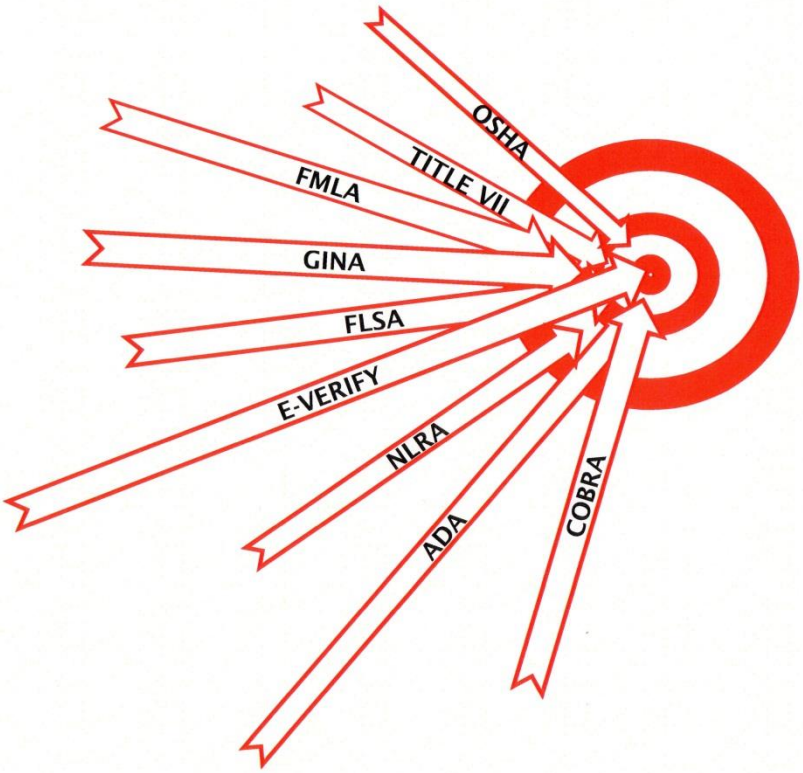
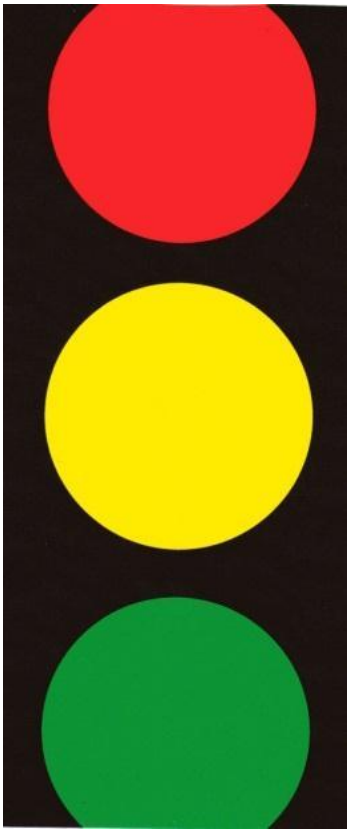


Is Your Organization A Target?

HR & EMPLOYMENT LAW
COMPLIANCE GUIDE
for Arizona Employers

revised: DECEMBER 2015

INTRODUCTION



DRIVER'S GUIDE

INCLUDING THE

RULES OF THE ROAD

PUBLISHED BY THE

MOTOR VEHICLE DEPARTMENT

YOUR STATE

In order to get a driver's license, your state requires you to know the "*rules of the road*" and the expectations it has of drivers. Your state even publishes a "Driver's Guide" so that you can know what those "*rules*" and expectations are and how to comply with them.

What federal or state agency provides you with a similar "Guide" regarding the "*rules of the road*" for the multiple federal and state employment laws with which your organization must comply? How does your organization avoid being a target for claims of discrimination or harassment?

Without such a "Guide", how is your business expected to know how to comply with:

- the Fair Labor Standards Act (FLSA)?
- the Family and Medical Leave Act (FMLA)?
- OSHA?
- Title VII of the Civil Rights Act?
- the Arizona Civil Rights Act?
- the ADA & the ADAAA?
- the Arizona Medical Marijuana Act (AMMA)?
- the Arizona Crime Victim Leave Act?
- Child Labor Laws?
- the Genetic Information Non-Discrimination Act (GINA)?
- The Age Discrimination in Employment Act (ADEA)?
- other such state and federal laws?

This document was created and is provided to help you know (by threshold numbers of employees) the employment laws with which your organization is expected to be in compliance, notice/poster requirements, and other "*rules of the road*" regarding those laws AND to help you not be a target for claims of discrimination or harassment.

The first version of this **GUIDE** was created in 1990. Back then, I purchased a number of "how-to-start-a-business-in-Arizona" books to learn what, if any, information was provided in them regarding employment laws and the compliance requirements of the laws. Most of those books had some information about the employment laws; but, the information only gave a brief description of each. Little, if any, compliance guidance was provided.

The information did not identify which businesses (by threshold numbers of employees) had to comply with which laws. There was no information about required notices/posters, recordkeeping/ documentation requirements, or other such information to help a business be able to meet the compliance requirements of the laws.

Since the initial 1990 version, this **GUIDE** has been updated periodically as new federal and/or state employment laws have become effective, as court cases have been decided that give new understandings on how to comply with the employment laws, or as compliance regulations and expectations have been added or revised.

There is an old saying: ***IGNORANCE IS BLISS***. While that statement may be true, I have always told employers that ignorance is NOT a good defense to a non-compliance violation of any of the employment laws. All of the laws presume the employer knows what its compliance requirements are and is in compliance with those requirements. "***Oh, we didn't know that we were supposed to be doing this.***" or "***Oh, we didn't know we were not supposed to be doing this.***" are NOT appropriate responses to non-compliance charges/claims/allegations OR to charges/ claims/allegations of discrimination, harassment, or wrongful employment practices.

This **GUIDE** is a resource for you to know (by threshold numbers of employees) the employment laws with which your organization is expected to be in compliance, notice/poster requirements, and other such information, so that your organization can avoid being "***blissfully ignorant***."

At any time you have questions about the information in the **GUIDE**, about employment laws, and/ or about specific HR situations, feel free to contact me. There is never any cost, commitment, or obligation for answers to your questions.

If you want to be on the email distribution list for **HR Alerts** (periodic emails regarding HR and/or employment law issues), please send an email to hrhelp@cox.net; in the Subject line, please enter: ***subscribe***.

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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 1: The Doctrine of Employment At-Will

The doctrine of employment at-will, which was established in the courts, means:

> ***When the employment relationship is of no specific duration (no employment contract exists), the employment relationship can be terminated at the whim or will of either party (employee or employer) with or without notice, with or without cause/reason, and without liability to the other party.***

Corollary: if an employee can resign or quit with or without notice, with or without cause/reason, and without liability, then the employer can discharge the employee with or without notice, with or without cause/reason, and without liability.

While it may seem that employment at-will will allow you to fire an employee at any time, with or without notice, and with or without cause/reason, the reality is that many laws exist that restrict or limit employment at-will. Also, many court decisions have the effect of restricting or limiting employment at-will.

The wise employer is the one who makes him/herself aware of these laws with which his/her organization must comply and the compliance requirements of each. Then, the wise employer should ensure that the human resource (HR) policies and practices of his/her organization are consistent with the compliance requirements of these laws to minimize the possibility of legal or administrative action against the organization.

NOTE: "Right to work" is not employment at-will. Many employers believe that when a state is a "right to work" state, as is Arizona, it means the employment relationship can be ended with or without notice, with or without cause/reason, and without liability (i.e., employment at-will).

Instead, "right to work" is a legal principle from the Labor-Management Relations Act (Taft-Hartley Act). "Right to work" refers to an employee's right to work without having to be a member of a labor union in order to be hired or without having to join a labor union (or pay union dues) post-employment.

STATUTORY EXCEPTIONS TO EMPLOYMENT "AT-WILL"

A. Federal Laws

- discrimination on the basis of race, sex, national origin, religion, or age
- union activities
- pregnancy (with regard to disability benefits)
- handicapped status, disability status
- veteran status
- garnishment of wages
- assertion of statutory rights (FLSA, OSHA, ERISA, ADEA, etc.)

B. Arizona laws/statues

- A.R.S. 23-425 -- safety and health
- A.R.S. 41-1463 -- civil rights, which includes handicapped status
- A.R.S. 21-236 -- jury duty
- A.R.S. 16-402 -- time off to vote
- A.R.S. 26-167 & 168 -- national guard duty

JUDICIAL EXCEPTIONS TO EMPLOYMENT "AT-WILL"

A. Public Policy exceptions

- discharge for exercise of rights
- discharge for performance of civic duty
- discharge for whistle-blowing
- discharge for refusal to commit unlawful or unethical act
- violation of anti-discrimination statutes

B. Implied good faith and fair dealing

C. Implied Contract; promise of job security (written or oral)

- Employee Handbooks/Manuals, Human Resource (HR) Policies and Procedures Manuals, or other written representations
- oral representations

"*PRACTICAL*" EXCEPTIONS TO EMPLOYMENT "AT-WILL"

A. Your former employee files a claim for unemployment benefits. In order for the employee to be denied benefits, the employer must prove that the person committed an act(s) that disqualify the former employee from receiving benefits.

Will "*employment is at will; we didn't have a reason to fire the former employee*" be a response that will result in the former employee being disqualified from receiving benefits?

B. Your former employee files a claim of discrimination or files a wrongful discharge lawsuit.

Will "*employment is at will; we didn't have a reason to fire the former employee*" be a response that will result in the EEOC finding that discrimination did not occur or a jury finding that the employee was not wrongfully discharged? Will the EEOC or a jury really believe that the employer had absolutely no reason for the discharge? Or will they believe the former employee's claim that the discharge was based on a discriminatory motive or was wrongful?

C. The attorney for the former employee asks you the following questions during a deposition or when you are in the witness chair as part of a trial:

"In the past 10 years, how many employees did your company discharge/fire?

"How many of those employees were discharged/fired without any cause/reason?"

"How many of those employees were discharged or fired without any counseling, verbal warnings, written warnings, suspensions, last chance agreements, or other disciplinary actions?"

"How many times, in the past 10 years, has a manager/supervisor gone out into the workplace and, for no reason/cause and without any notice, discharged/fired a worker just because he/she (the manager/ supervisor) could?"

While it may seem that employment at-will will allow you to fire an employee at any time, with or without notice, and with or without cause/reason, the reality is that many laws exist that restrict or limit employment at-will. Also, many court decisions have the effect of restricting or limiting employment at-will.

Given the multiple statutory and judicial exceptions to employment at-will, the wise employer will:

- ✓ have a specific reason(s)/cause(s) to explain any discharge/firing; and,
- ✓ have sufficient documentation to explain and justify the reason(s)/cause(s) for the discharge/firing; and,
- ✓ be sure that the information on warning/disciplinary action documentation is consistent with information on the person's performance evaluation/review documents.

NOTE: The Arizona Employment Protection Act provides that employment in Arizona is "at-will" (terminable by either the employee or the employer without cause/reason, without notice, and without liability) except when there is:

- **a <u>written</u> contract of employment signed by both parties;**
- **an agreement signed by both parties restricting the right of either to terminate the employment relationship; or,**
- **a Handbook/Manual distributed to the employee and the Handbook/Manual states that it is intended to be a contract.**

Thus, claims of "implied contract" based on language in a handbook/manual/guide will not be able to proceed unless one of the three listed exceptions exist. This legislation overruled the *Leikvold v. Valley View Community Hospital* case (1984) in which the AZ Supreme Court said a terminated employee could make a breach of implied contract claim based on the language in the employer's handbook. Also, the statute of limitations for filing a wrongful discharge claim was reduced to one year.

Wrongful discharge claims tort claims may proceed when the employee was discharged in violation of state statute or in retaliation based on one or more of the following:

- **refusal to commit an act that violates state statutes or the state constitution;**
- **whistleblowing;**
- **exercising rights under worker's comp law;**
- **serving on a jury;**
- **exercising voting rights;**
- **service in the armed forces or national guard;**
- **refusing to join a labor union; or,**
- **refusing to give kickbacks to the employer.**

<u>TIPS, based on the Arizona Employment Protection Act, for ensuring that employment is at-will and remains at-will</u>:

- **include a disclaimer or notice in your business/organization's Employee Handbook that employment is at-will AND that the Handbook itself is NOT an employment contract;**
- **do not sign the Employee Handbook; and,**
- **use at-will language on the Employment Application form and in offer letters that is consistent with the at-will language in the Employee Handbook.**

Probation Periods – A Risky Practice

The following is a edited blend of two articles published by BLR (Business & Legal Resources).

COMMENTS by HRHelp regarding probationary periods follow the information below.

Probationary Periods

Many employers start new employees off with a "probationary period" during which the employer can let the new employee go without worrying about just cause and lawsuits. Sounds good, but there's a downside, says attorney Sandra Rappaport.

The use of "probationary hiring" has been confusing for employers and employees alike, Rappaport says. Originally, it was a way for an employer subject to a collective bargaining agreement (CBA) to carve out a short, introductory period that would **not** be governed by the same termination requirements as the regular employment period under the agreement

Generally, that meant that during the probationary period, a union employee could be let go without concern for just cause or other rules governing termination.

Probationary periods have since been adopted by many employers who aren't unionized, says Rappaport.

Must You Have a Probationary Period?

No particular law requires employers to have a category of probationary employees or governs termination during a probationary period, says Rappaport. Essentially, the answer to how one should treat a probationary hire depends on the nature of the particular employment relationship.

If an employment contract sets forth the requirements for termination – e.g., employment can only be terminated for cause – the employer obviously must comply with those requirements. Similarly, if the employment relationship is governed by a CBA negotiated between the employer and a union representing its employees, the CBA likely will specify the grounds for termination and the required procedures for discharge. In both an employment agreement and a CBA, the contract's language governs the requirements for lawful termination during a probationary period.

If there is no employment contract saying otherwise, the presumption in many states is that all employment is at-will, which means that either party can terminate it with or without cause.

If an employer has an at-will employment relationship with all of its employees, a probationary period is really not needed. A new hire can be terminated at any time in his or her employment without cause; setting aside a special introductory period does not change that.

No Guarantee

However, says Rappaport, most employers understand that the at-will presumption does not necessarily mean that they will be immune from a wrongful termination suit. Even in an at-will state, an employer cannot terminate a person for any reason barred by state or federal law; employment decisions based on prohibited grounds like race, age, gender, national origin, religion, disability, or for reporting illegal conduct ("whistleblowing") can subject the employer to liability, even if the discharge is during a probationary period.

Therefore, it is helpful to document the legitimate bases for a termination decision, regardless of when it occurs.

Don't Create an Implied Agreement

In addition, says Rappaport, at-will employers need to avoid creating implied agreements – through actions, policies, verbal commitments, and the like – that an employee will not be terminated except for cause.

