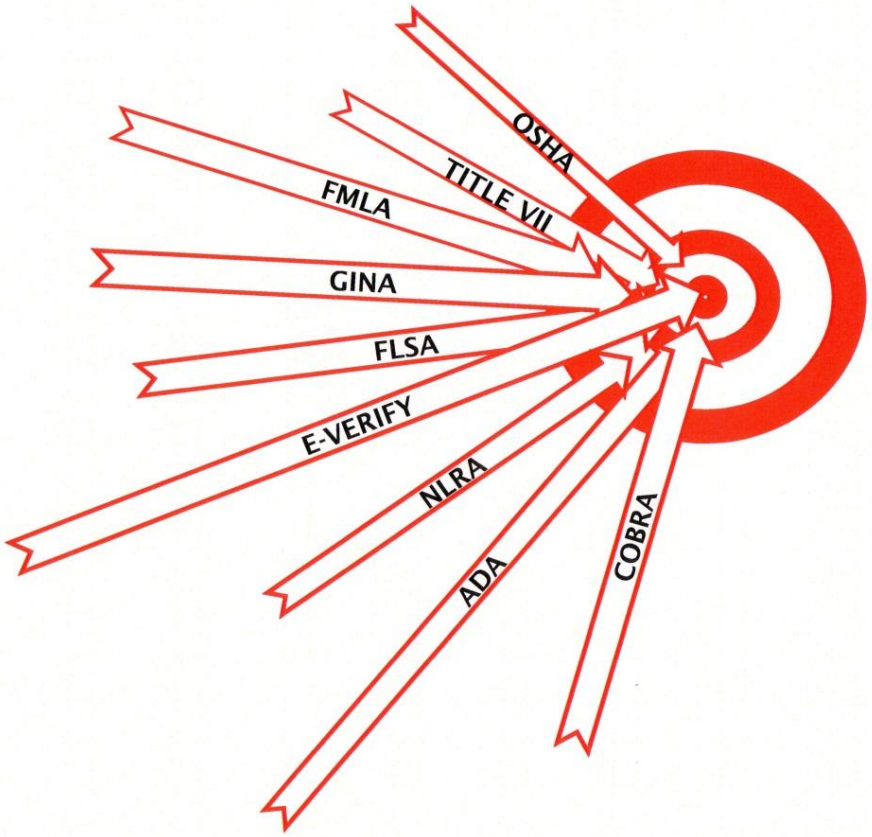
SUPPLEMENT

to the

HR & EMPLOYMENT LAW COMPLIANCE GUIDE

for Arizona Employers

revised October 2021



Is Your Organization A Target?

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[NOTE: PARTS 1 – 8 are in the HR & EMPLOYMENT LAW COMPLIANCE GUIDE.]

PART 9: EXHIBITS

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. Many, but not all, of compliance requirements of most, but not all, federal and state (AZ) laws are identified.

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

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

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

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

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

PART 9: EXHIBITS

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

AN EXCERPT, with comments added by HRHelp

SHRM Information Center

SHRM WHITE PAPER

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

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

Introduction

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

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

COMMON HR MISTAKES SMALLER ORGANIZATIONS MAKE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- ***Poor Documentation Practices***

Effective documentation is critical to the employment process. Many employment activities can be the basis for a discrimination charge – from when an employee is interviewed and hired to when the

employee is terminated. To be effective, documentation must be accurate, consistent, complete and evaluated.

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

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

B: HR Policy Manuals and Employee Handbooks

Should your organization have one?

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

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

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

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

ADVANTAGES OF AN EMPLOYEE HANDBOOK (partial listing)

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

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

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

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

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

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

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

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

DISADVANTAGES (a partial listing)

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

C: "model/recommended" Table of Contents for a HR Policy Manual and Employee Handbook

NOTE:

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

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

page

WELCOME!

ABOUT [*ORGANIZATION NAME*]
Our History
Our Organization Chart
Our Mission Statement
Our Vision Statement
Our Core Values
Profitability

QUALITY AND SERVICE

Products/Services We Provide Our Customers/Clients
Dedication to Our Customers/Clients
Relations with Customers/Clients: Your Role
Working Relationships with Co-Workers: Your Role
Quality of Work

EMPLOYMENT AND ORIENTATION

Equal Employment Opportunity (EEO)
Affirmative Action Plan (AAP) *[**if required as a federal contractor or as a "first-tier" sub-contractor to a prime contractor**]*
The Americans With Disabilities Act (ADA) and Americans With Disabilities Act Amendments Act (ADAAA)
Recruitment Policy
Applicant Referral Bonus
Pre-Employment Drugs/Substances Testing
Criminal Background Checks
Credit Checks (if applicable)
Bonding (if applicable)
Pre-Employment Assessments (if applicable)
Fingerprinting Requirements (if applicable)
Immunization Requirements (if applicable)
Selection Policy
Offers of Employment
Employment of Relatives or Domestic Partners (Anti-Nepotism)
Immigration Reform and Control Act of 1986
E-Verify *[**federal contractors + employers in AZ and certain other states**]*
Orientation (On-Boarding) of New Employees
Employment Classifications/Categories
Personnel Files/Records
Requests to Verify Employment
Notices and Posters
Promotions/Transfers
Reassignment or Demotion
Reduction in Force (RIF) or Layoffs or Reduced Work Schedule
Leaves of Absence
Family and Medical Leave Act (FMLA) Leave SUMMARY ***[if 50+ employees]***
Non-FMLA Leave, including:
- Medical Leave of Absence
- Personal Leave of Absence
- Military Leave of Absence

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

COMPENSATION

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

EMPLOYEE BENEFITS

Group Health Insurance
Group Dental Insurance
Group Vision Insurance
Group Life Insurance, including AD&D
Group Insurance Enrollments and Payroll Deductions
Short-Term Disability (STD) Insurance
Long-Term Disability (LTD) Insurance
Supplemental Insurance Plans
Health Savings Account (HSA)
Cafeteria (Section 125) Plan
COBRA (Continuation of Group Health Benefits) ***[if 20+ employees]***
AZ "mini-COBRA ***[if 1-19 employees and group health insurance is offered]***
401(k) Savings Plan
Retirement Plan (Defined Contribution or Defined Benefit Plan)
Profit-Sharing Plan
Employee Stock Ownership Plan (ESOP)
Holidays and Holiday Pay
Vacation Time Off and Vacation Pay
Earned Paid Sick Time (PST) (per the AZ Fair Wages & Healthy Families Act)
Illness/Sick Time Off ***[supplement to or in addition to PST]***

