get cleared to return to work may show that the severity of the impairment is great enough to be considered a disability, the impairment itself must be analyzed under the ADA's definitions.

In any case where the employee is unable to get return-to-work certification, the employer must engage the employee (and potentially the employee's medical care provider) in a discussion as to whether there is any accommodation the employer could reasonably provide to bring the employee back to work and how long it may be before the employee would be able to return to work.

Situation: At or near to the end of the employee's FMLA leave, a "***Return to Work Certification***" (RWC) form is completed by the employee's health care provider and the form is marked "***NO; the employee is not released to return to work***", so the employee is granted additional unpaid leave of absence.

Question: In the situation above, how long does the employer have to 'make due' or use a temp before replacing the person who has used all of his/her FMLA time and who has been given an extended unpaid (non-FMLA leave) leave of absence as an ADA accommodation because he/she has not been released to return to work by his/her health care provider?

Answer: If an RWC is marked "***No***" as to the employee being able to return to work, the employer must work diligently to get an anticipated date from the employee or health care provider as to when the employee will be released to work.

Without a return date, an employer will be unable to determine whether extended leave is reasonable.

If the employee and health care provider refuse to provide a return date, the employer should send a letter to both informing them that without a return date, the employer is unable to make a determination as to whether the leave is reasonable and by failing to provide a return date, or even an estimation of one, the employee is failing to participate in the interactive process which could result in the employee losing the protection of the ADA and risking discharge from employment.

Employers should also watch out for the chronic-extender employee who simply provides a date of return, and then repeatedly extends that return date. Just as indefinite leave does not have to be accommodated under the ADA, an employee who continually extends may also be outside the coverage of the ADA.

F: Drugs/Substances/Alcohol Testing – the Arizona Statutes

Private sector employers in Arizona are able to establish a drugs/substances/alcohol testing policy as part of their company human resource (HR) policies and practices OR as part of a collective bargaining agreement.

Random testing, of certain groups/classes of employees (safety-sensitive, security, or other interests) is mandated by certain state and/or federal regulations and, is legally defensible when required by regulation. Random testing that was not mandated was more difficult to defend, until the Arizona Revised Statutes (A.R.S.) were revised in 1994.

Drugs/substances/alcohol testing based on reasonable suspicion or cause (on-the-job injury, driving accident, performance/behavior consistent with users or abusers) and drugs/substances/alcohol testing of applicants is allowed in the A.R.S.

NOTE: until further information about the Arizona Medical Marijuana law is available, employers that have a drugs/substances/alcohol testing program that meets A.R.S. Title 23, Article 14 should continue following the actions, protocols, and procedures in their testing program.

A summary of the A.R.S. with regard to drugs/substances/alcohol testing of applicants and/or employees begins on the next page.

SUMMARY:
A.R.S. Title 23, Chapter 2, Article 14
Regarding Drug Testing of Employee and Applicants

- Only private sector employers are covered by the Act.
- Testing may be conducted in order to investigate individual employee impairment; to investigate workplace accidents; to maintain the safety of those in or outside the workplace; to maintain productivity, quality, and/or security; or, when there is reasonable suspicion that an employee's performance or the work environment are affected by drugs/substances/alcohol.
- Random testing of an employee or of groups of employees is allowed.
- Urine, blood, breath, saliva, hair, or other bodily substances are considered as samples (specimens).
- Employers may request samples from employees or applicants for the purpose of testing the sample for drugs and may request the person to provide reliable identification at the time the sample is collected.
- Employers may request samples from employees for the purpose of testing the sample for alcohol and may request the person to provide reliable identification at the time the sample is collected.
- Testing must normally be done immediately before, during, or immediately following the scheduled/ regular work period. For non-exempt employees, the time needed to test is considered time worked.
- The cost of testing employees must be paid by the employer. The cost of testing applicants can be paid in whole by the employer, in whole by the applicant, or shared by both parties.
- Employers must pay the transportation costs to a testing site if employees are required to travel away from their normal work site for testing.
- When samples are collected, they must be properly labeled. The employee or applicant must have the opportunity to identify any prescription drugs/substances/alcohol currently being used.

[NOTE: because of the Americans With Disabilities Act, such disclosure should only be made to a Medical Review Officer (MRO) and only when an employee or applicant has tested non-negative (positive) for prohibited drugs/substances and/or alcohol.]

- The collection, transportation, and storage of the sample must be done to not result in contamination, adulteration, or misidentification. And, the analysis must follow scientifically accepted analytical methods.
- Testing must be done at a lab/facility approved or certified by the U.S. Dept. of Health and Human Services, the College of American Pathologists, or the AZ Dept. of Health Services.
- An initial positive test of a sample from an employee must be retested and confirmed using a chromatographic methodology.
- To have protection under the AZ Statute, the employer must have a **WRITTEN** drug testing policy and must distribute a copy of same to each employee (or may make the policy available in the same manner as other human resource policies, such as via the employee handbook or as a posting). In addition, all applicants must be made aware that they must undergo drug testing.
- The **WRITTEN** policy must include the following:
  - * policy statement (prohibition of use of illegal or controlled substances or prescription drugs for which the employee does not have a current prescription);
  - * identification of persons subject to be tested;
  - * circumstances under which testing will be required;
  - * the drugs/substances, including alcohol, prohibited and to be tested for;

* a description of the collection protocols and testing protocols;

* the consequences of refusing to provide a specimen (or providing a specimen that is adulterated or substituted);

* discipline or other employment actions that may be taken based on the testing procedure or test results;

* the employee's right to request a copy of the test results;

* the right of an employee who tests positive to explain why (to a Medical Review Officer (MRO));

and,

* a promise of confidentiality.

- The policy must cover ALL compensated employees, including officers, directors, and supervisors (managers).
- An employer may take adverse employment action (discipline or discharge) against any employee who refuses to provide a specimen (or provides a specimen that is adulterated or substituted) or who tests positive for drugs/substances/alcohol. An employer may take adverse employment action (refuse to hire) an applicant who refuses to supply a specimen (or provides a specimen that is adulterated or substituted) for a drugs/substances/alcohol test or who tests positive for drugs/substances/alcohol (but not alcohol).
- No liability will occur for an employer who establishes a drugs/substances/alcohol testing program, as described above, for:

  * good faith actions based on a positive test result;

  * failure to test or failure to test for a specific substance;

  * failure to detect a specific substance or a medical or mental or emotional or psychological disorder; or,

  * termination or suspension of the testing program.

- All communications received by the employer through the testing program (or in conjunction with the testing program) cannot be disclosed, even in a legal action, unless the proceeding is related to an action by an employer or employee under the statute.
- Confidentiality must be maintained. Exceptions include disclosure to:

  * the person tested or his/her designee;

  * individuals (Medical Review Officer's (MRO's)) authorized by the employer to receive test results or hear the person's explanation of positive results; or,

  * an arbitrator, mediator, court, or governmental agency.

- The tested person has right of access to written test results.
- Compliance with the statute is voluntary. No cause of action if an employer has a testing program not in compliance with the statute; but, a testing program not in compliance does not have the immunity protections offered by the statute.
- "Misconduct" for the purpose of disqualifying an unemployed person from receiving unemployment benefits now includes, "failure to pass, or refusal to take, a drug or alcohol impairment test administered pursuant to the statute".

ACTIONS REQUIRED TO CREATE AND IMPLEMENT A DRUGS/SUBSTANCES/ALCOHOL TESTING PROGRAM

Employers who create drugs/substances/alcohol policies and protocols for the drug testing of employees and applicants which meet legal guidelines **and** who consistently follow the policies and practices established have the best protection from legal challenges.

A written drugs/substances/alcohol testing program should include:

1. a policy statement that identifies the purposes of the program, the drugs/substances, including alcohol, that are prohibited, and definitions of when and where the prohibition against drugs/substances/alcohol use applies;
2. plans for communicating the policy and protocols to all employees prior to the implementation of the policy and for periodically reviewing the policy and protocols with all employees;
3. statements identifying how employees will be selected for testing and how selection, if based on reasonable suspicion, will be confirmed before asking an employee to submit to testing;
4. methods for getting employees selected for testing to a pre-determined location at which the specimen can be collected and plans for having a pre-established document/agreement with the collection agency/ organization regarding the protocols for collecting specimens and transporting the specimens to the selected laboratory;
5. steps for obtaining proper releases from employees to allow specimens to be collected and to allow the results of the lab analysis to be released;
6. protocols with the collection agency/organization regarding "shy bladder" syndrome;
7. protocols with the collection agency/organization **and** with the specimen testing organization for maintaining chain-of-custody of the specimen from collection thru analysis and for storage, if the sample tests positive;
8. protocols for a Medical Review Officer (MRO) to review ALL positive test results with employees to determine whether the positive test result was from a prohibited drugs/substances/alcohol or from a current, valid prescription;
9. steps for reviewing the lab analysis results with the employee who provided the specimen, whether positive or negative for drugs/substances/alcohol;
10. plans for establishing a relationship with an Employee Assistance Program (EAP) concurrent with the implementation of the policy and for offering drugs/substances/alcohol treatment for those who test positive for the first time or for those who voluntarily identify their drugs/substances/alcohol use and ask for treatment;
11. statements identifying the discipline that will be applied to employees who refuse to submit to testing or who fail to complete an EAP or who test positive a second time; and,
12. plans for providing periodic training regarding drugs/substances/alcohol use or abuse for managers and supervisors and for all other employees.

NOTE: A non-negative (positive) test for drugs/substances/alcohol ONLY shows that the person has, or had, the drugs/substances/alcohol in his/her system. **A non-negative (positive) test DOES NOT DEMONSTRATE IMPAIRMENT.**

Therefore, policies based on the employee or applicant not testing positive for drugs/substances/alcohol (whether use is on or off the job) have been upheld in the legal system; policies that state or imply that a positive test is proof of impairment have not been upheld.

NOTE: The drugs/substances that should be prohibited under a drugs/substances/alcohol policy include: illegal drugs/substances, including alcohol; **and**, controlled substances (i.e., alcohol, prescription drugs); **and**, prescription drugs for which a person (employee or applicant) does not have a current, valid prescription.

CAVEAT: Creating drugs/substances/alcohol testing policies and procedures that meet the needs of the business and that meet the compliance requirements of employment laws, such as the ADA, Worker's Compensation laws, and the AZ Drug Testing Statutes, is not recommended as a "do-it-yourself" project for anyone unfamiliar with the laws or with drugs/substances/alcohol testing protocols. If you attempt to create and implement a drugs/substances/alcohol testing program yourself, it is strongly recommended that the policies and protocols reviewed by an attorney or a HR professional who has expertise regarding the Arizona drug testing statutes.

