Human Resource Law: What You Need to Know Now

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Human Resource Law: What You Need to Know Now

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Table Of Contents

Hiring/Recruiting **1**

Is Your Employee Handbook up to Date?: Essential Components and Sample Policies for Today's Workplace **29**

Wage and Benefit Issues **89**

Discrimination and Harassment **119**

Employee Discipline and Termination **151**

Workplace Behavior and Privacy Issues **169**

Hiring/Recruiting

Submitted by Ashley Arnold

PRESENTATION

Legal Issues in Recruiting and Hiring

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PRESENTATION

Today's Presentation

I. **Application Process**
II. **Conducting Lawful Interviews**
III. **Hiring From Competitors and Agreements with Competitors**
IV. **Conducting Lawful Investigations of Applicants**
V. **Drafting Effective Employment Agreements**

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EXPAND YOUR EXPECTATIONS®

I. Application Process

Application Process

- If at all possible, utilize an application.
- Resumes can be misleading.
- Your application matters. In a "failure to hire" lawsuit, this is often the only written document.
- Read your application. If you do not need to know something, do not ask for it on your application.

Careful Review of Application

- No signature
- No signed consent
- Blank portions
- Self-reporting
- Failure to adequately explain departures
- Gaps

Hiring Considerations

- Seek only information that is job-related
- Make no promise of employment
- Include an at-will statement
- Procure signed consent
- Include equal opportunity statement
- Inform regarding any drug-free workplace

Medical Inquiries

- The Americans with Disabilities Act governs what questions you may ask.
- Before a conditional offer, you just ask that one question: “Are you able, with or without a reasonable accommodation…..”
- After a conditional offer, all inquiries must be job-related AND consistent with business necessity.
- Proceed with caution!

II. Conducting Lawful Interviews

Conducting a Lawful Interview

- Very important for employer and the potential employee.
- Interviewer's goal: is the applicant suitable for the job?
- Interviewers must be aware of what they can and cannot legally ask.
- Assuming supervisors know what is appropriate is a potentially costly mistake.

Generally, Employers Can Ask About:

- Applicant's knowledge and experience in the relevant area.
- Any other qualifications for the job.
- Strengths and weaknesses associated with the tasks required by the job.
- Ability to work with others.

Question Areas Specifically Prohibited Include:

- Age
- Children
- Marital status
- Medical issues
- Religious Affiliations
- Bank Accounts and Other Personal Financial Information
- Union or Club Memberships

Less Risky Questions

Examples:

This job will require a number of weekend conferences you will need to attend. Does overnight or weekend travel present a problem for you?

This job will require you to walk/stand for 8 hours per day. Does this present a problem for you?

III. Hiring From Competitors and Agreements with Competitors

Hiring From Competitors

- Gather all necessary information before making an offer (post-restrictive covenants or confidentiality obligations).
- If a candidate has a restrictive covenant, determine its likely enforceability.
- Determine if the new position would require a violation of any restrictions.
- Utilize an offer letter as "Defendant Exhibit No. 1"—candidate could certify that he or she has reviewed the position and is not prevented from taking the position.
- Timing matters: multiple hires from the same competitor within a short period of time

Hiring From Competitors (cont'd)

All the following requirements of La. R.S. 23:921 must be met in order to have a valid Non-Compete Agreement:

1. A person may agree with his or her employer
2. To refrain from carrying on "business similar to that of [his or her] employer"
3. Within specific parishes, municipalities, or parts thereof (List parishes)
4. For a period not to exceed 2 years.

Hiring From a Competitor (cont'd)

- The statute does not prescribe any particular form for the agreement.
- Typically, a non-compete agreement will be included in a broader employment agreement.
- A standalone non-compete agreement is also acceptable.
- Best to have the employee sign the non-compete at the beginning of employment to avoid questions regarding proper consideration. Louisiana courts have held agreements valid where the only consideration to an employee in exchange for the non-compete is continued employment.
- Whether included in an employment agreement or not, each agreement should be individually tailored.

Agreements with Competitors

- On October 20, 2016, the Federal Trade Commission (FTC) and the Department of Justice (DOJ) issued a joint Antitrust Guidance for Human Resources Professionals
- The Guidance aims to ensure a competitive workforce by calling HR Professionals to take actions to prevent "no poaching" agreements and wage-fixing

Agreements with Competitors

- Avoid agreements with Competitors that limit an individual employer's decision-making on wages, salaries, benefits, terms of employment or job opportunities
- Even informal discussions could be a violation- An agreement between competing employers need not be in writing to violate the law
- Antitrust laws are also applicable to non-profit organizations and employers

Agreements with Competitors

- **Other ways to Avoid Pitfalls:**
  - **1. Consult Federal Antitrust Agencies Before Acting**
    The DOJ's Business Review Process or an FTC Advisory Opinion can inform a potential decision
  - **2. Improper Suggestions Made by Competitors**
    Refuse the competitor's suggestion; remember that a mere invitation to enter into an illegal agreement may be an antitrust violation. Next, consult your legal department.
  - **3. Past Improper Conduct**
    Report past unknowing violations to your compliance officer (or other designated representative under your compliance policy) and/or seek legal advice.

IV. Conducting Lawful Investigations of Applicants

Background Checks

- Credit check
- Criminal background
- Check references at prior jobs, education, licenses
- Look for independent verification of jobs, education

- According to the Society of Human Resource Management, about 73% of employers use criminal background checks

Risks of Not Performing Background Checks

- Incurring tort liability for negligent hiring
- Hiring employees with a history of theft, violence, reckless driving records, and false credentials
- High turnover

Risks of Performing Background Checks

- Fines for violating Fair Credit Reporting Act ("FCRA")
- EEOC enforcement action for disparate impact
  (Example: *EEOC v. Kaplan* — Kaplan rejected applicants with poor credit history and EEOC claimed this was not job related or a business necessity)
- Private plaintiff suits

Fair Credit Reporting Act

- Purpose
  - To protect the privacy of consumer report information and to guarantee that the information supplied by consumer reporting agencies is as accurate as possible
  - Distinguishes between two forms of reports:
    - Consumer Reports
    - Investigative Reports

Federal Trade Commission

- FTC regulates:
  - Internet
  - Telemarketing
  - identity theft
  - other fraud-related complaints
- FTC has a user guide for Employers:
  - *Using Consumer Reports*: What Employers Need To Know
- FTC has a Notice to Users of Consumer Reports

Consumer Reports

- A Consumer Report contains information about your personal and credit characteristics.
- To be covered by the FCRA, a report must be prepared by a consumer reporting agency (CRA) – a business that assembles such reports for other businesses.

Examples of Consumer Reports

- Department of Motor Vehicle Reports (MVR)
- Criminal background checks
- Credit history checks
- Verification of Social Security number
- Past Addresses
- Verification of academic credentials and licenses
- Under certain circumstances:
  - Drug test results may also be considered “consumer reports”

Information That May Not Be Included In Consumer Reports

- Medical information
  - unless the subject of the report specifically consents to its disclosure
- Individual arrest information that predates the report by more than 7 years.
  - However, if the individual earns, or is reasonably expected to earn, an annual salary of $75,000 or more, older arrest information may be reported
  - Convictions may be reported no matter how old

Investigative Reports

- Provide in-depth information about an individual's:
  - character
  - general reputation
  - personal characteristics
  - mode of living, etc.
- Employers requesting such reports are required to comply with additional notice and disclosure requirements

Procedures for Complying With the FCRA

- Obtain a disclosure and consent form that is separate from any other document.
- Send a job application or current employee a "notification letter" prior to taking any adverse employment action
- Send a copy of the consumer report and a summary of rights under the FCRA with the notification letter
- Wait a reasonable amount of time before taking adverse action
- Provide an "adverse action letter"

Key Provisions of FCRA

- Written Notice and Authorization
  - You must notify the individual in ***writing***, in a document consisting solely of this notice, that a report may be acquired
    - Keep separate from application
  - You must also obtain the person's ***written authorization*** before you ask a CRA for the report

Key Provisions cont…

- Adverse Action Procedures
  - Adverse action
    - Denying a job application
    - Reassigning or terminating an employee
    - Denying a promotion
  - If you rely on a consumer report for an *"adverse action"* the following steps are required:

Step 1

- **Pre-adverse action disclosure**
  - Must give the individual a pre-adverse action disclosure that includes:
    - a copy of the individual's consumer report
    - a copy of "A Summary of Your Rights Under the FCRA"
  - Summary is prescribed by the FTC
  - CRA that furnishes the individual's report will give you the summary of consumer rights

Step 2

- **Adverse Action Notice**
  - After you have taken an adverse action, you must give the individual notice - orally, in writing, or electronically – that the action has been taken, including:
    - The name, address, and phone number of the CRA that supplied the report;
    - Statement that the CRA that supplied the report did not make the decision to take the adverse action and cannot give specific reasons for it;
    - Notice of the individual's right to dispute the accuracy or completeness of any information the agency furnished;
    - His or her right to an additional free consumer report from the agency upon request within 60 days.

Records Retention

- File all reports separately from other Personnel information, in a secure cabinet
- File away in two categories (Pass/Fail)
  - Failed/restricted reports must have a copy of results attached to consent form prior to filing
- Results are maintained for a period of five years

Non-Compliance

- There are legal consequences for employers who:
  - Fail to get an applicant's permission before requesting a consumer report
  - Failing to provide pre-adverse action disclosures and adverse action notices to unsuccessful job applicants
- FCRA allows individuals to sue employers for damages in federal court

Non-Compliance

- Any person who successfully sues is entitled to recover court costs and reasonable legal fees
- The law also allows individuals to sue for punitive damages for deliberate violations
- FTC, other federal agencies, and states may also sue employers for noncompliance and obtain civil penalties

Penalties and Damages for Violating FCRA

- Civil penalties up to $2,500 in an action by FTC
- Individuals can sue for:
  - Up to $1,000 plus punitive damages, attorney, and court fees
  - Emotional distress and loss of reputation
  - Negligent noncompliance: actual damages
- Obtaining a consumer report under false pretenses
  - the greater of $1,000 or the actual damages sustained by the agency
  - Two years in prison

Criminal Background Check

- Proceed with caution!
- An employer's use of criminal history information may violate Title VII (disparate treatment and disparate impact)
- A policy that excludes everyone with a criminal record from employment will not be job related and consistent with business necessity and is illegal

EEOC Guidance

- Do not assume an arrest = guilt
- Use of conviction records preferred, not arrest records
- For arrests and convictions, employer should consider:
  - nature of the job,
  - nature and seriousness of the offense, and
  - length of time since the offense was committed.

Other Federal Laws cont…

- Driving Records
  - Driver's Privacy Protection Act of 1994
    - Regulates third-party access
    - The Act prohibits motor vehicle departments from disclosing individual's personal record information
    - Allows employers to obtain and verify personal information for holders of commercial driver's licenses
  - An employer may obtain DMV personal record information upon receipt of a record holder's written and signed consent.

Compliance In a Multistate Environment

- Employers should keep in mind it is safest to comply with the laws of the states where:
  - The individual investigated resides
  - The reporting agency is incorporated or has its primary place of business
  - The employer requesting the report is incorporated
  - The employer has its principal place of business
  - Otherwise where the employer receives and actually uses the report for employment purposes

IV. Social Media and Hiring

Social Media

- Cheap and easy way to obtain information
- Information that was previously unavailable
- Voluntarily posted for anyone to see
- People stand out for the wrong reasons
- Reasons for and against use of social media in hiring

Use of Social Media in Recruiting and Hiring

- Half of HR professionals run a candidate's name through a search engine (such as Google).
- 45% of employers use social networking sites to screen employees.
- Louisiana law prohibits asking an employee or candidate for their internet passwords.
- It is dangerous to find out things about an applicant using social media that you would not be allowed to ask about in their application or interview.

Best Practices

- If you are going to use social media to investigate a candidate, use a screener to review social media; do not let the ultimate decision maker do the research.
- Only review publicly available information; do not use subversive methods to learn about a candidate on social media.
- Do not use information learned on social media improperly.
- Consider only information learned that is relevant to the position.