Personal Time Off (PTO)
Jury Duty
Called as a Witness
Bereavement (Funeral) Leave
Time Off To Vote
Service/Longevity Awards/Recognition
Membership in Professional Associations
Reimbursement of Work-related Expenses, including Mileage Reimbursement
Travel and Travel Expenses
Relocation/Moving Reimbursement
Workshops/Seminars/Professional Development/Continuing Education
Education/Tuition Reimbursement

COMMUNICATION

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

WHAT WE EXPECT OF YOU

Business Ethics and Conduct
Anti-Fraud Policy
Whistleblowing
Workplace Etiquette/Courtesies
Changes of Personal Information or Changes in Status
Accessibility by Phone
Attendance/Punctuality
Job Abandonment
Photographic-, Video-, or Audio-Recording by Employees and/or Non-Employees Prohibited
Smoking/No Smoking
Scent-Free and Chemical-Free Workplace
Personal Plants or Vegetation
Housekeeping
Personal Property/Equipment/Tools
Personal Computers, Laptops, or Games Devices
Personal Telephone Calls or Text Messages
Emergency Phone Calls
Personal Cell Phones, Smart Phones, iPads, Tablets, or other Electronic Devices
Radios/iPod's/MP3 Players in the Workplace
Personal Mail

Parking
Carpooling or Maricopa County Trip Reduction Plan
Use of [*Organization Name*] Equipment or Tools
Appearance, Grooming, and Dress
Uniforms
Personal Hygiene in the Workplace
Body Piercings
Tattoos (Body Art)
Gifts to Employees by Suppliers/Vendors or by Potential Suppliers/Vendors or by Customers/Clients
Conflict of Interest
Freelancing
Moonlighting/Outside Employment
Media Inquiries or Public Statements
Social Media
Confidential Organization Information and Your Duty Not to Disclose
Confidential Customer/Client Information and Your Duty Not to Disclose
Internal Communications
E-Mail
[*Organization Name*] Files and Records and Your Duty Not to Disclose
Proprietary Work Products
Gambling
Drugs/Substances/Alcohol
Drugs/Substances/Alcohol Testing Program (if conducted)
Disciplinary (Corrective) Action
Standards of Conduct (Unacceptable Performance and/or Behaviors)

SAFETY

Safety, General
Safety Standards/Expectations
On-The-Job Injuries/Illness/Accidents
First Aid or Emergency Treatment
Workers' Compensation
Emergency Procedures
Hazardous Materials or Chemicals in the Workplace
Life-Threatening Illness

SECURITY (RISK MANAGEMENT)

No Expectation of Privacy regarding Organization-Provided Desks, Lockers, and/or other Storage Devices OR Organization-Provided Vehicles
Organization-Provided Lockers and Locks
Internal Investigations and/or Searches
Workplace Monitoring
Recording of Conversations Prohibited
Voice Messages
Entering and Leaving a Building/Facility
Building/Facility Security
Office/Office Door Security

ID Badges
Key Cards
Keys
Copyright Software
Copyrighted Media
Violence-Free Workplace
Visitors
Children in the Workplace
Standards for and Expectations of Employees who drive on Organization Business
Use of Personal Vehicle to Conduct [*Organization Name*] Business
Use of Organization-owned or -provided Vehicles (if applicable)
Distracted Driving Prohibited

OTHER

Lunchroom/Kitchen
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Organization Sponsored Events for Employees and their Family Members
Recycling

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RECEIPT OF MANUAL/HANDBOOK

ADDENDA

Employment Law Notices and Posters
Confidentiality of Employee Personal Data/Information
General Safety Expectations/Standards
Emergency Evacuation Protocols
OSHA's Globally Harmonized System (GHS)
Written Hazard Communication Program Summary *[**if the organization is required to comply with the federal Hazard Communication Standard**]*
Drugs/Substances/Alcohol Testing Program *[**PROVIDED the organization develops a Written Drugs/Substances/Alcohol Testing Program, including written protocols, that meets the requirements of the statutes of its state**]*
FMLA Policy ***[50+ employees]***
E-Mail
Social Media
Computer Network and Internet Access
Software
Telecommuting
Recording of Inbound Phone Conversations
Use of Credit Cards or Pre-Paid Cards issued by the Organization
Travel on Organization Business

D: Lawful and Unlawful Interview Questions

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

EEOC GUIDE TO PRE-EMPLOYMENT INQUIRIES

https://www.hmc.edu/human-resources/wp-content/uploads/sites/23/2014/04/EEOC-Guide-to-Pre-Employment-Inquiries.pdf

	QUESTION CATEGORIES	QUESTIONS ALLOWED	EXAMPLES OF POTENTIAL DISCRIMINATORY QUESTIONS
1	Arrest records	None *(for convictions, see No. 5)*	Number and kinds of arrest
2	Availability for work on weekends, evenings	If asked of all applicants and it is a business necessity for the person to be available to work weekends and/or evenings	Any inquiry about religious observance
3	Child care	None, unless asked of all applicants	Inquiry into child care arrangements of only female applicants
4	Citizenship, birthplace & national origin	The only legitimate concern here is whether the applicant is eligible to work in the United States, under the terms of the Immigrant Reform and Control Act of 1986 There is a fair and advisable way to obtain information. The best approach is to ask: Are you either a U.S. citizen or an alien authorized to work in the United States? The Yes or No answer that follows provides all needed information while not disclosing which (citizen or alien) the applicant is.	Birthplace, national origin, ancestry, or lineage of applicant, applicant's parents or applicant's spouse
5	Conviction records	Inquiry into convictions if job-related	Any inquiry about conviction, unrelated to job requirements
6	Creed or religion	None, except where religion is a bonafide occupational qualification	Applicant's religious affiliation, church, parish, or religious holidays observed
7	Credit records	None, unless job-related	Inquiries about charge accounts, bank accounts, etc.
8	Family status	Whether applicant has responsibilities or commitments that will prevent meeting work schedules, if asked of all applicants regardless of sex	Marital status, number and age of children, spouse's job