To avoid wrongful termination lawsuits based on a claim that an implied agreement exists, employers must be careful not to behave in ways inconsistent with at-will employment. **Using a probationary period may imply some increased level of job security after the period ends – an implication that is completely inconsistent with at-will employment.**

Probationary Period? Get Rid of It!

Attorney Hunter Lott says that any "probationary period" or "introductory period" (or as one company calls it, "comfort time") is a threat to the employer's at-will status because it suggests that after the probationary period, employees have greater rights.

What you really want, he says, is to eliminate the probationary period entirely. Then, he says, *"Your employees are on probation forever."*

COMMENTS by HRHelp:

If employment is truly at-will, then employment will be at-will during an employee's first 30 days of employment, first 90 days of employment, first 4 years of employment, first 25 years of employment, and forever.

But, a probationary period implies that employment at-will only applies for a certain time period and, that if the employee is allowed to continue working after that time period expires (as stated in CBA's), the employee becomes a "for cause" employee.

The contradiction between employment at-will as a forever concept versus employment at-will only during a probationary period is one that a former employee's attorney will exploit with a jury.

The jury will be told about the history of probation periods (stemming from CBA's) and that if employment truly were at-will at your organization, there would be no need for a probation period since "probation – the ability to discharge an employee without cause" would always be in effect.

And, the jury will be told that your organization really doesn't practice employment at-will because it has a probationary period and, even during the probationary period, has never discharged an employee without cause (or "good cause") because you document everything in order to defend against a claim of discrimination or wrongful termination by justifying (showing "good cause") for every discharge that has occurred during an employee's probation period.

PART 2: Federal, State, and Local Laws with which Employers Must Comply

Federal Laws

- ADA – Americans With Disabilities Act
- ADAAA – Americans With Disabilities Amendments Act
- ADEA – Age Discrimination in Employment Act
- Civil Rights Act of 1964
- Civil Rights Act of 1991
- COBRA – Consolidated Omnibus Budget Reconciliation Act
- Drug Free Workplace Act
- Employee Polygraph Protection Act
- Equal Pay Act
- ERISA – Employee Income Retirement Security Act
- FACT – Fair and Accurate Credit Transactions Act
- FCRA – Fair Credit Reporting Act
- FLSA – Fair Labor Standards Act
- FMLA – Family and Medical Leave Act
- GINA – Genetic Information Non-Discrimination Act
- IRCA – Immigration Reform and Control Act
- LMRA – Labor-Management Relations Act (Taft-Hartley Act)
- NLRA – National Labor Relations Act (Wagner Act)
- OSHA – Occupational Safety and Health Act
- OWBPA – Older Workers Benefit Protection Act
- PDA – Pregnancy Discrimination Act
- Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (New Hire Reporting)
- USERRA
- Vietnam Veterans Readjustment Act
- Vocational Rehabilitation Act
- WARN – Worker Adjustment and Retraining Notification Act

Arizona Laws

- Arizona Child Labor Laws
- Arizona Civil Rights Act
- Arizona Crime Victim Leave Act
- Arizona Employment Protection Act
- Arizona Medical Marijuana Act
- Arizona Minimum Wage Act
- Arizona Wage Laws
- Arizona Workers Compensation Statutes
- Legal Arizona Workers Act
- Smoke-Free Arizona Act

Local Laws

- County Ordinances and Acts (e.g., Maricopa County Trip Reduction Legislation)
- City Ordinances and Acts (e.g., Affirmative Action requirements of contractors to the City of Phoenix; City of Phoenix Smoking Ordinance)

PART 3: The Basics of Employment Law Compliance, by Threshold Numbers of Employees

ALL EMPLOYERS

Some businesses/organizations may be exempt from provisions of the laws listed under **ALL EMPLOYERS** depending upon: the nature of the business/organization; whether it engages in interstate commerce; its annual gross revenues/sales; and/or other factors.

Any questions about whether a specific business/organization does or does not have to comply with a specific law should be addressed to a competent labor law attorney or to the agency that administers the law. It is recommended that, unless the business/organization has determined through a labor law attorney or the agency that it does not have to comply with a specific law, it should meet the compliance requirements of that law.

- **New Hire Reporting (Personal Responsibility and Work Opportunity Reconciliation Act of 1996)**

  Employers are required to report new hires within 20 days of employment. In Arizona, new hires must be reported to the Arizona New Hire Reporting Center. New hires can be reported by sending a copy of the employee's completed W-4 form or by sending a completed Arizona New Hire Reporting Form.

  For additional information, contact them at: https://az-newhire.com/

- **Fair Labor Standards Act (FLSA)**

  The FLSA establishes the minimum wage employers must pay. The federal minimum wage was raised to $7.25/hour on July 24, 2009.

  NOTE: The Arizona minimum wage became $8.05/hour as of January 1, 2015. Employers must pay the Arizona minimum wage since it is higher. For 2016, there will be no change/adjustment to the wage.

  A poster, ***"Employee Rights Under The Fair Labor Standards Act"*** must be posted; see **PART 4**.

  Employers are to establish a 168 consecutive hour (7 days x 24 hours/day) work week for purposes of calculating and paying overtime. Employers are required to pay overtime wages (at a rate of at least 1.5 times the employee's regular hourly rate) to non-exempt employees for all hours worked over 40 in a work week. Payment for overtime must be in the paycheck for the work week in which the overtime is worked. Non-exempt employees are NOT allowed to be given "COMP" time in lieu of payment for overtime.

- **Immigration Reform and Control Act (IRCA)**

  The IRCA requires that an I-9 form be completed for each new employee within the first 3 days of employment in order that the employer verify the identity and the employment eligibility of the new employee**. NOTE: Section 1 of the form MUST be completed by the employee on his/her first (1st) day of employment.** Section 2, can be completed up to the 3rd day (not counting the first day of employment).

  To obtain the current version of the form I-9 (rev. 03/08/13), go to: http://www.uscis.gov/files/form/i-9.pdf **NOTE:** pages 1-6 are Instructions; the form is on pages 7 & 8; and, documents acceptable for proof of identify and/or employment eligibility are on page 9.

  A **Handbook for Employers** (M-274, Rev. 03/08/13) is available from the Bureau of Citizenship and Immigration; go to: http://www.uscis.gov/files/form/m-274.pdf to download it.

  The **Handbook** provides instructions for completing the I-9 forms, includes the current version of the I-9 form, and includes color photos of the documents that are acceptable for proof of identity, employment eligibility, or both.

- **Legal Arizona Workers Act (LAWA)**

  Employers in Arizona must use the federal E-Verify system to verify the employment eligibility of each person hire on or after January 1, 2008. This requirement is **IN ADDITION TO** the federal I-9 requirement (proof of identity and proof of employment eligibility).

  Information regarding E-Verify and how to register as an employer is available at: http://www.dhs.gov/files/programs/gc_1185221678150.shtm

  To obtain a copy of the ***E-Verify User Manual for Employers*** (M-775, June 2013), go to: http://www.uscis.gov/USCIS/Verification/E-Verify/E-Verify_Native_Documents/manual-employer_comp.pdf

- **Worker's Compensation Laws of the state of Arizona**

  All employees, whether full-time, part-time, or temporary, MUST be covered by worker's compensation insurance. For specific information regarding the Arizona Worker's Compensation Law and its compliance requirements, contact the Arizona Industrial Commission.

  The State Compensation Fund (SCF) in Arizona was formed to make worker's compensation insurance more available to small companies (since many private insurance carriers do not write policies for small businesses/organizations).

- **Arizona Civil Rights Act (ACRA)**

  Arizona employers with one (1) or more employees are subject to the sexual harassment provisions of the Arizona Civil Rights Act; so, if a business/organization has one or more employees, its employees have protections from sexual harassment under ACRA.

- **Arizona Wage Laws**

  Arizona employers must designate two or more days in each month, not more than sixteen days apart, as fixed paydays for payment of wages to the employees.

  When an employee is discharged from the service of an employer, he/she must be paid wages due him within three working days or on the next regular payday, whichever is sooner.

  Employers may not withhold or divert any portion of an employee's wages unless one of the following applies:

  1. The employer is required or empowered to do so by state or federal law.
  2. The employer has prior written authorization from the employee.
  3. There is a reasonable good faith dispute as to the amount of wages due, including the amount of any counterclaim or any claim of debt, reimbursement, recoupment or set-off asserted by the employer against the employee.

- **Arizona Minimum Wage Act**

  The minimum wage in Arizona became $8.05/hour as of January 1, 2015. This rate is adjusted annually, based on economic indicators, by the Arizona Industrial Commission and becomes effective January 1 of the following year. For 2016, the wage will not change.

  NOTE: This law requires that new hires be given the employer's name, address, and phone number on the first day of employment; see PART 4.

  There is a "small business" exemption:

  - the business must have gross annual revenue of less than $500,000; and,
  - the business must be exempt from paying the minimum wage under the federal Fair Labor Standards Act (FLSA), 29 U.S.C. 206(a).

- **Smoke-Free Arizona Act**

  As of May 1, 2007, employers must prohibit smoking in all public places and place of employment. The only exception is outdoor patios as long as tobacco smoke does not enter, via entrances or windows or ventilation systems or other means, any areas where smoking is prohibited.

  Certain signage is required at ALL entrances to buildings. For information about the statute, including signage, go to: http://www.smokefreearizona.org/order-signage.asp

- **Arizona Child Labor Laws**

  A.R.S. 23-230 to 23-242 AND the federal Fair Labor Standards Act (FLSA) provide guidance regarding "Youth Employment", including the permissible hours of work for youths under the age of 16, prohibited types of work for youth under age 16, and prohibited types of work for youth under 18.

- **Wage Payments, Tax Withholdings (Social Security, Medicare, federal income, state income), and Garnishments**

  With regard to wage payments, see **Arizona Wage Laws**, on the previous page.

  With regard to tax withholdings, employers should obtain and refer to **Publications 15 & 15A, "Circular E, Employer's Tax Guide"**, which is available from the IRS; go to: http://www.irs.gov/app/picklist/list/publicationsNoticesPdf.html

  With regard to garnishments, you should obtain **Fact Sheet #30: The Federal Wage Garnishment Law, Consumer Credit Protection Act's Title 3 (CCPA)**; go to: http://www.dol.gov/whd/regs/compliance/whdfs30.pdf

- **Employee Polygraph Protection Act**

  The Act restricts the use of polygraphs (which includes lie detector tests, "honesty" tests, and similar tests or activities), except under some very specific conditions and only with the consent of the employee and only if certain procedures are followed and documented. A poster, "**Notice: Employee Polygraph Protection Act**", must be displayed; see **PART 4**.

- **Fair Credit Reporting Act (FCRA)**

  Background checks/investigations of applicants or employees are considered "consumer reports" under the Act. Applicants or employees must be given a Notice of the employer's intention to obtain a "consumer report" and authorize the background check/investigation.

  A copy of the applicant/employee's rights under the FCRA ***("A Summary of Your Rights Under the Fair Credit Reporting Act"***) also must be provided to him/her.

  No adverse employment decision based on the results of the "consumer report" can be made until the applicant/employee is told of the information used to reach the decision and is given the opportunity to correct such information.

- **Employee Retirement Income Security Act (ERISA)**

  ERISA sets standards for employee benefits plans to ensure the equitable character of and financial soundness of such plans and sets standards and rules governing the conduct of plan fiduciaries. Group health insurance plans, profit-sharing plans, 401(k) plans, 403(b) plans, and other such group benefits plans must meet ERISA standards.

- **Uniformed Services Employment and Reemployment Rights Act (USERRA)**

  Identifies the obligations employers have with regard to the hiring of members of the uniformed services, providing benefits to such members during periods of active duty, and the re-employment of such members returning from active duty.

- **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.

  For additional information, go to: https://www.ftc.gov/tips-advice/business-center/guidance/disposing-consumer-report-information-rule-tells-how **and** http://corporate.findlaw.com/business-operations/new-ftc-regulations-on-proper-destruction-of-consumer.html

EMPLOYERS OF 11 OR MORE

- **Occupational Safety and Health Act (OSHA)**

  Employers of 11 or more employees in certain, but not all, Standard Industrial Classification (SIC) codes and employers required by the Bureau of Labor Statistics must keep records of on-the-job injuries and illnesses on a calendar year basis and must provide that information annually to the Bureau of Labor Statistics.

  All employers of 11 or more must meet OSHA safety standards, must display the OSHA required poster, and must report any accident that results in one or more fatalities or the hospitalization of five or more employees.

EMPLOYERS OF 15 OR MORE

- **Title VII of the Civil Rights Act of 1964; the Civil Rights Act of 1991; and, the Arizona Civil Rights Act.**

  These laws prohibit discrimination in any aspect of employment (recruiting, interviewing, selection, compensation, benefits, selection for training, discipline, termination, layoff, etc.) on the basis of race, gender, religion, national origin, creed, or color. The Arizona law prohibits discrimination on the basis of handicap status, as well.

  The federal laws require employers to display a notice, ***"Equal Opportunity Is The Law"***, which is available from the Equal Employment Opportunity Commission; see **PART 4.**

  The Arizona law requires employers to display a separate, additional notice, ***"Arizona Law Prohibits Discrimination In Employment"***, which is available from the Civil Rights Division, Attorney General's Office; see **PART 4**.

  NOTE: Arizona employers with one [1] or more employees are subject to the sexual harassment prohibitions in the Arizona Civil Rights Act; prior to the Arizona Employment Protection Act, only employers with 15+ employees were subject to those prohibitions.

- **The Genetic Information Non-Discrimination Act**

  The Act prohibits employers from using a person's genetic information in making employment decisions such as hiring, firing, job assignments, or any other terms of employment; and, it prohibits employers from requesting, requiring, or purchasing genetic information about persons or their family members.

The Act also prohibits group and individual health insurers from using a person's genetic information in determining eligibility or premiums; and, it prohibits an insurer from requesting or requiring that a person undergo a genetic test.

The law requires employers to display a notice that is a supplement to the **"*Equal Employment Opportunity Is The Law*"** poster required by the Civil Rights Acts; see **PART 4**.

- **The Americans With Disabilities Act (ADA) <u>AND</u> the Americans With Disabilities Amendments Act of 2009 (ADAAA)**

  These laws prohibit discrimination in any aspect of employment on the basis of a person being:

  a) a "qualified individual with a disability";

  b) someone with a history of a disability; or,

  c) someone perceived to have a disability.

  A "qualified individual with a disability" is one who meets the prerequisite qualifications for a job and who can perform the essential functions of the job, with or without reasonable accommodation.

  The ***"Equal Opportunity Is The Law"*** poster covers discrimination on the basis of disability; no additional notice or poster is required. This is a complicated law. It is recommended that employers who are required to comply with the ADA meeting compliance requirements as quickly as possible and that they get assistance from an experienced human resource professional.