V. Drafting Effective Employment Agreements

Drafting Effective Employment Agreements

Louisiana's At-Will Employment Doctrine:

- Louisiana is an at-will state
- Either party may terminate the relationship at any time, with or without cause, and with or without notice.
- However, absent a disclaimer to the contrary, the terms and conditions of an employer's Employment Manual or Handbook may narrow and restrict the employment at-will doctrine.

Considerations for Employment Agreement

1. Compensation
2. Scope of Employment
3. Benefits
4. Term and Termination
5. Reimbursement of Expenses

Considerations for Employment Agreements

6. Liability Protection
7. Confidentiality Restrictions
8. Non-Compete Agreements and other Post-Termination Limitations
9. Intellectual Property Rights
10. Disability and Death
11. Dispute Resolution Provisions

Thank You!

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Is Your Employee Handbook up to Date?: Essential Components and Sample Policies for Today's Workplace

Submitted by Karuna Davé

Is Your Employee Handbook Up-to-Date? Essential Components and Sample Policies for Today's Workplace

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BEST DRAFTING PRACTICES

There are numerous reasons why every employer should have an Employee Handbook. First, the handbook provides an opportunity to formally welcome new employees, introduce the organization and, most importantly, explain the company's expectations. Second, having all employment policies contained in a handbook ensures that each employee receives a copy of all relevant policies. Remember, a handbook is a centralized place for employees to look for answers to common questions. Last, handbooks and signed acknowledgments can assist in an employer's legal defense. When drafting your handbook, you should consider both style and substance.

Some **general** tips when drafting a handbook include:

1. Use a positive and professional tone that matches the organization's culture. For example, don't end every policy with the statement that "failure to follow this policy will result in termination."

2. Write for the reader who, in this case, is the employee. Avoid unnecessary complex or legal terms.

3. Avoid absolutes such as "the following acts shall result in termination." Instead, give examples but always include generalized language that grants the employer discretion to discipline in the manner in which he/she chooses.

4. Include enough information so that the policies can be understood, but avoid providing too much detail. A handbook should not include all office procedures such as how to order supplies.

5. If employees speak a language other than English, provide the handbook in that language.

6. Use one voice throughout. Be consistent in referring to the reader either as "you" or "the employee.''

Some **organizational** tips include:

1. Organize policies by subject matter, using section headings.

2. Create a table of contents. Employees can more easily find a policy, or group of policies, if the handbook includes a table of contents.

3. Consider using individual pages for each policy instead of including multiple

shorter policies on the same page. However, this can make for an unwieldy size.

4. For online handbooks, consider online acknowledgments and verifications of having reviewed policies.

5. Include the date on the first page of the handbook and acknowledgment, or if using a loose leaf binder, on each page. This makes it easier to confirm that a handbook includes the most up-to-date policies.

6. Welcome Statement: Although not legally required, many employers begin their handbook with an introduction in the form of a letter or memorandum from the Chief Executive Officer or President. The statement may also include a brief description of the employer, its mission statement and its culture.

Understand the Risks Associated with Employee Handbooks

1. Be aware that employee handbooks may be considered contractual in nature. In many states, certain provisions in an employee handbook have been found to create implied contractual terms of employment or undermine the presumption of at-will employment. For example, an employee may argue that an employer's failure to follow disciplinary provisions was a breach of contract. For this reason, handbooks must:

- be drafted in a manner that does not create legal obligations that the employer did not intend; and
- contain provisions reserving certain employer rights as discussed below.

2. View the handbook as a potential exhibit. While a handbook is a useful way to communicate an employer's policies to employees and answer commonly asked questions, it also often becomes an exhibit in any employment-related litigation or administrative proceeding. Policies in a handbook should:

- comply with applicable law;
- demonstrate an employer's commitment to comply with the law; and
- accurately reflect the employer's actual practices.

I. NECESSARY DISCLAIMERS AND EMPLOYEE STATUS

To minimize the risk that a court will treat the handbook as an employment contract or a modification of the at-will employment relationship, the handbook should include various disclaimers.

A. Handbook Limitations

Some of the disclaimers in the opening section, usually titled "About Your Handbook," should include that:

1. The policies in the handbook are guidelines only;

2. The employer has the right to modify or delete policies in the handbook without notice. Some employees include a provision that modification must be written to avid disputes about whether an alleged oral statement "changed" a policy;

3. The employment relationship is at-will in Louisiana and nothing in the handbook creates an employment contract for term. Assuming that your employees are at-will, you should include language such as "This handbook is not an employment contract. You are an at-will employee meaning that either party may terminate the employment relationship with or without cause." If some employees do have employment contracts for a specific term, you may want to state that, for example, "Only the Board [or CEO] may authorize and execute a written contract for term"; and

4. Statements of employment policies do not create contractual rights in favor of employees.

B. Compliance with National Labor Relations Act

Even if you are not a union shop, you must adhere to NLRB's regulations protecting workers' interests. The focus of the General Counsel's report issued on March 18, 2015, arises out of Section 8(a)(1) of the NLRA which makes unlawful any rule that has a chilling effect on an employee's Section 7 activity, irrespective of the intended purpose of the rule. "Section 7 activity" is any employee activity to improve pay or working conditions, regardless of whether or not the employee is unionized.

The General Counsel recommends that handbook policies include clear and specific language, precise examples, and explanatory context so that employees will not reasonably construe otherwise lawful policies as limiting their Section 7 activity. As with other policies, the use of clarifying examples and context to avoid misinterpretation is highly recommended in the Report.

For example, handbook policies are considered unlawfully overbroad if they leave employees with the impression they cannot discuss wages, hours, and other terms and conditions of employment with fellow employees and with non-employees. Employers can minimize the risk of creating such an impression by defining terms such as "confidential information," which would not include the above.

As for employee conduct rules governing criticisms of management (a protected Section 7 activity), the NLRB considers it unlawful for such rules to prohibit merely "rude" or "disrespectful" behavior toward managers or the "company" without sufficient clarification or context. Businesses may nevertheless prohibit disrespectful or unprofessional behavior toward co-workers, clients, and other non-managers - as opposed to the company management - and may generally prohibit insubordination toward management, as well.

Company media policies, in the meantime, need to be clear that any prohibition on speaking with the media is limited to any employee speaking on behalf of the employer without authorization. For example, the General Counsel found lawful a media policy that indicates one person only should speak for the company and that instructs any employee interviewed to state that he or she is not authorized to comment for the employer in response to any reporter inquiries. However, employees should not be led to believe, whether intentionally or not, that they are in any way limited from speaking with the media regarding their employment in an individual capacity regarding wages, benefits, and other terms and conditions of employment.

The General Counsel looked unfavorably upon employee handbook policies that invoked anti-strike language within policies restricting employee movement to and from work. Such policies should not prohibit "walking off the job," which can be misconstrued to refer to protected strike actions and walkouts. Phrases like "work stoppage" should also be avoided. The General Counsel, however, found acceptable a policy that simply stated, "Entering or leaving Company property without permission may result in discharge." But employers must also be careful regarding a requirement of permission before employees can enter property, as employers may not deny off-duty employees

access to non-work areas (such as parking lots) unless justified by legitimate business reasons.

As a final example, the General Counsel's Report indicates that lawful employee policies may prohibit employee activity that amounts to competition against the company or to self-dealing, but a policy may not, under the broad label of a "conflict-of-interest" rule, prohibit **any** conduct that is not "in the best interest" of the employer because protected Section 7 activity can work against the interest of the company.

C. Equal Employee Opportunity Employer

The Equal Employment Opportunity (EEO) policy is often considered one of the most important policies to communicate to employees. Although most employers must post employee EEO rights posters, an EEO policy is not technically required by federal law. However, a written policy demonstrates the employer's compliance with anti-discrimination laws and can support a legal defense against discrimination claims.

D. Signed Acknowledgement

It is important to document that the employee has received the handbook and had the opportunity to seek clarification of any policy. Best practice is for employers to:

1. Set a deadline for return or completion of signed acknowledgments. An employer should follow up with any employees who fail to submit acknowledgments.

2. Keep signed acknowledgments in the respective employee's personnel file.

3. Louisiana allows for electronically signed acknowledgments. La Rev. Stat. 9:2607. Therefore, you can have employees electronically acknowledge receipt of an electronically delivered handbook.

4. Have the acknowledgment identify the title and date or version of the handbook for which the employee acknowledges receipt, review and understanding.

5. If an employee refuses to sign an acknowledgment, ask the employee to document such with the date. If he/she refuses, have the primary contact for handbook distribution or posting write "I gave [EMPLOYEE NAME] a copy of the handbook on [DATE]. [EMPLOYEE NAME] refused to sign the acknowledgment." Best practice is to

have another employer representative present to witness the employee's refusal and the statement from the individual who distributes the handbooks. The witness should also sign the "refusal to acknowledge" letter.

II. LAWS AND POLICIES TO INCLUDE

A. Creating a Handbook from Existing Policies

If an employer is creating a handbook from existing policies, it should first conduct an audit to confirm all existing policies are up-to-date. Because policies may have been created by different departments, it is important to ensure consistency before employees read the policies as a single collection in a handbook. Before finalizing its handbook, an employer should be certain that all policies:

1. Comply with current law. In addition to an employer's compliance and legal obligations, policies should demonstrate an employer's commitment to adherence to current law because the policies in a handbook often become exhibits in an employment litigation or administrative charge;

2. Are current with respect to the employer's business practices. Employers must reflect any changes to their policies or procedures; and

3. Are internally consistent and do not contradict each other.

B. Updating Policies

Keeping policies up to date is crucial in light of the many changes to employment regulations in recent years. Employers should review handbooks periodically to ensure that all policies are current and lawful. Some employers choose to review their handbook annually whereas others monitor changes in the law or in the employer's procedures on an ongoing basis.

1. A handbook should be reviewed and revised, if necessary, when:

   a. When there is a change in the law. For example, when the Genetic Information Nondiscrimination Act of 2008 (GINA) was enacted, employers revised their equal employment opportunity policies to demonstrate compliance with GINA's prohibition on discrimination on the basis of genetic information. It

is important to be aware of the governing regulations at the federal, state, and local level.

b. There is a change to the employer's policies or procedures. If, for example, an employer decides to limit outside employment and creates a policy prohibiting outside employment, the policy should both be added to the employer's handbook and a written copy provided to all employees.

c. The employer expands into new states. The employer's handbook likely will need to be modified to be consistent with state law and to incorporate any additional policies that might be required by state law.

2. A revised handbook should indicate that it supersedes any prior handbooks so that employees are clear about which policies are current.

3. Employers should distribute or post significantly revised handbooks, and reissue and collect signed acknowledgment forms from all employees.

4. Additionally, when an employer distributes an updated handbook, it should keep copies of any older versions. If the employer is ever involved in litigation, it should be able to point to the written policies in effect at the time of the challenged employment action.

C. Policies to Include

There are certain policies that should be included in all handbooks as follows.

1. Anti-Harassment

All employers should consider implementing and maintaining an anti-harassment policy even if they do not have the requisite number of employees for jurisdictional purposes. Some employers even have a separate sexual harassment policy. It helps to demonstrate reasonable care to prevent and promptly correct harassing behavior, and can establish a *Faragher-Ellerth* defense for a hostile work environment claim. These anti-harassment policies should

a. Include a general description of which groups are protected, i.e. race, age, gender, color, nationality, religion, etc.;

b. Include a description, but not an exclusive listing, of prohibited behaviors;

c. Explain how to make a complaint and provide at least two individuals to whom and/or methods by which the employee can lodge a complaint;

d. State that all claims are taken seriously, will be investigated, and be kept confidential to the extent practicable; and

e. Include anti-retaliation provisions.

Suggested language follows:

All Unlawful Harassment Prohibited

[EMPLOYER NAME] strictly prohibits and does not tolerate unlawful harassment against employees or any other covered persons [including interns] because of race, color, religion, creed, national origin, ancestry, sex (including pregnancy), gender (including gender nonconformity and status as a transgender or transsexual individual), age (40 and over), physical or mental disability, citizenship, genetic information, sickle cell trait, past, current or prospective service in the uniformed services, [OTHER PROTECTED CLASSES RECOGNIZED BY APPLICABLE STATE OR LOCAL LAW] or any other characteristic protected under applicable federal, state or local law.