9	Height and weight	None, unless job-related	Any inquiry unrelated to job requirements
10	Language	Language applicant speaks or writes fluently, if job-related	Applicant's other tongue, language used by applicant at home, or how applicant acquired the ability to read, write or speak a foreign language
11	Marital status	None	Whether applicant is married, single, divorced, separated, engaged or widowed
12	Military status	Military experience or training	Type or condition of discharge
13	Name	Whether applicant has worked under a different name	The original name of an applicant whose name has been legally changed or the national origin of an applicant's name
14	Organizations	Applicant's membership in professional organizations if job-related	All clubs, social fraternities, societies, lodges or organizations to which applicant belongs
15	Photographs	None except after hiring	Photographs with application or after interview but before hiring
16	Pregnancy	None	Any inquiry into pregnancy, medical history of pregnancy or family plans
17	Race or color	None	Applicant's race or color of applicant's skin
18	References	Names of character references	Name of applicant's pastor or religious leader
19	Relatives/friends	Names of applicant's relatives already employed by your organization or a competitor, but you may not give preference if women and minorities are underrepresented in workforce	Names of friends working for the company or relatives other than those working for the company
20	Sex	None, except where sex is a bona fide occupational qualification	Any inquiry except where a bona fide occupational qualification
21	Workers' Compensation	None	Past workers' compensation claims

Go to: https://www.eeoc.gov/prohibited-employment-policiespractices, for additional information, re **Pre-Employment Inquiries and**:

- Race
- Height & Weight
- Financial Information
- Unemployed Status
- Background Checks
- Religious Affiliation Or Beliefs
- Citizenship
- Marital Status, Number Of Children

- Gender
- Disability
- Medical Questions & Examinations

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

https://www.azag.gov/sites/default/files/publications/2018-06/Pre-Employment_Inquiries.pdf

PURPOSE OF GUIDE:

The Arizona Civil Rights Act contains a number of specific provisions designed to prevent discrimination in employment. Although the Act does not expressly prohibit pre-employment inquiries based on an applicant's race, color, religion, sex, age, disability or national origin, such questions usually bear no demonstrable relationship to a job applicant's abilities or qualifications and, consequently, serve no lawful purpose.

The Act's restrictions may necessitate changes in the content of application forms as well as oral questions asked of applicants. It is the employer's right to establish job related requirements and to seek the most qualified individual for the job. Information obtained through application forms and interviews is presumed to be used by the employer in making selection and assignment decisions. For this reason, the employer should make only those inquiries necessary to determine the applicant's eligibility to be considered for employment.

Documents required for legitimate business purposes that reveal protected information (such as birth certificates or naturalization papers) may be requested at the point of hire, but not before. The point of hire is reached once the employer has decided to hire the applicant and has so informed the applicant.

This guide is provided to assist private employers in understanding and applying the law. The guide is not intended to be an exhaustive list of all acceptable or unacceptable questions that may constitute evidence of unlawful discrimination. Information obtained through acceptable questions may not be used to unlawfully discriminate in the basis of race, color, religion, sex, age, disability, or national origin.

This guide pertains only to inquiries directed to an applicant prior to employment. Employers may obtain and use certain protected information pursuant to an exemption from the Arizona Civil Rights Act. The Act permits certain types of discrimination on the basis of applicable security regulations established by the United States, on the basis of a bona fide occupational qualification which is considered essential to a particular position or occupation, or on the basis of religion by a religious corporation, association, educational institution, or society.

Inquiries that are otherwise unacceptable but necessary for affirmative action programs or other government reporting or record keeping requirements should be made on a separable portion that will be removed prior to processing the application. Forms with such inquiries should include a statement that the information is for statistical purposes only and will not be part of the application. Such information should be kept separate from regular employee records.

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

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

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

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

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

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

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

E: Should Workers be Treated/Classified as Employees or Independent Contractors? What difference does it make?

When the IRS and/or DOL determine that workers who have been misclassified (treated) as Independent Contractors are instead Employees, the consequence(s) to the employer can include back wages, back taxes, fines/penalties, class-action lawsuits, and/or prison.

Worker classification is important because it determines whether an employer must withhold income taxes and pay Social Security, Medicare taxes and unemployment tax on wages paid to an employee. Businesses normally do not have to withhold or pay any taxes on payments to independent contractors. The earnings of a person working as an independent contractor are subject to self-employment tax.

The U.S. Department of Labor has guidelines on **Misclassification of Employees as Independent Contractors**.

> **Misclassification of Employees as Independent Contractors**
>
> Misclassified employees often are denied access to critical benefits and protections they are entitled to by law, such as the minimum wage, overtime compensation, family and medical leave, unemployment insurance, and safe workplaces. Employee misclassification generates substantial losses to the federal government and state governments in the form of lower tax revenues, as well as to state unemployment insurance and workers' compensation funds.
>
> https://www.dol.gov/whd/workers/Misclassification/

The entire set of handouts from the workshop, **SHOULD WORKERS BE CLASSIFIED AS EMPLOYEES OR INDEPENDENT CONTRACTORS? What difference does it make?**, is available at: https://www.dropbox.com/s/bcda769exmreizp/Should%20Workers%20be%20Classified%20as%20Employees%20or%20Independent%20Contractors%20rev%20JAN%202021.pdf?dl=0

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

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

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

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

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

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

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

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

  * policy statement (prohibition of use of illegal or controlled substances or prescription drugs for which the employee does not have a current prescription);
  * identification of persons subject to be tested;
  * circumstances under which testing will be required;
  * the drugs/substances, including alcohol, prohibited and to be tested for;
  * a description of the collection protocols and testing protocols;
  * the consequences of refusing to provide a specimen (or providing a specimen that is adulterated or substituted);
  * discipline or other employment actions that may be taken based on the testing procedure or test results;
  * the employee's right to request a copy of the test results;
  * the right of an employee who tests positive to explain why (to a Medical Review Officer (MRO));

  and,

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

  * good faith actions based on a positive test result;
  * failure to test or failure to test for a specific substance;
  * failure to detect a specific substance or a medical or mental or emotional or psychological disorder; or,

* termination or suspension of the testing program.