<u>EMPLOYERS OF 20 OR MORE</u>

- **Age Discrimination in Employment Act (ADEA)**

  This law prohibits discrimination in any aspect of employment on the basis of age – defined as age 40 or older. The ***"Equal Opportunity Is The Law"*** poster covers discrimination on the basis of age; no additional notice or poster is required.

- **COBRA**

  The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) allows employees, and their enrolled dependents, who otherwise would lose group health insurance benefits to continue such benefits. Employers are required to provide an ***"Initial COBRA Notice"*** to employees who enroll for group health insurance benefits at the time of enrollment or at the time benefits become effective. If a spouse and/or dependent children are enrolled, an ***"Initial COBRA Notice"*** also has to be mailed to them.

  At the time of a COBRA "qualifying event", the "qualified beneficiary(ies)" must be provided with a ***"COBRA Election Notice"*** that includes all information necessary for a "qualified beneficiary" to make an election decision.

  For answers to frequently asked questions (FAQ's) about COBRA by employers, go to: http://www.dol.gov/ebsa//faqs/faq_compliance_cobra.html

  NOTE: COBRA is a complicated law. It is recommended that employers who are required to comply with COBRA get assistance from an experienced human resource professional or employment law attorney.

- **Older Workers Benefit Protection Act (OWBPA)**

  It is basically an amendment to the ADEA that establishes the circumstances under which a "release/waiver of claims" agreement, in which the employee waives his/her rights under the ADEA, is valid when offered, in conjunction with a severance package, to an employee who is being discharged or laid-off or otherwise separated from employment.

EMPLOYERS OF 50 OR MORE

- **Family and Medical Leave Act (FMLA)**

  The Act requires employers to grant up to 12 weeks of unpaid FMLA leave to employees who are eligible.

  The Act requires employers to display a notice, ***"Your Rights Under the Family and Medical Leave Act of 1993"***, which is available from the Wage and Hour Division, U.S. Dept. of Labor; see **PART 4.**

  NOTE: the original FMLA has been amended by the Congress. The changes became effective on January 16, 2009. The changes in the compliance requirements are substantial; the forms for an employee and the employer to use for FMLA requests also have changed.

  The new regulations include provisions for:

  Military Caregiver Leave: Implements the requirement to expand FMLA protections for family members caring for a covered service member with a serious injury or illness incurred in the line of duty on active duty. These family members are able to take up to 26 workweeks of leave in a 12-month period.

  Leave for Qualifying Exigencies for Families of National Guard and Reserves: The law allows families of National Guard and Reserve personnel on active duty to take FMLA job-protected leave to manage their affairs — "qualifying exigencies." The rule defines "qualifying exigencies" as: (1) short-notice deployment (2) military events and related activities (3) childcare and school activities (4) financial and legal arrangements (5) counseling (6) rest and recuperation (7) post-deployment activities and (8) additional activities where the employer and employee agree to the leave.

  For further information about FMLA, including Military Caregiver Leave, go to: http://www.dol.gov/whd/fmla/index.htm **and** http://www.dol.gov/whd/regs/compliance/whdfs28a.pdf

  NOTE: The FMLA is a complicated law. It is recommended that employers who are required to comply with the FMLA get assistance from an experienced human resource professional or employment law attorney.

- **Trip Reduction Legislation (Maricopa County Employers)**

  Employers in Maricopa County, Arizona, who employ 50 or more employees working at, or reporting to, a single work site must comply with the 1988 Air Quality Bill (ARS 49-581 et seq.).

  For more information about the requirements of employers for establishing a trip reduction program, go to: http://www.maricopa.gov/aq/divisions/trip_reduction/default.aspx

- **Arizona Crime Victim Leave Act**

  Requires employers to provide unpaid "crime victim leave" to employees who is a "victim" of a crime, as defined in A.R.S. 13-4439 or A.R.S. 8-420, in order to attend all court proceedings involving the perpetrators of the crime, including preliminary hearings, trials, and post-trial hearings.

  For more information about the Arizona Crime Victims' Rights services, go to: https://www.azag.gov/victim-services/victim-services-0

  The leave guarantees for victims can be found in ARS 13-4439 which is at: http://www.azleg.gov/FormatDocument.asp?inDoc=/ars/13/04439.htm&Title=13&DocType=ARS

EMPLOYERS WITH 100 OR MORE

- **EEO-1 Reporting**

  Private employers must file an EEO-1 report annually if they are:

  - subject to Title VII of the Civil Rights Act of 1964 (as amended by the Equal Employment Opportunity Act of 1972) with 100 or more employees EXCLUDING State and local governments, primary and

secondary school systems, institutions of higher education, Indian tribes and tax-exempt private membership clubs other than labor organizations;

OR

- subject to Title VII who have fewer than 100 employees if the company is owned or affiliated with another company, or there is centralized ownership, control or management (such as central control of personnel policies and labor relations) so that the group legally constitutes a single enterprise, and the entire enterprise employs a total of 100 or more employees.

For more information or to obtain an EEO-1 Report Form, go to: http://www.eeoc.gov/eeo1survey/

- **Trip Reduction Legislation (Maricopa County Employers)**

  Employers in Maricopa County, Arizona, who employ 100 or more employees working at, or reporting to, a single work site must meet MORE requirements of the 1988 Air Quality Bill (ARS 49-581 et seq.) than do employers of 50-99 employees working at, or reporting to, a single work site.

  For more information about the requirements of employers for establishing a trip reduction program, go to: http://www.maricopa.gov/aq/divisions/trip_reduction/default.aspx

- **Worker Adjustment and Retraining Notification Act (WARN)/ Plant Closing Law**

  Requires employers to provide early (60 days prior) and written notification to employees when plant closings, layoffs, or reduction of work hours will affect them. Certain terms and conditions apply (number of employees that will be affected, employer size, etc.) and certain exceptions exist based on reason for the actions. If layoffs, plant closings, or reductions in hours worked are anticipated for more than a few employees, the organization should obtain additional information regarding the requirements of the WARN/Plant Closing Law.

PART 4: Required Notices and Posters, by Threshold Numbers of Employees

ALL EMPLOYERS (1+ Employees)

- **Worker's Compensation Laws, State of Arizona**

  "***Notice to Employees RE: Arizona Worker's Compensation Law***"; the bi-lingual (English and Spanish) poster is available from your Worker's Compensation insurance carrier or at:

  http://www.ica.state.az.us/Claims/Forms/Claims_Poster_WorkersCompLawBilingual.pdf

  NOTE: the poster MUST include the name, address, and phone number of the worker's compensation insurance carrier AND the policy number. If you obtain the poster from your carrier, that information should be pre-printed on the poster. If the information is not pre-printed on the poster (regardless of the source), you must write-in that information.

  AND

  "***Work Exposure To Bodily Fluids, HIV, AIDS, HepC***"; the bi-lingual (English and Spanish) poster is available from your Worker's Compensation insurance carrier or at:

  http://www.ica.state.az.us/Claims/Forms/Claims_Poster_WorkExpToBodilyFluids_HIV_AIDS_HepC.pdf

NOTE: certain employers also may be required to post/display the following:

"Work Exposure to Methicillin-resistant *STAPHYLOCOCCUS AUREUS* (MRSA), Spinal Meningitis, or Tuberculosis (TB); the bi-lingual **(**English and Spanish) poster is available from:

http://www.ica.state.az.us/Claims/Forms/Claims_Poster_WorkExpToMRSA_SpMen_TB.pdf

- **Occupational Safety and Health Act (OSHA)**

  All Employers must post either the Arizona **OR** the federal poster.

  The Arizona poster, "***Employee Safety and Health Protection***", is available from the Industrial Commission, State of Arizona. The bi-lingual poster (English and Spanish) is available at: http://www.ica.state.az.us/ADOSH/Forms/ADOSH_Poster_WorkplaceSafetyBilingual.pdf

  The federal posters, ***"Job Safety and Health, It's the Law"***, are available at:

  http://www.osha.gov/Publications/osha3165.pdf (English)

  http://www.osha.gov/Publications/osha3167.pdf (Spanish)

  In 2014, OSHA updated its rules regarding recordkeeping. For information about the new recordkeeping rule, ***Detailed Guidance for OSHA's Injury and Illness Recordkeeping Rule***, go to: https://www.osha.gov/recordkeeping/entryfaq.html

  The OSHA Recordkeeping forms are available at: https://www.osha.gov/recordkeeping/RKforms.html

  The OSHA Recordkeeping Advisor page is available at: http://webapps.dol.gov/elaws/OSHARecordkeeping.htm

- **Unemployment Insurance for Employees**

  "***Notice To Employees, You Are Covered By Unemployment Insurance***". Available from the Arizona Department of Economic Security at:

  https://des.az.gov/sites/default/files/legacy/dl/POU-003.pdf (English)

  https://des.az.gov/sites/default/files/legacy/dl/POU-003-S.pdf (Spanish)

- **Fair Labor Standards Act (FLSA)**

  "***Employee Rights Under The Fair Labor Standards Act***". Available from the U.S. Department of Labor, Wage and Hour Division in English, Spanish, and other languages.

  For the English version, go to: http://www.dol.gov/whd/regs/compliance/posters/minwagep.pdf

  For the Spanish version, go to: http://www.dol.gov/whd/regs/compliance/posters/minwagespP.pdf

- **Employee Polygraph Protection Act**

  "***NOTICE: Employee Polygraph Protection Act***". Available from the U.S. Department of Labor, Wage and Hour Division.

  For the English version, go to: http://www.dol.gov/ofccp/regs/compliance/posters/pdf/eppac.pdf

  For the Spanish version, go to: http://www.dol.gov/whd/regs/compliance/posters/eppaspan.pdf

  NOTE: The two printed pages must be taped or pasted together to form an 11 x 17 inch poster.

- **Uniformed Services Employment and Reemployment Rights Act (USERRA)**

  "***Your Rights Under USERRA***." Available at: http://www.dol.gov/vets/programs/userra/USERRA_Private.pdf

- **Arizona Minimum Wage Act**

  "***Arizona Minimum Wage Act***" poster. Available at:

  http://www.ica.state.az.us/labor/Forms/Labor_MinWag_MinimumWagePoster_2016_English.pdf (English); and,

  http://www.ica.state.az.us/labor/Forms/Labor_MinWag_MinimumWagePoster_2016_Spanish.pdf (Spanish).

  The AZ minimum wage became $8.05/hour as of January 1, 2015 and will remain the same for 2016. For Frequently Asked Questions (FAQs) regarding the Arizona Minimum Wage Act, go to: http://www.ica.state.az.us/Labor/Labor_MinWag_FAQs_English.aspx

  NOTE: Every year, the Industrial Commission of the State of Arizona will set the minimum wage to be effective on January 1 of the following year; please make sure you check with the Industrial Commission to learn what the

change, if any, in the minimum wage will be. **Also note that each year, whether the minimum wage changes or not, the required poster changes.** You can obtain the current poster (in English and Spanish) at the same web address.

- **E-Verify**

  The Department of Homeland Security has a notice/poster available that identifies the employer as one that complies with E-Verify.

  This notice/poster of employer participation is recommended and is available at:

  http://www.uscis.gov/USCIS/Controlled%20Vocabulary/Native%20Documents/E-Verify/E-Verify_Poster_V08-08_Standard_English.pdf (English); and,

  http://www.uscis.gov/USCIS/E-Verify/EverifyPosterSpanish1.pdf (Spanish).

  The "right to work" posters are available at:

  http://www.uscis.gov/USCIS/Verification/E-Verify/E-Verify_Native_Documents/Right_to_Work_Poster_English.pdf (English); and,

  http://www.uscis.gov/USCIS/Verification/E-Verify/E-Verify_Native_Documents/Right_to_Work_Poster_Spanish.pdf (Spanish).

  To obtain a copy of the ***E-Verify User Manual for Employers*** (M-775, June 2013), go to:

  http://www.uscis.gov/USCIS/Verification/E-Verify/E-Verify_Native_Documents/manual-employer_comp.pdf

- **Smoke-Free Arizona Act**

  Employers are required to post "No Smoking" signs OR the international "No Smoking" symbol wherever smoking is prohibited. And, the same signage must be posted at every entrance. The signs must include information about to whom a complaint can be made. To order signage, go to:

  http://www.smokefreearizona.org/order-signage.asp

15 OR MORE EMPLOYEES

- **Title VII, the Civil Rights Act of 1964; the Civil Rights Act of 1991; the Americans with Disabilities Act (ADA); and, the Arizona Civil Rights Act.**

  "***Equal Employment Opportunity Is The Law***"; this poster identifies protections provided by the Civil Rights Act, the Equal Pay Act, the Americans With Disabilities Act, and the Age Discrimination in Employment Act. Available from the Equal Employment Opportunity Commission.

  For the English poster, go to: http://www.dol.gov/ofccp/regs/compliance/posters/pdf/eeopost.pdf

  For the Spanish poster, go to: http://www.dol.gov/ofccp/regs/compliance/posters/pdf/eeosp.pdf

  NOTE: The two printed pages must be taped or pasted together to form an 11 x 17 inch poster.

  AND

  "Arizona Law Prohibits Discrimination In Employment"; this poster identifies protections provided by the Arizona Civil Rights Act. Available from the Arizona Attorney General's Office, Civil Rights Division. (English and Spanish language versions on the same poster.). Go to:

  https://www.azag.gov/sites/default/files/sites/all/docs/civil-rights/discrimination/EmploymentPoster.pdf

- **Genetic Information Non-Discrimination Act (GINA)**

  "*EEO is the Law*" Poster Supplement; this poster is IN ADDITION TO and supplements the ***"Equal Employment Opportunity Is The Law"*** poster

  For the English poster, go to: http://www.dol.gov/ofccp/regs/compliance/posters/pdf/Supplement_English.pdf

  For the Spanish poster, go to: http://www.dol.gov/ofccp/regs/compliance/posters/pdf/Supplement_Spanish.pdf

20 OR MORE EMPLOYEES

- **Age Discrimination In Employment Act (ADEA)**

  Same poster as for the Civil Rights Acts; see **15 OR MORE EMPLOYEES**, above.

50 OR MORE EMPLOYEES

- **Family and Medical Leave Act (FMLA)**

  "***Employee Rights and Responsibilities Under the Family and Medical Leave Act*** ." Available from the U.S. Department of Labor, Wage and Hour Division.

  For the English poster, go to: http://www.dol.gov/whd/regs/compliance/posters/fmlaen.pdf

  For the Spanish poster, go to: http://www.dol.gov/whd/regs/compliance/posters/fmlasp.pdf

OTHER REQUIRED NOTICES/POSTERS

- "***Notice to Employees Working On Government Contracts***".

  Applies to employers with federal government contracts that exceed a certain dollar amount. Contact the U.S. Department of Labor; Wage and Hour Division. Phone: (602) 514-7100.