Sexual Harassment

All [EMPLOYER NAME] employees, other workers and representatives (including [vendors/patients/customers/subscribers/clients] and visitors) are prohibited from harassing employees and other covered persons based on that individual's sex or gender (including pregnancy and status as a transgender or transsexual individual) and regardless of the harasser's sex or gender.

Sexual harassment means any harassment based on someone's sex or gender. It includes harassment that is not sexual in nature (for example, offensive remarks about an individual's sex or gender), as well as any unwelcome sexual advances or requests for sexual favors or any other conduct of a sexual nature, when any of the following is true:

Submission to the advance, request or conduct is made either explicitly or implicitly a term or condition of employment;

Submission to or rejection of the advance, request or conduct is used as a basis for employment decisions; or

Such advances, requests or conduct have the purpose or effect of substantially or unreasonably interfering with an employee's work performance by creating an intimidating, hostile or offensive work environment.

[EMPLOYER NAME] will not tolerate any form of sexual harassment, regardless of whether it is:

Verbal (for example, epithets, derogatory statements, slurs, sexually-related comments or jokes, unwelcome sexual advances or requests for sexual favors).

Physical (for example, assault or inappropriate physical contact).

Visual (for example, displaying sexually suggestive posters cartoons or drawings, sending inappropriate adult-themed gifts, leering or making sexual gestures).

This list is illustrative only, and not exhaustive. No form of sexual harassment will be tolerated.

Harassment is prohibited both at the workplace and at employer-sponsored events.

Other Types of Harassment

[EMPLOYER NAME]'s anti-harassment policy applies equally to harassment based on an employee's race, color, religion, creed, national origin, ancestry, age (40 and over), physical or mental disability, citizenship, genetic information, sickle cell trait, past, present or prospective service in the uniformed services, [OTHER PROTECTED CLASSES RECOGNIZED BY APPLICABLE STATE OR LOCAL LAW] or any other characteristic protected under applicable federal, state or local law.

Such harassment often takes a similar form to sexual harassment and includes harassment that is:

Verbal (for example, epithets, derogatory statements, slurs, derogatory comments or jokes);

Physical (for example, assault or inappropriate physical contact); or

Visual (for example, displaying derogatory posters, cartoons, drawings or making derogatory gestures).

This list is illustrative only, and not exhaustive. No form of harassment will be tolerated at the workplace or at employer-sponsored events.

Complaint Procedure

If you are subjected to any conduct that you believe violates this policy, you must promptly speak to, write or otherwise contact your direct supervisor or, if the conduct involves your direct supervisor, the [next level above your direct supervisor/[DEPARTMENT NAME] Department], ideally within [ten (10)/[NUMBER]] days of the offending conduct. If you have not received a satisfactory response within [five (5)/[NUMBER]] days after reporting any incident of what you perceive to be harassment, please immediately contact [[POSITION]/[DEPARTMENT NAME] Department]. These individuals will ensure that a prompt investigation is conducted. [Although not mandatory, a Complaint Form is available at [LOCATION] to make your complaint if you wish to use it.]

Your complaint should be as detailed as possible, including the names of all individuals involved and any witnesses. [EMPLOYER NAME] will directly and thoroughly investigate the facts and circumstances of all claims of perceived harassment and will take prompt corrective action, if appropriate.

Additionally, any manager or supervisor who observes harassing conduct must report the conduct to [[POSITION]/[DEPARTMENT NAME] Department] so that an investigation can be made and corrective action taken, if appropriate.

No Retaliation

No one will be subject to, and [EMPLOYER NAME] prohibits, any form of discipline, reprisal, intimidation or retaliation for good faith reporting of incidents of harassment of any kind, pursuing any harassment claim or cooperating in related investigations. [For more information on [EMPLOYER NAME]'s policy prohibiting retaliation, please refer to [EMPLOYER NAME]'s Anti-Retaliation Policy or contact the [DEPARTMENT NAME] Department.]

[EMPLOYER NAME] is committed to enforcing this policy against all forms of harassment. However, the effectiveness of our efforts depends largely on employees telling us about inappropriate workplace conduct. If

employees feel that they or someone else may have been subjected to conduct that violates this policy, they should report it immediately. If employees do not report harassing conduct, [EMPLOYER NAME] may not become aware of a possible violation of this policy and may not be able to take appropriate corrective action.

Violations of this Policy

Any employee, regardless of position or title, whom [[POSITION]/[DEPARTMENT NAME] Department] determines has subjected an individual to harassment or retaliation in violation of this policy, will be subject to discipline, up to and including termination of employment.

3. ADA/ADAAA Policy

Best practice is for employers covered by the Americans with Disabilities Act of 1990 (ADA), as amended by the ADA Amendments Act of 2008, to implement and maintain a disability accommodations policy. It should include prohibitions against any form of disability discrimination or harassment, identify to whom the employee should give a request for an accommodation, and stress the interactive process.

Suggested language:

[EMPLOYER NAME] complies with the Americans with Disabilities Act (ADA), as amended by the ADA Amendments Act (ADAAA), the Louisiana Employment Discrimination Law (LEDL) and all applicable local fair employment practices laws, and is committed to providing equal employment opportunities to qualified individuals with disabilities. Consistent with this commitment, [EMPLOYER NAME] will provide a reasonable accommodation to disabled applicants and employees if the reasonable accommodation would allow the individual to perform the essential functions of the job, unless doing so would create an undue hardship.

Requesting a Reasonable Accommodation

If you believe you need an accommodation because of your disability, you are responsible for requesting a reasonable accommodation from the [DEPARTMENT NAME] Department. You may make the request orally or in writing, but [EMPLOYER NAME] encourages employees to make their request in writing [on [EMPLOYER NAME]'s reasonable accommodation request form] and to include relevant information, such as:

A description of the accommodation you are requesting.

The reason you need an accommodation.

How the accommodation will help you perform the essential functions of your job.

After receiving your oral or written request, [EMPLOYER NAME] will engage in an interactive dialogue with you to determine the precise limitations of your disability and explore potential reasonable accommodations that could overcome those limitations. [EMPLOYER NAME] encourages you to suggest specific reasonable accommodations that you believe would allow you to perform your job. However, [EMPLOYER NAME] is not required to make the specific accommodation requested by you and may provide an alternative, effective accommodation, to the extent any reasonable accommodation can be made without imposing an undue hardship on [EMPLOYER NAME].

4. Religious Accommodations Policy

Although not required by federal law, employers covered by Title VII may choose to implement and maintain a religious accommodations policy, especially given some of the issues in our current society.

Suggested language includes:

If you believe you need an accommodation because of your religious beliefs or practices or lack thereof, you should request an accommodation from the [DEPARTMENT NAME] Department. You may make the request orally or in writing. [EMPLOYER NAME] encourages employees to make their request in writing [on [EMPLOYER NAME]'s religious accommodation request form] and to include relevant information, such as:

A description of the accommodation you are requesting.

The reason you need an accommodation.

How the accommodation will help resolve the conflict between your religious beliefs or practices or lack thereof and one or more of your work requirements.

After receiving your oral or written request, [EMPLOYER NAME] will engage in a dialogue with you to explore potential accommodations that could resolve the conflict between your religious beliefs and practices and

> one or more of your work requirements. [EMPLOYER NAME] encourages you to suggest specific reasonable accommodations that you believe would resolve any such conflict. However, [EMPLOYER NAME] is not required to make the specific accommodation requested by you and may provide an alternative, effective accommodation, to the extent any accommodation can be made without imposing an undue hardship on [EMPLOYER NAME].

D. Employee Classifications

Although federal law does not require that employers maintain a written description of employee classifications in a handbook, most employers include a brief description of the categories they use, for example, exempt or nonexempt under the FLSA, and full-time or part-time. This helps employees understand which policies apply to them. For example, some employers only allow full-time employees to take paid vacation days. However, avoid specifying who is or who is not exempt; rather, tell the employee to see an HR representative if unsure. Instead, state that the employer follows federal and state law as it pertains to whether an employee is entitled to overtime.

III. ADDRESSING PARAMETERS OF EMPLOYMENT

A. Expectations for Employees

One of the most important functions of a handbook is to set out an employer's expectations for its employees and the consequences for failure to follow the employer's policies.

1. Workweek and Business Hours

In addition to a general attendance policy, employers frequently set business and work hours in a written policy. The policy might state that any non-exempt employee working beyond those hours must get written permission to do so. This will reduce unexpected and unauthorized overtime. Remember - you must pay for overtime whether authorized or not.

This section might also explain how the employee must track or report their time worked. Including a timekeeping policy in the handbook helps an employer ensure it has accurate time records and that nonexempt employees are paid for all hours worked, including overtime.

2. Attendance Policy

The policy should state that regular and punctual attendance is a requirement of the job, if applicable. It should also provide instructions for the employee when he or she will either be tardy or absent from work, when an absence is excused, and the consequences for repeated unexcused absences or tardiness.

Suggested language:

> [EMPLOYER NAME] requires regular and punctual attendance from all employees. Employees who are going to be absent for a full or partial work day or late for work must notify their supervisor [[and/or] the [DEPARTMENT NAME] Department] as far in advance as possible [but at least [NUMBER] hours before the start of the work day]. Employees who must miss work because of emergencies or other unexpected circumstances must notify their supervisor [[and/or] the [DEPARTMENT NAME] Department] as soon as possible.
>
> Absences will be considered excused if the employee requested the time off in accordance with [EMPLOYER NAME] policies on [vacation/sick leave/paid time off], received the required approval for the absence, and has sufficient accrued, but unused, time to cover the absence. Absences also will be considered excused if the employee requested the time off in accordance with an [EMPLOYER NAME] policy permitting a leave of absence, received the required approval for the leave, and is in compliance with the leave policy (for example, an employee's absences while he or she is taking approved leave under [EMPLOYER NAME]'s policy on [TYPE OF LEAVE] generally will be considered excused).
>
> An employee will be considered to have taken an unexcused absence if the employee is absent from work during scheduled work hours without permission, including full or partial day absences, late arrivals and early departures. [However, [EMPLOYER NAME] allows a [NUMBER]-minute grace period on an employee's arrival at work [and a [NUMBER]-minute grace period when an employee returns from lunch.]]
>
> [Any employee who is absent for [three/[NUMBER]] or more consecutive days due to illness must provide a note from his or her [physician/health care provider] to verify the employee's need for sick leave [and fitness to return to work].]
>
> **Consequences of Unexcused Absences**
>
> [[EMPLOYER NAME] reserves the right to discipline employees for unexcused absences. Discipline may include counseling, oral or written

warnings, suspensions or termination of employment, in [EMPLOYER NAME]'s discretion.

[With the exception of unusual circumstances,][A/a]ny employee who is absent from work for [three/[NUMBER]] days without notifying [EMPLOYER NAME] will be deemed to have voluntarily abandoned his or her job and the employee's employment will be terminated.

3. Standards of Conduct Policy

Standardizing the conduct expected from employees can demonstrate that the employee was aware that certain contested conduct was prohibited. Also, a Conduct Policy ensures that employees' and the company's rights are respected by prohibiting conduct that may be disruptive, unproductive, unethical, or illegal.

The Conduct policy should state that violations may lead to disciplinary action, which, based on the circumstances of the individual case, could result in corrective action up to and including discharge. The following is a non-exhaustive list of conduct that the employer may want to include. Note: the handbook should always note that the list is not exhaustive.

- Falsifying records.
- Engaging in fraud.
- Removing employer property from the premises without authorization.
- Stealing or attempting to steal employer or employee property.
- Fighting on employer property at any time.
- Being under the influence of intoxicating substances on employer property at any time.
- Being insubordinate.
- Using or abusing employer time, property, materials, or equipment without authorization.
- Gambling on employer premises at any time.
- Sleeping on the job.
- Using offensive or profane language on company premises.
- Bringing dangerous or unauthorized weapons onto employer premises.
- Being absent from work without authorization during scheduled work hours.
- Defacing employer property.
- Engaging in criminal activity.
- Violating or abusing employer policies.
- Neglecting job duties.
- Bringing the organization into serious disrepute.

Some employers include progressive discipline in their policies, i.e. oral warning, then written warnings, etc. These can be limiting and reduce the employer's flexibility.