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

  * the person tested or his/her designee;

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

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

ACTIONS REQUIRED TO CREATE AND IMPLEMENT A WRITTEN DRUG TESTING PROGRAM

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

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

1. a policy statement that identifies the purposes of the program, the drugs/substances, including alcohol, that are prohibited, and definitions of when and where the prohibition against drugs/substances/alcohol use applies;
2. plans for communicating the policy and protocols to all employees prior to the implementation of the policy and for periodically reviewing the policy and protocols with all employees;
3. statements identifying how employees will be selected for testing and how selection, if based on reasonable suspicion, will be confirmed before asking an employee to submit to testing;
4. methods for getting employees selected for testing to a pre-determined location at which the specimen can be collected and plans for having a pre-established document/agreement with the collection agency/ organization regarding the protocols for collecting specimens and transporting the specimens to the selected laboratory;
5. steps for obtaining proper releases from employees to allow specimens to be collected and to allow the results of the lab analysis to be released;
6. protocols with the collection agency/organization regarding "shy bladder" syndrome;
7. protocols with the collection agency/organization **and** with the specimen testing organization for maintaining chain-of-custody of the specimen from collection thru analysis and for storage, if the sample tests positive;

8. protocols for a Medical Review Officer (MRO) to review ALL positive test results with employees to determine whether the positive test result was from a prohibited drugs/substances/alcohol or from a current, valid prescription;
9. steps for reviewing the lab analysis results with the employee who provided the specimen, whether positive or negative for drugs/substances/alcohol;
10. plans for establishing a relationship with an Employee Assistance Program (EAP) concurrent with the implementation of the policy and for offering drugs/substances/alcohol treatment for those who test positive for the first time or for those who voluntarily identify their drugs/substances/alcohol use and ask for treatment;
11. statements identifying the discipline that will be applied to employees who refuse to submit to testing or who fail to complete an EAP or who test positive a second time; and,
12. plans for providing periodic training regarding drugs/substances/alcohol use or abuse for managers and supervisors and for all other employees.

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

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

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

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

What are the drug testing laws in states other than Arizona?

https://www.edrugtest.com/Messages_from_Admin/Statebystatelaw_Guide_89046.pdf; the .pdf document will load at the bottom of your screen.

http://www.nolo.com/legal-encyclopedia/testing-work; go to the bottom of the page to select the state.

http://www.ohsinc.com/info/state-drug-testing-laws/

G: Negligent Hiring – Employees Who Drive on Company Business

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

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

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

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

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

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

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

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

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

HR Risk Management Tip

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

Employees using their own vehicles on company business

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

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

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

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

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

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

Four Approaches

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

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

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

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

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

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

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

H: Retention Requirements for Forms/Records/Documents

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

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

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

LAW: Age Discrimination in Employment Act (ADEA)

Applies to employers with at least 20 employees

RECORDS/REPORTS:

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

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

RETENTION REQUIREMENTS:

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

LAW: Americans with Disabilities Act (ADA)

Applies to employers with at least 15 employees

RECORDS/REPORTS:

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

RETENTION REQUIREMENTS:

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

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

LAW: Civil Rights Act of 1964, Title VII

Applies to employers with at least 15 employees

RECORDS/REPORTS:

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

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

RETENTION REQUIREMENTS:

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

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

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

LAW: Consolidated Omnibus Budget Reconciliation Act (COBRA)

RECORDS/REPORTS:

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

LAW: Employee Retirement Income Security Act (ERISA)

RECORDS/REPORTS:

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

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

RETENTION REQUIREMENTS:

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

LAW: Employee Polygraph Protection Act

RECORDS/REPORTS:

Polygraph test results and the reasons for administering.

RETENTION REQUIREMENTS:

Three years.

LAW: Equal Pay Act

RECORDS/REPORTS:

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

RETENTION REQUIREMENTS:

Three years.

LAW: Fair Labor Standards Act (FLSA)

RECORDS/REPORTS:

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

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

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

RETENTION REQUIREMENTS:

For at least three years.

LAW: Family & Medical Leave Act (FMLA)

RECORDS/REPORTS:

Records containing the following information:

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

RETENTION REQUIREMENTS:

Three years.

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

RECORDS/REPORTS:

Records containing the following information for each employee:

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

Compensation records to include:

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

Tax records to include:

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

RETENTION REQUIREMENTS:

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

LAW: Immigration Reform & Control Act (IRCA)

RECORDS/REPORTS:

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

RETENTION REQUIREMENTS:

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

LAW: Occupational Safety & Health Act (OSHA)

Applies to employers with at least 10 employees

RECORDS/REPORTS:

A log of occupational injuries and illnesses

A supplementary record of injuries and illnesses

Post a completed annual summary of injuries and illnesses

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

RETENTION REQUIREMENTS:

Employee's job tenure plus thirty years

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

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

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

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

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

I: Resources provided by the Equal Employment Opportunity Commission (EEOC).

U.S. Equal Employment Opportunity Commission

Preventing Discrimination is Good Business

OPEN for Business

Preventing discrimination makes good business sense. Complying with the law may increase employee productivity, retention, and morale and limit legal expenses. You may even be entitled to tax benefits for hiring individuals with disabilities or making your business accessible to individuals with disabilities! See http://www.eeoc.gov/eeoc/publications/adahandbook.cfm#appendixa for more information.

The EEOC can help small business owners! The EEOC is the federal government agency that enforces the federal laws against employment discrimination based on race, color, religion, sex, national origin, disability, age, and genetic information. These laws also prohibit retaliation (punishment) for opposing or reporting discrimination or participating in a discrimination investigation or lawsuit.

Your Responsibilities

- **Ensure that employment decisions** are not based on race, color, religion, sex, national origin, disability, age, or genetic information.
- **Ensure that work policies and practices** are related to the job and do not disproportionately exclude people of a particular race, color, religion, sex, national origin, disability, or age.
- **Ensure that employees are not harassed** because of race, color, religion, sex, national origin, disability, age, or genetic information.
- **Provide equal pay to male and female employees who perform the same work,** unless you can justify a pay difference under the law.
- **Respond promptly and adequately to discrimination complaints.** Stop, address, and prevent harassment and discrimination. Ensure that employees are not punished for complaining.
- **Provide reasonable accommodations** (changes to the way things are normally done at work, such as permitting a schedule change so an employee can attend a doctor's appointment or can observe a religious holiday) **to applicants and employees who need them for medical or religious reasons,** if required by law.
- **Display a poster** that describes the federal employment discrimination laws. (Download one for free at http://www1.eeoc.gov/employers/poster.cfm).
- **Keep any employment records** (such as applications or personnel records) as required by law.

You may have additional responsibilities under federal, state, or local laws.