- Posters/Notices are also required of employers who:

  (a) anticipate a plant closing or mass layoff that falls under the Worker Adjustment and Retraining Notification Act (WARN)/Plant Closing Act; (contact the U.S. Department of Labor; phone: 602-514-7100);

  OR,

  (b) are working on federally-financed construction projects; (contact the U.S. Department of Labor; phone: 602-514-7100).

COUNTING EMPLOYEES FOR COMPLIANCE PURPOSES

The U.S. Supreme Court says that as long as an employee is on the payroll every day of a calendar week (whether at work or not), he/she is counted as an employee for compliance purposes. *See Walters v. Metropolitan Educational Enterprises, 1997 WL9783 (Supreme Court).*

WHERE TO POST

Employment posters/notices must be displayed in areas that employees frequent on a daily basis, such as exits and entrances, by time clocks, and/or lunchroom or break areas. Companies with large physical facilities should display posters/notices in multiple locations. If employees work in separate facilities, buildings, or locations, posters/ notices must be displayed in each location, facility, or building. If employees work on more than one floor/level of a multiple-story building/facility, posters/notices must be displayed on every floor on which employees work.

Also, to ensure that posters/notices are visible to applicants, a set of posters/notices should be displayed in the employment (or reception) area where applicants complete their Employment Application forms.

OTHER COMPLIANCE RESOURCES

- **OSHA FORM 300: LOG OF OCCUPATIONAL INJURIES AND ILLNESSES**

  Businesses/Organizations in certain Standard Industrial Classification (SIC) codes and employers required by the Bureau of Labor Statistics must keep records of on-the-job injuries or illness.

  In 2014, OSHA updated its rules regarding recordkeeping. For information about the new recordkeeping rule, ***Detailed Guidance for OSHA's Injury and Illness Recordkeeping Rule***, go to: https://www.osha.gov/recordkeeping/entryfaq.html

  The OSHA Recordkeeping forms are available at: https://www.osha.gov/recordkeeping/RKforms.html

The OSHA Recordkeeping Advisor page is available at: http://webapps.dol.gov/elaws/OSHARecordkeeping.htm

- **IMMIGRATION REFORM AND CONTROL ACT (IRCA)**

  The IRCA requires that an I-9 form be completed for each new hire within the first 3 days of employment (not including the first day of employment) in order for the employer to verify the identity and the employment eligibility of the new employee.

  NOTE: The new hire, by law, MUST complete Section 1 of the I-9 form on his/her first (1st) day of employment.

  Failure of the employer to properly document the employee's identity and employment eligibility, using the I-9 form, can result in a penalty of from $110 to $1100 PER VIOLATION.

  To obtain the current version of the form I-9 (rev. 03/08/13), go to: http://www.uscis.gov/files/form/i-9.pdf

  NOTE: pages 1-6 are Instructions; the form is on pages 7 & 8; and, documents acceptable for proof of identify and/or employment eligibility are on page 9.

  A **Handbook for Employers** (M-274, Rev. 03/08/13) is available from the Bureau of Citizenship and Immigration; go to: http://www.uscis.gov/files/form/m-274.pdf to download it.

  The **Handbook** provides instructions for completing the I-9 forms, includes the current version of the I-9 form, and includes color photos of the documents that are acceptable for proof of identity, employment eligibility, or both.

- **EQUAL EMPLOYMENT OPPORTUNITY, EMPLOYER INFORMATION REPORT EEO-1**
  Employers with 100+ employees are required to submit an annual EEO-1 Report. Obtain an instruction booklet and the EEO-1 Report form from the Joint Reporting Committee; phone: 1.866.286.6440. Or, you can go to: http://www.eeoc.gov/employers/eeo1survey/index.cfm

- **HAZARD COMMUNICATION STANDARD (HCS)**

  All employers with hazardous chemicals in their workplaces must have labels and MSDS's for their exposed workers, and train them to handle the chemicals appropriately.

  For general information about hazardous chemicals in the workplace and the requirements of employers, go to: http://www.osha.gov/dsg/hazcom/index.html

  For information about employer responsibilities and compliance assistance available from federal OSHA, go to: http://www.osha.gov/dcsp/compliance_assistance/index.html

- **THE FEDERAL WAGE GARNISHMENT LAW**

  With regard to garnishments, you should obtain ***Fact Sheet #30: The Federal Wage Garnishment Law, Consumer Credit Protection Act's Title 3 (CCPA)***; go to: http://www.dol.gov/whd/regs/compliance/whdfs30.pdf

- **NEW HIRE REPORTING (PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996)**

  Employers are required to report new hires within 20 days of employment. In Arizona, new hires must be reported to the Arizona New Hire Reporting Center. New hires can be reported by sending a copy of the employee's completed W-4 form or by sending a completed Arizona New Hire Reporting Form.

  For additional information, contact them at: https://az-newhire.com/

- **FAIR CREDIT REPORTING ACT (FCRA)**

  Employers who obtain or wish to obtain background investigation reports ("consumer reports") about applicants or employees (e.g., reference checks, credit checks, felony conviction checks, etc.) through an outside agency/firm or using consumer reporting services must comply with the FCRA. Applicants or employees must be provided with a written disclosure Notice and must sign the Notice **before** the "consumer report" is conducted.

A copy of the "consumer report" must be given to the applicant or employee if it is the basis of an adverse employment action (e.g., not hiring an applicant, taking disciplinary action against an employee, discharging an employee, etc.) along with a copy of "***A Summary of Your Rights Under the Fair Credit Reporting Act***." To obtain a copy, go to: http://files.consumerfinance.gov/f/201410_cfpb_summary_your-rights-under-fcra.pdf

For the document, ***Using Consumer Reports: What Employers Need to Know***, go to: https://www.ftc.gov/tips-advice/business-center/guidance/using-consumer-reports-what-employers-need-know.

For the document, ***Your Duties Under the Fair Credit Reporting Act***, go to: https://www.firstdata.com/downloads/marketing-merchant/fcra_duties_secure.pdf

- **FAIR AND ACCURATE CREDIT TRANSACTIONS (FACT) ACT**

  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.

  For additional information, go to: https://www.ftc.gov/tips-advice/business-center/guidance/disposing-consumer-report-information-rule-tells-how **and** http://corporate.findlaw.com/business-operations/new-ftc-regulations-on-proper-destruction-of-consumer.html

PART 5: HR Forms and Recordkeeping Documents

This part identifies the forms and documents typically needed to conduct appropriate human resource (HR) activities and to keep adequate employment records in each employee's personnel file. It is recommended that employers create and maintain a personnel file for each employee. The file should, at least, include the documents listed below.

- **Employment Application.**

  A completed and signed Application, which should be obtained prior to interviewing, should be kept in the personnel file of the person hired. If the applicant attached a resume to the Application form, keep it attached to the Application. If the applicant provided a resume prior to or after the Application form was completed, attach it to the Application form.

  Applications of those not hired should be filed, in case you need them at a later date. Applications of those not hired should be shredded after approximately 18 months.

  NOTE: the recordkeeping requirement is 12 months; but, employees can file EEOC charges up to 300 days following an alleged discriminatory event. So, it is wiser to keep the applications for the longer period.

- **Fair Credit Reporting Act (FCRA) Notice and Authorization + *"A Summary of Your Rights Under the FCRA"***

  Each applicant for whom a background check, criminal background check, or other "consumer report" will be obtain must complete a Notice and Authorization form AND must receive a copy of the Consumer Financial Protection Bureau's publication, ***"A Summary of Your Rights Under the FCRA"*** BEFORE the background check, criminal background check, or "consumer report" is ordered. To obtain a copy, go to: http://files.consumerfinance.gov/f/201410_cfpb_summary_your-rights-under-fcra.pdf

- **Telephone Reference Check**

  For each reference called, a Telephone Reference Check form should be completed. The goal is to obtain as much information as possible or (to protect against negligent hiring) show that an attempt was made to obtain information but was unsuccessful. Completed forms should be attached to the Application form of the person about whom the call is made.

- **Offer Letter**

  While offers can be made verbally, it is better to make them via an offer letter. The offer letter should state the agreed upon job title and starting wage/salary. The letter should include a statement that it is contingent upon ALL of the contingencies listed in the letter. Thus, if the applicant signs the offer letter, he/she has agreed to accept the contingencies.

  Contingencies upon which an offer is based and that should/could be listed include, but are not limited to, that:

  - the employee provide proof of identity and proof of employment eligibility and properly complete a form I-9 on his/her first day of employment; and, meet E-Verify requirements;
  - the employee sign on his/her first day of employment a Confidential Information Agreement; if this is a contingency, a copy of the Agreement should be included with the offer letter so the applicant can read/review the Agreement before being required to sign;
  - the employee provide a copy of his/her current driver's license and MVD report, if he/she will be driving on company business;
  - and/or other such contingencies.

  The offer letter should include language that the applicant, if he/she signs the letter, attests that he/she is not under a "covenant not to compete agreement" with a former employer and that he/she will not bring materials,

files, documents, or other information from a previous employer that would be in violation of a "Confidential Information Agreement" with a former employer.

Also, the offer letter should identify the process by which a signed copy is presented to the employer and the date and deadline at which the offer, if not accepted, is void.

- **New Hire Orientation & Assimilation Checklist**

  This form provides a checklist of the forms each employee is to complete during the first few days of employment, the information that the employee is to receive regarding the company and its products or services, the materials or tools or documents the employee is to be given, and other related actions.

  At the conclusion of the orientation and assimilation process, the employee signs that all of the information was presented, all of the forms were completed, and all of the materials/tools/documents received. The signed original of this form should be kept in the personnel file.

- **Form I-9, Employment Eligibility**

  The completed and signed I-9 form for each employee should be filed **separate from the personnel file**. It is recommended that all I-9 forms be kept together in a **separate file**, so Immigration and Citizenship Enforcement (ICE) will not have access to personnel files if they conduct a field audit to inspect and verify I-9 forms.

  For current employees, the forms should be filed by hire date. As employees leave the organization, their forms should be filed by termination date. Periodically, the forms of terminated employees should be purged based on the date the employer no longer has to produce the form.

  Forms that are no longer required to be produced (one year from the termination date or three years from the hire date, **whichever is longer**) should be shredded, per the FACT Act; see page 19.

- **E-Verify**

  When E-Verify is conducted and the new hire is shown to have employment authorization, a copy of the employment authorization (printed from the computer screen) must be attached to the form I-9.

- **Tax withholding forms.**

  Keep the original federal (W-4) and state (A-4 in Arizona) forms in the personnel file. From time to time, the employee may wish to change information (address, number of exemptions).

- **Employee Data and Whom To Notify In Case of An Emergency Form**

  This form collects data needed to meet payroll and recordkeeping requirements and should be kept in the personnel file. As necessary, the employee should update this form so that address, phone number, and who to notify in case of an emergency is always current. As new, updated forms are filed, the old ones can be destroyed.

- **Arizona Minimum Wage Notice**

  The statute requires employers to provide each new hire with a "disclosure" form at the time of hire. That form must included the name, address, and telephone number of the business.

- **Confidential/Proprietary Information Agreement**

  Each employee should be required to sign such an Agreement to agree not to divulge or disclose confidential/ proprietary information obtained while an employee either while employed or following termination of employment. The signed original of the Agreement should be kept in the personnel file.

- **Covenant Not-To-Compete Agreement (Key Employees Only)**

  Only key employees should be required to sign such an Agreement to agree not to compete against the company either while employed or for a time period following termination of employment. Courts have ruled that having all employees sign such agreements invalidates the company's ability to enforce such agreements. Only those employees who genuinely are in a position to compete should be required to sign such an agreement.

  The signed original of the Agreement should be kept in the personnel file.

- **HR Policy Manual & Employee Handbook Receipt**

  When the printed Manual/Handbook is issued to an employee, he/she should sign a Receipt form that is kept in his/her personnel file as documentation of having received a copy of the Manual/Handbook.

  If a printed copy of the Manual/Handbook not distributed to the employee but, instead, is available online via a company intranet, then the Receipt language is modified to reflect the employee's acknowledgement of where to find the document. That Receipt is kept in the employee's personnel file as documentation of his/her being notified how to access the Manual/Handbook.

- **Timekeeping Records**

  Two types of records are typically used to record the hours worked by non-exempt employees: one for payroll periods that are every two weeks (bi-weekly payroll) and one for payroll periods that are twice per month (semi-monthly).

  The Fair Labor Standards Act (FLSA) requires employers to establish a 168 hour workweek (24 hours x 7 days) and requires that employers keep records of the hours worked by non-exempt employees (whether paid hourly or by salary) in each workweek.

  NOTE: if a semi-monthly payroll period is elected, the calculation of over-time must still be for the workweek. Thus a single workweek, depending upon when the first and last days of the payroll period fall, may include some days in two payroll periods. To ease the calculation of overtime pay, many employers use a bi-weekly payroll period (two workweeks in one payroll period) so that recordkeeping and overtime calculations are easier.

  The signed originals of time-keeping records should be kept in a separate file, by payroll period. These records are required to be available to the U.S. Department of Labor, Wage and Hour Division, for inspection for at least the past 3 years. It is suggested that records over 2 years old be stored, rather than filed.

- **Performance Management (Performance Evaluation) Form**

  Periodically, the performance of each employee should be evaluated on a performance management form. The employee's manager or supervisor who conducts the evaluation then meets with the employee to discuss which performances need to be improved (because of deficiencies) and which need to be continued (because they meet or exceed expectations). The signed originals of each form should be kept in the personnel file. Previous form(s) should not be discarded when adding the most current one.

- **Other Forms**

  There may be other forms or documentation that an organization should use or might be required to use, depending upon the kind of organization, the number of employees, and the employment laws with which an organization has to comply, in order to meet recordkeeping/documentation requirements.

  Such forms/documents might include, but not be limited to, the following:

  Request for FMLA Leave of Absence; Request for Non-FMLA Leave of Absence; Return to Work Certification, FMLA; Return to Work Certification, Non-FMLA; Absence/Attendance form; Disciplinary (Corrective) Action form; Performance Improvement Plan (PIP); Exit Processing Checklist; and, Exit Interview form.

NOTE: EXHIBIT K provides information about the retention requirements for certain forms/records/documents.