4. Dress Code and Grooming Policy

In certain circumstances, some businesses implement and maintain a dress code and grooming standards for employees in the workplace. Legally, the employee may have different standards for different job classifications, such as for employees working in the warehouse section and those working in the front office. Be careful that any dress prohibitions are linked to the job duties.

5. Solicitation and Distribution

Some employers choose to implement and maintain this policy to restrict employee solicitation and distribution of non-business written materials in the workplace. Suggested language:

> [EMPLOYER NAME] has established rules to govern employee solicitation and distribution of written materials. [EMPLOYER NAME] has established rules to:
>
> • Maintain and promote safe and efficient operations, employee discipline and an attractive clutter-free work place.
>
> • Minimize non-work-related activities that could interfere with customer satisfaction, product quality and teamwork.
>
> **Conduct Not Prohibited by this Policy**
>
> Besides imposing lawful restrictions on employee solicitation during working time and employee distribution of written materials during working time and in working areas, this policy is not intended to preclude or dissuade employees from engaging in legally protected activities/activities protected by state or federal law, including the National Labor Relations Act such as discussing wages, benefits or terms and conditions of employment, forming, joining or supporting labor unions, bargaining collectively through representatives of their choosing, raising complaints about working conditions for their and their fellow employees' mutual aid or protection or legally required activities.
>
> OR

This policy is not intended to restrict communications or actions protected or required by state or federal law.

Rules

Employees may not:

- Solicit other employees during working time.
- Distribute literature during working time.
- Distribute literature at any time in working areas.

[The sole exceptions to this policy are for solicitations and distributions related to charitable activities approved by [EMPLOYER NAME].]

Definitions

Solicitation includes, but is not limited to, approaching someone in person or through employer-owned property such as computers, smartphones, e-mail systems and intranets for any of the following purposes:

- Offering anything for sale.
- Asking for donations.
- Collecting funds or pledges.
- Seeking to promote, encourage or discourage participation in or support for any organization, activity or event, or membership in any organization.
- Distributing or delivering membership cards or applications for any organization.

Distribution includes, but is not limited to, disseminating or delivering in person or through employer-owned property such as bulletin boards, computers, smartphones, e-mails and intranets any literature or other materials including circulars, notices, papers, leaflets or other printed, written or electronic matter (except that distributing or delivering membership cards or applications for any organization is considered solicitation and not distribution).

Working time includes any time in which either the person doing the solicitation (or distribution) or the person being solicited (or to whom non-business literature is being distributed) is engaged in or required to be performing work tasks. Working time excludes times when employees are properly not engaged in performing work tasks, including break periods and meal times.

Working areas include areas controlled by [EMPLOYER NAME] where employees are performing work, excluding, for example, cafeterias, break rooms[, [EMPLOYER NAME]'s e-mail system] and parking lots.

6. Travel and Business Expense Reimbursement Policy

To set out guidelines for reimbursement of business-related expenses, many employers implement and maintain an expense reimbursement policy. If this policy will not change or be modified frequently, it may be included in the handbook.

7. Outside Employment Policy

Although not required by federal law, some employers implement and maintain an outside employment policy to either limit their employees' ability to work for other employers, or describe when outside employment is permitted, subject to certain conditions necessary to protect the employer's business. Also, some employers require that the employee report outside employment to ensure there is no conflict of interest with the employer.

Suggested language:

> [[EMPLOYER NAME] recognizes that some employees may seek additional outside employment, including second jobs, consulting engagements, self-employment and volunteer activities.] To protect [EMPLOYER NAME]'s confidential information, trade secrets[, [SPECIFIC BUSINESS INTERESTS]] and other business interests while employees are engaged in outside employment, [EMPLOYER NAME] has adopted the following rules and guidelines relating to outside employment by employees:
>
> 1. Before beginning outside employment, employees must [obtain advance written approval for the outside employment from/give advance written notice of the outside employment to [POSITION].]
>
> 2. Outside employment must not interfere with the employee's work performance or work schedule.
>
> 3. Employees may not use [EMPLOYER NAME] property, facilities, equipment, supplies, IT systems (such as computers, networks, e-mail, telephones or voicemail), time, trademark, brand or reputation in connection with any outside employment.

4. Employees engaging in outside employment must comply with [EMPLOYER NAME]'s [POLICIES ON CONFLICTS OF INTEREST, CONFIDENTIALITY AND PROTECTION OF CONFIDENTIAL, PROPRIETARY AND TRADE SECRET INFORMATION].

5. Employees may not engage in any outside employment for an employer that competes with [EMPLOYER NAME].

6. If you are considering outside employment, but are not sure if it complies with the rules and guidelines set out in this policy, you should speak with [[POSITION]/the [DEPARTMENT NAME] Department], who will help you determine whether the outside employment complies with this policy.

Any employee, regardless of position or title, who [[POSITION]/the [DEPARTMENT NAME] Department] determines has violated this policy will be subject to discipline, up to and including termination of employment.

8. Code of Ethics/Conflict of Interest Policy

Many private employers choose to implement and maintain a code of ethics or conflict of interest policy for employees even though federal law does not require it. A written policy helps employers promote professionalism and raise awareness of potential conflicts of interest.

9. Telecommuting Policy

Telecommuting policies are not required by federal law. However, employers that permit employees to telecommute should consider a written policy to set out expectations for employees and explaining the employer's responsibilities. If the employee is non-exempt, it is critical the employer correctly tracks all time worked from home.

Suggested language:

[EMPLOYER NAME] may allow employees to telecommute (work remotely or work from home). This policy applies to employees permitted to telecommute on a regular basis. This policy does not apply to requests for reasonable accommodation [or occasional work from home arrangements such as in instances of inclement weather]. [Employees requesting to telecommute as a reasonable accommodation should follow [EMPLOYER NAME]'s procedures on requests for reasonable accommodation.]

Eligibility

After [the Introductory Period/[NUMBER] days of employment], [full-time] employees are eligible to apply to telecommute. All telecommuting arrangements must be approved in advance by [EMPLOYER NAME]. Permission to telecommute is at [EMPLOYER NAME]'s discretion and can be withdrawn at any time.

Requests to Telecommute

After [the Introductory Period/[NUMBER] days of employment], [EMPLOYER NAME] will consider requests to telecommute from [full-time] employees.

A request to telecommute should be:

In writing.

Submitted to your direct supervisor and the Human Resources department.

[A form is available at [LOCATION].]

[Upon receipt of your request, [EMPLOYER NAME] may [contact you for additional information/ask you to explain [why your job responsibilities are suitable for telecommuting/how you plan to stay in contact with your supervisor]].]

[[EMPLOYER NAME] may require employees who telecommute to report to work at [EMPLOYER NAME]'s office[s] [as needed/for office-wide meetings/once a month].]

[EMPLOYER NAME] May Approve Requests to Telecommute For a Trial Period

[EMPLOYER NAME] may approve a request to telecommute for a trial period [of [NUMBER] days]. At the conclusion of the trial period, the telecommuting arrangement will be reviewed by [EMPLOYER NAME] and may be withdrawn or approved for a longer period of time.]

[EMPLOYER NAME]'s Policies Remain in Effect

Employees permitted to telecommute must continue to abide by [EMPLOYER NAME]'s [Handbook/all employee policies [on the Intranet][, including Discrimination and Harassment, IT Resources and Communications Systems and Workplace Safety policies]]. [Failure to

follow [EMPLOYER NAME] policies may result in discipline and termination of the telecommuting arrangement.]

[Employees are prohibited from unauthorized work during their telecommuting work hours.]

Timekeeping

Nonexempt employees who are permitted to telecommute must comply with [EMPLOYER NAME]'s [Timekeeping Policy/Payroll Practices]. Employees must accurately record all working time.]

Written Telecommuting Agreement

When a request to telecommute is approved, you will be required to sign a written telecommuting agreement that explains:

- Permission to telecommute can be withdrawn at any time.
- The agreed-upon hours of work [and how hours will be recorded].
- Expectations regarding how frequently you and your supervisor will communicate (for example, [daily phone calls/weekly status reports/in-office visits]).
- Your responsibilities, including [safeguarding [EMPLOYER NAME]'s equipment and confidential information/consulting local tax and zoning ordinances that may impose requirements on you or impose limits on conducting business from your home].
- Work space setup[, including ergonomics].]

Equipment and Technology Support

[You will provide all furniture and equipment that you will need to telecommute. [EMPLOYER NAME] will not be responsible for any damage to your furniture or equipment.

OR

[EMPLOYER NAME] will provide the following equipment to employees approved to telecommute:

- [Computer/laptop.]
- [Cellphone/teleconferencing equipment.]
- [Facsimile equipment.]
- [Anti-virus software.]

- [Office supplies such as paper or printer cartridges.]

[Any equipment supplied by [EMPLOYER NAME] is to be used solely by you and for business purposes only.] [You must comply with [the IT Resources and Communications Systems] Policy.]

[[EMPLOYER NAME] will be responsible for repairing any [EMPLOYER NAME] equipment. However, you are responsible for any intentional damage.]

[You must return all [EMPLOYER NAME] equipment when the telecommuting arrangement ends.]]

[[EMPLOYER NAME]'s technology support is available to assist employees who telecommute from [HOURS]. You can contact [EMPLOYER NAME]'s technology support at [TELEPHONE NUMBER].]

You agree that your access and connection to [EMPLOYER NAME]'s network(s) may be monitored [to record dates, times and duration of access].

Security

[You are responsible for securing from theft any [EMPLOYER NAME] property.] Employees must use secure remote access procedures.

You agree to maintain confidentiality by using passwords[, locked file cabinets] and maintaining regular anti-virus and computer backup. You will not download company confidential information or trade secrets onto a non-secure device.

You agree not to share your password with anyone outside of [EMPLOYER NAME]. If any unauthorized access or disclosure occurs, you must inform [EMPLOYER NAME] immediately.

Expenses

[[EMPLOYER NAME] will reimburse the following costs:

- [Cellphone/Long distance charges.]
- [Internet access.]
- [Electric bills.]

[EMPLOYER NAME] will not reimburse any additional expenses without advance [notice/approval].

OR

[EMPLOYER NAME] will not be responsible for any of the following costs:

- [Cellphone/Long distance charges.]
- [Internet access.]
- [Electric bills.]]

10. Flexible Work Schedule Policy

Some employers allow their employees to work nonstandard schedules, for example, fewer days per week or per pay period, but for longer hours on the days they do work. To minimize legal risk, a flexible work schedule policy should set out expectations for the employee and explain both parties' responsibilities. Again, if the employee is non-exempt, the employer must ensure that either the employee does not work more than 40 hours weekly or, if allowed, actual time worked is accurately tracked.

11. Travel Reimbursement

Employers that require or authorize employees to use company owned, rented or leased cars can guard against a number of potential risks by implementing and maintaining a company car policy.

Suggested language:

It is [EMPLOYER NAME]'s practice to reimburse employees for reasonable expenses incurred during the period they are employed by [EMPLOYER NAME] in connection with travel and other business on behalf of [EMPLOYER NAME], subject to the guidelines and procedures set out in this policy. The specific types of expenses that may be reimbursed and procedures for requesting reimbursement are set out below. Employees must obtain [advance] written approval from [the [DEPARTMENT NAME] Department/[POSITION]] and receipts or other appropriate substantiating documentation for all travel and other business expenses incurred. [For expenses in excess of $[AMOUNT], employees must obtain prior written approval from [the [DEPARTMENT NAME] Department/[POSITION]].]

This policy is intended to qualify as an "accountable plan" under the Internal Revenue Code (IRC) and relevant Treasury Regulations.

Reimbursable Expenses

Expenses that may be reimbursed under this policy are:

Business travel expenses, including transportation, lodging and meals.
Business meals and entertainment.
Miscellaneous business expenses[, including [EXAMPLES]].

[EMPLOYER NAME] will only reimburse expenses that meet the substantiation requirements set out below. Expenses not addressed in this policy, such as child care costs and personal entertainment, are not reimbursable.

Travel Expenses

[EMPLOYER NAME] will generally reimburse employees for business travel expenses incurred in accordance with the guidelines set out below. Employees should always use the lowest-priced transportation option that is reasonably available.

Air Transportation.