How We Can Help

- **We can answer your questions** about the laws we enforce.
- **We can provide suggestions** to help you prevent harassment, retaliation, and other forms of unlawful discrimination.
- **We can train you and your employees** about workplace rights and responsibilities.
- **We can help you resolve EEOC charges (complaints) of discrimination** through mediation. EEOC mediation is a free, informal, confidential process to resolve disputes that may save you time and money.

Contact Us!

EEOC staff across the country are available to help you. Don't wait; contact us today!
Free language assistance is available, if needed.

- ***Need EEOC information or training?***
Contact your local EEOC Small Business Liaison (http://www.eeoc.gov/employers/contacts.cfm) or call us at 1-800-669-4000 (TTY: 1-800-669-6820).
- ***Need information about the laws we enforce?***
Call us at (202) 663-4691.
- ***Have questions about an EEOC charge of discrimination against your business?***
Contact the EEOC investigator assigned to your charge.

We look forward to hearing from you!

For additional information, contact your local EEOC Small Business Liaison (http://www.eeoc.gov/employers/contacts.cfm).

Small Business Requirements

As a small business owner and an employer you may have legal responsibilities under the federal employment anti-discrimination laws.

Below you will find the information you need to determine whether the anti-discrimination laws apply to your particular business and if they do, what you need to know!

Do the federal employment anti-discrimination laws apply to my business?

It depends on how many employees your business has:

If you have at least one employee: You are covered by the law that requires employers to provide equal pay for equal work to male and female employees.

If you have 15 to 19 employees: You are covered by the laws that prohibit discrimination based on race, color, religion, sex (including pregnancy, sexual orientation, or gender identity), national origin, disability and genetic information (including family medical history). You are also covered by the law that requires employers to provide equal pay for equal work.

If you have 20 or more employees: You are covered by the laws that prohibit discrimination based on race, color, religion, sex (including pregnancy), national origin,

age (40 or older), disability and genetic information (including family medical history). You are also covered by the law that requires employers to provide equal pay for equal work.

State and/or local employment discrimination laws may also apply to your business. State and local government websites may have information about these laws.

See also:

Who is an "employee" under federal employment discrimination laws?

Your Legal Responsibilities If the Federal Employment Anti-Discrimination Laws Apply to Your Business

Equal Pay for Equal Work

You must provide equal pay to male and female employees who perform the same work unless you can justify a pay difference under the law.

Don't Discriminate/Harass Because of Race, Color, Religion, Sex, National Origin, Age, Disability or Genetic Information

You cannot discriminate against or harass applicants, employees or former employees because of race, color, religion, sex (including pregnancy, sexual orientation, or gender identity), national origin, age (40 or older), disability or genetic information (including family medical history).

Policies/Practices with Negative Effect on Race, Color, Religion, Sex, National Origin or Disabilities

You cannot use employment policies or practices that have a negative effect on applicants or employees of a particular race, color, religion, sex or national origin or applicants or employees with disabilities unless the policies or practices are related to the job and necessary for the operation of your business.

Policies/Practices with Negative Effect on Age 40 or Older

You cannot use employment policies or practices that have a negative effect on applicants or employees who are 40 or older unless the policies or practices are based on a reasonable factor other than age.

Provide Required Reasonable Accommodations

You may be required to provide reasonable accommodations (changes to the way things are normally done at work) because of an applicant's or employee's religious beliefs or disability.

Prohibited Requests for Medical or Genetic Information

In general, you cannot request medical or genetic information from applicants. You may request medical or genetic information from employees only in limited circumstances.

If you legally obtain medical or genetic information, you must keep it confidential, with very limited exceptions, and in a separate medical file.

Don't Retaliate

You cannot retaliate against (punish) an applicant, employee or former employee for reporting discrimination, participating in a discrimination investigation or lawsuit or opposing discrimination (for example, threatening to file a charge or complaint of discrimination).

Inform Employees About the Laws

You must display a poster at your business that describes the federal employment discrimination laws.

Retain Employment Records

You must retain any employment records, such as applications, personnel, payroll and benefits records, as required by law.

Report Workforce Data

If you have 100 or more employees, or if you are a federal contractor with at least 50 employees and at least $50,000 in government contracts, you are required to complete and submit an EEO-1 Report to the EEOC and the U.S. Department of Labor every year.

The EEO-1 Report is a government form that requests data about the ethnicity, race and gender of your workforce.

Available from: https://www.eeoc.gov/employers/smallbusiness/requirements.cfm

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U.S. Equal Employment Opportunity Commission

As a small business owner, you've got a lot on your plate. You need to find information quickly and easily so we have created a one-stop shop of resources tailored just for small businesses! Here you will find answers to common questions about your responsibilities under the federal employment discrimination laws. You will also find tips on preventing discrimination and how to deal with issues when they do arise in your business, plus a whole lot more!

Small Business Requirements

You are required to keep certain employment records and to post information about discrimination laws. You may also be required to complete a report about your workforce. Learn more - and download a free "EEO is the Law" poster!

Frequently Asked Questions

Responses to questions we often receive from small business owners: Do the laws that the EEOC enforces apply to my business? How can I prevent discrimination? If I receive a charge of discrimination, what should I do? And more!

Tips for Small Businesses

Know what to do if an employee requests leave to attend a doctor's appointment or to observe a religious holiday? How do you consider an applicant's criminal record when hiring? Get tips on handling some common workplace issues.

Making an Employment Decision?

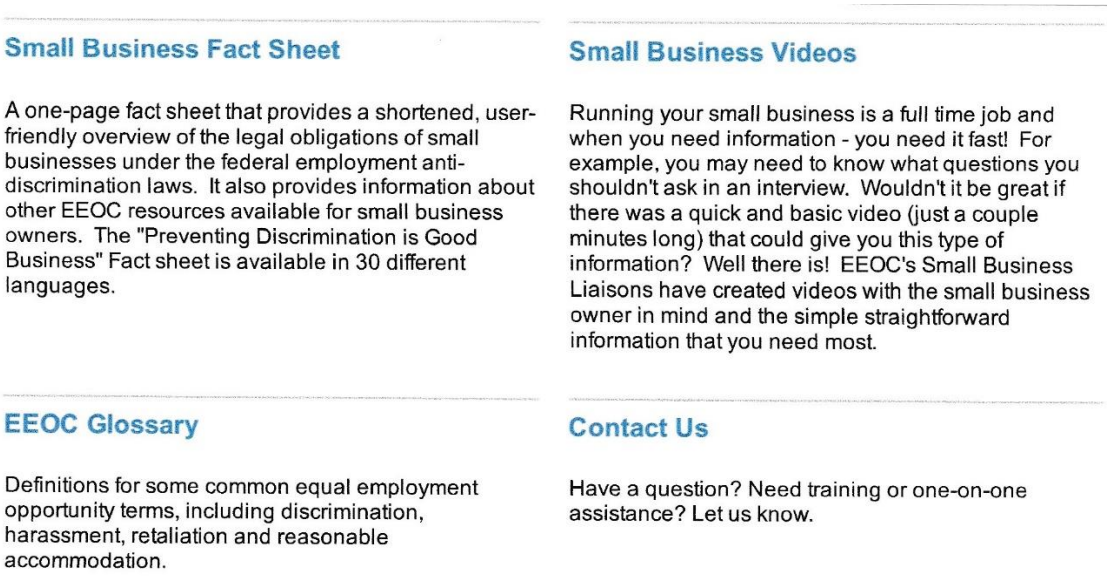
As a small business owner, you make dozens of decisions every day. Get advice about common employment decisions, from hiring and training to evaluating, disciplining, and firing employees.