G: Table of Contents for an HR Policy Manual and Employee Handbook

"model/recommended"
Table of Contents
HR Policy Manual and Employee Handbook

NOTE:

Some of the topics/issues listed below will not be applicable to every organization and will not require a policy statement.

Conversely, some organizations may require policy statements for topics/issues not listed below.

E-Verify ***[federal contractors and employers in AZ and certain other states]***
Orientation and Assimilation of New Employees
Employment Classifications/Categories
Personnel Records
Requests to Verify Employment
Notices and Posters
Promotions/Transfers
Reassignment or Demotion
Reduction in Force (RIF) or Layoffs or Reduced Work Schedule
Leaves of Absence
Family and Medical Leave Act (FMLA) Leave SUMMARY ***[if 50+ employees]***
Non-FMLA Leave, including:
- Personal Leave of Absence
- Medical Leave of Absence
- Military Leave of Absence

Crime Victim Right to Leave Work ***[AZ employers with 50+ employees]***
Leaving [*Organization Name*] and Exit Interviews
Rehires
Post-Employment Inquiries or References

COMPENSATION
Compensation/Pay Policy
Shift Premium Pay (Non-Exempt Employees)
Call-in or Call-back Pay (Non-Exempt Employees)
Show-Up Pay (Non-Exempt Employees)
Bonuses or Incentives
Payroll Periods, Paydays, and Paycheck Distribution
Payroll Deductions/Withholdings
Pay Corrections
Direct Deposit (Automatic Bank Deposit)
Pay Advances/Loans to Employees
Garnishments
Hours of Operation (Office Hours/Plant Hours)
Work Schedules and Scheduling
Personal Activities During Scheduled Work Time
Emergency Closings
Exempt or Non-Exempt Job Positions
The Work Week
Break/Rest Periods (Non-Exempt Employees)
Meal Periods (Non-Exempt Employees)
Timekeeping Requirements (Non-Exempt Employees)
Overtime (Non-Exempt Employees)
Performance Reviews/Evaluations
Wage/Salary Adjustments

EMPLOYEE BENEFITS
Group Medical Insurance
Health Savings Account (HSA)

Group Dental Insurance
Group Vision Insurance
Group Life Insurance, including AD&D
Group Insurance Enrollments and Payroll Deductions
Short-Term Disability (STD) Insurance
Long-Term Disability (LTD) Insurance
Supplemental Insurance Plans
Cafeteria (Section 125) Plan
Continuation of Group Health Benefits (COBRA) ***[if 20+ employees]***
401(k) Savings Plan
Retirement Plan (Defined Contribution or Defined Benefit Plan)
Profit-Sharing Plan
Employee Stock Ownership Plan (ESOP)
Holidays and Holiday Pay
Vacation Time Off and Vacation Pay
Illness/Sick Time Off
Personal Time Off (PTO)
Jury Duty
Called as a Witness
Bereavement (Funeral) Leave
Time Off To Vote
Service/Longevity Awards/Recognition
Membership in Professional Associations
Reimbursement of Work-related Expenses
Mileage Reimbursement
Travel and Travel Expenses
Relocation/Moving Reimbursement
Workshops/Seminars/Professional Development/Continuing Education
Education/Tuition Reimbursement

COMMUNICATION

ALL Employees Meetings
Employee Newsletter
Communication Meetings
Suggestion Program
Employee Opinion Surveys
No Solicitation/No Distribution Rule
Bulletin Boards
Differences, Complaints and Problems between or among Employees
Solving Employee Concerns (Dispute Resolution)
Prohibited Harassment, including Sexual Harassment
Romantic or Sexual Relationships with Co-Workers

WHAT WE EXPECT OF YOU

Business Ethics and Conduct
Anti-Fraud Policy
Whistleblowing
Workplace Etiquette/Courtesies

Changes of Personal Information or Changes in Status
Accessibility by Phone
Attendance/Punctuality
Job Abandonment
Smoking/No Smoking
Scent-Free and Chemical-Free Workplace
Personal Plants or Vegetation
Housekeeping
Personal Property/Equipment/Tools
Personal Computers, Laptops, or Games Devices
Personal Telephone Calls or Text Messages
Emergency Phone Calls
Personal Cell Phones, PDA's, Smart Phones, Pagers, iPads, Tablets, or other Electronic Devices
Radios/iPOD's/MP3 Players in the Workplace
Personal Mail
Parking
Carpooling
Use of [*Organization Name*] Equipment or Tools
Appearance, Grooming, and Dress
Uniforms
Personal Hygiene in the Workplace
Body Piercings
Tattoos (Body Art)
Gifts to Employees by Suppliers/Vendors or by Potential Suppliers/Vendors or by Customers/Clients
Conflict of Interest
Freelancing
Moonlighting/Outside Employment
Media Inquiries or Public Statements
Social Media
Confidential Organization Information
Confidential Customer/Client Information
Internal Communications
E-Mail
[*Organization Name*] Files and Records
Proprietary Work Products
Gambling
Drug-Free Workplace Act (if applicable)
Drugs/Substances/Alcohol
Drugs/Substances/Alcohol Testing Program
Disciplinary (Corrective) Action
Standards of Conduct (Unacceptable Performance and/or Behaviors)

SAFETY
Safety
Safety Standards/Expectations
On-The-Job Injuries/Illness/Accidents
First Aid or Emergency Treatment

Worker's Compensation
Emergency Procedures
Hazardous Materials or Chemicals in the Workplace
Life-Threatening Illness

SECURITY (RISK MANAGEMENT)

No Expectation of Privacy with regard to Organization-Provided Vehicles, Desks, Lockers, and/or other Storage Devices
Organization-Provided Lockers and Locks
Internal Investigations and/or Searches
Workplace Monitoring
Recording of Conversations Prohibited
Voice Messages
Entering and Leaving a Building/Facility
Building/Facility Security
Office/Office Door Security
ID Badges
Key Cards
Keys
Copyright Software
Copyrighted Media
Violence-Free Workplace
Visitors
Children in the Workplace
Standards for and Expectations of Employees who drive on Organization Business
Distracted Driving Prohibited
Use of Personal Vehicle to Conduct [*Organization Name*] Business
Use of Organization-owned or -provided Vehicles (if applicable)

OTHER

Lunch Room/Kitchen
Conference Rooms
Events for Employees Sponsored by the Organization
Recycling

INDEX

RECEIPT OF MANUAL/HANDBOOK

ADDENDA

Employment Law Notices and Posters
Summary of Benefits and Coverage (SBC)
Confidentiality of Employee Personal Data/Information
General Safety Expectations/Standards
Emergency Evacuation Protocols
Written Hazard Communication Program Summary ***[if the organization is required to be in compliance with the federal Hazard Communication Standard]***

Drugs/Substances/Alcohol Testing Program *[**PROVIDED the organization develops a Written Drugs/Substances/Alcohol Testing Program, including written protocols, that meets the requirements of the statutes of its state**]*
FMLA Policy *[**50+ employees**]*
E-Mail
Social Media
Computer Network and Internet Access
Software
Telecommuting
Photographic-, Video-, or Audio-Recording by Employees and/or Non-Employees Prohibited
Recording of Inbound Phone Conversations
Use of Credit Cards or Pre-Paid Cards issued by the Organization
Travel on Organization Business

HR POLICY MANUAL & EMPLOYEE HANDBOOK
Should your organization have one?

INTRODUCTION

Think of a handbook serving the same purpose as a "fire drill."

When you participated in a "fire drill" at school, the purpose was to ensure that everyone knew exactly what to do in case of an emergency – boys in one line; girls in another line; turn right or left; go out the door; meet at the swing set, or monkey bars, or big tree. The school wanted to ensure that, should a particular circumstance occur, every child would know what to do so that pandemonium, chaos, or mayhem did not happen.

With a handbook, the organization identifies, IN ADVANCE, what its policies/practices will be with regard to certain issues; therefore, the organization pre-determines how it will manage certain issue, situations, and circumstances when they are presented. Instead of having to ponder/consider what to do when those issues/situations/ circumstances occur, managers and supervisors can go to the handbook, read the policy statement, and apply it. This also reduces the risk that actions will be taken based upon the employees involved which could result in discriminatory animus.

Obviously, managing some situations will not be quite so simple. But, without policies and practices in place prior to the situation, the managers of the organization could react the same way as would children who had not been prepped by fire drills.

ADVANTAGES OF AN EMPLOYEE HANDBOOK (partial listing)

- **Certainty.** Without published policies and procedures, supervisors and managers may not know which steps, if any, to take in a given situation. Employees may not understand what's expected of them or why you handle matters in a certain way without written guidance.

  And, employees know what is expected of them, so that they can meet or exceed those expectations and not be surprised if consequences are applied for failure to meet expectations.

- **Consistency.** Putting policies and procedures on paper and distributing them to employees encourages managers and supervisors to consistently apply them.

NOTE: inconsistent treatment often results in claims of unfair (discriminatory) treatment and/or can result in employees seeking to be represented by a labor union.

- **Proof.** The number of employment-related lawsuits seems to increase every year. A handbook with clearly stated policies can persuade judges and juries that your company acted appropriately because your employees had notice of what to expect if they engaged in certain conduct.

NOTE: with or without a handbook, an agency (EEOC or equivalent state agency) will investigate how "similarly situated" employees were treated. So, to better ensure **Certainty** and **Consistency** AND to provide **Proof** that employees were informed of expectations, a handbook is necessary.

- **Efficiency.** A handbook is simply an efficient way to communicate necessary information like work rules, terms of employment, and wage and benefits information to employees.

- **Protection.** A well-drafted handbook can protect you from certain types of legal claims, particularly charges that your company formed an implied contract of continued employment with your employees. And if your policies and procedures are sound and your practices conform to your policies, a handbook can be an effective tool for combating a union- organizing campaign.

DISADVANTAGES (a partial listing)

If your handbook isn't carefully drafted, it can support a claim that your employees are protected by an implied contract of continued employment. To be effective, language disclaiming an implied contractual relationship must be very clear. And, if you don't follow your own policies, your handbook will be persuasive evidence in any lawsuit filed against you.

H: Lawful and Unlawful Interview Questions

Various federal and state laws prohibit discrimination in all aspects of employment, including the hiring (interviewing and selection) process. Interview questions must be job-related. Questions which are not related to the applicant's ability to perform the job duties and which ask for or collect information which could be used to discriminate on the basis of age, gender, national order, color, religion, disability, or any other protected factor are discriminatory and unlawful/illegal.