Employees must travel on the lowest-priced coach airfare available, taking into consideration preferred airports, preferred arrival and departure times, connection times and other restrictions, including cancellation and change fees. [Premium fares, such as fares for first-class or business-class travel, are reimbursable only in the following circumstances:

Flights exceeding [NUMBER] hours in duration.
Other circumstances that have been approved in advance by [the [DEPARTMENT NAME] Department/[POSITION]].

Employees [should/must] obtain pre-approval for premium fares from [the [DEPARTMENT NAME] Department/[POSITION]].]

Baggage Fees. Airline charges for checked baggage are reimbursable in each of the following circumstances:

The employee is transporting materials belonging to [EMPLOYER NAME].
The employee is traveling for longer than [NUMBER] days.

[The [DEPARTMENT NAME] Department/[POSITION]] has approved the charge in advance of the flight.

[Frequent Flyer Plans. Employees may personally retain frequent flyer awards that accrue from business travel. However, employees will not be reimbursed for tickets purchased with frequent flyer miles.]

Changes and Cancellations. [Penalties and other charges for flight cancellations or changes will be reimbursed only in the following circumstances: [CIRCUMSTANCES].

OR

[EMPLOYER NAME] has reserves the right to determine whether to reimburse employees for penalties and other charges for flight cancellations or changes, taking the particular circumstances into account.]

Automobile Transportation and Parking.

Personal Vehicles. If use of an employee's personal vehicle is required for business purposes, employees will be reimbursed at the mileage rate set by the Internal Revenue Service (IRS). [As of [DATE], that rate is $[AMOUNT] per mile.] Tolls and parking fees are also reimbursable. However, [EMPLOYER NAME] will not reimburse employees for expenses not necessary for business purposes, such as:

Parking tickets.
Vehicle repairs and maintenance.
Fines for moving violations.
Vehicle towing charges.

[Employees using a personal vehicle for business purposes should ensure that their automobile insurance covers business travel.]

Rental Cars. If an employee uses a rental car for business purposes, [EMPLOYER NAME] will reimburse employees for the reasonable cost of the rental car, gasoline, tolls and parking fees. [Employees must reserve an economy or standard-sized vehicle. Upgrades to full-size vehicles are permissible only with advance approval by [the [DEPARTMENT NAME] Department/[POSITION]] and if required due to the number of passengers.]

[[EMPLOYER NAME]'s insurance will cover both the employee and the vehicle when a vehicle is rented for business purposes. Accordingly,

employees should not purchase additional insurance coverage from the rental car company.]

Ground Transportation. Employees will be reimbursed for ordinary and reasonably priced ground transportation, including buses, shuttles, taxis and car services to and from airports or railroad stations and between the employee's hotel and other business-related locations.

Rail Transportation.

Employees may use rail travel when it is less costly than air travel. Employees are expected to choose the lowest, most reasonable fare available, taking into account preferred arrival and departure times, applicable connection times and other restrictions, including cancellation and change fees. Reimbursement of penalties and other charges for cancellations or changes is governed by the rules applicable to air transportation, as set out above.

Hotels and Lodging.

[EMPLOYER NAME] will reimburse employees for the cost of standard accommodations in a reasonably priced hotel for overnight stays during business trips. Employees seeking reimbursement for lodging expenses must submit an itemized hotel receipt or statement which indicates that full payment has been made and contains:

The name and location of the hotel or other lodging.
The date or dates of the employee's stay.
Separately stated charges for lodging, meals, telephone and other expenses.
[A maximum nightly rate applies in certain geographic locations, including a maximum of $[AMOUNT] per night in [LOCATION]. Employees must obtain prior written approval from [the [DEPARTMENT NAME] Department/[POSITION]] before incurring rates that exceed the listed maximum for a specific location.]

[Employees traveling to [LOCATION] must stay at one of the following hotels, with which [EMPLOYER NAME] has negotiated discounted rates: [HOTELS].]

[EMPLOYER NAME] will pay room cancellation fees for guaranteed room reservations only in extenuating circumstances, as determined by [EMPLOYER NAME] in its sole discretion.

Meals.

[EMPLOYER NAME] will reimburse employees for the reasonable cost of their own meals while on overnight travel or where an employee is away from his normal work location for an entire day [up to a maximum of $[AMOUNT] per day]. However, [EMPLOYER NAME] will not reimburse employees for meals that [EMPLOYER NAME], in its sole discretion, determines are lavish or extravagant [or for the cost of any alcoholic beverages].

Employees must provide receipts or other appropriate substantiating documentation for each meal taken throughout the trip[, unless the meal costs less than $[AMOUNT]]. Employees may include the expense of reasonable gratuities [of up to [NUMBER]%].

This section does not apply to meals purchased for purposes of business entertainment. Reimbursement of business meals and entertainment is covered below.

[Preferred Provider[s].

Employees [may/must] make travel arrangements, including transportation and lodging, through [EMPLOYER NAME]'s preferred provider[s], [NAME OF PREFERRED PROVIDER(S)].]

Business Meals with Clients, Customers and Business Affiliates.

[EMPLOYER NAME] will reimburse employees for the ordinary and necessary costs of meals with clients, customers and other business affiliates if the purpose of the meal is business related. However, [EMPLOYER NAME] will not reimburse employees for meals that [EMPLOYER NAME], in its sole discretion, determines are lavish or extravagant [or for the cost of any alcoholic beverages].

When submitting expense reimbursement forms for business meals, employees must submit receipts specifying the names of the attendees and the business purpose served by the meal. [For business meals in excess of $[AMOUNT] per person, employees must get advance written approval from [the [DEPARTMENT NAME] Department/[POSITION]].]

Business Entertainment.

Meals and functions are considered business entertainment if they are intended to provide hospitality to non-employees which, although partly social in nature, are necessary and customary in furtherance of

[EMPLOYER NAME]'s business. Expenses for business entertainment should be reasonable in relation to the nature of the meal or function and the resulting business benefit that is anticipated. [For meals and functions in excess $[AMOUNT] per person, employees must get advance written approval from [the [DEPARTMENT NAME] Department/[POSITION]].] [In addition, [EMPLOYER NAME] will not reimburse employees for the cost of any alcoholic beverages.]

Employees seeking reimbursement for business entertainment should submit a description specifying:

The date of the event;
The name and location of the venue;
The names of each attendee;
An itemized list of expenditures;
The business purpose served by the entertainment; and
The nature of the business discussions before, during or after the entertainment.

[Employee Banquets and Functions. [EMPLOYER NAME] will reimburse the actual cost of occasional banquets and other functions [up to a maximum of $[AMOUNT]] for employees if the expense is intended to serve as a token of appreciation that primarily:

Promotes employee relations or morale.

Recognizes individual or group achievements.

[However, [EMPLOYER NAME] will not reimburse employees for the cost of any alcoholic beverages.]

Smaller functions, such as worksite parties to recognize births, marriages or other personal events, are generally paid for by the employees involved and will not be reimbursed by [EMPLOYER NAME].]

Conferences and Professional Development.

[EMPLOYER NAME] will reimburse employees for the cost of attending professional development or continuing education programs approved in advance by [the [DEPARTMENT NAME] Department/[POSITION]], including travel costs and registration fees, provided that the content of the program is of a substantive nature that relates directly to the employee's current job responsibilities. [EMPLOYER NAME], however, will not reimburse any costs for continuing education programs required to

maintain a professional certification or license not directly related to the employee's current position.

Conference registration fees and other similar expenses should be paid directly by the employer in advance of the event, but may be reimbursed following the event if prior payment by the employer is not possible.

Communications. [EMPLOYER NAME] will reimburse employees traveling on business for the reasonable costs of business-related:

Phone calls.
Internet service fees.
Faxes.

Employees must present receipts and other substantiating documentation itemizing costs and identifying the parties contacted.

Expense Reimbursement Requests

Employees may request reimbursement for business-related expenses incurred in accordance with this policy by completing an expense reimbursement form, obtaining written approval from [POSITION] and submitting the completed form, including all receipts and appropriate substantiating documentation as required by this policy, to the [DEPARTMENT NAME] Department. All expense reimbursement forms must be signed and verified by the employee and [the employee's supervisor/[POSITION]]. Expense reimbursement forms are available [on the [EMPLOYER NAME] intranet/from the [DEPARTMENT NAME] Department].

Expense reimbursement forms must include original receipts or other appropriate substantiating documentation for each expense showing:

The amount paid.
The date the expense was incurred and paid.
The vendor or provider name and location.
The nature of the expense.
Other information required by this policy. [OTHER REQUIRED INFORMATION.]

Expense reimbursement forms relating to business use of an employee's personal vehicle must list the:

Miles driven;
Origin and destination;

Date; and
Business purpose.

If a receipt or other substantiating documentation is not available, the employee must submit a written explanation of why the documentation cannot be provided. [EMPLOYER NAME], in its sole discretion, will evaluate the explanation and determine whether the expense is reimbursable. Receipts or other supporting documentation, however, are not required for expenses less than $[AMOUNT].

Employees must submit expense reimbursement forms to the [DEPARTMENT NAME] Department within 60 days of incurring the expense. [Failure to comply with this time frame may result in the reimbursement being taxable income for the employee/[EMPLOYER NAME] will not reimburse employees for any expenses submitted after this deadline.]

[The [DEPARTMENT NAME] Department/[POSITION]] will verify that expenses are permissible and that documentation is adequate and accurate. [EMPLOYER NAME] reserves the right to refuse any expense reimbursement request that is inaccurate, does not include the appropriate substantiating documentation, is submitted late or otherwise fails to fully comply with [EMPLOYER NAME]'s policy, as determined by [EMPLOYER NAME] in its sole discretion. Expense reimbursement forms may be subject to audit by [EMPLOYER NAME] [or by government agencies].

If an employee receives an excess reimbursement, the employee must report and return any excess amounts to the [DEPARTMENT NAME] Department within 120 days.

Expense Reimbursement Payment
Payment Date.

[EMPLOYER NAME] will reimburse an employee for reimbursable expenses promptly following the date on which the employee submits a complete expense reimbursement form that includes all required approvals and substantiating documentation, but in any event no later than December 31 of the calendar year following the calendar year in which the expense is incurred.

Section 409A of the Internal Revenue Code.

Reimbursements under this policy are intended to comply with IRC Section 409A and applicable guidance issued thereunder or an exemption from the application of Section 409A.

Accordingly, all provisions of this policy shall be construed in a manner consistent with the requirements for avoiding taxes or penalties under Section 409A. The amount of reimbursements provided under this policy in any calendar year shall not affect the amount of reimbursements provided during any other calendar year and the right to reimbursements hereunder cannot be liquidated or exchanged for any other benefit.

Notwithstanding any provision of this policy, [EMPLOYER NAME] shall not be liable to any employee for any taxes or penalties imposed under Section 409A on any reimbursements hereunder.

[[EMPLOYER NAME] Issued Credit Cards

[EMPLOYER NAME] may, in its sole discretion, issue [EMPLOYER NAME] credit cards to certain employees for business-related purposes. Employees may only use their [EMPLOYER NAME] credit card to incur expenses that are reimbursable under this policy. Employees may not incur personal expenses on [EMPLOYER NAME] credit cards. Employees must [pay the credit card bill directly and] submit reimbursement requests for expenses incurred on their [EMPLOYER NAME] credit card in the same manner as expense reimbursement requests for other expenses as set out in this policy, including by submitting all necessary receipts, substantiating documentation and approvals and complying with applicable deadlines. [EMPLOYER NAME] will not reimburse employees for expenses that are not reimbursable under this policy, including personal expenses and late fees.

Use of [EMPLOYER NAME] credit cards is a privilege and may be withdrawn by [EMPLOYER NAME] at any time in its sole discretion.]

12. Romance in the Workplace Policy

Although not required by federal law, employers should consider a policy on romantic or dating relationships between employees in conjunction with an Anti-harassment Policy. A Romance in the Workplace Policy can help employers manage the legal risks (such as sexual harassment claims) and practical problems (such as employee morale) of romance in the workplace. Minimally, dating relationships between

individuals in which one supervises the other should not be allowed.