EEOC Resources

Need information about a specific discrimination topic? We've categorized EEOC material for small businesses by topic, so you can find what you need quickly and easily.

Small Business Assistance

As a small business owner, you don't have legal or Human Resources experts to advise you. We're here to help!



Available from: https://www.eeoc.gov/employers/smallbusiness/index.cfm

EEOC GLOSSARY FOR SMALL BUSINESS

(https://www.eeoc.gov/employers/smallbusiness/glossary.cfm)

Age Discrimination: Treating an applicant, employee or former employee who is 40 years old or older less favorably because of his or her age or using an employment policy or practice that has a negative effect on applicants or employees who are 40 or older and is not based on a reasonable factor other than age.

Charge of Discrimination: A formal employment discrimination complaint filed with the U.S. Equal Employment Opportunity Commission (EEOC) or a Fair Employment Practices Agency (FEPA), a state or local agency responsible for enforcing state or local employment discrimination laws.

Charge Process: The process by which the EEOC handles charges of discrimination. The EEOC will notify you that a charge has been filed against your business and request an explanation for the claims in the charge (a Position Statement) or responses to specific questions in a Request for Information. The EEOC may ask if you would like to mediate or settle the charge. If the charge is not resolved, the EEOC will continue its investigation. The EEOC will review the information obtained during the investigation to determine whether discrimination occurred. If the EEOC determines that discrimination did not occur, the EEOC will dismiss the charge and give the person who filed the charge permission to file a lawsuit. If the EEOC determines that discrimination did occur, it will invite you to conciliate the charge. If conciliation is unsuccessful, the EEOC may file a lawsuit or give the person who filed the charge permission to file a lawsuit.

Color Discrimination: Treating an applicant, employee or former employee less favorably because of his or her skin color, pigmentation, complexion, shade or tone. Color discrimination also includes using an employment policy or practice that has a negative effect on applicants or employees of a particular color and that is not related to the job and necessary to the operation of the business.

Complaint Policy/Complaint Procedure: A policy or procedure that informs employees how to file an internal discrimination complaint. Small businesses that have these types of policies or procedures should distribute them to employees, include them in employee handbooks and post them in the employee break room, online or in other places where employees can easily find them.

Disability: A physical or mental disorder, illness or condition (an impairment) that substantially limits one or more major life activities, a record (past history) of a disability, or being regarded as having a physical or mental impairment that is not transitory (lasting or expected to last six months or less) and minor.

Disability Accommodation: A change to the way things are normally done at work to help an applicant or employee with a disability apply for a job, perform job duties or enjoy job benefits. For example, an employer may provide a sign language interpreter for a deaf applicant, permit an employee with diabetes to take regular breaks to eat and monitor blood sugar and insulin levels, or allow an employee with cancer to rearrange her schedule around radiation or chemotherapy treatments. You are not required to provide a disability accommodation if it would result in significant difficulty or expense, based on your resources and the operation of your business. In addition, you are not required to provide a disability accommodation that requires you to change the fundamental duties of a job, lower production or performance standards or tolerate misconduct.

Disability Discrimination: Treating an applicant, employee or former employee less favorably because the person or someone the person associates with has a disability, had a disability in the past or is believed to have a disability. Disability discrimination also includes failing to provide a disability accommodation to an applicant or employee, unless the accommodation would require significant difficulty or expense, changing fundamental job duties, lowering production or performance standards or tolerating misconduct. In addition, disability discrimination includes using an employment policy or practice that has a negative effect on an applicant or employee with a disability or a group of applicants or employees with disabilities and that does not reflect what is actually required to do the job.

Discrimination: Treating a person or a group of people less favorably. Federal law prohibits employment discrimination based on race, color, religion, sex (including pregnancy, sexual orientation, or gender identity), national origin, disability, age (40 years old or older), genetic information (including family medical history) or in retaliation for filing a charge or complaint of discrimination, participating in a discrimination proceeding (such as an investigation or lawsuit) or opposing discrimination.

EEOC: U.S. Equal Employment Opportunity Commission. The EEOC is the federal agency that enforces the federal laws that prohibit employment discrimination based on race, color, religion, sex (including pregnancy, sexual orientation, or gender identity), national origin, disability, age (40 years old or older) and genetic information (including family medical history). The laws enforced by the EEOC also prohibit retaliation. The EEOC is a bipartisan Commission led by five Commissioners who are appointed by the President and confirmed by the Senate. The EEOC has a headquarters office in Washington, D.C. and 53 field offices throughout the United States.

EEO-1 Report: A government form that requests data about workforce ethnicity, race and gender. Employers with at least 100 employees and federal contractors with at least 50 employees and at least $50,000 in government contracts are required to complete and submit the EEO-1 form to the EEOC and the Department of Labor every year.

Fair Employment Practices Agencies (FEPAs): State and local agencies responsible for enforcing state and local employment discrimination laws.

Federal Employment Discrimination Laws: Laws that apply in every state that prohibit employment discrimination based on race, color, religion, sex (including pregnancy, sexual orientation, or gender identity), national origin, disability, age (40 or older) and genetic information (including family medical history). These laws also prohibit retaliation. These laws include Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, the Age Discrimination in Employment Act of 1967, Title I of the Americans with Disabilities Act of 1990 and Title II of the Genetic Information Nondiscrimination Act of 2008.