Guidance is provided on the following 4 pages.

INTERVIEWING GUIDANCE:

- **WHAT QUESTIONS CAN LEGALLY BE ASKED OF AN APPLICANT?**
- **WHAT QUESTIONS, IF ASKED, WOULD BE CONSIDERED TO BE POTENTIALLY DISCRIMINATORY (UNLAWFUL)?**

From the EEOC document: Guide to Pre-Employment Questions

CATEGORY	QUESTIONS ALLOWED (LAWFUL)	EXAMPLES OF POTENTIALLY DISCRIMINATORY (UNLAWFUL) QUESTIONS
Arrest records	None *(also, see Conviction records, below)*	Number and kinds of arrest
Availability for work on weekends, evenings	If asked of all applicants and it is a business necessity for the person to be available to work weekends and/or evenings	Any inquiry about religious observance
Child care	None, unless asked of all applicants	Inquiry into child care arrangements of only female applicants
Citizenship, birthplace & national origin	The only legitimate concern here is whether the applicant is eligible to work in the United States, under the terms of the Immigrant Reform and Control Act of 1986. There is a fair and advisable way to obtain information. The best approach is to ask: "Are you either a U.S. citizen or an alien authorized to work in the United States?" The Yes or No answer that follows provides all needed information while not disclosing which (citizen or alien) the applicant is.	Birthplace, national origin, ancestry, or lineage of applicant, applicant's parents or applicant's spouse
Conviction records	Inquiry into convictions if job-related	Any inquiry about conviction, unrelated to job requirements
Creed or religion	None, except where religion is a bona fide occupational qualification	Applicant's religious affiliation, church, parish, or religious holidays observed
Credit records	None, unless job-related	Inquiries about charge accounts, bank accounts, etc.
Family status	Whether applicant has responsibilities or commitments that will prevent meeting work schedules, if asked of all applicants regardless of sex	Marital status, number and age of children, spouse's job
Height and weight	None, unless job-related	Any inquiry unrelated to job requirements
Language	Language applicant speaks or writes fluently, if job-related	Applicant's other tongue, language used by applicant at home, or how applicant acquired the ability to read, write or speak a foreign language
Marital status	None	Whether applicant is married, single, divorced, separated, engaged or widowed
Military status	Military experience or training	Type or condition of discharge
Name	Whether applicant has worked under a different name	The original name of an applicant whose name has been legally changed or the national origin of an applicant's name
Organizations	Applicant's membership in professional organizations if job-related	All clubs, social fraternities, societies, lodges or organizations to which applicant belongs
Photographs	None except after hiring	Photographs with application or after interview but before hiring

Pregnancy	None	Any inquiry into pregnancy, medical history of pregnancy or family plans
Race or color	None	Applicant's race or color of applicant's skin
References	Names of character references	Name of applicant's pastor or religious leader
Relatives/friends	Names of applicant's relatives already employed by your organization or a competitor, but you may not give preference if women and minorities are underrepresented in workforce	Names of friends working for the company or relatives other than those working for the company
Sex/Gender	None, except where sex/gender is a bona fide occupational qualification	Any inquiry except where a bona fide occupational qualification
Workers' Compensation	None	Past workers' compensation claims

GUIDE TO PRE-EMPLOYMENT INQUIRES UNDER THE ARIZONA CIVIL RIGHTS ACT

A private employer is covered by the **Arizona Civil Rights Act (ACRA)** if it is an employer with 15 or more employees on each working day in each of 20 or more calendar weeks in the current or preceding calendar year.

Acceptable Pre-Employment Inquiries	**Subject**	**Unacceptable Pre-Employment Inquiries**
Name of applicant. Any other names applicant may be known by so a proper check of work and educational records can be made.	**Name**	Inquiries regarding origin of applicant's name that may tend to indicate the applicant's national origin, religion or ancestry.
Place and length of residence, telephone number, only.	**Residence**	
Statement concerning employment subject to verification that applicant meets legal age requirements.	**Age**	ACRA prohibits discrimination on the basis of age with respect to individuals who are at least 40 but less than 70 years of age. It is unlawful for an employer to print or publish any notice or advertisement relating to employment indicating any preference, limitation, specification or discrimination based on age, except when age is bona fide occupational qualification for It is unlawful to limit, segregate or classify applicants for employment in any way which would deprive or tend to deprive employment opportunities based on an individual's age.
Status of Residency: 1) U.S. Citizen? 2) Legal right to work in the U.S.? Statement to applicant that, if hired, applicant may be required to submit proof of citizenship/legal right to work in the U.S.	**Birthplace, Citizenship**	It is unlawful to require proof of citizenship or residency prior to of employment.
Foreign languages applicant reads, speaks, or writes, if job related.	**National Origin**	To inquire, limit, segregate or classify applicants for employment in any way that will deprive or tend to deprive employment based on an applicant's national origin.

	Gender	To limit, segregate or classify applicants for employment in any way that would deprive or tend to deprive employment opportunities based on an applicant's gender.
	Religion	To inquire, limit, segregate or classify applicants for employment in any way that would deprive or tend to deprive employment opportunities based on an applicant's religion.
Statement of regular days, hours or shifts to be worked.	**Work Days/ Shifts**	
Statement that photo may be required after hiring	**Race/Color or Physical Description**	To inquire, limit, segregate or classify applicants for employment in any way which would deprive or tend to deprive employment opportunities based on an applicant's race, color or physical description
Make pre-employment inquiries into the ability of an applicant to perform job related functions.	**Medical**	The prohibition against discrimination based on a disability, includes medical exams and inquiries.
Require a medical examination after an offer of employment has been made to a job applicant and before commencement of employment duties of the applicant and may condition an offer of employment on the results of such examination if both of the following apply:		Except as stated, a covered entity shall not conduct a medical or exam or make inquiries of a job applicant as to whether the applicant is an individual with a disability or as to the nature or or severity of the disability.
(a) All entering employees in the same job classification are subjected to the examination regardless of disability.		To fail or refuse to hire, or to otherwise discriminate against, any Individual based on the results of a genetic test received by the employer.
b) Information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record.		Use qualification standards, exams, tests or other selection criteria that screen out or tend to screen out an individual with a disability, or a class of individuals with disabilities, unless the standard test or other selection criteria is shown to be job related for the job position in question and is consistent with business necessity.
Inquiry into academic, vocational, professional education and schools attended, degrees/diplomas received	**Education**	Specific inquiry into the nationality, racial, or religious affiliation of a school.
Inquiry regarding prior convictions. When, where, final disposition of case. *Must include statement that conviction will not be an absolute bar to employment.*	**Criminal Record**	
May ask for references: (a) Person who referred applicant. (b) Names of applicant's relatives currently employed by company. (c) Former employers	**Professional/Character References**	
Emergency contact information.	**Notice in case of emergency**	

List of organizations, clubs, professional societies or other associations of which applicant is a member, **excluding** those which by their name or character indicate race, color, religion, gender, age, disability or national origin.	**Organizations**
Notice to applicant that any misstatements or omissions of material facts in the application may be cause for dismissal.	**Miscellaneous**

It is recommended that questions to be used in an interview be prepared in advance and be reviewed by the HR Dept. of your organization or by the employment/labor law attorney your organization uses to ensure that the questions are not potentially discriminatory (unlawful).

I: Negligent Hiring – Employees Who Drive On Company Business

An employer can be liable for the negligent acts of its employees. Most employers are at risk for the following: negligent hiring claims arising from accidents caused by employees who drive on company business.

Negligent hiring liability occurs when the employer can foresee that the employee can do harm to the public, but the employer does not conduct a sufficient or appropriate background check of the employee (which can include a driver's license and MVD report for those who drive on company business).

Few employers check the driver's license or MVD reports of employees who drive on company business. Such employers just assume the employee has a driver's license and an acceptable driving record.

However, if an employee is involved in an accident while driving on company business, the employer may be named in a negligent hiring claim if the plaintiff's attorney discovers that the employee does not have a valid driver's license or has a history of moving violations, DWI/DUI, felony hit & run, or the like.

So, ALL employees who drive on company business (including the secretary/receptionist who drives to the Post Office at 4:45 p.m. each day to drop off the mail, or the person who is sent to pick-up lunch for a meeting, or the person who drives to the office supply store during his/her lunch hour to pick up the post-it notes that are needed) should be required, at the time of hire and periodically thereafter, to provide a valid driver's license and a copy of their MVD report (the 60 month report is preferred to the 39 month report).

The employer, if the employee does not have a valid driver's license or if the employee's MVD report includes more violations than is acceptable to the employer, can remove the employee from driving. The definition of an "acceptable record" should be in writing, to avoid inconsistent application. The standard (i.e., what is an "acceptable record") should be restrictive. The more violations that are "acceptable" to the employer, the greater the likelihood that a court or jury will second-guess the employer's standard, especially if there is an employee-involved accident that results in bodily injuries.

Also, in Arizona, as in most states, the vehicle insurance of the personal vehicle that the employee drives on company business is primary if an accident occurs. However, not all employees carry insurance; and, some carry only low amounts of liability insurance.

Once the employee's vehicle insurance is exhausted, the injured party(s) will pursue the employer for further payments. Yet, if the employer does not have a "Non-Owned Auto" endorsement to its general liability insurance policy, the general liability insurance carrier will deny the claim.

So, every employee who drives on company business should be required to have the highest liability limits possible (so it is less likely that their liability coverage will be exhausted) AND every business should ensure that its general liability insurance policy includes a "Non-Owner Auto" endorsement to cover any liability that might arise from an employee driving on company business.

HR Risk Management Tip

David Mitchell, SPHR, MBA, MA in HR, CIC

Employees using their own vehicles on company business

Many employers do not understand the risk to which they expose their company by allowing employees to run errands or do other company business while using their own vehicles.

Often the company can and is held liable IN ADDITION TO the employee if an at-fault accident occurs while the employee driving his/her personal vehicle on company business.

The way a company usually finds out they are liable is after the employee has been deposed, by counsel for the plaintiff's, and was asked if he/she was on company time when the accident occurred Once the plaintiff's attorney discovers that the employee was on company time at the time of the accident, the employer is served. The company then starts the mad scramble to figure out if there is any insurance to cover this loss.

The question then becomes: is the employer covered under the employee's policy and, if so, for how much? The answer to the first part of the question is maybe. If the employee has liability coverage, the employer has coverage along with the employee and will have the opportunity to share those limits. The exception to this coverage is delivery, livery, or if the employer is engaged in the business of selling, repairing, servicing, storing, or parking vehicles. An example where there would not be coverage under the employee's policy is pizza delivery; but, coverage also depends on the employee's policy, as some personal policies exclude any business use.