RECOMMENDATIONS REGARDING PERSONNEL FILES & RECORDKEEPING

What to Keep in Personnel Files

The following records related to employment should be kept in the personnel file of each employee:

- Employment application, with resume, interviewing notes, pre-employment assessments/tests, and telephone reference check form attached
- The Offer Letter
- The Covenant Not-To-Compete Agreement
- The Confidential Information Agreement
- The Manual/Handbook Receipt form
- A current Job Description
- The Employee Data and Whom To Notify In Case of An Emergency form
- The New Employee Orientation Checklist
- Records relating to hiring, promotion, demotion, transfer, layoff, rates of pay, other forms of compensation
- Records relating to other employment practices, including disciplinary/corrective actions/warning, recognition awards, attendance records, etc.
- Records of participation in professional development, education classes, and the like
- OHSA-required documentation regarding Hazardous Materials/Chemicals training in which the employee has participated
- Performance management/evaluation forms
- Termination records, including exit processing checklist and exit interview

What to keep in CONFIDENTIAL files

The following items should be kept in **CONFIDENTIAL** files, separate from the employee's personnel file:

- Medical Records. The American with Disabilities Act (ADA) requires employers to keep all medical records separate. Many states have privacy laws to protect employees. Medical records include those related to: physical examinations; medical leaves (including FMLA leave and/or Non-FMLA medical leave); and, drug and alcohol testing results.
- Workers comp claims. All paperwork related to an employee's on-the-job injury/illness.
- Equal/Employment Opportunity. If a internal/external charges of discrimination and/or harassment are investigated, it is recommended that these files also be maintained separately.
- Immigration (I-9) Forms. It is recommended that these forms be maintained chronologically by the employees' dates of hire. Keeping this information in a separate file reduces the opportunity for an auditor to pursue and investigate unrelated information.
- Invitation to Self-Identify Gender/Sex or Race. In order to minimize claims of discrimination, it is important to keep source documents that identify an individual's race and sex (the Invitation To Self-Identify form required of federal contractors by Executive Order 11246) in a separate file.
- Invitation to Self-Identify Disability or Veterans Status. This information is required to be maintained by federal contractors. Laws prohibit employment decisions on the basis of certain protected classes; however, managers have the right to access an employee's file for a number of operational issues. Unless there is a need to know for accommodation purposes these files should be maintained separately to reduce a potential source of bias.

- Safety Training records – Hazardous Materials/Chemicals. OSHA requires training records of employee participation in Hazardous Materials/Chemicals training to be kept in the employee's personnel file. A copy of that record can be kept in a training log/file by class title/subject/topic and date.

Access to Files

Every employer should have written policy statements regarding access to personnel files, including CONFIDENTIAL files, by HR persons, employees, manager/supervisors, and former employees.

- Personnel File. It is recommended that only the employee, HR employees with a need to know, or managers/supervisors with a need to know have access to an employee's personnel file.
- CONFIDENTIAL Medical File. It is recommended that only HR employees with a need to know, managers/ supervisors, as needed to provide reasonable accommodation, or government/legal agencies conducting investigations relevant to the information in Confidential Medical files have access to an employee's CONFIDENTIAL medical file.
- I-9 form and E-Verify confirmation. It is recommended that only HR employees with a need to know or government/legal agencies conducting audits or investigations relevant to the information on I-9 forms or to E-Verify confirmations have access to I-9 forms or E-Verify confirmations.

PART 6: A Non-Exhaustive Self-Assessment of Your Organization's Compliance with Employment Laws

Mark "**T**" or "**F**" for each of following items to conduct a non-exhaustive self-assessment of your organization's compliance with federal and state employment laws.

1. Notices & Posters

The following posters are prominently displayed where employees and applicants can easily find and read them:

ALL EMPLOYERS (1+ Employees)

____ "***Notice to Employees RE: Arizona Worker's Compensation Law***" (Arizona Workers Compensation law)

AND

____ "***Work Exposure To Bodily Fluids***" (Arizona Workers Compensation law)

____ "***Employee Safety and Health Protection***" (Arizona OSHA)

OR

____ ***"Job Safety and Health: It's the Law"*** (federal OSHA)

____ "***Notice To Employees, You Are Covered By Unemployment Insurance***" (Arizona Unemployment law)

____ "***Employee Rights Under The Fair Labor Standards Act***" (federal Fair Labor Standards Act)

____ "***NOTICE: Employee Polygraph Protection Act***" (federal Employee Polygraph Protection Act)

____ ***"Your Rights Under USERRA***" (federal Uniformed Services Employment and Reemployment Rights Act)

____ "***Arizona Minimum Wage Act***" (Arizona law)

____ ***"Smoke-Free Arizona, No Smoking"*** signage (Smoke-Free Arizona Act)

____ ***"We Participate in E-Verify"*** (Arizona law requiring E-Verify

____ ***"You Have The Right To Work, Don't Let Anyone Take It Away"*** (Arizona law requiring E-Verify)

15 OR MORE EMPLOYEES

____ "***Equal Employment Opportunity Is The Law"*** (federal Civil Rights Act of 1964)

AND

____ **"*EEO is the Law*" Poster Supplement** (federal Civil Rights Act of 1964)

AND

____ ***"Arizona Law Prohibits Discrimination In Employment"*** (Arizona law – AZ Civil Rights Act)

50 OR MORE EMPLOYEES

____ "***Employee Rights and Responsibilities Under the Family and Medical Leave Act*** " (federal Family and Medical Leave Act)

____ Notices/Posters are located in each building/facility (for employees who work at multiple, separate buildings/facilities).

____ Notices/Posters are located on each floor (for employees who work in multiple-story buildings/facilities).

2. HR Policies and Practices + Your Organization's Employee Handbook/Manual

____ Each employee has a copy of the handbook/manual and has signed a receipt stating that he/she understands that he/she is to read the handbook and abide by the current policies.

____ The handbook/manual includes statements such as: "this handbook/manual is not a contract of employment", "this handbook/manual is subject to change at the discretion of the employer, with or without notice", "employment is at-will (for no specific duration)", and, "this list of actions for which you can be disciplined or terminated is not all inclusive".

3. Personnel Files and Recordkeeping

____ All records for an employee are kept in his/her personnel file, **except** I-9 forms, E-Verify authorizations, requests for FMLA leave, requests for reasonable accommodation (ADA) and/or FMLA leave.

____ There is a policy regarding employee access to their personnel files, making copies of file documents for employees, and how your organization will respond to court orders or subpoenas for documents.

____ There is a policy regarding FORMER employee access to their personnel files, making copies of file documents for FORMER employees, and how your organization will respond to court orders or subpoenas for documents.

4. Employment Practices, including EEO/AA

____ All applicants must complete and sign an Employment Application prior to being interviewed.

____ The Application for Employment form is reviewed periodically to ensure that it does not ask for or collect any potentially discriminatory information.

____ An EEO-1 Report (***organizations with 100+ employees***) is completed and submitted annually.

____ All managers and supervisors receive periodic training regarding legal/non-discriminatory interviewing techniques and questions and use structured interviews and use a list of prepared, job-related questions to interview applicants.

____ Offers of employment are made contingent upon the applicant: completing a form I-9 and providing acceptable documents to establish identify and employment eligibility; signing a Confidential/Proprietary Information Agreement form; providing copies of degrees/diplomas/ certificates, as appropriate; being accepted for bonding; taking a physical examination and being recommended for employment; and other such contingencies.

5. Reference Checking + Fair Credit Reporting Act (FCRA)

____ Managers and supervisors have been trained and receive periodic re-training regarding "negligent hiring".

____ References are sought from prior employers/supervisors before an offer of employment is made; a reference checklist form is used to document references.

____ Applicants are provided with a written "***Notice and Consent***", separate from the Employment Application form, and must sign the "***Notice and Consent***" before a "consumer report" is conducted.

____ If, as a result of a "consumer report", an applicant is not hired, the applicant is provided with an adverse-action notice and a copy of the "consumer report" and a copy of "***A Summary of Your Rights Under the Fair Credit Reporting Act***" (rev. 09/2015).

6. New Hires, including: New Hire Reporting Requirements, New Hire Orientation, the Immigration Reform and Control Act (forms I-9); and, the Arizona Legal Arizona Workers Act

____ All new hires receive a "disclosure" form that includes the name, address, and telephone number of the employer, as required by the Arizona Minimum Wage Act.

____ All new hires are reported to the AZ New Hire Reporting Center within 20 days of the hire date.

____ A New Employee Orientation Checklist is completed during orientation and signed by the employee and the supervisor when orientation is completed.

____ Each new hire completes Section 1 (Employee's Certification) of a form I-9 **on his/her first (1st) day of employment**.

____ Each new hire provides proof of identity and/or employment eligibility on or before the 3rd day of employment and Section 2 (Employer's Certification) of a form I-9 is completed on or before the 3rd day of employment.

____ A **Handbook for Employers** (M-274; Rev. 03/08/13) is available at all sites where forms I-9 are completed.

____ The documents used to prove identity and employment eligibility are NOT copied or attached to the I-9 form.

____ The employee's employment eligibility is confirmed using E-Verify.

____ A copy of the E-Verify certification is printed and attached to the form I-9.

7. The Americans With Disabilities Act (ADA)

____ All managers and supervisors have been trained and receive periodic re-training regarding how the ADA affects employment practices, particularly interviewing.

____ The Employment Application has been reviewed to ensure it does not inquire regarding a person's health or disability status or about whether the person has received worker's compensation or other disability benefits.

____ The results of any post-offer, pre-employment medical/physical exam are kept in a separate, confidential medical file.

8. Family and Medical Leave Act (FMLA) [*applies ONLY to employers with 50+ employees*]

____ Employees request FMLA leave on a form which must be completed, signed, and submitted before a decision to grant or deny FMLA leave is made.

____ A "Notice of Eligibility and Rights & Responsibilities" form (WH-381, rev. January 2009) is given to each employee who requests FMLA leave.

____ A "Designation Notice" (WH-382, rev. January 2009) is given to each employee who requests FMLA leave once a decision is made whether the employee is or is not eligible.

____ A completed and signed "Certification of Health Care Provider" form (form WH-380-E, rev. January 2009 OR WH-380-F, rev. January 2009) must be received before a decision to grant or deny the request for FMLA leave is made.

____ Employees who return to work from FMLA leave that was for their own serious illness are required to provide a "Release To Return To Work Certification" form (or similar document) signed by their Health Care Provider or treating physician.

____ Employees are required to integrate vacation time, or sick leave time, or other paid-time-off with unpaid FMLA leave, except when receiving disability or worker's compensation lost wages benefits.

9. Harassment: Sex/Gender, Race, Age, Religion, and/or other protected factors

____ A policy stating that harassment (on the basis of sex/gender, race, color, age, religion, and/or or other protected factors), including the creation of a hostile work environment, is unwelcome and prohibited in the workplace has been created; it is included in the employee handbook/manual.

____ All managers and supervisors have been trained and receive periodic re-training regarding how to prevent unlawful harassment in the workplace.

____ Employees are trained regarding how to make a complaint of harassment; the employee handbook/ manual also contains this information.

____ There are several persons to whom a complaint can be made other than the employee's supervisor/ manager; at least one of them is a female supervisor/manager.

____ Periodically, management-by-walking-around is conducted to ensure there are no improper posters, signs, or cartoons in work areas and to allow employees to discuss any improper behaviors.

10. Performance Management

____ A current job description, including the Essential Functions of the job, has been provided to each employee for his/her job.

____ Managers and supervisors have been trained and receive periodic re-training regarding how to provide performance evaluation feedback on an on-going basis and how to conduct a periodic performance evaluation interview.

____ When performance is not meeting expectations, the manager/supervisor meets with the employee to discuss performance and obtains a written performance/behavior improvement plan from the employee regarding how he/she will improve his/her performance and/or behavior.

11. Discipline and Terminations

____ Standards of conduct (work rules) are listed in the employee handbook/manual.

____ All disciplinary actions are documented; the employee signs the discipline form; and, the employee receives a copy of the form.

____ All involuntary terminations (dismissals or firings) are reviewed by HR and/or upper management before being acted upon.

____ For terminated employees who do not receive their final paychecks at the time of termination, the final paycheck is mailed within 3 work days of the date of termination.

____ If an employee has not returned tools, equipment, or other company property, we deduct the value of the property from his/her final paycheck or hold the paycheck until the property is returned.

12. Fair Labor Standards Act (FLSA)

____ All job positions have been reviewed to determine whether the position is Exempt, or Non-Exempt, from the overtime provisions of the FLSA (as revised August 2004).

____ A 168 consecutive hour workweek (7 consecutive periods of 24 hours each) has been established for Non-Exempt employees.

____ All Non-Exempt jobs are paid either the federal or the AZ minimum wage, whichever is greater.

____ All Exempt jobs are paid a minimum of $455/week, regardless of the number of hours scheduled to work or actually worked in a work week.

____ All employees in Non-Exempt job positions submit a signed record of hours worked (a time card/time sheet) in each workweek.

____ Employees in Exempt jobs are "docked" for partial day absences when they do not have accrued vacation or sick leave time.

13. COBRA & HIPAA

____ Each new employee (and spouse and/or dependents, if enrolled) receives an Initial COBRA Notice at the time of enrolling for medical benefits or when the benefits become effective.

____ A HIPAA Certificate of Coverage is automatically provided when a COBRA "qualifying event" has occurred.

____ As new hires enroll for group health insurance, a HIPAA Certificate of Coverage from the last employer is requested.

14. Drugs/Substances/Alcohol Testing

____ A written drugs/substances/alcohol testing policy (that contains all of the required elements identified in A.R.S. Title 23) has been created and has been distributed to employees.

Protocols have been established for:

____ collecting a urine specimen

____ determining substitution of or tampering with a specimen

____ "shy-bladder syndrome"

____ maintaining chain-of-custody from the collection site to the testing lab

____ the screening panel and methodology to be used for initial testing

____ the confirmatory methodology if the initial test is non-negative (positive)

____ reporting the results of the drugs/substances test

____ maintaining chain-of-custody for specimens that test positive twice

____ obtaining expert testimony from the testing lab, as needed

____ All non-negative (positive) test results are forwarded to a Medical Review Officer (MRO) who then contacts the applicant/employee to discuss whether the use of prescription drug/medicine can explain the positive test result.

____ Employees who use prescription medicines/drugs that are issued with a warning notice/label that the medicine/drug may cause drowsiness or that the employee should not operate equipment/ machinery are referred to the MRO for consultation.

____ Procedures for maintaining the confidentiality of an employee's drugs/substances/alcohol test, request for treatment, or related confidential information have been implemented.

15. OSHA, including Claims of On-The-Job Injury/Illness

____ An OSHA Form 301 is completed whenever an employee experiences an on-the-job illness, injury, or accident.

____ All on-the-job accidents, injuries, and illnesses are investigated to obtain complete data and to identify ways to prevent future such incidents.

____ All recordable injuries and illnesses are recorded on an OSHA Form 300 Log; the summary data from the previous year's Form 300 is transferred to an OSHA form 300A and is displayed in conspicuous locations from February 1 to April 1 of each year.

____ There are employees in all areas/departments and on all shifts who have been trained in first aid and CPR.

16. Hazard Communication Standard (HCS)

____ All hazardous chemicals used or stored in the workplace have been identified and are properly labeled.

____ A Written Hazard Communication Program has been created, has been communicated to employees, and is reviewed, at least annually, and updated, as necessary.

____ Material Safety Data Sheets (MSDS's) are available for each hazardous chemical and are located in each area in which the hazardous chemical is used or stored.