Field Office: One of the EEOC's 53 offices located across the country. Field offices accept, investigate, resolve and litigate charges of employment discrimination . Field offices also conduct outreach and training.

Genetic Information: Information about an applicant's, employee's or former employee's genetic tests; a family member's genetic tests; family medical history; requests for, or receipt of, genetic services; or genetic information about a fetus or an embryo.

Genetic Information Discrimination: Treating an applicant, employee or former employee less favorably because of genetic information (including family medical history). For example, an employer may not refuse to hire an applicant because cancer runs in her family.

Harassment: Unwelcome conduct that is so frequent or severe that it objectively creates a hostile or offensive work environment or results in a negative employment action (such as being fired or demoted). For example, assault, threats, insults or offensive graffiti may be illegal harassment. Federal law prohibits harassment based on race, color, religion, sex (including pregnancy, sexual orientation, or gender identity), national origin, disability, age (40 years old or older) or genetic information (including family medical history).

Investigation: The process by which an employer and/or the EEOC determine whether illegal discrimination has occurred. The employer and/or the EEOC may interview the applicant, employee or former employee who complained about discrimination; the person or people allegedly responsible for the discrimination; and other employees who may have seen or have information about the alleged discrimination. The employer and/or the EEOC may also request and review relevant documents, such as policies, applications, interview notes or employee files.

Liability: Legal responsibility for illegal activity, such as discrimination.

Mediation: A free, informal, confidential process to resolve disputes .

National Origin Discrimination: Treating an applicant, employee or former employee less favorably because the person or someone the person associates with comes from a particular country, has a foreign accent, appears to have a particular ethnic background. National origin discrimination also includes using an employment policy or practice that has a negative effect on applicants or employees of a particular national origin and that is not related to the job and necessary to the operation of the business.

Officer of the Day: EEOC staff available to provide information about the laws enforced by the EEOC. Conversations with Officers of the Day will not be shared with EEOC staff who investigate, resolve, and litigate charges of discrimination.

Pay Discrimination: Paying an employee or a group of employees less based on race, color, religion, sex (including pregnancy, sexual orientation, or gender identity), national origin, age (40 or older), disability or genetic information (including family medical history). Pay discrimination also includes paying an employee or group of employees less because they filed a discrimination charge or complaint or participated in a discrimination investigation or lawsuit.

Position Statement: An employer's response to a charge of discrimination, providing specific, factual explanations for the claims in the charge.

Pregnancy Discrimination: Treating an applicant, employee or former employee less favorably because of pregnancy, past pregnancy, potential or intended pregnancy, childbirth or a medical condition related to pregnancy or childbirth. Pregnancy discrimination also includes using an employment policy or practice that has a negative effect on women affected by pregnancy, childbirth or related medical conditions and that is not related to the job and necessary to the operation of the business.

Race Discrimination: Treating an applicant, employee or former employee less favorably because the person or someone the person associates with is a particular race or has personal characteristics associated with a particular race. Race discrimination also includes using an employment policy or practice that has a negative effect on applicants or employees of a particular race and that is not related to the job and necessary to the operation of the business.

Reasonable Accommodation (Disability): See Disability Accommodation

Reasonable Accommodation (Religion): See Religious Accommodation

Religious Accommodation: A change to the way things are normally done at work to allow an applicant or employee to practice or observe his or her religion. For example, a small business may permit an employee to swap shifts with a colleague so he can observe a religious holiday or grant an exception to a dress or grooming policy that conflicts with an employee's religious beliefs or practices. You are not required to provide religious accommodations that impose more than minimal costs or disruptions for your business. In addition, you are not required to provide a religious accommodation if it would conflict with another law or regulation.

Religious Discrimination: Treating an applicant, employee or former employee less favorably because of his or her religious beliefs or association with a person of a particular religion. Religious discrimination also includes failing to provide a religious accommodation, unless the accommodation would impose more than minimal costs or disruptions for your business. In addition, religious discrimination includes using an employment policy or practice that has a negative effect on members of a particular religion and that is not job related and necessary to the operation of the business.

Retaliation: Treating an applicant, employee or former employee less favorably because he or she made an internal discrimination complaint, filed a discrimination charge with the EEOC or another agency, participated in a discrimination investigation or lawsuit (for example, served as a witness), or opposed discrimination (for example, threatened to file a charge of discrimination). All of the laws enforced by the EEOC prohibit retaliation.

Sex Discrimination: Treating an applicant, employee or former employee less favorably because of his or her sex (including pregnancy, sexual orientation, or gender identity) or because of his or her connection with an organization or group that is associated with people of a particular sex. Sex discrimination also includes using an employment policy or practice that has a negative effect on men or women and that is not related to the job and necessary to the operation of the business.

Sexual Harassment: Unwelcome conduct or comments based on sex (including pregnancy, sexual orientation, or gender identity) that are so frequent or severe that they objectively create a hostile or offensive work environment or result in a negative employment action (such as being fired or demoted). Sexual harassment includes unwelcome sexual advances, unwelcome requests for sexual favors, offensive comments about men or women (including comments that are not sexual in nature) or other offensive conduct based on sex.

Small Business Liaisons: EEOC staff who are responsible for helping small businesses understand and comply with federal employment discrimination laws. The Small Business Liaisons, who are located in EEOC field offices across the country, provide information about employment discrimination, answer questions and conduct outreach and training for small businesses. Conversations with Small Business Liaisons will not be shared with EEOC staff who investigate, resolve, and litigate charges of discrimination.

J: Additional Resources

Why train supervisors about the law?

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

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

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

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

Management asks: Why do comprehensive legal training?

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

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

1. *Your* company culture is so enlightened, *you* don't need it.
2. Getting sued gives you firsthand experience with the exciting legal process.
3. Watching particularly smug supervisors getting cross-examined about every snarky e-mail they've ever sent can be fun (in a sick sort of way).

4. Jury trials get less scary after your third or fourth one.
5. Punitive damages are really no big deal.
6. You can put off training until a court or government agency concludes that discrimination occurred at your workplace and orders you to do training.
7. Ignorance is bliss.

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

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

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

Supervisors ask: Why do we have to be trained?

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

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

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

If you don't think that those points will generate enough interest (or fear, if that's what you're going for), you could try opening the discussion with a quiz, calling on specific supervisors in the audience and asking elementary questions about harassment, vicarious liability, and individual liability issues or even about company policies and procedures. Hopefully, your supervisors will get a perfect score, but it's more likely

that the quiz would emphasize that almost everyone can learn *something* new about this rapidly changing area of employment law.