The next question is: is the employee's vehicle insurance policy in effect? There is a strong possibility that the employer does not know whether the employee had insurance on his/her personal vehicle at the time of the accident.

The next question is: how much coverage does the policy have? It is possible, especially if the employee is young and/or without a lot of personal assets, that he/she, if liability insurance is on the policy, is carrying only the minimum state requirements of $15,000 per person, $30,000 per accident and $10,000 property damage. Since the insurance on the personal vehicle is primary, once the limits are exhausted, the employer becomes liable for the excess (the amount of the award less the liability limits on the personal vehicle policy).

Four Approaches

As a risk management technique what should an employer do? There are four approaches we will talk about.

Approach number one is avoidance. Never allow an employee under any circumstances to use their own vehicles on company business, even when employees may be traveling between meetings. This approach probably is not practical for most businesses, since such businesses do not want to have to own and provide vehicles to employees.

Approach number two is to have a list of designated drivers who only on rare occasions will use their vehicles. The company should establish criteria regarding which employees can be designated drivers. Such criteria could require that an employee's motor driving record be kept on file with the company showing the employee that is "acceptable" to the company. This approach should reduce the risk of liability to the company.

Approach number three is for the company to add an endorsement called non-owned auto to either its business auto policy or general liability policy. This endorsement does not come automatically with a business auto policy or with a general liability policy. It must be requested by the employer and added on as an endorsement.

The non-owned auto endorsement is an excess policy. The endorsement would be triggered after the employee's policy limits are exhausted and would provide "excess" coverage up to the limits chosen on the endorsement.

The fourth approach is a combination of approach number two and approach number three. This approach provides the best protection for the employer.

If you have questions regarding this article please contact David Mitchell at IDEAL INSURANCE (602-938-7579).

J: Resources regarding the Affordable Care Act (ACA)

UNITED STATES DEPARTMENT OF LABOR

The following two pages are from: http://www.dol.gov/ebsa/healthreform/

United States Department of Labor
Employee Benefits Security Administration
Affordable Care Act

For information on the protections related to your employment-based health plan or if you are looking for coverage, please visit our consumer page. The Affordable Care Act prohibits employers from retaliating against employees who report violations of the Act's health insurance reforms, found in Title I of the Affordable Care Act. For more information, visit www.whistleblowers.gov.

Regulations and Guidance

- Affordable Care Act Implementation FAQs
- Affordable Care Act Nondiscrimination Provisions Applicable to Insured Group Health Plans
- Applicability to HRAs, Health FSAs, and Certain other Employer Healthcare Arrangements
- Automatic Enrollment
- Coverage of Preventive Services
- Early Retiree Reinsurance Program
- Employer Shared Responsibility
- Essential Health Benefits
- Excepted Benefits
- Extension of Coverage For Adult Children
- Grandfathered Health Plans
- Internal Claims and Appeals and External Review
- Mental Health Parity
- Medical Loss Ratio
- Multiple Employer Welfare Arrangements
- Ninety-Day Waiting Period Limitation
- Notice to Employees of Coverage Options
- Pre-Existing Condition Insurance Plan Program
- Preexisting Condition Exclusions, Lifetime and Annual Limits, Rescissions, and Patient Protections
- Provider Non-Discrimination
- Public Forum on Automatic Enrollment in Large Employer Health Plans
- Small Business Health Care Tax Credit for Small Employers
- Stop Loss Insurance
- Summary of Benefits and Coverage and Uniform Glossary
- Value-Based Insurance Design in Connection with Preventive Care Benefits
- Wellness Programs

Compliance Workshops, Seminars and Webcasts

- Health Benefits Laws Seminar – Denver CO | Louisville KY | New York NY | Santa Fe NM
- Health Benefits Laws – Webcast Archive
- Affordable Care Act Compliance Assistance Webcast Archive – Part I | Part II

Participant Workshops and Webcasts

- The Affordable Care Act: How Will It Affect You? – Webcast Archive

Mandated Research Studies and Surveys

- U.S. Department of Health and Human Services' Study: Consistency of Large Employer and Group Health Plan Benefits with Requirements of the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008
- HHS Cover Document for Report to Congress, 2013 - Workplace Wellness Programs Study: Final Report
- Report to Congress, 2013 – Workplace Wellness Programs Study: Final Report
- Workplace Wellness Programs Study: Case Studies Summary Report
- A Review of the U.S. Workplace Wellness Market - 2012
- An Analysis of 2007-2009 Filings of Form M-1
- 2013 Annual Report on Self-Insured Group Health Plans: 2013 Report | Appendix A [Original] [Revised] | Appendix B
- 2012 Annual Report on Self-Insured Group Health Plans: 2012 Report | Appendix A [Original] [Revised] | Appendix B
- 2011 Annual Report on Self-Insured Group Health Plans: 2011 Report | Appendix A | Appendix B
- Study of the Large Group Market
- Recent Data on Health Benefits from the National Compensation Survey | Letter from Secretary Hilda L. Solis
- A Review of the U.S. Workplace Wellness Market – 2012

Health Insurance Marketplace

- HealthCare.gov – Official consumer site for the marketplace
- Marketplace.cms.gov – Resources for professionals preparing for the marketplace
- HHS FAQ – State Participation in Certain Plan Management Activities
- About the Health Insurance Marketplace | En Español
- The Value of Health Insurance | En Español
- About the Small Business Health Options Program (SHOP) | En Español

News and Official Statements

- Testimony of Phyllis C. Borzi, Assistant Secretary of Labor, Employee Benefits Security Administration, Before the Senate Committee on Small Business and Entrepreneurship
- Statement of US Secretary of Labor Hilda L. Solis on implementation of Affordable Care Act's early retiree reinsurance program
- Statement of Assistant Secretary of Labor Phyllis C. Borzi calling on employers and benefit plans to make young adult coverage available immediately
- Statement of U.S. Secretary of Labor Hilda L. Solis on passage of health care reform by U.S. House of Representatives
- Statement of Assistant Secretary of Labor Phyllis C. Borzi on Health Care Reform

Related Resources

- Consumer Information on Health Plans
- Compliance Assistance for Health Plans
- Group Health Plan Reports and Form 5500 Data
- Health Benefits Education Campaign
- White House Web Page on Health Reform
- HHS.gov/HealthCare
- IRS Website on the Affordable Care Act
- GAO Report – Private Health Insurance: Data on Application and Coverage Denials
- House Committees Health Insurance Reform at a Glance | Implementation Timeline | Consumer Protections | For Employers

Law

- Patient Protection and Affordable Care Act
- Health Care and Education Reconciliation Act of 2010

K: Retention Requirements for Forms/Records/Documents

There usually is some confusion among employers concerning the legal requirements for record keeping and retention of employee files and other employment-related records. Not only do various federal agencies have their own record retention requirements, but individual states also have requirements that have to be followed. Some of the requirements apply to most employers, while others apply primarily to government contractors and subcontractors. Many of these requirements are dependent on the number of employees or the purposes for which the record keeping is designed.

The accompanying data provides a reference regarding what records must be kept under each federal law, the retention period for those records, and the applicability of each federal law. In reviewing the data below, you will notice that the same or similar records are often required under more than one law. However, the period of retention for this information may vary. If that is the case, you are advised to retain the information for the longer period of time.

It is also advisable to establish a system for auditing your company's record keeping, including personnel files, as well as a consistent program for record destruction. However, be cautious that even with such a standard practice in place, when a discrimination charge or lawsuit is filed, all records relevant to the charge must be kept until "final disposition" of the charge or lawsuit.

LAW: Age Discrimination in Employment Act (ADEA)

Applies to employers with at least 20 employees

RECORDS/REPORTS:

Payroll or other records, including those for temporary positions showing employees' names, addresses, dates of birth, occupations, rates of pay and weekly compensation.

Applications (including those for temporary employment), personnel records relating to promotion, demotion, transfer, selection for training, layoff, recall, or discharge; job advertisements and postings; copies of employee benefit plans, seniority system and merit systems.

RETENTION REQUIREMENTS:

Three years for payroll or other records showing basic employee information. One year for applications and other personnel records. Where a charge or lawsuit is filed, all relevant records must be kept until "final disposition" of the charge or lawsuit.

LAW: Americans with Disabilities Act (ADA)

Applies to employers with at least 15 employees

RECORDS/REPORTS:

Applications and other personnel records (e.g. promotions, transfers, demotions, layoffs, terminations) requests for reasonable accommodation.

RETENTION REQUIREMENTS:

One year from making the record or taking the personnel action.

Where a charge or lawsuit is filed, all relevant records must be kept until "final disposition".

LAW: Civil Rights Act of 1964, Title VII

Applies to employers with at least 15 employees

RECORDS/REPORTS:

Applications and other personnel records (e.g. promotions, transfers, demotions, layoffs, terminations), including records for temporary or seasonal positions.

Requires the filing of an annual EEO-1 Report (for Federal contractors with 50 or more employees, non-contract employers with 100 or more).

RETENTION REQUIREMENTS:

One year from making the record or taking the personnel action.

Where a charge or lawsuit is filed, all relevant records must be kept until "final disposition".

A copy of the current EEO-1 Report must be retained.

LAW: Consolidated Omnibus Budget Reconciliation Act (COBRA)

RECORDS/REPORTS:

Provide written notice to employees and their dependents of their option to continue group health plan coverage following certain "qualifying events", such as the employee's termination, layoff or reduction in working hours, entitlement to Medicare, and the death or divorce of the employee (that would cause dependents to lose coverage under the employer's plan).

LAW: Employee Retirement Income Security Act (ERISA)

RECORDS/REPORTS:

Maintain, disclose to participants and beneficiaries, and report to the Department of Labor, IRS, and The Pension Benefit Guaranty Corporation (PBGC) certain reports, documents, information, and materials. Except for specific exemptions, ERISA's reporting and disclosure requirements apply to all pension and welfare plans, including:

- Summary plan description (updated with changes and modifications)
- Annual reports
- Notice or reportable events (such as plan amendments that may decrease benefits, a
- Substantial decrease in the number of plan participants, etc.)
- Plan termination

RETENTION REQUIREMENTS:

Employers must maintain ERISA-related records for a minimum of six years.

LAW: Employee Polygraph Protection Act

RECORDS/REPORTS:

Polygraph test results and the reasons for administering.

RETENTION REQUIREMENTS:

Three years.