____ All new employees are trained regarding the hazardous chemicals they work with and all employees who transfer are trained regarding the hazardous chemicals used in their new department/area.

____ As employees are trained, they sign a document verifying the training; the originals of the training certification documents are kept in each employee's personnel file and copies are kept in a master HCS training file.

17. Smoke-Free Arizona Act

____ All entrances to each building have the required signage.

____ All employees have been trained about the Act, as required by the Act.

____ No ashtrays are available in any building.

____ Any designated smoking area outside a building is at least 20 feet away from an entrance.

NOTE: for every statement for which your answer was "F", your organization is at-risk. See PART 7, which begins below, for further information about Risk Assessment and Risk Management.

PART 7: A Non-Exhaustive Self-Assessment for Risk

As previously stated, for every statement in **PART 6** for which your answer was "**F**", your organization is at-risk. But, **PART 5** is a non-exhaustive list. Your organization can be at-risk even if all of your answers in **PART 6** were marked "**T**."

The following is a list of statement that would be included in a RISK MANAGEMENT AUDIT of HR policies, procedures, and practices. Mark "**T**" or "**F**" for each of the statements below in order to conduct a non-exhaustive assessment of your organizations exposure to risk.

A. EMPLOYMENT, including EEO and AA and Prohibited Harassment

____ We use multiple recruiting sources to minimize the risk of "disparate impact."

____ We conduct periodic training with supervisors/managers regarding how to interview to minimize the risk of discrimination.

____ We require supervisors/manager to use prepared questions in interviews to minimize the risk of discrimination.

____ We have provided supervisors/managers with a list of unlawful/discriminatory questions that are not to be used during interviews to minimize the risk of discrimination.

____ We use written job offers in which all the contingencies upon which the offer is based are listed in order to minimize the risk of detrimental reliance and/or wrongful discharge.

____ We conduct regular (at least annual) training of ALL employees with regard to our Prohibited Harassment, including Sexual Harassment policy, including how to report an allegation.

____ We conduct regular (at least annual) training for all supervisors/managers with regard to our Prohibited Harassment, including Sexual Harassment policy, including how to prevent such harassment.

B. ADA + ADAAA COMPLIANCE

____ An ADA coordinator has been identified

____ Our Employment Application includes a statement about the availability of accommodation in the application and interviewing processes.

____ There is appropriate signage in the area in which applications are distributed and received regarding the availability of accommodation in the application and interviewing processes.

____ The area in which applications are distributed and received is accessible to the disabled.

____ Supervisors/Managers have been training regarding how interviewing is effected by the ADA, in order to minimize the risk of discrimination.

____ The essential functions of jobs been identified and incorporated into job descriptions or attached to each job description as a separate attachment.

C. "EMPLOYMENT ELIGIBILITY VERIFICATION"; (I-9) FORMS COMPLIANCE

____ We have a procedure producing forms that need to be presented for inspection and for purging and destroying forms that no longer have to be presented.

____ The employee(s) who complete Section 2 of the I-9 form on behalf of the employer has/have been trained regarding how to complete the section, what documents are acceptable for proof of identity, proof of employment eligibility, or both, and what to do if documents acceptable for Section 2 are not presented within the time limit.

D. E-VERIFY COMPLIANCE

____ We have a "designated agent" who conducts e-verify.

____ The employee who conducts e-verify has a copy of the E-Verify User Manual (June 2011).

E. HAZARD COMMUNICATION STANDARD (HCS) COMPLIANCE

We have hazardous chemicals/materials in the workplace; therefore:

____ We have a designated Safety Officer who is responsible for HCS compliance.

____ We have a Written Hazard Communication Program.

____ We train new hires, and transferred employees, who will work with or be exposed to hazardous chemicals/materials.

____ We document employee training under HCS by placing the original training certificate in the employee's personnel file.

F. FAIR LABOR STANDARD ACT (WAGE & HOUR) COMPLIANCE

____ We have a job description for each job position and the FLSA status (Exempt or Non-Exempt) is listed on each job description.

____ We have identified the "work week" for every job or job class.

____ If Non-Exempt employees receive non-discretionary bonuses, we factor those bonuses into overtime payments for Non-Exempt employees.

NOTE: for every statement for which your answer was "F", your organization is at-risk.

What can we do? What should we do?

1. Have a RISK MANAGEMENT AUDIT of your HR policies, procedures, and practices conducted to determine what, if any, compliance discrepancies exist. When compliance discrepancies exist, risk exists.

   For information about such Audits, contact **HRHelp**.

2. Consider Employment Practices Liability (EPL) insurance to insure against financial loss from a discriminatory act, act of harassment, and/or act of non-compliance.

   Employment practices liability (EPL) insurance, as a risk management tool.

   The recent recession has resulted in a rise in employee lawsuits against their employers for such claims as age discrimination, sexual harassment, disability discrimination, racial discrimination, and retaliation – the latter being an up-and-coming growth industry for EPL lawyers.

   While American firms were downsizing in 2010, the Equal Employment Opportunity Commission (EEOC) saw record 99,922 discrimination claims filed in the fiscal year ending September 30. It was the highest number of cases brought in the agency's 45-year history.

   Before a claimant can press a discrimination claim in federal court, he/she must file a charge of discrimination with the EEOC. But even if the charges wind up being ruled unfounded, EPL cases can be a drain on time and monetary resources for a small or mid-sized organization. The average tally for a discrimination case exceeded $235,000, according to the EEOC.

   What can EPL do for an organization?

   Employers can purchase EPL insurance as a risk management tool for employee claims.

   What Is EPL Insurance?

   EPL insurance policies protect organizations from the financial costs incurred from employment-related lawsuits filed for a range of reasons, from wrongful termination to harassment to discrimination and so on. More than half of claims are filed against small organizations, according to insurer Munich RE. However, less than two percent (2%) of organizations with fewer than 50 employees purchase EPL insurance.

   A recent Chubb Insurance survey found that 36 percent of private company executives understand the gravity of their exposure to EPL suits and 21 percent said they had an experience with an EPL suit in the last five years.

   While every EPL policy is different, a company with $1 million in sales and 50 employees can likely get a policy for about $7,000 per year – $10,000 if they also take out coverage protecting directors and officers in the event of liability lawsuits against them personally.

   Leading Causes of EPL Claims

   The leading charge filed in discrimination cases is an allegation of racial discrimination, at 36 percent of cases, according to EEOC figures from 2009. Gender-based discrimination was alleged in 30 percent of cases. Age-based claims made up 24 percent and allegations from the disabled tallied 23 percent. In many cases, multiple allegations are made.

   One of the growing charges, according to the EEOC, is retaliation against employees for making discrimination claims, which can involve a job switch that the employee views as a demotion related to the initial claim.

   If an employee goes to his/her supervisor and says he/she has been harassed by another employee, he/she can file a charge with the EEOC. Then if the organization decides to discharge the employee or cut back his/her hours, that is retaliation. Retaliation charges are more likely to succeed than the original charge of discrimination. The employer may prevail on the charge of discriminated, but lose on the retaliation claim for moving the complainant to a different job or office setting.

EPL policies often have a broad definition of actions that trigger the insurance, but usually the definitions include any written demands for monetary or non-monetary compensation, an administrative action or EEOC charge, a lawsuit or any type of formal statement that an employee – or ex-employee – has been harmed, experts say.

Protections Against EPL Lawsuits

In general, the more protections a small organization puts in place against EPL claims and the better internal policies and procedures that are implemented, the lower the organization's premiums will be for EPL coverage and the more likely the organization will be considered a candidate for coverage. It's essential that organizations have a written employee handbook with strong anti-harassment and anti-discrimination policies, but other efforts can also pay off.

Training managers/supervisors in HR procedures and policies is a necessity. Such training should include, but not be limited to, procedures for conducting disciplinary actions, procedures for discharging/firing, how to prevent unlawful harassment or discrimination, how to respond to unlawful harassment or discrimination, the expectations of managers/supervisors with regard to ADA and FMLA situations, and other such topics/issues.

An employer considering an EPL insurance policy should be asking certain questions to make sure the policy will protect them, such as what kind of claims will be covered and what kind won't and the policy limits and deductibles. Another issue is whether the policy allows your organization to choose the lawyer who will represent you in the case of a claim. Most policies specify that the insurance company gets to choose legal representation; if the employer has a preferred attorney for such matters, it may want to look for a policy that allows some choice in selecting the attorney that will represent it.

Employment Practices Liability Insurance – Buyer Beware

From the law firm of Quarles & Brady, with comments (hi-lited in YELLOW) by **HRHelp**

An employer who purchases employment practices liability insurance ("EPLI") likely expects coverage for claims of unlawful employment practices. As one large employer recently found out the hard way, such coverage may be unavailable when it is most needed.

A federal trial court recently held that Cracker Barrel is not entitled to coverage under its EPLI policy in a large lawsuit brought by the U.S. Equal Employment Opportunity Commission ("EEOC"), because the plaintiff technically was not an employee as provided in the policy. The Cracker Barrel decision highlights that EPLI is not a panacea, and there are important factors that should be considered by employers in considering whether to purchase this insurance.

The Cracker Barrel Decision

In *Cracker Barrel Old Country Store, Inc. v. Cincinnati Ins. Co.*, M.D. Tenn., No. 3: 07-cv-00303, a federal trial court in Tennessee held that the company could not collect $2.7 million under its EPLI policies for the settlement of an EEOC discrimination lawsuit. **The court ruled that because the restaurant chain's EPLI policies limited claims to proceedings brought by employees — and the EEOC, which sued the company, was not its employee — the claim was not covered.**

The case arose after 10 Cracker Barrel employees filed charges of race and/or sex discrimination with the EEOC and the EEOC filed a complaint against the company under Title VII of the 1964 Civil Rights Act. The company notified its insurer of the charges and later sent in a written notice of the complaint. After spending what it estimated to be at least $700,000 defending itself, the company entered into a consent decree with the EEOC and settled the case. The consent decree required Cracker Barrel to place $2 million in a settlement fund. **Cracker Barrel sought to recover the defense and settlement costs under its EPLI insurance policies.**

The district court granted the insurer's motion for summary judgment. Quoting the policy language, the court observed that, "[a] claim under the policies is defined as "a civil, administrative or arbitration proceeding commenced by the service of a complaint or charge, which is brought by any past, present, or prospective "employee(s) of the 'insured entity' against any 'insured'" for certain listed causes.

Cracker Barrel argued that this definition required only that the proceeding "evolved from" or be started "as a result of" a complaint or charge brought by the employee. However, the court ruled that the words "evolved from" or "as the result of" were not found in the definition. As a result, the court held that the insurers did not have a duty to indemnify Cracker Barrel for the settlement of the EEOC complaint.

The court recognized that the insurer still might have had a duty to defend this case. As the court observed, the duty to defend is broader than the duty to indemnify under the law. Nevertheless, the court reasoned that in this case, the issue is not one of the substance of the underlying allegations, but rather whether the form of the EEOC complaint fell within the policies' definition of a claim. Since the court found that the complaint did not fall within the policies' definition of a claim, the court ruled that the insurer had no duty to defend.

Should You Buy EPLI?

Most companies have insurance for comprehensive general liability ("CGL") and insure against fire, theft, floods and other catastrophes. **These policies typically do not cover employment claims such as sexual harassment, age discrimination, wrongful termination, and defamation. Indeed, these policies often expressly exclude employment-related claims.**

As a result, some employers have seriously considered and ultimately purchased EPLI policies. Should your company do so? The answer is, of course, "it depends." There are about 50 insurers offering EPLI policies, and there are significant differences among the coverage offered. This means that any employer — or its insurance broker — must shop carefully for the coverage desired at the right price.

Factors to Consider in Evaluating EPLI

Most EPLI insurers offer "claims-made" coverage. Under these policies, coverage occurs when the complaint or lawsuit is filed, not when the alleged wrongful action occurred. Thus, if you were to purchase a policy covering the 2011 policy period, coverage would be limited to complaints or lawsuits filed in 2011.

Most EPLI policies include defense costs (also known as legal fees) within the limit of liability for a covered loss. This is an important factor. For example, let's assume the limit is $100,000 per claim. If a former employee files an employment discrimination claim and the employer incurs $50,000 in defense costs, the insurer will only pay another $50,000 to settle the case or pay a judgment. After that, the employer in this example is on its own.

EPLI policies typically cover claims such as sexual harassment, discrimination, wrongful discharge, and retaliation and sometimes personal injury claims, such as defamation and invasion of privacy. However, **EPLI policies often expressly exclude intentional wrongdoing. This is significant because many employment claims, especially discrimination claims, involve allegations of intentional misconduct.** If a jury were to conclude that an employer intentionally discriminated against a former employee, the EPLI policy may not cover the employer for the loss. The good news is that many EPLI policies often pay defense costs until a jury makes that finding and sometimes during any appeal. In employment cases, defense costs can often exceed a plaintiff's actual damages. As a result, the duty to defend is highly valuable to the employer.

"Prior acts" (acts that occurred before the policy period or whether the claim was made during the policy period) are typically covered as long as the employer did not have prior knowledge of the alleged wrongful acts. In other words, just as you cannot buy fire insurance for a building while it is burning, you also cannot insure against a "known" employment loss.

In purchasing EPLI coverage, an employer also needs to consider how much control it will retain over the defense of a claim where the insurer has accepted coverage. Can the employer select its own defense counsel? If the employer has counsel it trusts and who knows its employment practices, it may not want the insurer to appoint its own chosen counsel.

[NOTE: HRHelp has clients who were defended by law firms selected by their EPLI insurance carriers. The insurance carrier will inform its policy holder that the carrier will select a law firm from among those law firms on its "list" – my experience is that the law firms on the "list" are similar to health care providers on a "preferred provider list" – that is, the law firms on the "list" are willing to accept cases at the hourly rate that the carrier will pay. Policy holders will be told that, if it wants to use a law firm that it

prefers, the insurance carrier will pay that firm the established amount and the policy holder will have to pay the difference between the billing rate of the firm it prefers and the rate paid by the insurance carrier. (Similar to "in-network" and "out-of-network" reimbursements by group health insurance carriers.)

So, it is in every employer's better interest to know what, if any, control it will have in selecting the law firm, to know the rate that will be paid, to know whether that rate will allow the employer to select its own law firm or be defended by a law firm on the "list".]

In addition, the employer needs to consider how much control it will have over any settlement. The insurer's and employer's interests do not always coincide in this respect. While settlement may make economic sense to the carrier in the context of a particular insurance claim, **an employer may have business reasons that make settlement undesirable.**

[NOTE: I have clients who were TOLD that their case would be settled, rather than defended, because the carrier said that it would be less expensive to do so. The carrier was not interested in any "principle" behind my client's desire to defend against the claim.