Bottom line

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

No PROHIBITED HARASSMENT training = no "affirmative defense" = employer vicarious liability

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

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

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

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

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

Part-timers earning less than FLSA's minimum (Salary Level Test) aren't Exempt, regardless of duties

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

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

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

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

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

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

Go to: https://www.dol.gov/agencies/whd/flsa/faq for more information.

Lastly, the DOL has confirmed that employees are subject to the $684 weekly ($35,584 annualized) minimum salary requirement regardless of how many or how few hours an employee works.

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

OCAHO Decision Clarifying I-9 Violations

During the hearing described below, the employer argued against fines (currently from $230 up to $1,948 per violation for first offense) for having improperly completed forms I-9. The employer said that the discrepancies were minor, technical errors. The federal government argued that the discrepancies were substantive errors and that the fines should be applied. The hearing officer ruled that the errors were substantive, not technical.

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

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

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

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

Excerpted from the Written Decision by the Hearing Officer:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

What are Substantive and Technical Violations of IRCA?

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

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

The following are **substantive violations**:

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

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

The following are **technical violations**:

1. Use of the Spanish version of the I-9, except in Puerto Rico;
2. Failure to ensure an individual provides her maiden name, address or birth date in Section 1 of the I-9;

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

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

Substantive / Uncorrected Technical Violation Fine Schedule
(Effective for penalties assessed after April 5, 2019 whose associated violations occurred after November 2, 2015)

Substantive Verification Violations	Standard Fine Amount		
	1st Offense $230 - $2,292	2nd Offense $230 - $2,292	3rd Offense + $230 - $2,292
0% – 9%	$230	$1,146	$2,292
10% – 19%	$573	$1,375	$2,292
20% – 29%	$917	$1,604	$2,292
30% – 39%	$1,261	$1,834	$2,292
40% – 49%	$1,604	$2,063	$2,292

Substantive / Uncorrected Technical Violation Fine Schedule
(Effective for penalties assessed after April 5, 2019 whose associated violations occurred after November 2, 2015)

Substantive Verification Violations	Standard Fine Amount		
	1st Offense $230 - $2,292	2nd Offense $230 - $2,292	3rd Offense + $230 - $2,292
50% or more	$1,948	$2,292	$2,292

From www.workforce.com.

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

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

Ten Ways To Make Sure An Employee Will Sue You!

By *Lawrence F. Feheley*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"Oops, I Did It Again"

Ten Most Common Managerial Mistakes That Lead to Litigation

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

By Maxine Neuhauser

It is not illegality that fuels employee lawsuits, but rather employee anger arising from perceived unfair treatment.

Placing a legal label, such as discrimination or retaliation, on the seeming unfairness occurs afterward.

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

Forget About Training

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

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

Disregard Company Policies

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

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

Shoot From the Hip

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

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

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

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

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

Motivate Poor Performers With Raises and Bonuses

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

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

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

Criticize the Person

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

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

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

Ignore Problems

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

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

Put Nothing in Writing

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

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

Understand That Boys Will Be Boys

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

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

Lie

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

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

Cover-up

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

Two common risks of overtime violations under the FLSA are:

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

Beware the Meal Period Time-Bomb **(source: the law firm of Fisher & Phillips)**

An increasing number of federal Fair Labor Standards Act lawsuits and U.S. Labor Department investigations include claims based upon the employer's automatically deducting meal periods from non-exempt employees' recorded work times. Typically, the employees did not clock out-and-in to reflect the mealtime they took. **Instead, the employers systematically subtracted the full, scheduled meal period from each employee's total daily hours on the**

assumption that the person took an entire, uninterrupted meal break each workday. An employee who worked during a meal period could avoid the deduction by using an exception feature of the timekeeping system, but the usual allegation is that employees did so inconsistently or infrequently, if ever.

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

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

A safer approach is to instruct employees clearly that they:

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

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

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

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

HARVEY MACKAY

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?'"***

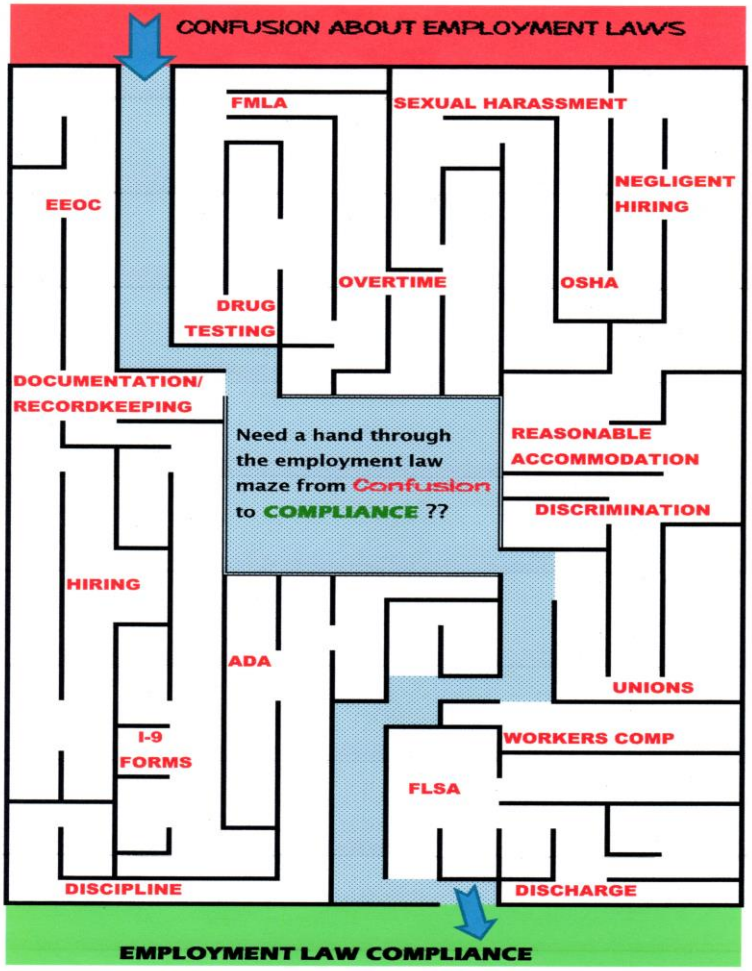
You get what you pay for

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?***

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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.