LAW: Equal Pay Act

RECORDS/REPORTS:

Payroll records including time cards, wage rates, additions to and deductions from wages paid, and records explaining sexually based wage differentials.

RETENTION REQUIREMENTS:

Three years.

LAW: Fair Labor Standards Act (FLSA)

RECORDS/REPORTS:

Payroll or other records containing the following information for each employee:

- Employee's name, home address, date of birth (if under 19 years of age), gender, and occupation
- Time of day/day of week for beginning of workweek
- Regular hourly rate of pay or other basis of payment (hourly, daily, weekly, piece rate, commission on sales, etc.)
- Daily hours worked and total hours for each workweek
- Total daily or weekly straight-time earnings (exclusive of overtime premiums)
- Total additions to and deductions from wages for each pay period
- Total wages per paid period
- Date of each payment of wages and the period covered by the payment

For executive, administrative, and professional employees, or those employed in outside sales, employers must maintain records which reflect the basis on which wages are paid in sufficient detail to permit calculations of the employee's total remuneration, perquisites, including fringe benefits.

RETENTION REQUIREMENTS:

For at least three years.

LAW: Family & Medical Leave Act (FMLA)

RECORDS/REPORTS:

Records containing the following information:

- Basic employee data to include name, address, occupation, rate of pay, terms of compensation, daily and weekly hours worked per pay period, additions to/deductions from wages and total compensation.
- Dates of leave taken by eligible employees. Leave must be designated as FMLA leave.
- For intermittent leave taken, the hours of leave.
- Copies of employee notices and documents describing employee benefits or policies and practices regarding paid and unpaid leave.
- Records of premium payments of employee benefits
- Records of any dispute regarding the designation of leave

RETENTION REQUIREMENTS:

Three years.

LAWS: Federal Insurance Contribution Act (FICA); Federal Unemployment Tax Act (FUTA); Federal Income Tax Withholding

RECORDS/REPORTS:

Records containing the following information for each employee:

Basic employee data to include name, address, social security number, gender, date of birth, occupation, and job classification

Compensation records to include:

- Amounts & dates of actual payment
- Period of service covered
- Daily and weekly hours
- Straight time and overtime hours/pay
- Annuity and Pension payments
- Fringe benefits paid
- Tips
- Deductions and additions

Tax records to include:

- Amounts of wages subject to withholding
- Agreements with employee to withhold additional tax
- Actual taxes withheld and dates withheld
- Reason for any difference between total tax payments and actual tax payments
- Withholding forms (W-4, W4-E)

RETENTION REQUIREMENTS:

Four years from the date tax is due or tax is paid.

LAW: Immigration Reform & Control Act (IRCA)

RECORDS/REPORTS:

INS Form 1-9 (Employee Eligibility Verification Form) signed by each newly-hired employee and the employer.

RETENTION REQUIREMENTS:

Three years after date of hire or one year after date of termination, whichever is later.

LAW: Occupational Safety & Health Act (OSHA)

Applies to employers with at least 10 employees

RECORDS/REPORTS:

A log of occupational injuries and illnesses

A supplementary record of injuries and illnesses

Post a completed annual summary of injuries and illnesses

Maintain medical records and records of exposure to toxic substances for each employee.

RETENTION REQUIREMENTS:

Employee's job tenure plus thirty years

NOTE: Document destruction is governed by the Fair and Accurate Credit Transactions Act (FACT)

As of June 1, 2005, all employers are required to destroy any document that has personal information on it prior to discarding the document. Personal information could be a telephone number, address, Social Security number, etc.

The law requires the destruction — 'shredding or burning' or 'smashing or wiping' — of all paper or computer disks containing personal information that is 'derived from a consumer report' before it is discarded. This law applies to all employers with one or more employees.

The aim is to protect the public from identity theft, one of the fastest-growing crimes in the United States. Many times personal information is stolen from an employer. The information comes from the employer's paperwork, as well as computer database systems.

Employers have a duty to restrict access to this data as well as properly dispose of (destroy) the information. Every employer should establish written guidelines for maintaining confidentiality and placing restrictions on access to and use of this information. The guidelines also should contain provisions regarding data of temporary employees and contract employees.

L: Additional Resources

"Oops, I Did It Again"

Ten Most Common Managerial Mistakes That Lead to Litigation

Employers that fail to adopt and follow basic good management practices will substantially increase their risk of litigation and liability.

By Maxine Neuhauser

It is not illegality that fuels employee lawsuits, but rather employee anger arising from perceived unfair treatment. Placing a legal label, such as discrimination or retaliation, on the seeming unfairness occurs afterward.

Supervisors, managers, executives and even human resources staff often engage in behaviors that, unwittingly, lead employees to feel misled, lied to or otherwise unfairly treated. In doing so, they increase the likelihood of litigation. Ten common mistakes increase the likelihood of employee lawsuits and financial exposure.

Forget About Training

Workplaces today are busier than ever. Devoting time to management training takes precious hours away from productive, moneymaking endeavors. A company, however, is its managers. What the managers say and do, the company says and does. Correct behavior prevents lawsuits. Missteps lead to liability. Managers who are not conversant in company policies, and who do not know the basics of setting goals, preparing performance appraisals and proper documentation become the catalyst for lawsuits.

Supervisors need training about how to handle difficult situations--what to say, whom to turn to for assistance and what not to do. Failing to provide management training is shortsighted, and with the rise of potential individual liability, unfair to a company's supervisors.

Disregard Company Policies

Policies establish a company's "rules for the road" for both employees and managers. They set company standards and inform employees of management's expectations. Well-drafted policies tied to an enterprise's business needs provide guidance to managers and employees. If followed, policies help ensure consistent treatment of employees.

Disregarding policies heightens the potential for inconsistent treatment. It thus increases the risk that employees subjected to harsher action than their co-workers will interpret the discipline they received as unfair or discriminatory. Ignoring policies also sends the message that the employer believes they are unimportant, and gives license to employees to disregard them as well. An employer that fails to follow its policies not only loses the benefit of having them, but it also sets itself up to be portrayed as mismanaged, uncaring and willfully noncompliant with the law.

Shoot From the Hip

Firing without notice may occasionally be appropriate, but rarely. Acting without fair warning--or rashly or arbitrarily--invites resentment. Employees who feel ambushed may be led to seek their revenge through litigation.

Companies can reduce this risk by making employees aware of the probable consequences of misconduct through well-publicized and consistently enforced policies and progressive discipline. Before disciplining an employee, a company should be able to state:

- The legitimate business reason for the action.
- Whether the action is consistent with other disciplinary actions the company has taken in similar situations, and if not, why not.

In addition, employers are usually well advised to give an employee the opportunity to give his or her side of the story before administering discipline. A meeting with the employee often provides a valuable safety valve for both employee and employer.

Often, employees admit the misconduct (or some portion of it). Though unhappy with the discipline levied, employees often will be satisfied with the opportunity to have been heard. Managers need not agree with the employee, and should not argue or apologize. Meeting and listening alone can make employees feel that they have been treated fairly--because, in fact, they have been.

Motivate Poor Performers With Raises and Bonuses

The season for annual raises and bonuses brings with it the temptation to give underperforming employees some amount of increase or bonus. Withholding raises and bonuses is a tough decision. We all like to be liked. Withholding raises and bonuses seems contrary to a supervisor's goal of maintaining morale and staff loyalty.

Giving undeserved increases, however, does not spur poor performers to improve. Rather, it reinforces poor performance by telling employees that their performance merited an increase or bonus.

Terminating someone on the grounds of poor performance, after years of raises and bonuses (even small ones), creates concrete evidence of inconsistency between what the employer says now versus what it did then. It raises suspicion of ulterior motives for the adverse employment action and provides strong motivation for the employee to consult counsel.

Criticize the Person

Few jobs lend themselves to purely objective evaluation. Subjective criteria nearly always come into play. The challenge lies in relating performance criticism (and praise) to the job and not the person. Reviews that characterize the employee, rather than evaluating his or her performance, may become evidence of bias and discriminatory stereotyping.

Praise an employee for becoming the region's leading sales person in just two months, but not for being "young and enthusiastic."

Similarly, criticize an employee for repeatedly failing to meet deadlines, not for being "lazy." Employees may need to "update their skill sets"; they do not, however, constitute "deadwood." To avoid such pitfalls, companies should encourage and assist managers in establishing measurable goals and creating business-related standards against which to evaluate employee performance.

Ignore Problems

Employers ask for trouble when they ignore problems and complaints. Failing to address performance issues has the practical effect of lowering performance standards. It leads employees to believe that they are performing at satisfactory levels because management has not told them otherwise.

Management may be dissatisfied with an employee's level of performance, and may truly believe that the employee ought to know he or she is missing the mark. Unless supervisors confront employees about performance deficiencies, however, and expressly state what employees need to do to meet expectations, change is unlikely. When after years of accepting poor performance a manger finally acts, perhaps by discharging the poor performer or perhaps by passing the employee over for promotion, the employee may react with surprise, hostility and claims of discrimination.

Put Nothing in Writing

Without a written record documenting employee performance issues and management's response, employers increase the risks of "he said, she said" situations when taking adverse employment actions. Employees who have not been given (and required to sign) counseling memos or performance evaluations frequently claim that the counseling, the warning or the evaluation was never received. Verbal warnings carry less weight than written warnings with employees, their lawyers and juries.

Employees who have been repeatedly spoken to, but never written up, are likely to discount or even disregard the import of the counseling. Employers who do not document employment issues leave themselves with little concrete evidence to prove a history of poor performance as the reason for discharge, instead of, for example, retaliation for taking medical leave.

Understand That Boys Will Be Boys

A hostile work environment, whether because of sexual harassment or harassment based on age, disability or race, may arise from either severe or pervasive conduct. Jokes, e-mails and passing comments when considered individually may be of little consequence. Accumulated and viewed as a whole, however, they can be used to show pervasive misbehavior that has converted a professional workplace into a frat house. That a harassing employee may not intend to harass his co-worker does not constitute a defense nor does it create a shield from being sued.

Employers who know of employee misconduct, such as use of the company's e-mail system to send sexually explicit jokes or photographs, and who fail to take action to stop the conduct, substantially increase their risk of litigation and liability for damages.

Lie

When management's fails to tell the truth, employee disgruntlement inevitably follows, and with it a fast- track to the courthouse – and potential liability.

Employers do not protect themselves by telling an older employee that he is being discharged because of job elimination when the true reason is poor performance. As soon as someone (younger) is hired to replace the discharged employee, the company's lie, even if intended to protect the employee from hurt feelings, will be seen as a pretext to hide discrimination.