HRHelp was involved in a case where the attorney assigned by the carrier, in response to a demand letter received from an attorney for a former employee, advised the employer to settle. The attorney did not inform the employer that the lawsuit threatened in the demand letter could not be filed unless and until the former employee exhausted her administrative remedies – unless and until the employee filed a Charge of Discrimination with the EEOC or ACRD and had received a "Right to Sue" notice.

From my perspective, the carrier was eager to have this case settled without incurring much cost. Any settlement with the former employee would be paid by the employer, not the carrier. So, it appeared that the carrier, through the attorney who works for the carrier, not the employer, was trying to "steer" the employer into settling versus defending.]

In short, employers have to assess whether EPLI coverage makes sense.

[NOTE: in other words, "caveat emptor" – buyer beware. Before purchasing such coverage, the wise employer will ask a lot of questions about what is or is not covered and how the employer would be defended should a demand letter or Notice of Charge of Discrimination be received.]

As the Cracker Barrel decision demonstrates, EPLI policies are not a cure-all, but they can provide employers with some level of protection for some employment claims.

Of course, **the best protection of all is to have good policies and practices in place, stay familiar about employment matters, and consult with employment counsel (or HRHelp) early and often when potential issues arise. Here again, a proactive, preventive approach will go far in limiting costs, exposure and liability.**

[NOTE: The "best" proactive, preventative approach is to periodically conduct an HR Audit – a complete audit of HR policies and practices and documentation/recordkeeping – to determine the risk, if any, to which the employer is exposed.]

For further information about EPLI, contact your insurance broker/agent.

PART 8: FAQ's regarding HR and Employment Law Compliance Issues

1. **When are I-9 (Employment Eligibility Verification) forms supposed to be completed?**
   EVERY new hire, by law, must complete Section 1 of a form I-9 on his/her FIRST day of employment.

   To obtain the current version of the form I-9, go to: http://www.uscis.gov/files/form/i-9.pdf ; (the I-9 form is on pages 7 & 8).

   The Employer certification section (Section 2) can be completed on or before the 3rd business day of employment (not including the first day on the job).

   The penalty for discrepant I-9 forms (i.e., forms that contain recordkeeping errors) ranges from $110 to $1100 PER FORM. Most employers have forms that are incorrectly completed, incomplete, and/or lacking required data.

   The penalty for knowingly hiring an illegal alien starts at $10,000 with a minimum 6 month jail sentence.

   Additional information for employers is available in the **Handbook for Employers** (rev. April 2013), go to: http://www.uscis.gov/files/form/m-274.pdf

2. **What is E-Verify?**
   The Legal Arizona Workers Act requires all employers in Arizona to use E-Verify, in addition to the federal I-9 process, to verify that new hires have employment eligibility (i.e., have the legal right to work in the U.S.).

   The consequences for non-compliance begin with a 10 day suspension of the businesses right to operate in Arizona.

   To obtain information about E-Verify or to enroll in the program, go to: http://www.dhs.gov/files/programs/gc_1185221678150.shtm

3. **Do all my employees have to be age 18 or older?**
   No. However, the state of Arizona has youth employment (child labor) laws (A.R.S. 23-230 through 23-242) that restrict the hours an underage (under 18) child can work. Also, the federal and Arizona Occupational Safety and Health Acts (OSHA) restrict the kinds of jobs and work activities that an underage child can perform.

   No one under 14 can be employed, with a few exceptions. No one under 16 may be employed before 6 a.m. or after 9:30 p.m., except newspaper carriers; employees under 16 cannot work more than 3 hours per day or 18 hours per week while school is in session if they are enrolled in school OR more than 8 hours per day or 40 hours per week if they are not enrolled in school. No one under 16 may be employed in solicitation sales or door-to-door deliveries after 7 p.m.

4. **Can job offers be made verbally? Or, should they be in writing?**

   While offers can be made verbally, it is better to make them via an offer letter. The offer letter should state the agreed upon job title and starting wage/salary. The letter should include a statement that it is contingent upon ALL of the contingencies listed in the letter. Thus, if the applicant signs the offer letter, he/she has agreed to accept the contingencies.

   Contingencies upon which an offer is based and that should/could be listed include, but are not limited to, that:

   - the employee provide proof of identity and proof of employment eligibility and properly complete a form I-9 on his/her first day of employment; and, meet E-Verify requirements;
   - the employee sign on his/her first day of employment a Confidential Information Agreement; if this is a contingency, a copy of the Agreement should be included with the offer letter so the applicant can read/review the Agreement before being required to sign;
   - the employee provide a copy of his/her current driver's license and MVD report, if he/she will be driving on company business; and/or

- other such contingencies.

The offer letter should include language that the applicant, if he/she signs the letter, attests that he/she is not under a "covenant not to compete agreement" with a former employer and that he/she will not bring materials, files, documents, or other information from a previous employer that would be in violation of a "Confidential Information Agreement" with a former employer.

Also, the offer letter should identify the process by which a signed copy is presented to the employer and the date and deadline at which the offer, if not accepted, is void.

5. **What questions can or cannot be asked during an employment interview?**
Questions that are considered to be discriminatory (the answers to the questions could result in discrimination against the applicant) are unlawful and should not be asked.

Questions that are job-related and that will allow you to assess how well the person could perform the job are lawful and may be asked.

See **EXHIBIT H** for further information.

6. **What is "negligent hiring"?**
When an employer hires someone into a position where it is foreseeable that the employee could do harm to the public and the employer does not complete an adequate background check and the employee does do harm to the public, the employer can be liable under the legal theory of "negligent hiring."

For instance, if a company has employees who install appliances, who deliver furniture, or who otherwise are in a customer's home and the employee commits an act of violence toward the homeowner, or steals, or rapes, and the company did not conduct a thorough background check, and the employee has a history of such acts, the employee probably will face a claim of "negligent hiring."

The most common risk for employers is allowing employees to drive on company business without knowing the employee's driving record. If an employee drives on company business and his/her driving record shows a history of speeding, moving violations, running stop signs or red lights, and the employee is involved in an accident while driving on company business, the business will probably face a claim of "negligent hiring." See **EXHIBIT I** for further information.

7. **Does a payroll service (ADP, Paychex, other) automatically report new hires to the Arizona New Hire Reporting Center?**
Typically, such payroll services only provide the information on your behalf if you have enrolled for that service and are paying a fee for that service. Since the liability is on the employer, not the payroll service, you should verify with your payroll service that it is reporting new hires. If it is not, you can pay for that service or report new hires yourself.

8. **Can we test employees for prohibited/illegal drugs or substances? Applicants?**

Yes. Arizona has a drugs/substances/alcohol statute that is favorable toward an employer, provided the employer has a written drugs/substances/alcohol testing program that meets the statutes. Having a written policy that meets the Arizona statutes allows an employer to: terminate an employee who refuses to provide a specimen for testing or who tests positive to receive a discount on worker's compensation insurance costs.

When a drugs/substances/alcohol testing policy that meets the Arizona statutes is in place, employees who refuse to consent to provide a specimen or who test positive will be disqualified from receiving unemployment insurance benefits.

NOTE: In the fall of 2010, Proposition 203, the Arizona Medical Marijuana Act (AMMA), was approved by voters. There are provisions in the AMMA that prohibit employment discrimination against a person (applicant or employee) who possesses a Medical Marijuana Card issued by the AZ Dept. of Health Services. For more information about the AMMA, please contact HRHelp.

For additional information about drugs/substances testing, see **EXHIBIT F**.

9. **Who is an employee and who is an independent contractor and why does it make a difference?**
The Internal Revenue Service (IRS) has begun a very serious effort to determine whether workers declared as independent contractors are instead employees. Employers who have paid workers as independent contractors (gross wages without withholding for taxes) in order to avoid the employer's FICA contribution and federal Unemployment Tax are being assessed the amount of the FICA and unemployment taxes that should have been paid, **plus** interest and penalties, by the IRS.

   Read **EXHIBIT B** for further information. Your answers to the questions in that document will help you determine whether a worker is an employee or an independent contractor.

   If, after answering the questions, you are still uncertain whether a worker is an employee or an independent contractor, you may want to obtain a form SS-8 from the IRS or contact an employment law attorney for further assistance.

   For additional information about who the IRS considers to be an employee or an independent contractor, go to: https://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Independent-Contractor-Self-Employed-or-Employee

   Also, see Publication 15, (Circular E), ***Employer's Tax Guide***, for more information; go to: http://www.irs.gov/pub/irs-pdf/p15.pdf. Section 2 is entitled: "Who Are Employees?"

10. **How often and when do I have to pay employees?**
The Arizona Wage Claims Statute (A.R.S. 23-351) states that employees must be paid at least twice monthly; so, you can pay weekly, bi-weekly, or semi-monthly. You can withhold up to 5 days of salary/ wages; meaning that the pay day can be up to a week (5 working days) following the end of the payroll period.

    Employees who quit or resign can be paid on the normal pay day following their last day of employment; you have the option of paying sooner.

    Employees who are discharged (involuntary termination) must be paid within seven (7) business days or on the normal pay day following discharge, whichever is sooner.

    You must withhold (payroll deduct) for certain taxes (Social Security, Medicare, federal withholding, and AZ withholding). You may make other payroll deductions, such as for health insurance, uniforms, purchases of company products, etc., only when the employee has provided written authorization to do so.

    You must withhold for garnishments, tax liens, or other court ordered deductions. You cannot withhold from payroll any amounts for tools, keys, equipment, or other lost or non- returned items, unless you have a signed document from the employee authorizing such a deduction.

    With regard to garnishments, you should obtain ***Fact Sheet #30: The Federal Wage Garnishment Law, Consumer Credit Protection Act's Title 3 (CCPA)***; go to: https://www.dol.gov/whd/regs/compliance/whdfs30.pdf

11. **What is the difference between hourly-paid versus salary-paid employees? Between Exempt and Non-Exempt employees?**
The Fair Labor Standards Act (FLSA) defines employees as either exempt from the overtime payment provisions of the Act or non-exempt from the provisions of the Act. Non-exempt employees can be paid either hourly or by salary.

    NOT ALL EMPLOYEES PAID ON A SALARY BASIS ARE EXEMPT; JUST BECAUSE AN EMPLOYEE RECEIVES A SALARY DOES NOT MAKE HIS/HER JOB POSITION EXEMPT FROM OVERTIME.

    To be exempt, jobs also must meet the three (3) tests established by the Dept. of Labor:

    - a fixed salary test; **AND**,
    - a salary level test; **AND**,
    - a job duties test.

Exempt employees are those who meet the FLSA fixed salary test, the salary test, **AND** the job duties test for one of the following categories:

- Professionals,
- Outside Sales Persons,
- Executives, or
- Administrative.

NOTE; Many job positions that are treated as Exempt (because they meet the fixed salary test and the salary level test) are NOT exempt because they fail the Job Duties Test.

Exempt employees do not have to be paid overtime for hours worked that exceed 40 hours in a workweek.

ALL EMPLOYEES IN NON-EXEMPT JOBS MUST BE PAID OVERTIME FOR THEIR HOURS WORKED THAT EXCEED 40 HOURS IN A WORKWEEK, WHETHER THEY ARE REGULARLY PAID BY THE HOUR OR BY SALARY.

The Act requires employers to establish a consecutive 168 hour period (7 days x 24 hours/day) as a workweek. The workweek may begin on any day and at any time of the day. (Employers often start the workweek at 12:01 a.m. each Monday and end the workweek at 12 midnight the following Sunday.) Non-exempt employees must be paid overtime for all hours worked over 40 in the workweek. For hourly employees, payment must be at least 1½ their regular hour rate for overtime hours. Non-exempt salaried employees must, in addition to their regular salary, be paid at least ½ times their hourly equivalent rate for overtime hours.

Payment for overtime must be made with the paycheck for the payroll period in which the overtime was worked. **COMP TIME (COMPENSATORY TIME OFF) CANNOT BE PROVIDED TO NON-EXEMPT EMPLOYEES IN LIEU OF PAYMENT FOR OVERTIME. AN EMPLOYER CANNOT REDUCE THE NUMBER OF HOURS AN EMPLOYEE WORKS IN A SUBSEQUENT WORKWEEK TO *"make-up"* FOR OVERTIME WORKED IN A PREVIOUS WORKWEEK**. E.g., if Joe works 50 hours in workweek A and 30 hours in workweek B, he has to be paid overtime for the 10 hours of overtime in workweek A even though he is only paid for the 30 hours worked in workweek B; if the payroll period covered workweeks A + B, Joe would be paid the equivalent of 85 hours: 40 + (10 x 1.5 = 15) + 30. It would be a violation of the FLSA to only pay Joe a combined 80 (50 + 30) hours in a payroll period that covered weeks A + B.

The DOL implemented regulations that became effective on August 23, 2004. The minimum salary level for an employee to be EXEMPT has increased to $455/week, regardless of the number of hours the Exempt employee works.

EXAMPLE: an employee is hired or reassigned to a job that only works 20 hours per week and the job normally pays $807.69/week ($42,000 annually for a full-time, 40 hour/week employee). The now part-time employee is paid a pro-rated amount $403.85 (50% or 20/40 times $807.69). The job does NOT meet the $455/week minimum salary level. Thus, the Exempt job becomes a Non-Exempt job unless the employee is paid a salary of at least $455/week.

For further information, go to: http://www.dol.gov/whd/fact-sheets-index.htm and read the Fact Sheets. The Fact Sheets are listed in alphabetical order; the corresponding Fact Sheet numbers are on the right side of the page.

A number of free publications regarding the FLSA are available from the Wage and Hour Division, U.S. Dept. of Labor; go to: http://www.osha.gov/pls/epub/wageindex.list.

Questions regarding who is an exempt employee or a non-exempt employee, definitions of hours worked or not worked for calculating overtime, record keeping requirements, etc. will be answered by the Wage and Hour Division publications or by calling them.

12. **Can employees agree to be treated as Exempt? Our employees consider themselves "professionals" and don't want to be treated as hourly workers. If our employees agree to it, can we still treat them as "Exempt" even if they don't meet all of the requirements under the FLSA or state law?**
In a word, NO. This question comes up more often than you might think. In some cases, particular industries have developed a practice of treating certain categories of employees as "*salaried*" and assuming that they are not exempt. In others, employees would simply rather be "*salaried*" or "*exempt*" because this suggests a higher status than an "*hourly*" position, or because they prefer not to have to track their time.

    Unfortunately for employers, an employee's choice generally had nothing to do with whether or not the employee can legitimately be classified as "*exempt*" from overtime requirements under state and federal law. With very few exceptions, the rights provided to employees by the Fair Labor Standards Act (FLSA) and equivalent state laws cannot be waived or modified by an agreement with the employee. [**NOTE: if there were such an "agreement" and an employee filed a wage claim for unpaid overtime under the FLSA, the DOL would ignore the "agreement" since it would be illegal and therefore not binding. Thus, the employer (per the reality that "no good deed goes unpunished") that "agreed" to treat the employees as exempt would be liable for violating the FLSA and owe back wages.**]

    So how can employers manage employee expectations without running afoul of the law?