Suggested language:

> In order to minimize the risk of conflicts of interest and promote fairness, [EMPLOYER NAME] maintains the following policy with respect to romance in the workplace:
>
> [All romantic or dating relationships between employees are prohibited.
>
> **OR**
>
> No person in a management or supervisory position shall have a romantic or dating relationship with an employee whom he or she directly supervises or whose terms or conditions of employment he or she may influence (examples of terms or conditions of employment include promotion, termination, discipline and compensation).
>
> **OR**
>
> No person in a management or supervisory position shall have a romantic or dating relationship with an employee whom he or she directly supervises or whose terms or conditions of employment he or she may influence (examples of terms or conditions of employment include promotion, termination, discipline and compensation). In addition, no employees working in the same department shall have such a relationship. A department is defined as a group of employees who report directly to the same supervisor.
>
> **OR**
>
> Romantic or dating relationships between employees are permitted, but only under the circumstances described by this policy:
>
> During working time and in working areas, employees are expected to conduct themselves in an appropriate workplace manner that does not interfere with others or with overall productivity.
>
> During nonworking time, such as lunches, breaks, and before and after work periods, employees engaging in personal exchanges in non-work areas should observe an appropriate workplace manner to avoid offending other workers or putting others in an uncomfortable position.
>
> Employees are strictly prohibited from engaging in physical contact that would in any way be deemed inappropriate by a reasonable person while anywhere on company premises, whether during working hours or not.

Employees who allow personal relationships with co-workers to adversely affect the work environment will be subject to the appropriate provisions of [EMPLOYER NAME]'s disciplinary policy, including counseling for minor problems. Failure to change behavior and maintain expected work responsibilities is viewed as a serious disciplinary matter.

Employee off-duty conduct is generally regarded as private, as long as such conduct does not create problems within the workplace. An exception to this principle, however, is romantic or sexual relationships between supervisors and subordinates.

Any supervisor, manager, executive or other company official in a sensitive or influential position with [EMPLOYER NAME] must disclose the existence of a romantic or sexual relationship with another co-worker. Disclosure may be made to the immediate supervisor or the director of human resources (HR). This disclosure will enable [EMPLOYER NAME] to determine whether any conflict of interest exists because of the relative positions of the individuals involved. When a conflict-of-interest problem or potential risk is identified, [EMPLOYER NAME] will work with the parties involved to consider options for resolving the problem. The initial solution may be to make sure the parties no longer work together on matters where one is able to influence the other or take action for the other. Matters such as hiring, firing, promotions, performance management, compensation decisions and financial transactions are examples of situations that may require reallocation of duties to avoid any actual or perceived reward or disadvantage. In some cases, other measures may be necessary, such as transfer to other positions or departments. If one or both parties refuse to accept a reasonable solution or to offer of alternative position, if available, such refusal will be deemed a voluntary resignation.

Failure to cooperate with [EMPLOYER NAME] to resolve a conflict or problem caused by a romantic or sexual relationship between co-workers or among managers, supervisors or others in positions of authority over another employee in a mutually agreeable fashion may be deemed insubordination and cause for immediate termination. The disciplinary policy of [EMPLOYER NAME] will be followed to ensure fairness and consistency before any such extreme measures are undertaken.

The provisions of this policy apply regardless of the sexual orientation of the parties involved.

13. Nepotism Policy

Nepotism policies are not required by federal law. However, many employers choose to implement and maintain a nepotism policy to ban family members from working in the same chain of command, and specify that employees may not participate in decisions having a direct potential benefit to a family member.

Suggested language:

> Due to potential for perceived or actual conflicts, such as favoritism or personal conflicts from outside the work environment, which can be carried into the daily working relationship, [EMPLOYER NAME] will hire or consider other employment actions concerning relatives of persons currently employed only if: a) candidates for employment will not be working directly for or supervising a relative, and b) candidates for employment will not occupy a position in the same line of authority in which employees can initiate or participate in decisions involving a direct benefit to the relative. Such decisions include hiring, retention, transfer, promotion, wages and leave requests.
>
> This policy applies to all current employees and candidates for employment.
>
> **Definitions**
>
> "Family member" is defined as one of the following: relationships by blood—parent, child, grandparent, grandchild, brother, sister, uncle, aunt, nephew, niece and first cousin; and relationships by marriage—husband, wife (as defined by state law), step-parent, step-child, brother-in-law, sister-in-law, father-in-law, mother-in-law, son-in-law, daughter-in-law, half-brother, half-sister, uncle, aunt, nephew, niece, spouse/partner of any of the above and co-habitating couples or significant others.
>
> **Procedure**
>
> Prior to the employment offer, the immediate supervisor must complete a signed statement certifying that the candidate for employment or other employment action is not a relative as defined above. Failure to submit the signed statement to [NAMED COMPANY REPRESENTATIVE] will result in the delay of the job offer until the statement is submitted.
>
> Employees are responsible for immediately reporting any changes to their supervisor. If any employee, after employment or change in employment, enters into one of the above relationships, one of the affected individuals must seek a transfer or a change in the reporting relationship. Such

changes must be approved by [NAMED COMPANY REPRESENTATIVE]. If a decision cannot be made by the affected employees within 14 days of reporting, reassignment will be made on direction of [NAMED COMPANY REPRESENTATIVE].

No exception to this policy will be made without the written consent of [NAMED COMPANY REPRESENTATIVE].

14. Health and Safety

Because nearly all employers have a duty to provide a safe working environment under the federal Occupational Safety and Health Act ("OSHA"), handbooks frequently include a section with policies demonstrating an employer's commitment to a safe workplace. This section describes various optional policies typically included in a health and safety section of a handbook.

15. Smoke-free Workplace Policy

Although not required by federal law, many employers choose to implement and maintain a policy that prohibits smoking in the workplace to protect workers from the health hazards related to exposure to secondhand smoke. La. Rev. Stat. 40:1291.11, effective June 2, 2015, makes it illegal to smoke in an enclosed area within a place of employment, or for the employer to allow smoking within a closed area.

Suggested language:

[EMPLOYER NAME] Prohibits Smoking in the Workplace

[EMPLOYER NAME] prohibits and will not tolerate smoking in the workplace, including all indoor facilities[[,offices][,lunchrooms][,break rooms][,bathrooms][and company vehicles with more than one person]]. [Smoking is also prohibited on [EMPLOYER NAME]'s outdoor property[with the exception of designated areas].] This policy applies to all employees[,vendors/patients/customers/clients] and visitors.

For purposes of this policy, smoking includes lighting, smoking or carrying a lighted cigarette, cigar or pipe[and the use of any electronic smoking device]. This list is illustrative only and not exhaustive.

["No Smoking" signs will be posted at all entrances[, on bulletin boards/in stairwells] and in bathrooms.]

Complaint Procedure

If you witness possible violations of this policy, you should speak, write or otherwise contact your direct supervisor or, if the conduct involves your direct supervisor, the [next level above your direct supervisor/[DEPARTMENT NAME]] as soon as possible. Your complaint should be as detailed as possible, including the names of all individuals involved and any witnesses.

[EMPLOYER NAME] will investigate all complaints of violations of this policy and will take prompt corrective action, including discipline, if appropriate

16. Substance Abuse in the Workplace Policy

Federal law does not require private employers to implement and maintain a policy prohibiting the use of illegal drugs and alcohol in the workplace. However, OSHA considers substance abuse in the workplace an avoidable workplace hazard and strongly supports drug-free workplace programs. Such prohibitions are common-sense.

17. Drug Testing in the Workplace Policy

Employers may choose to implement and maintain a drug and alcohol testing program as part of their effort to maintain a safe and healthy workplace. Note: Recently, OSHA has ruled it illegal to drug test anyone involved in an accident unless there is reasonable suspicion that drugs may be a cause of the accident. Many employers have policies and procedures that mandate drug and alcohol testing in the wake of a workplace accident, regardless of whether there is any suspicion that the employee involved was impaired. However, effective August 10, 2016, OSHA's final rules on electronic reporting of workplace injuries require employers to implement "a reasonable procedure" for employees to report workplace injuries and that procedure cannot deter or discourage employees from reporting a workplace injury. Though the text of the final rule (29 CFR § 1904.35(b)(1)(i)) does not specifically address mandatory post-accident drug and alcohol testing, OSHA's May 12, 2016, commentary accompanying the final rules specifies that the agency views mandatory post-accident testing as deterring the reporting of workplace safety incidents. OSHA avers that employers who continue to operate under such policies will face penalties and enforcement scrutiny.

So what is "a reasonable procedure" for drug and alcohol testing and how can employers test for impairment following an accident? The previous version of 29 CFR § 1904.35(b)(1)(i) already required employers to set up a way for employees to report work-related injuries and illnesses promptly. The final rule adds new text to clarify that reporting procedures must be reasonable, and that a procedure that would deter or discourage reporting is not reasonable. OSHA's commentary with regard to drug testing notes that, "Although drug testing of employees may be a reasonable workplace policy in some situations, it is often perceived as an invasion of privacy, so if an injury or illness is very unlikely to have been caused by employee drug use, or if the method of drug testing does not identify impairment but only use at some time in the recent past, requiring the employee to be drug tested may inappropriately deter reporting." To eliminate that deterrent effect, OSHA maintains that drug testing policies should limit post-incident testing to situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use. Employers need not specifically suspect drug or alcohol use or impairment before testing, but there should be a reasonable possibility that use by the reporting employee was a contributing factor to the reported injury or illness in order for an employer to require drug testing.

Also, make sure your policy comports with the drug testing requirements of La. Rev. Stat. 49:1001 *et seq.* Failure to follow these guidelines when terminating an employee for drug use can result in the employee getting unemployment payments. Drug testing policies are often addendums to the handbook, and require the employee's signature to be kept on file.

Suggested language:

> [EMPLOYER NAME] is committed to providing a safe, healthy and productive workplace that is free from alcohol and unlawful drugs as classified under local, state or federal laws [,including marijuana,] while employees are working on the employer's premises (either on or off duty) and while operating employer-provided vehicles. [INCORPORATE OR CROSS REFER TO ANY SUBSTANCE ABUSE POLICY.] Employees that work while under the influence of drugs or alcohol pose a safety risk to themselves and others with whom they work.

In furtherance of this commitment, [EMPLOYER NAME] maintains a policy in which job applicants and current employees may be requested or required to submit to drug and alcohol testing in certain situations. This policy is intended to comply with applicable laws regarding drug and alcohol testing and current and prospective employee privacy rights.

Pre-employment Testing

All job applicants are subject to drug and alcohol testing. All offers of employment with [EMPLOYER NAME] are conditioned on the applicant submitting to and successfully completing and passing a drug and alcohol test in accordance with the testing procedures described in this policy.

Testing Based on Reasonable Suspicion

Employees may be asked to submit to a drug and alcohol test if an employee's supervisor or other person in authority has a reasonable suspicion, based on objective factors such as the employee's appearance, speech, behavior or other conduct and facts, that the employee possesses or is under the influence of unlawful drugs[, such as marijuana,] or alcohol, or both. Employees who take over-the-counter medication or other lawful medication that can be legally prescribed under both federal and state law to treat a disability should inform [their supervisors/the [DEPARTMENT NAME] Department] if they believe the medication will impair their job performance, safety or the safety of others or if they believe they need a reasonable accommodation before reporting to work while under the influence of that medication. [For more information on how to request a reasonable accommodation, please refer to [EMPLOYER NAME]'s Disability Accommodations Policy.]

[Periodic/Random Testing

Employees in safety or security-sensitive positions are subject to drug and alcohol testing on a [yearly/random] basis.]

[Post-incident Testing

Employees involved in any work-related accident or incident involving the violation of any safety or security procedures may be required to submit to drug and alcohol testing if there is reasonable suspicion that drugs were involved.]

Testing Procedures

All drug and alcohol testing under this policy will be conducted by an independent testing facility [licensed by the state], which will obtain the individual's written consent prior to testing. [EMPLOYER NAME] will pay for the full cost of the test. Employees will be compensated at their regular rate of pay for time spent submitting to a drug and alcohol test required by [EMPLOYER NAME].

Employees suspected of working while under the influence of illegal drugs or alcohol will be suspended [with/without] pay until [EMPLOYER NAME] receives the results of a drug and alcohol test from the testing facility and any other information [EMPLOYER NAME] may require to make an appropriate determination.