Cover-up

Repeatedly, experience shows that a cover-up carries worse consequences than the initial misdeed. Shredding documents, deleting files or throwing away drafts upon learning of an impending lawsuit can all add up to trouble. When confronted with a bad situation, it remains true that honesty is the best policy.

From www.workforce.com.

The ten items below are not in rank order. If they were to be ranked, "Ignore Problems" would be #1.

I cannot tell you how many times calls have been received that begin with, "I know I should have called you sooner, but I have this employee who ……."

Ten Ways To Make Sure An Employee Will Sue You!

By *Lawrence F. Feheley*

I have studiously advised employers to avoid employee lawsuits, but no more. I now realize it is foolish to instruct them how to avoid legal fees. Follow this list, and you can increase the chances an employee will sue you.

- **Hire anyone who has a pulse.**

Every company wants to hire the best, but when applicants are scarce, employers are relaxed in hiring. Mistakes may stick you with an unproductive employee, or subject you to liability. While recruiting, don't inadvertently screen out potential applicants in legally protected classifications. Ensure applications are completed since they require written acknowledgment of certain legal considerations. Run background checks. Confirm conditional offers in writing.

- **Don't commit any personnel policies to writing.**

The view that putting an employer's policies in writing limits management's discretion is outdated. Well-written employee handbooks are necessary for effective human resources practices. Reliable handbooks are beneficial because they reflect the purposeful compilation of an employer's policies and policies required by law, while helping to define and resolve employee complaints or disputes. A handbook acknowledgment page signed by an employee can be valuable in any lawsuit.

- **Pay everyone a salary so you don't have to worry about overtime.**

Everyone knows that an employer doesn't have to pay overtime to an employee who is paid a salary, right? Wrong. The Fair Labor Standards Act requires that employees working more than 40 hours in a week receive overtime, at time and one-half their regular rate of pay. But there are certain exceptions to the overtime requirement for exempt employees - white-collar employees.

- **Encourage the candid and unrestrained use of e-mail among employees.**

Workplace e-mail messages are at worst, defamatory, harassing or indelible evidence of illegal conduct. Because e-mail histories are increasingly appearing in litigation, employees must be cautioned not to commit anything to e-mail that they wouldn't want published in the newspaper. Asserted rights of privacy on the part of the employees is an issue regarding written e-mail policies. Most jurisdictions permit a private employer to monitor and inspect transmissions on company-owned systems. Remember to include an explicit statement in your e-mail policy that e-mail conversations may be monitored, and employees should harbor no expectation of privacy in using the system.

- **Manage employee performance through payroll deductions.**

In many cases, federal wage-hour laws prohibit penalizing an employee financially for work-related problems. Deductions from an exempt salaried employee's compensation will most likely destroy the overtime exemption, exposing the company to overtime liability.

- **Ignore the Family and Medical Leave Act (FMLA) because it's too much trouble and paperwork.**

FMLA law requires that eligible employees be afforded up to 12 weeks of unpaid leave in a 12-month period, if they encounter a qualifying condition. Employers must adopt and publish a FMLA policy. But an employee does not have to specifically request FMLA leave. Instead, when an employee requests time off and alerts the company about a potentially qualifying condition, the company must determine if FMLA leave is applicable and notify the employee within two business days how the absence will be treated.

- **As long as you have a written Equal Employment Opportunity statement and a workplace harassment policy, don't worry about training and education.**

Employers need to have written anti-discrimination and workplace harassment policies that outline effective complaint procedures. Even the best-written policies are of little value if employees don't know about or understand them. An effective harassment prevention policy and complaint procedure can be a defense for workplace harassment or punitive damages. But, be sure managers know and understand the policies, and invest the time to provide appropriate training (documenting that it occurred).

- **Don't document anything and trust the judicial system.**

Proper documentation of employee misconduct, attendance and unsatisfactory performance is essential for proper evaluation. Good documentation requires drafting the document as though written for a third party, signing and dating it, including details about the conduct involved and disciplinary history, and having the employee sign the document (or noting their refusal). Make it a habit to put all events of significance in writing.

- **Quell dissent by quickly getting rid of complainers and trouble-makers.**

It's natural to want to get rid of problem employees, but that can be grounds for a retaliation claim. Difficult situations arise when an employee files a discrimination claim, and then performs so poorly that discipline or termination is appropriate. Test the legitimacy of disciplining a problem employee by assessing proposed discipline against other employees who haven't filed charges or complaints. A clear track record of similar discipline is a good basis to show that retaliation was not a factor.

- **Since your employees serve at-will, fire them frequently and without warning.**

At-will employment means employees can be discharged at any time and for any reason. Nonetheless, employees still cannot be fired for reasons that are prohibited by law, such as discrimination or protected conduct. At-will employees cannot be fired contrary to a specific promise, or for violating an important public policy or statute. Use caution with the number in which employees are terminated, since the process can impact pursuit of a claim.

Why train supervisors about the law?

Excerpted from Vermont Employment Law Letter, written by attorneys at the law firm Dinse, Knapp & McAndrew, P.C.
by Jeff Nolan

On your list of projects to do this year, be sure to include comprehensive training for your supervisors on legal issues.

Why? Because harassment training, while crucial, isn't enough.

If your supervisors also are trained about broader legal issues and understand the larger context in which harassment and other claims arise, they'll be better able to identify potential legal issues and seek appropriate guidance before the issues turn into real legal problems.

Management asks: Why do comprehensive legal training?

Of course, good training programs come at some price in terms of the resources devoted to planning and delivering them, lost productivity for the time supervisors spend in training, and, for some employers, the use of attorneys or consultants.

Logically, one of the first questions from decision-makers outside your HR department will be "How do we justify the costs associated with this training?" If they have a sense of humor, you could be a smart aleck and respond with the following reasons **not** to do legal training:

1. *Your* company culture is so enlightened, *you* don't need it.
2. Getting sued gives you firsthand experience with the exciting legal process.
3. Watching particularly smug supervisors getting cross-examined about every snarky e-mail they've ever sent can be fun (in a sick sort of way).
4. Jury trials get less scary after your third or fourth one.
5. Punitive damages are really no big deal.
6. You can put off training until a court or government agency concludes that discrimination occurred at your workplace and orders you to do training.
7. Ignorance is bliss.

If it seems your management team has had just about enough foolishness and would prefer some real answers, try the following points:

- Sexual harassment training is practically required by law. In light of U.S. Supreme Court decisions, an employer that conducts no sexual harassment training will be at a serious disadvantage in defending a sexual harassment claim.
- Training regarding other types of prohibited harassment also has become a legal requirement in practical terms.
- Most important from a practical perspective, comprehensive legal-issues training can prevent claims by allowing supervisors to spot legal issues and ask for help when appropriate *before* the issues turn into serious employee dissatisfaction or a lawsuit.
- Comprehensive legal training can strengthen your position when a lawsuit is filed by lessening the chance that supervisors will create what could later be portrayed as a "smoking gun" memo or e-mail.
- The fact that training was done can be a partial defense in harassment cases.

Hopefully, that list and your observations on how your practices could be improved will be enough to convince your decision-makers that comprehensive legal-issues training is worth the limited costs.

Supervisors ask: Why do we have to be trained?

Your supervisors might respond with this question or, more candidly, something like "Oh no, not more training!" Granted, many employers already do a lot of training on issues such as workplace safety, regulatory compliance, and compliance with company protocols and procedures.

Therefore, one of your initial goals in any legal-issues training program is to convince your supervisors that the issues to be covered are important *to them* as supervisors and individuals. So how do you engage your audience? Here are some thoughts:

- Open the discussion with examples (hypothetical or real if the information is public and appropriate) of how legal issues and/or litigation could affect or has affected various departments for which the group has supervisory responsibility.
- Emphasize that because of vicarious-liability principles, the actions of supervisors will be considered by the law to be actions of the employer in most circumstances.
- Explain that there's potential for supervisors to be held personally liable or at least be sued for actions taken in a supervisory role under some statutes, particularly state statutes. That, at least, should get their attention.
- Emphasize the practical burdens and disruption that legal disputes and lawsuits can cause for entire departments, for the individuals involved, and for the supervisors themselves when litigation involves a member of their department.

If you don't think that those points will generate enough interest (or fear, if that's what you're going for), you could try opening the discussion with a quiz, calling on specific supervisors in the audience and asking elementary questions about harassment, vicarious liability, and individual liability issues or even about company policies and procedures. Hopefully, your supervisors will get a perfect score, but it's more likely that the quiz would emphasize that almost everyone can learn *something* new about this rapidly changing area of employment law.

Bottom line

Having a comprehensive legal-issues training program for supervisors as a defense to a lawsuit is a great step, but obviously, avoiding a lawsuit in the first place is even better. Avoiding harm, harassment, and other legal concerns should be the ultimate objective of your supervisor training program. Remember, if your program avoids even one lawsuit, it will have paid for itself several times over.

No PROHIBITED HARASSMENT training
= no affirmative defense
= employer liability

Legal Alert: Court Emphasizes that Evidence of Training Is a Must

For over 10 years, employers have been able to avail themselves of an affirmative defense to sexual harassment allegations by an employee against a supervisor/manager in those situations where no tangible adverse employment action has been taken against the employee. This defense is known as the *Faragher/Ellerth* defense, and can be invoked where the employer can demonstrate that: (1) it exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to otherwise avoid harm. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 764-65 (1998). The vast majority of employers have anti-harassment policies including reporting procedures and protocols for employees to follow, have disseminated those policies and procedures to all employees, and have required employees to acknowledge receipt of the policies. However, the adoption, dissemination and acknowledgment of receipt of the policy by the employee may not be sufficient for employer to invoke the affirmative defense.

Recently, in *Bishop v. Woodbury Clinical Laboratory*, No. 3:08-cv-1032 (M.D. Tenn. 2010), **the court rejected the employer's *Faragher/Ellerth* affirmative defense despite the fact that the employer had an existing anti-harassment policy that was published and provided to all of its employees**. The employee admitted that she had received the policy and had been directed to read it. She claimed, however, that she did not read the policy or understand the reporting requirements. **The court noted that there was no evidence offered to demonstrate that the employee or her supervisor received any training on the sexual harassment policy and reporting obligations**. Thus, **the court concluded that the employer failed to establish that it was entitled to invoke the *Faragher/Ellerth* affirmative defense as it could not demonstrate that it exercised reasonable care to prevent and promptly correct any sexually harassing behavior**.

This case clearly highlights the employer's obligations to take reasonable care – **not only must the employer have an effective anti-harassment policy and reporting procedures disseminated to its employees, but it should also conduct anti-harassment training for its employees and supervisors to ensure they all understand the policy and procedures. Just passing out the policy is not enough**.