    First, there is nothing in the Fair Labor Standards Act that precludes employers from paying a non-exempt employee a "salary." The employee must still receive extra compensation for any hours in excess of the work time covered by the salary, and must receive 1-1/2 times the "regular rate of pay" for any hours worked in excess of 40 hours in a single workweek. However, if the employee works 40 or fewer hours in a single week and the salary is at least equal to the minimum wage for all hours worked, there is nothing wrong with paying a flat salary.

    Unfortunately, this still means that you need to keep a detailed record of each employee's daily work hours so that you can determine when overtime is owed. While there is no way around this, there are a number of relatively painless timekeeping systems on the market.

    Alternatively, many employers practice "payroll by exception," in which employees who work on a known schedule report only deviations from their schedule, rather than "clocking in" and "clocking out" at the start and end of each shift. Such a system is permissible if it results in an accurate record of time. However, such systems require close attention by supervisors and management to ensure that employees are accurately reporting all deviations from their schedules. **For that reason, a system in which employees affirmatively record their actual hours on a daily basis is generally preferable**.

13. **How important is it that a non-exempt employee signs his/her time sheet?**
VERY. When a non-exempt employee signs that the time sheet is accurate (he/she has not worked fewer hours than recorded and not worked more hours than recorded), the company is protected.

    If the employee were to file a claim with the Wage & Hour Division of the Dept. of Labor that he/she had not been paid overtime, the signature would allow the company to refute the employee's claim that he/she worked more hours than recorded.

    If the company learned and had proof that the employee had worked fewer hours than recorded, the signature would be proof of the employee's falsification of the time sheet. Then, the employee could be disciplined or discharged and the employer would have the signed time sheet, along with other document of the false record, to defend any claim.

14. **Do I have to provide employees Break Periods and/or Meal Periods?**
Neither the federal government, nor the state of Arizona, has statutes regarding employers providing meal and/or break periods, with one exception; see the FAQ that follows regarding Lactation-Breaks. Therefore, each employer can set its own policy about meal and/or break periods.

    A meal period for employees in Exempt jobs is not an employment law issue. Since Exempt employees are paid a fixed salary regardless of the number of hours worked in a workweek, the length of a meal period of an Exempt

employee is not an issue under the Fair Labor Standards Act (FLSA). An overly long lunch/meal period by an Exempt employee may be a discipline issue for the employer; but, it is not a FLSA issue.

A meal period for employees in a Non-Exempt job IS an issue under the FLSA. In order for a meal period to be unpaid (which is what most employers want), the meal period has to meet guidelines of the FLSA. The following is from the FLSA and states the conditions that have to be met for a meal period to be unpaid.

> 29 CFR 785.19 - Meal.
> Section Number: 785.19
> Section Name: Meal.
>
> (a) Bona fide meal periods. Bona fide meal periods are not work time. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods.
>
> The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions.
>
> The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating.
>
> (b) It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period.

So, allowing (not requiring, but merely allowing) a non-exempt employee to sit at his/her desk or work station during a "meal period" could result in the "meal period" being time worked, for purposes of the FLSA. And that work time would have to be counted when calculating overtime, if the employee performed ANY work during that "meal period." The employee is "not relieved" when he/she could be just answering the employer's phone or doing some job/work-related research on the internet or answering questions from customers or co-workers. Such activities would be ANY work under the FLSA definition.

15. **Do I have to provide a Lactation-Break to employees who are nursing?**
Yes. The FLSA was amended to require employers to provide a lactation-break to any employee who is nursing. For employers with fewer than 50 employees and for whom providing such a break would create an "undue hardship", lactation breaks are not required.

16. **Do I have to provide insurance coverage to all of my employees?**
All employees must be provided worker's compensation coverage, paid in full by the employer, according to the Arizona Worker's Compensation Law. The Industrial Commission requires all employers who have employees to post two notices: ***"Notice to Employees RE: Arizona's Worker's Compensation Law"***; AND, ***"Work Exposure to Bodily Fluids."*** See **PART 3, Notices and Posters** for information about how to obtain each poster.

Medical insurance, per the Affordable Care Act (ACA) has to be provided to employees who work at least 30 hours/week on a regular basis or the employer is subject to fines. For additional information about the ACA, see **EXHIBIT J** or contact **HRHelp** or your insurance agent/broker.

Life, dental, vision, disability, or other similar types of insurance are NOT required by law at this time.

General liability, vehicle liability, and others types of insurance coverage for one or more employees may be a wise decision, but are not necessarily required.

17. **What is "Unlawful or Prohibited Harassment"?**

The EEOC's guidelines regarding prohibited harassment state that ALL forms of harassment will be subject to its guidelines: sexual harassment AND/OR harassment based on the person's race, gender, age, color, national origin, disability, religion.

If a tangible employment action occurs against an applicant or an employee, the employer will ALWAYS LIABLE; the employer cannot present an "affirmative defense."

A tangible employment action against an applicant or employee is an adverse employment-related decision toward the person. Such actions could include: not hiring; unwelcome transfer; disciplinary actions; discharge, etc.

The components of an affirmative defense are that:

- the business has and enforces a policy against harassment; and,
- the victim failed to use the complaint process provided in the policy.

18. What do I need to know about OSHA?

Businesses/Organizations in certain Standard Industrial Classification (SIC) codes and employers required by the Bureau of Labor Statistics must keep records of on-the-job injuries or illness.

Effective January 1, 2002, OSHA requires that: each recordable on-the-job injury/illness must be reported via a form 301; the annual recordkeeping of recordable injuries/illnesses to be kept on a form 300; and, the annual summary information of recordable injuries/illnesses for the previous calendar year (from the form 300) be displayed on a form 300A from February 1 – April 1.

In 2014, OSHA updated its rules regarding recordkeeping. For information about the new recordkeeping rule, ***Detailed Guidance for OSHA's Injury and Illness Recordkeeping Rule***, go to: https://www.osha.gov/recordkeeping/entryfaq.html

The OSHA Recordkeeping forms are available at: https://www.osha.gov/recordkeeping/RKforms.html

The OSHA Recordkeeping Advisor page is available at: http://webapps.dol.gov/elaws/OSHARecordkeeping.htm

19. What do I need to know about the OSHA Hazard Communication Standard?

If your organization is required to meet the requirements of the OSHA Hazard Communication Standard (HCS), you should be aware of the following. The links below will take you to useful information.

OSHA Issues Final HazCom Rule

OSHA has released a final rule that updates its Hazard Communication Standard.

According to OSHA, the new standard "covers over 43 million workers who produce or handle hazardous chemicals in more than five million workplaces across the country." The changes are expected to prevent more than 500 injuries and 40 fatalities each year.

OSHA released some handy tools along with the new rule, including a **Fact Sheet** (https://www.osha.gov/dsg/hazcom/HCSFactsheet.html) and a **Quick Card** (https://www.osha.gov/Publications/OSHA3491QuickCardPictogram.pdf)

What Changed?

Here are the major changes:

- Hazard Classification: Chemical manufacturers and importers are required to determine the hazards of chemicals they produce or import. Classifications provide specific criteria to address health and physical hazards as well as classification of chemical mixtures.
- Labels: Chemical manufacturers and importers must provide a label that includes a signal word, pictogram, hazard statement and precautionary statement for each hazard class and category.
- Safety Data Sheets: The new format includes 16 specific sections to ensure consistency in presentation of protection info.

What Do I Need To Do And When?

Full compliance with the rule was required by June 1, 2015, with some exceptions spelled out in the Fact Sheet.

Other deadlines:

- Employers: **Train employees on the new label elements and safety data sheet format by December 1, 2013**. Update alternative workplace labeling and HazCom program as necessary and provide additional employee training for newly identified physical or health hazards by June 1, 2016.

- Chemical Users: Continue to update safety data sheets when new ones become available, provide training on the new label elements and update HazCom programs if new hazards are identified.

20. Must employees received accrued/earned vacation pay when they quit, resign, or are fired.
Yes. In *Schade v. Dietrich*, the Arizona Supreme Court ruled that vacation pay is "wages." And, the Arizona Revised Statutes (ARS Title 23, Chapter 2, Article 7, Payment of Wages) requires the payment of "wages" on the next regular payday (if the person quits or resigns) or within 3 business days (if the person is discharged).

To not pay vacation pay could result in a penalty equal to three (3) times the amount owed to the employee.

21. Are all employees eligible for (non-Military) FMLA leave?
No. To be eligible for (non-Military) FMLA leave, an employee must work for a business that has 50+ employees.

In addition, the employee must have worked:

- for the employer at least 12 months, even if not consecutively; **AND**,
- at least 1250 hours during the 12 months, rolling backward from the date that FMLA leave, if granted, would begin; **AND**,
- at a site/facility where within a 75 mile distance there are 50+ employees.

22. If an employee is on FMLA leave and cannot return to work on the date he/she is scheduled to return to work, can I just fire/discharge him/her?
Maybe or maybe not; it depends. Because of the ADAAA, discharging an employee who is not able to return to work on the date he/she was scheduled to return to work may be problematic (and unlawful). While providing an indefinite unpaid leave of absence beyond FMLA leave is not a reasonable accommodation, the EEOC has taken the position that additional unpaid leave of absence may be a reasonable accommodation under the ADAAA.

23. What's the difference between a "no-fault" attendance policy and a policy that allows for "excused"/ "unexcused" absences?
A "no-fault" attendance policy states that, if you are absent, the reason doesn't matter; i.e., you are either here or not here and the reason is not at issue.

Attendance policies that allow for "excused" or "unexcused" absences allows a supervisor/manager to count an "unexcused" absence as a violation of the attendance policy and to forgive or not count an "excused" absence as a violation of the attendance policy.

Policies that allow for "excused" versus "unexcused" absences frequently result in claims of discrimination because what one supervisor will "excuse" another will not. Thus inconsistent treatment occurs. Employees who are in protected classes (based on age, color, religion, gender, etc.) may have the perception of discrimination – my absence was "unexcused", but a person not in a protected class was "excused" by his/ her supervisor/manager. At the minimum, such perceptions of unequal treatment create tension in the workplace; at the worse, such perceptions lead to charges of discrimination.

24. If an employee is absent, can we require a "doctor's note/slip/statement" in order to allow the employee to return to work and/or to determine "excused" or "unexcused" under our attendance policy?
Requiring such "notes" in order to determine "excused or unexcused" is problematic. Typically there are no guidelines as to what constitutes a "doctor's note" or what information is needed in the note. Asking for medical information, in an uncontrolled manner and without the necessary GINA notice, can result in violations of the ADA, GINA, or both.

If your organization, per the employee manual/handbook and/or per actual practice, requires an employee to present a "doctor's note's/slip/statement" in order to return to work and/or to determine "excused" or "unexcused", you should consider ending that practice.

There is a process/way by which information can be obtained legally; the process/way includes limiting the information requested to only information about: (1) can the employee, with or without restrictions/ limitations, perform the essential functions of his/her job; and, (2) does the employee pose a "direct threat" (language in the ADA) to him/herself or to others.

25. **We receive mailings about ALL-IN-ONE federal and state posters. Should we purchase those?**
The advantages of such posters are that they are laminated and require less wall space than the space required of the individual posters.

    One disadvantage are that you are paying for notices/posters that can be obtained for free from the appropriate state or federal agency. Another is that the workers compensation insurance notice will not include the name and address of your workers compensation insurance carrier or the policy number; all of that information is required, by law, to be on the notice/poster.

    The major disadvantage of purchasing such posters is the risk of having to comply with a law with which your business would otherwise not be required to comply. For instance, the ALL-IN-ONE, 5-in-1, and 6-in-1 posters include the FMLA poster.

    If your business is under 50 employees, but posts the notice, it will have accepted responsibility to comply with FMLA since it notified employees of their rights to FMLA . . . Ooops!

    It is recommended that you review the required notices and posters, by threshold numbers of employees (see **PART 4**), and post only those you are required to display.

26. **If employees pay for the cost of disability insurance, instead of the company paying the premium, the benefit is not taxed to the employee. Can we require every employee to sign up for disability insurance and deduct the premium from payroll?**
No. If the employee pays all or part of a premium, he/she may not be required to sign up for the benefit. Only when the employer pays the entire cost is it possible to require every employee to sign up for disability insurance.

HRHelp periodically creates and sends HR Alerts via email regarding employment law issues. Often the HR Alerts are in response to questions, like the ones above, about compliance with the laws. If you wish to be on the distribution list, send an email to: hrhelp@cox.net. In the Subject line, enter: Subscribe.

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?'"**

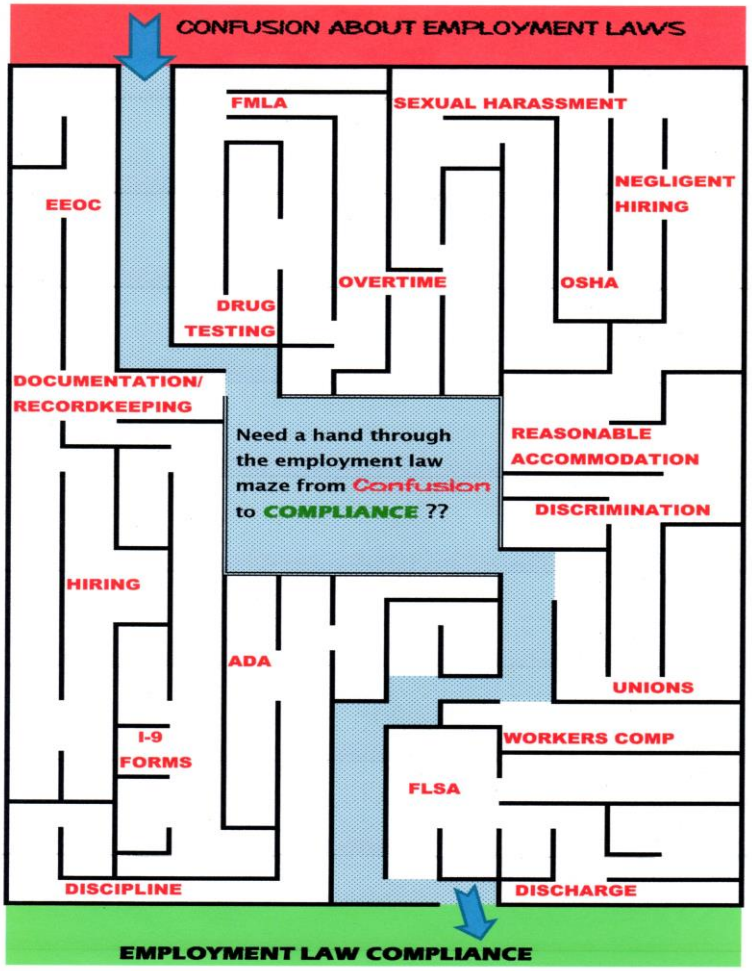
You get what you pay for

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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