Confidentiality

All records relating to an employee or applicant's drug and alcohol test results will be kept confidential and maintained separately from the individual's personnel file.

Consequences of a Positive Test

Employees who test positive will be subject to discipline, up to and including immediate termination of employment. Job applicants who test positive will have their conditional job offers withdrawn.

Consequences for Refusing to Submit to Testing or Failing to Complete the Test

Employees who refuse to submit to testing as required by [EMPLOYER NAME] or who fail to complete the test will be subject to discipline, up to and including immediate termination of employment. Job applicants who refuse to submit to drug and alcohol testing will be deemed to have withdrawn themselves from the application process and will no longer be considered for employment.

18. Workplace Searches Policy

Employers may decide to implement and maintain a workplace searches policy reserving the employer's right to conduct searches at the workplace.

Suggested language:

> To maintain a safe, healthy and productive work environment, [EMPLOYER NAME] reserves the right at all times to search or inspect employees' surroundings and possessions. This right extends to the search or inspection of clothing, offices, files, desks, credenzas, lockers, bags, briefcases, containers, packages, parcels, boxes, tools and tool boxes, lunch boxes, any employer-owned or leased vehicles and any vehicles parked on company property[where items prohibited by [EMPLOYER NAME]'s policies may be concealed]. Employees should have no expectation of privacy while on [EMPLOYER NAME] premises, except in [restrooms/locker rooms/hotel rooms [OTHER LOCATIONS WITH A REASONABLE EXPECTATION OF PRIVACY]].
>
> [Refusal to allow search or inspection may result in discipline.]

19. Workplace Violence Policy

Although it is not required by federal law, OSHA recommends employers create a zero-tolerance policy for workplace violence. Implementing and maintaining a workplace violence policy also can help an employer defend against a claim the employer violated the general duty clause and provides greater security for employees. Some employers request notice if an employee has a Temporary Restraining Order ("TRO") against anyone to alert security on the premises.

Currently, there is no federal law that regulates weapons at private workplaces. However, several states, including Louisiana, have enacted so-called guns-at-work laws. These laws, which are typically designed to protect employees' rights to possess concealed firearms, vary in terms of their restrictions. Recently, the Fifth Circuit upheld the right of an employee in Mississippi to contest his termination for having a gun locked in his car on the employer's premises. Although it violated the employer's policy, court stated that Second Amendment trumped at-will employment. La. R.S. 32:292.1 provides employees the right to keep firearms in a locked, privately-owned vehicle under certain circumstances. Employers seeking to restrict the presence of firearms on company property must be sure to remain in compliance with the statute.

Suggested language:

> [EMPLOYER NAME] Prohibits and Will Not Tolerate Workplace Violence

[EMPLOYER NAME] prohibits and will not tolerate any form of workplace violence by an employee, supervisor, or third party, including [vendors/patients/customers/subscribers/clients] [and] visitors [both] at the workplace [and at employer-sponsored events].

Prohibited Conduct

For purposes of this policy, workplace violence includes:

- Making threatening remarks (written or verbal).
- Aggressive or hostile acts such as shouting, using profanity, throwing objects at another person, fighting, or intentionally damaging a coworker's property.
- Bullying, intimidating, or harassing another person (for example, making obscene phone calls or using threatening body language or gestures, such as standing close to someone or shaking your fist at them).
- Behavior that causes another person emotional distress or creates a reasonable fear of injury, such as stalking.
- Assault.

This list is illustrative only and not exhaustive. No form of workplace violence will be tolerated.

[EMPLOYER NAME] Prohibits Weapons at the Workplace

[EMPLOYER NAME] prohibits all employees [with the exception of [POSITION TITLE]] from possessing any weapons of any kind at the workplace, [while engaged in activities for [EMPLOYER NAME], and at [EMPLOYER NAME]-sponsored events]. [For purposes of this policy, the workplace is defined to include [EMPLOYER NAME]'s building[s], outdoor areas, and parking lots.] **[Depending on your state and federal district, employees may legally be allowed to keep guns locked in their vehicles.]**

Weapons include guns, knives, mace, explosives, and any item with the potential to inflict harm that has no common purpose. This list is illustrative only, and not exhaustive. [EMPLOYER NAME] prohibits employees from possessing any weapon at the workplace.

Complaint Procedure

If you witness or are subjected to any conduct you believe violates this policy, you must speak, write, or otherwise contact your direct supervisor

or, if the conduct involves your direct supervisor, the [next level above your direct supervisor/[DEPARTMENT NAME]] as soon as possible.

Your complaint should be as detailed as possible, including the names of all individuals involved and any witnesses. [A Workplace Violence Complaint Form is available at [LOCATION DESCRIPTION] if you wish to use it.]

[EMPLOYER NAME] will directly and thoroughly investigate all complaints of workplace violence and will take prompt corrective action, including discipline, if appropriate. [EMPLOYER NAME] reserves the right to contact law enforcement, if appropriate. [To the extent permitted by law, [EMPLOYER NAME] reserves the right to seek a restraining order to prevent workplace violence against an employee.]

If you become aware of an imminent violent act or threat of an imminent violent act, immediately contact appropriate law enforcement then contact [security/[DEPARTMENT NAME]].

No Retaliation

[EMPLOYER NAME] prohibits any form of discipline, reprisal, intimidation, or retaliation for reporting incidents of workplace violence of any kind, pursuing a workplace violence complaint, or cooperating in related investigations.

[EMPLOYER NAME] is committed to enforcing this policy against all forms of workplace violence. However, the effectiveness of our efforts depends largely on employees telling us about all incidents of workplace violence, including threats. Employees who witness any workplace violence should report it immediately. In addition, if an employee feels that they or someone else may have been subjected to conduct that violates this policy, they should report it immediately. If employees do not report workplace violence incidents, [EMPLOYER NAME] may not become aware of a possible violation of this policy and may not be able to take **appropriate corrective action.**

B. Employer's Responsibilities

1. Payroll

Handbooks almost always include a section describing payroll practices and compensation. Although these are not required by federal law, many employers include the policies described in this section to help minimize the risk of wage and hour claims

under the Fair Labor Standards Act of 1938 (FLSA). This Note uses the section heading "Payroll Practices and Compensation," but an employer can tailor the name of the section, or eliminate the section heading altogether, depending on its needs. Additionally, this Note describes the policies individually, but links to a single model payroll practices and compensation policy that incorporates all the individual policies.

Federal law does not require employers to include a written payroll schedule in their handbooks. However, in Louisiana, the employer is required to inform employees how and when they will be paid. La. Rev. Stat. 23:633.

You should include a clause in the employee handbook that offers employers a safe harbor defense to claims that it made improper deductions from an exempt employee's salary under the Fair Labor Standards Act (FLSA). This Standard Clause applies only to private workplaces, and is based on federal law although state or local law may impose additional or different requirements.

Suggested language:

EXEMPT EMPLOYEES

[EMPLOYER NAME] designates each employee as either exempt or nonexempt in compliance with applicable federal and state law. Employees who are designated as exempt are paid a fixed salary regardless of the number of hours worked each week and are not entitled to overtime pay. [EMPLOYER NAME] will not take any deductions from exempt employees' salaries except those allowed by applicable federal and state law.

Payroll Deductions

[[EMPLOYER NAME] is required by law to make certain deductions from your pay each pay period, including:

Federal and state income taxes.
Social Security (FICA) taxes.
Deductions required by wage garnishment or child support orders.
[Deductions required by collective bargaining agreements, such as union dues.]

[EMPLOYER NAME] also may deduct from your pay your portion of [health/dental/life/[TYPE OF INSURANCE]] insurance premiums and voluntary contributions to a [401(k)/retirement plan/pension plan].

Unless prohibited by state law, other allowable deductions and salary reductions in a workweek include:

Full-day absences for personal reasons other than sickness or disability, including vacation.

[Full-day absences for sickness or disability [pursuant to [EMPLOYER NAME]'s health and welfare benefit plan].]

Offsets for amounts received for jury duty, witness fees, or military pay.

Penalties imposed in good faith for infractions of safety rules of major significance.

Unpaid full-day disciplinary suspensions imposed in good faith for workplace conduct rule infractions.

Full days not worked during the first or last week of employment.

Full-day or partial-day absences for unpaid leave under the Family and Medical Leave Act (FMLA).

No other deductions will be made.

In any workweek in which you performed any work, [EMPLOYER NAME] will not reduce your salary because of:

Partial-day absences for personal reasons, sickness, vacation, or disability (unless leave is covered by the FMLA).

Absence because your worksite is closed on a scheduled work day.

Absences for jury duty, witness attendance, or military leave, except that [EMPLOYER NAME] can offset any fees you received for these services against your salary.

Any other deductions prohibited by federal or applicable state law.]]

OR

[[EMPLOYER NAME] prohibits deductions from an exempt salaried employee's pay except as allowed under the FLSA and applicable state law.]

Complaints

You should review your pay check for errors. If you have questions about any deductions from your pay, believe improper deductions have been made from your pay, or believe that your pay is otherwise incorrect, you [must/should] report your concern to your manager or [the [DEPARTMENT NAME] Department]/[DESIGNATED INDIVIDUAL OUTSIDE EMPLOYEE'S IMMEDIATE CHAIN OF COMMAND] immediately. [EMPLOYER NAME] will promptly investigate all complaints of paycheck errors. If [EMPLOYER NAME] has taken any improper deductions from your pay, or otherwise made any errors in paying you, it will promptly take corrective action, including reimbursing you for any improper deductions[as soon as practicable, but no later than [X] [pay period[s]/weeks] after the error has been established]. In addition, [EMPLOYER NAME] will take reasonable steps to ensure that the error does not recur in the future.

[If you have not received a satisfactory response within [NUMBER] business days after reporting the incident, please contact [NAME/POSITION] at [CONTACT INFORMATION] or use the [EMPLOYER NAME's reporting hotline at 1-800-[xxx-xxxx].]

[EMPLOYER NAME] prohibits and will not tolerate retaliation against any employee because that employee filed a good faith complaint under this policy. Specifically, no one will be denied employment, promotion, or any other benefit of employment or be subjected to any adverse employment action based on that person's good faith complaint. In addition, no one will be disciplined, intimidated, or otherwise retaliated against because that person exercised rights under this policy or applicable law. If you believe you have been the victim of retaliation in violation of this policy, report your concerns to [TITLE]/[DEPARTMENT NAME] Department[or 1-800-###-####] immediately.

2. Performance Review Policy

Most employers implement and maintain a performance review policy to help employees understand what work performance is expected and how and when their performance will be reviewed. The handbook should qualify that promotions and raises may be based in part on performance reviews, but are always discretionary.

Suggested language:

Purpose of Performance Reviews
[EMPLOYER NAME] conducts [annual/semi-annual] performance reviews of all employees. Performance reviews help management ensure that:

- Employees meet reasonable workplace standards and goals.

- Supervisors have an opportunity to assess employee achievement and areas needing improvement with respect to these standards and goals.

- Employees are on notice about supervisor assessments.

Review Process
The performance review process generally functions as described below. [EMPLOYER NAME] reserves the right to modify this process in its discretion.

1. [Self-Assessment. [EMPLOYER NAME] begins the review process with a self-assessment. The self-assessment provides an opportunity for employees to characterize accomplishments since hire or the last review date. These may include goals met or additional achievements above and beyond expectations. The self-assessment also gives employees a chance to describe challenges overcome, lessons learned and suggestions for how management or supervisors can provide additional support.

2. Performance Ratings. Employees are evaluated against an objective set of criteria. Supervisors will assess, across a variety of indicators, whether employees exceed, meet or fail to meet expectations. Examples of areas of assessment include:

- Knowledge of the job.
- Communication skills.
- Productivity and work quality.
- Adaptability to changing circumstances.
- Professionalism.
- Initiative and creativity.
- Time management and reliability.
- Interpersonal skills.
- Leadership abilities.
- Management.
- Goals. Working with supervisors, employees will have an opportunity to set goals for the coming review period. Subsequent reviews will take into consideration goals articulated in prior reviews.

- Training and development needs. Supervisors will suggest, as appropriate and in conjunction with the employee, additional training and development that can be used to help the employee improve performance.
- Employee comments. Finally, the employee will have an opportunity to provide personal commentary and will be asked to sign and date the review along with the supervisor or another employer representative.