While this decision is not binding on courts outside of the Middle District of Tennessee, it is possible other courts will follow the court's reasoning in *Bishop*. In these increasingly litigious times, it is more important than ever for employers to institute these mechanisms to ensure that its existing policy will be deemed "reasonable," therefore permitting the employer to fully protect itself.

During the hearing described below, the employer argued against fines ($965 per discrepant form I-9) for having improperly completed forms I-9. The employer said that the discrepancies were minor, technical errors. The federal government argued that the discrepancies were substantive errors and that the fines should be applied.
The hearing officer ruled that the errors were substantive, not technical.

What were the discrepancies? Section 2 of the form I-9 was not properly completed within 3 business days of the employee's date of hire. So the employer is facing a fine of $6,755 ($965 x 7).

To paraphrase a commercial on TV, "***What's in your folder of I-9 forms?***"

New OCAHO Decision Clarifying I-9 Violations

The Office of the Chief Administrative Hearing Officer (OCAHO) in a recent decision confirmed that ***"[f]ailure to properly complete section 2 of form I-9 within three business days of hiring an employee is a substantive violation, not a technical or procedural one***."

The case, *USA v. New China Buffet Restaurant* involved the question of whether the defendant was entitled to correct certain issues with its I-9s. Employers are given 10 days to correct procedural and technical violations, but substantive errors cannot be corrected.

Excerpted from the Written Decision by the Hearing Officer:

New China's prehearing statement argues that because it has now corrected its I-9 forms, the complaint is moot and should be dismissed.

The short answer to New China's contention is that it is simply wrong.

Failure to properly complete section 2 of form I-9 within three business days of hiring an employee is a substantive violation, not a technical or procedural one.

Failure of the employer to sign the certification within three business days is a substantive violation, and failure to identify proper List A, or List B and C documents on the form and to provide their titles, identification numbers and expiration dates, or alternatively attach copies of the documents to the form, is also a substantive violation.

New China's attempts to belatedly "correct" what are clearly substantive violations is accordingly ineffective.

The record thus plainly reflects that New China failed properly to complete section 2 of form I-9 for Fen Zhe Chen, Mei Hui Chen, Chang Jiang Jin, Cui Ping Jiang, Tai Peng Ouyang, Yi Mei Ouyang, and Zhi Lin.

New China Buffet Restaurant's contention that the violations charged were technical and procedural is wrong as a matter of law and ICE is entitled to summary decision as to liability.

Employer Obligations Under 8 U.S.C. § 1324a

The INA imposes an affirmative duty upon employers to prepare and retain certain forms for any employees hired after November 6, 1986 and to make those forms available for inspection.

Forms must be completed for each new employee within three business days of the hire, and each separate failure to properly prepare, retain, or produce the forms upon request constitutes a violation.

Regulations designate form I-9 as the employment eligibility verification form to be used by employers. The form has two parts. Section 1 consists of an employee attestation, in which the employee provides information under oath about his or her status in the United States. Section 2 consists of an employer attestation, which has two separate components: a documentation part and a certification part. Both are crucial to enforcement.

The documentation part requires the employer to list the specific documents which were examined to establish an individual's identity and eligibility for employment, and to provide certain information about the documents.

The certification part requires the employer or agent to sign the form under penalty of perjury within three days of hiring an employee certifying that the employer examined the documents identified and found that they appear to be both genuine and related to the individual named.

The statute provides that an entity charged with technical and procedural failures in connection with the completion of an I-9 form must be afforded a 10 day period after being advised of the basis for the failure in which to correct such technical and procedural errors.

No such relief is available, however, when the violation is **substantive** in nature rather than technical or procedural.

Section 1324a(b)(6) states that employers are relieved from liability for certain minor, unintentional violations of the verification requirements, but does not provide a shield to avoid the basic requirements of the Act).

Section 1324a(b)(6) thus applies only to certain specific technical or procedural failures, not to failures to comply with core verification requirements

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What are Substantive and Technical Violations of IRCA?

By Bruce Buchanan, Partner-in-Charge, Immigration Law Section, King & Ballow law firm

The Immigration and Customs Enforcement (ICE) issued an internal document entitled, Guide to Administrative Form I-9 Inspections and Civil Monetary Penalties, on November 25, 2008. The American Immigration Lawyers Association (AILA), through a FOIA request, received a copy of the Guide. It is very insightful as to how ICE defines substantive and technical violations.

The following are **substantive violations**:

1. Failure to timely prepare or present the I-9;
2. Failure to ensure that the individual provides his or her printed name in Section 1 of the Form I-9;
3. Failure to ensure the individual checks a box in Section 1 of the Form I-9 attesting to whether he is a citizen or national of the United States, a lawful permanent resident (LPR), or an alien authorized to work until a specified date, or checking multiple boxes;
4. Failure to ensure an LPR or alien authorized to work provides his or her "A" Number in Section 1 of the Form I-9, but only if the "A" Number is not provided in Sections 2 or 3 of the Form I-9 (or on a legible copy of a document retained with the Form I-9 and presented at the I-9 inspection);
5. Failure to ensure the individual signs the attestation in Section 1.
6. Failure to review and verify a proper List A document or proper List B or List C documents in Section 2 or Section 3;
7. Failure to provide the document title, identification number(s) and/or expiration date(s) of a proper List A or proper List B and List C documents in Section 2 or 3, unless a legible copy of the document(s) is retained with the Form I-9 and presented at the I-9 inspection;
8. Failure to provide the date employment begins in Section 2 of the I-9;
9. Failure to sign the attestation in Section 2 of the Form I-9;
10. Failure on the part of the employer of authorized representative to print their name in the attestation portion of Section 2.
11. Failure to date Section 2 of the Form I-9;
12. Failure to date Section 2 within three business days of the date the individual begins employment or, if the individual is employed for three business days or less, at the time employment begins.
13. Failure to recertify and complete within 90 days the pertinent Section 2 information for verification with a receipt for lost or stolen documents.

14. Failure to sign Section 3 of the Form I-9;
15. Failure to date Section 3 of the Form I-9; and/or
16. Failure to date Section 3 of the Form I-9 not later than the date of the expiration of the work authorization.

A person or entity that has committed one or more substantive violations does **not** have a 10-day notification and correction period and is subject to a Notice of Intent to Fine (NIF).

The following are **technical violations**:

1. Use of the Spanish version of the I-9, except in Puerto Rico;
2. Failure to ensure an individual provides her maiden name, address or birth date in Section 1 of the I-9;
3. Failure to ensure an LPR or alien authorized to work provides his alien number ("A" Number) in Section 1 of the I-9, but only if the "A" Number is provided in Sections 2 or 3 of the Form I-9 (or on a legible copy of a document retained with the Form I-9 and presented at the I-9 inspection);
4. Failure to ensure the individual dates Section 1 at the time employment begins;
5. Failure to ensure a preparer and/or translator provide his or her name, address, signature, or date;
6. Failure to provide the document title, identification number(s) and/or expiration date(s) of a proper List A document or proper List B and List C documents in Section 2 or 3, but only if a legible copy of the document(s) is retained with the Form I-9 and presented at the I-9 inspection;
7. Failure to provide the title, business name and address in Section 2;
8. Failure to state "Individual underage 18" in Column B, for employees under the age of 18 using only a List C document; and/or,
9. Failure to provide the date of rehire in Section 3 of the Form I-9.

For technical violations, an employer is provided with at least 10 business days to correct the violations after notification of such violations. If the employer corrects the violations within the designated time period, it is normally deemed to have complied with the requirements. If the technical violations cannot be reasonably corrected, the employer should provide ICE with an explanation in writing of why the violations reasonably cannot be corrected. If ICE determines the explanation is reasonable, the technical violation will not be consideration a violation subject to a NIF.

Does your organization have an explicit NO EXPECTATION OF PRIVACY policy statement that each employee has acknowledged in writing?

From the law firm of Fisher & Phillips LLP:

In Wake Of Court Ruling On Privacy Issue, All Employers Need Employee Tech Policies

In mid-June 2010, the U.S. Supreme Court, for the first time, considered whether an employer was within its rights to search employee text messages. The court decided unanimously that the search was reasonable. Although the case focused on a government employer, the decision clearly has ramifications for private businesses as well.

To protect themselves and minimize the possibilities that employees will misuse company technology, **it is extremely important that businesses and organizations put written communication policies in place. As the court observed, "Employer policies concerning communications will, of course, shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated."**

Both public and private employers should establish and implement formal, written electronic communications and systems usage policies, broad and flexible enough to cover emerging technologies, and update them regularly as new technologies develop. Internet or e-mail policies should cover use of company-issued electronic devices, texting and appropriate use of social-networking sites both at work and away from work. **The written policies should include**

explicit statements that employees have no privacy, confidentiality or ownership expectations in data stored on company systems or in any communications generated using employer-provided devices. Written policies should be acknowledged in writing by all employees.

Technology is necessary for conducting business, and its reach and effect will continue to expand. Policies that establish company expectations will help ensure that employees use that technology appropriately and in ways that provide a clear company benefit.

Two substantial risks of overtime violations under the FLSA are:

1. the automatic deduction of work time for a meal period; this issue is discussed below; and,
2. allowing NON-Exempt employees to eat at their work station; answering a phone, reviewing work-related email; answering a question from a co-worker; discussing work; etc. while at a work station is NOT an uninterrupted meal period; unless a meal period is at least 30 minutes of UNINTERRUPTED time, it has to be time worked and paid.

From the law firm of Fisher & Phillips.

Beware the Meal Period Time-Bomb

by John E. Thompson

An increasing number of federal Fair Labor Standards Act lawsuits and U.S. Labor Department investigations include claims based upon the employer's automatically deducting meal periods from non-exempt employees' recorded work times. Typically, the employees did not clock out-and-in to reflect the mealtime they took. **Instead, the employers systematically subtracted the full, scheduled meal period from each employee's total daily hours on the assumption that the person took an entire, uninterrupted meal break each workday**. An employee who worked during a meal period could avoid the deduction by using an exception feature of the timekeeping system, but the usual allegation is that employees did so inconsistently or infrequently, if ever.

Generally speaking, the FLSA does not require that employees be compensated for duty-free meal periods. However, to the extent that automatic time deductions deprive an employee of FLSA-required wages for work during a meal period, a violation often occurs. For instance, this frequently happens when the "standard" deduction is made for a day when the employee takes no meal break or takes only a shortened one, or where the meal period is shot-through with work-related interruptions.

A timekeeping-by-exception approach to meal periods is not unlawful under the FLSA *if it results in an accurate record of non-exempt employees' hours worked*. *See, e.g., Opinion Letter of Office of Enforcement Policy FLSA2007-1NA* (May 14, 2007). However, experience suggests that this is *not* what occurs in the real world. An unusual set of circumstances might permit such a claim to be defended successfully, but even then the "win" is likely to be so expensive and disruptive that it will not feel much like a victory.

A safer approach is to instruct employees clearly that:

- They are to clock out-and-in for the time taken for a meal period;
- They are not to work during mealtime unless it is unavoidable; but
- They will be compensated for and must therefore accurately record any time so worked.

Of course, even if employees are told these things, in the end what matters is what actually happens. For example, there might be situations in which work-related interruptions of a meal period should lead to considering the entire period to be compensable work time.

Meal periods might also be regulated by the laws of other jurisdictions, as in the state of California. In addition to considering FLSA issues, it is also important to know whether and how those laws might affect timekeeping and pay where meals are concerned.

Here's a question that arises periodically: "***Can part-time employees be Exempt?***"
The answer is "maybe." It depends on whether the salary that is received is $455/week or higher; the "Salary Level Test" imposed by the Fair Labor Standards Act (FLSA). Regardless of the number of hours a part-time employee works per week or his/her hourly equivalent rate (salary per payroll period divided by the number of hours worked), the job position is NON-EXEMPT if the weekly salary is less than $455/week.

See the response to this question from the "answer site" at SHRM.org.

Part-timers earning less than FLSA's minimum aren't Exempt, regardless of duties

By Amy Maingault, Society for Human Resource Management (SHRM)

Q: We have a group of employees who all do the same work. Generally, this position is considered exempt based on the duties and the salary.

However, we have a few employees in this position who work part-time. Is it OK to classify them as exempt even if they don't meet the minimum salary specified in the new Fair Labor Standards Act (FLSA) regulations (the Salary Level Test)?

Can we prorate the minimum salary requirement stated in the FLSA since these employees work fewer hours?

A: Many employers that have part-time workers are dealing with this situation.

According to information from the Department of Labor (DOL), employers may not prorate the minimum salary for part-time workers. Although the FLSA regulations do not specifically state that, the lack of any exception for part-time workers means that the minimum applies to all workers. This interpretation is supported by DOL's elaws – FLSA Advisor, which states, "Whether an employee is considered full-time or part-time does not change the application of the FLSA."

Go to: http://www.dol.gov/elaws/faq/esa/flsa/014.htm or more information.

Lastly, the DOL has confirmed that employees are subject to the $455 weekly/$23,660 yearly minimum salary requirement regardless of how many or how few hours an employee works.

Part-time workers who do not meet that minimum may not be classified as exempt and will be entitled to overtime payments if they work more than 40 hours in a workweek.

HARVEY MACKAY

United Feature Syndicate

DON'T NEED A PRO'S HELP? THINK AGAIN

In less-educated, more class-ridden societies, the professions constituted a middle force between the working class and the capitalist class. (But today) that special role of the professional has all but disappeared.

Attorney Carl Sapers, in Progressive Architecture

These days, the crunch has finally hit the group that believed the most in its own immortality: the professions.

In just the past five years, for example, the number of people employed as architects in the United States has shrunk to 157,000 from 199,500.

While the number of lawyers continues to grow, the legal profession has accommodated this swelling of its ranks by ceasing to be a profession and becoming a business. Lawyers now compete by out-promising each other in TV ads like car dealers. Law firms weed out lawyers, no matter how skilled, who can't bring in big fees.

Doctors are facing the most serious challenge of all. Under many of the health plans under consideration by Congress, their professional judgment is subject to second-guessing by various panels of non-medical

experts – government bureaucrats who will decide when and whether a medical procedure is sufficiently necessary to warrant payment. Directly or indirectly, instead of working for themselves on behalf of their patients, doctors seem destined to wind up working for the government, on behalf of the government.

Flip on relationship

The other day, I met with a lawyer I've relied on over the years for copyright work relating to my writing. The flip on the traditional lawyer/ client relationship came when he called me and offered to take me to lunch at one of my neighborhood bistros.

These days even the lawyers who don't advertise know enough to check in with their clients every now and then and to show face outside their usual haunts.

A few months earlier, I had suggested to a young author needing legal advice that he give the lawyer a call.

Over lunch, the lawyer told me this story:

> "I want to thank you for having your author friend contact me. We talked about drafting an agreement with an agent who wanted to sign him up. But I could sense that the longer we talked, the further apart we were getting. He was afraid to hire me -- afraid of the money it would cost him, on top of the money he would have to pay an agent. In fact, the real purpose of his call was to see if he could get by without hiring an agent at all, much less a lawyer."
>
> "I said to him: 'You can always avoid paying for a service, no matter what it is -- lawyer, doctor, architect, agent. But what you can't avoid is the performance of that service. If you're not going to pay to have it done, then you'll have to do it yourself.
>
> **The question is: Who can do the job better?'"**

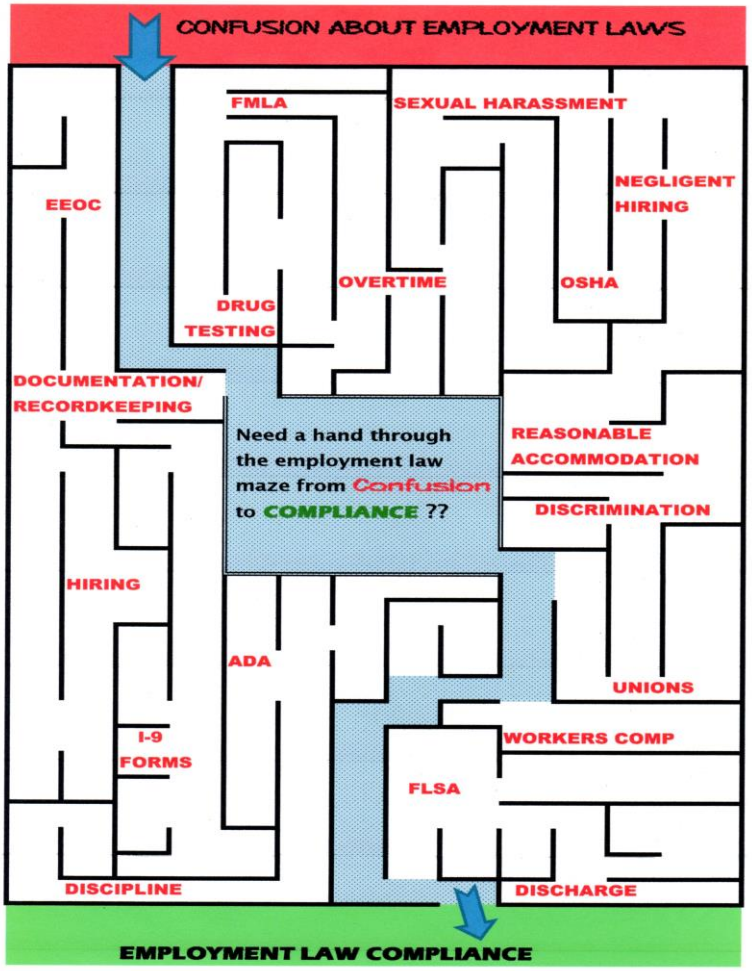
You get what you pay for

What the lawyer didn't have to say is that you get what you pay for. Because I know the author in this case, I also know that he wound up giving away a lot more of his deal than he would have had to if he had hired a professional to draft his contract with the agent.

But at least he had an agent and got published. Many first-time authors drop their manuscripts over the transom themselves to save the agent's fee, even though an agent can greatly improve the odds of publication. What I have never been able to figure out is why 100 percent of nothing is worth more than 90 percent of something.

These days, we all are into downsizing and value pricing and doing it ourselves and thumbing our noses at authority figures. It's the American Way in the '90s. But before you decide to (1) sell it on your own, (2) enter into a contract without seeing a lawyer or (3) practice do-it-yourself brain surgery, stop a minute and consider whether you're buzz wording yourself into a bad, bad decision.

Mackay's Moral: Cheap advice usually turns out to be the most expensive.



Need help navigating your way from confusion to compliance? You probably know a lot about the business you are in. But, unless that business is employment law compliance, your organization could be at risk.

On average, jury awards for discrimination claims against employers are $500,000 - $1,000,000, while proactive help costs a mere fraction of that.

We can help! If you lack the resources and inclination to establish a full-fledged human resources (HR) department, **HRHelp** can give you a hand.

We can provide the services and assistance your organization needs to eliminate or reduce the risk of the consequences for violations of the compliance requirements of the employment laws.

Paraphrasing Harvey MacKay from the previous page: ***Which course of action will get your organization the best result?***

FOR YOUR INFORMATION

Since 1988, John Perkins, SPHR, has consulted organizations and businesses in all aspects of human resource (HR) management. One of the most vital services that Mr. Perkins provides is helping clients avoid labor law violations, specifically with regard to the following: Americans With Disabilities Act (ADA); Family and Medical Leave Act (FMLA); Fair Labor Standards Act (FLSA); Immigration Reform and Control Act (IRCA); COBRA & HIPAA; and, federal and state Civil Rights Acts.

Through his firm, **HRHelp**, Mr. Perkins works with clients to assess their risk and develop solutions to potential problems. Specific issues are then managed by creating appropriate policies and procedures to meet the needs of the businesses while avoiding labor law compliance violations.

Additionally, Mr. Perkins specializes in the following:

- Workplace incident prevention, including: sexual and other forms of harassment, discrimination, and wrongful treatment.
- Investigation of claims of harassment, discrimination, hostile work environment, and wrongful treatment.
- Training program customization for employees and managers.
- Response management for clients that have received A Notice of Charge of Discrimination from the EEOC.

Professional Activities:

- Board of Directors of the Metro Phoenix Human Resource Association, Treasurer
- Business Counselor with the Arizona Small Business Development Centers (SBDC) Network
- Civil Service Board, City of Phoenix, Board Chair
- Small Business Council of the Phoenix Chamber of Commerce, Chair

Adjunct faculty member teaching HR and management courses at:

- Arizona State University
- Keller Graduate School of Management
- Ottawa University
- University of Phoenix
- Rio Salado Community College

Education:

- Indiana University M.B.A.
- Indiana University M.S. Ed.
- Purdue University B.A.

Certification:

- He has achieved lifetime certification as a Senior Professional in Human Resources (SPHR) from the Society for Human Resource Management.

John Perkins, SPHR

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