3. Discretionary Bonuses

Employers that provide discretionary bonuses to employees should establish in writing that the bonuses are discretionary to reduce the risk of liability for incorrect calculation of overtime. If bonuses become the norm, given to all, and are expected, they are no longer discretionary.

4. Meal and Rest Periods

Although not required under federal or state law with certain exception, many employers choose to implement and maintain a meal and rest period policy. Note that the FLSA does require covered employers to provide reasonable break time for employees who are nursing, or for breastfeeding mothers to express breast milk. Best practice is for these employers to implement and maintain a written policy to cover these situations.

5. Employee Referral Policy

As part of their recruiting efforts, many employers pay bonuses to employees for referring qualified candidates for open job postings. Employers that pay referral bonuses should implement and maintain an employee referral policy that provides the conditions under which a bonus will be a part.

6. Employee Benefits

Employers frequently provide benefits to their employees such as health insurance coverage and 401(k) retirement plans, and include a brief mention of these employee benefits in their handbook. Employers should ensure that they only mention those employee benefits that they intend to sponsor. Additionally, since the rules governing certain benefits are complex, and details of a benefit program can change, an employer should:

- Refer employees to the benefit plan documents for specific details. Best practice is to remind employees where these documents are located; and

- State that benefit plan documents are controlling.

Employers should avoid referring to any benefit arrangements that they do not intend to sponsor when discussing employee benefits in their employee handbooks.

7. Time Away from Work and Employee Leave

An employer's handbook should include the employer's policies on time off for holidays, vacation, sick days and eligibility, as well as the procedures for each type of leave the employer provides to employees.

8. Holidays, Vacation and Sick Days

Although private employers are not required by federal law to provide employees with paid holidays, vacation or sick days, many employers do so. Employers typically designate paid holidays company-wide to most, if not all, employees. Some employers provide a certain number of vacation days or sick days depending on the employee's job classification or tenure with the organization. Best practice is to inform employees of:

- The designated paid holidays;

- The number of vacation and sick days an employee may receive and how this time is accrued;

- The policy for requesting approval of vacation days and notifying the employer if an employee must take a sick day;

- Whether vacation or sick days may be carried over from year to year and, if so, how many; and

- Whether an employer pays out any unused but accrued vacation or sick days on termination and the conditions under which an employee can receive payment. In Louisiana, vacation is usually considered a wage but sick time is not. The policy should clearly state that any unused sick time is not paid upon separation from employment.

Some employers maintain policies that provide that unpaid time off may be requested and granted at the employee's discretion.

9. Leave Sharing and Vacation Donation

Some private employers implement leave-sharing programs, also known as leave-donation or vacation-donation programs, in connection with their policies on vacation, sick days and other paid time off. Leave-sharing programs generally allow employees to donate some or all of their accrued but unused vacation, sick days or other paid time off to a paid time off or leave-sharing "bank" that other employees can draw from in certain circumstances. Any such policy should include reasonable parameters regarding the circumstances in which time can be donated and limits on donations.

10. Bereavement Leave Policy

Since employers are not required under federal law to provide bereavement leave, they are not legally required to have a written policy. For employers that provide bereavement leave, the best practice is to implement and maintain a written policy that outlines the eligibility requirements and procedures for employees who are absent from work for bereavement leave. Some policies place limits on each leave and total annual leave that may be taken.

11. Family and Medical Leave Policy

Employers covered by the Family and Medical Leave Act of 1993 (FMLA) must include a general notice explaining the FMLA's provisions in their employee handbook (29 C.F.R. § 825.300). Employers should ensure that the policy accurately provides which category of employees are eligible for leave and the requirements that need to be met for such eligibility. An employer who misrepresents information about an employee's eligibility in FMLA leave in its employee manual may be liable for FMLA interference under an equitable estoppel theory. See *Tilley v. Kalamazoo Cnty. Road Comm'n*, No. 14-1679, 2015 WL 304190 (6th Cir. 2015).)

There are numerous examples of FMLA Leave policies, when can be lengthy, on time. However, it may be more efficient to refer the employee to the company representative who can best explain the procedures and provide assistance to the employee.

12. Pregnancy and Parental Leave Policy

Best practice is for employers that provide pregnancy and parental leave to their employees to implement and maintain a pregnancy and parental leave policy in their employee handbook. This should outline the eligibility requirements and procedures for employees who are absent from work for pregnancy or parental leave.

13. Military Service Leave Policy

All US employers must provide military service leave to employees under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). Best practice is to implement and maintain a military service leave policy that outlines the general eligibility requirements and procedures for employees who are absent from work to perform military service. The policy may refer the employee to the company representative who can best explain the leave policy and assist the employee.

14. Jury Duty Leave Policy

Employers should implement and maintain a written policy that outlines the eligibility requirements and procedures for employees who are absent from work for jury duty leave. In Louisiana, the employer must allow one day of leave to serve on a state petit or grand jury or central jury pool. In addition, Louisiana state law prohibits terminating or taking an adverse action against an employee for serving on a jury. See La. Rev. Stat. 23:965. The policy should note that employees should return to work daily if dismissed from duty before a certain time.

15. IT Resources and Communications Systems Policy

Most employers implement and maintain an IT resources and communications systems policy even though they are not required by federal law to do so. Employees' improper and inappropriate use of an employer's IT resources and communications systems carries various legal risks for the employer such as potential unauthorized disclosure of confidential and proprietary information, employee harassment and privacy violations. An employer can minimize these legal risks by implementing and maintaining a written policy.

IV. DRAFTING RESPONSIBLE SOCIAL MEDIA POLICIES

Employees are increasingly using various types of social media to discuss workplace issues, ranging from generalized gripes about their jobs to specific criticism of supervisors and working conditions. Employers are naturally inclined to respond these comments and complaints, but with little legislation, court precedent or agency guidance upon which to rely, employers are not sure how they may lawfully regulate their employees' social media use.

A. Use of Social Media

The National Labor Relations Board (NLRB), which enforces the National Labor Relations Act (NLRA), became the first federal agency to decide how employees' social media use fits in existing labor and employment laws.

The NLB has found most social media policies unlawful because those interfere with employees' rights to act collectively. It has found employers in violation for policies that

- prohibit posts that are inaccurate or misleading or that contain offensive, demeaning or inappropriate remarks;
- prohibit posts discussing non-public information, confidential information, and legal matters;
- threaten employees with discipline or criminal prosecution for failing to report violations of an unlawful social media policy;
- prohibit the use of the employer's logos or trademarks;
- discourage employees from "friending" co-workers;
- prohibit online discussion with government agencies concerning the company; and
- prohibit employees from making statements that are detrimental, disparaging or defamatory to the employer or discussing workplace dissatisfaction.

A social media policy can address three discrete concerns: (1) use of social media in evaluating applicants; (2) limits on social media content by existing employees; and (3) lost work time in using social media at work.

Suggested language:

> Use of social media presents certain risks and carries with it responsibilities. To assist the employee in making responsible decisions about the use of social media, [Employer] has established these guidelines for appropriate use of social media. This policy applies to all employees.

1. **Guidelines**: Social media can mean many things, and includes all means of communicating or posting information or content of any sort on the Internet, including to the employee's own or someone else's web log or blog, journal or diary, personal web site, social networking or affinity web site, web bulletin board or chat room, whether or not associated or affiliated with [Employer], as well as any other form of electronic communication, including but not limited to Facebook, Twitter, Tumblr, Flickr, Instagram, etc.

The employee is entirely responsible for what he/she post online. Before creating online content, consider some of the risks and rewards that are involved.

2. Know and follow the rules: Carefully read these guidelines, the company's [EEO policies, Code of Conduct, etc.], and ensure any postings are consistent with these policies. Inappropriate postings that may include discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct will not be tolerated and may subject the employee to disciplinary action up to and including termination.

3. Respectfulness: The employee should always be courteous to fellow employees, clients, customers, vendors, and suppliers. You are more likely to resolve work problems by speaking directly with your co-workers or supervisor(s) than by posting complaints on social media. Nevertheless, if you decide to post complaints or criticism, avoid using statements, photographs, video or audio that are malicious, obscene, threatening or intimidating, that disparage employees, clients, customers, vendors or suppliers, or that might constitute harassment or bullying. Examples of such conduct might include offensive posts meant to intentionally harm someone's reputation, or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy.

4. Honesty and accuracy: The employee should always be honest and accurate when posting information or news, and if makes a mistake, correct it quickly. The employee should never post any information or rumors that he/she knows to be false about the employer, fellow employees, consultants, clients, customers, vendors, suppliers or competitors.

5. All content posted should be appropriate and respectful: Maintain the confidentiality of company trade secrets and confidential information. Trade secrets may include information regarding the development of systems, processes, products, know-how and technology. Do not post internal reports, policies, procedures or other internal business-related

confidential communications. The employee should not create a link from his/her blog, website or other social networking site to a company website without identifying himself/herself as a company employee.

6. Social media at work: Do not use social media while at work or on company equipment, unless it is work-related and authorized. Do not use [Employer's] email to register on blogs, social networks, or other forms of social media.

7. Personal opinions only: The employee may never represent himself/herself as a spokesperson for [Employer]. If the company is a subject of the content the employee is creating, be clear and open that he/she is an employee and clarify that his/her views do not represent those of the company, fellow associates, members, customers, suppliers or people working on behalf of the company. An employee who publishes a blog or post online related to the work he/she does should clarify that he/she is not speaking on behalf of [Employer].

8. No retaliation: [Employer] prohibits taking adverse action against any employee for reporting a possible deviation from this policy or for cooperating in an investigation. Any employee who retaliates against another employee for reporting a possible deviation from this policy or for cooperating in an investigation will be subject to disciplinary action, up to and including termination.

B. Bring Your Own Device to Work Policy

Employers that allow employees to use their own smartphones, tablets and other mobile devices for work either at the office or during nonworking hours should consider implementing and maintaining a "bring your own device to work" policy. A written policy may help employers avoid some of the risk associated with dual use devices.

Suggested language:

Scope

Employees of [Employer] may have the opportunity to use their personal electronic devices for work purposes when authorized in writing, in advance, by the employee and management. Personal electronic devices include personally owned cellphones, smartphones, tablets, laptops and computers.

The use of personal devices is limited to certain employees and may be limited based on compatibility of technology. Contact the human resource (HR) department for more details.

Procedure

Device protocols

To ensure the security of [Employer] information, authorized employees are required to have anti-virus and mobile device management (MDM) software installed on their personal mobile devices. This MDM software will store all company-related information, including calendars, e-mails and other applications in one area that is password-protected and secure. [Employer]'s IT department must install this software prior to using the personal device for work purposes.

Employees may store company-related information only in this area. Employees may not use cloud-based apps or backup that allows company-related data to be transferred to unsecure parties. Due to security issues, personal devices may not be synchronized with other devices in employees' homes. Making any modifications to the device hardware or software beyond authorized and routine installation updates is prohibited unless approved by IT. Employees may not use unsecure Internet sites.

All employees must use a preset ringtone and alert for company-related messages and calls. Personal devices should be turned off or set to silent or vibrate mode during meetings and conferences and in other locations where incoming calls may disrupt normal workflow.

Restrictions on authorized use

Employees whose personal devices have camera, video or recording capability are restricted from using those functions anywhere in the building or on company property at any time unless authorized in advance by management.

While at work, employees are expected to exercise the same discretion in using their personal devices as is expected for the use of company devices. [Employer's] policies pertaining to harassment, discrimination, retaliation, trade secrets, confidential information and ethics apply to employee use of personal devices for work-related activities.

Excessive personal calls, e-mails or text messaging during the workday, regardless of the device used, can interfere with employee productivity and be distracting to others. Employees must handle personal matters on non-work time and ensure that friends and family members are aware of the policy. Exceptions may be made for emergency situations and as approved in advance by management. Managers reserve the right to

request employees' cellphone bills and use reports for calls and messaging made during working hours to determine if use is excessive.

Nonexempt employees may not use their personal devices for work purposes outside of their normal work schedule without authorization in advance from management. This includes reviewing, sending and responding to e-mails or text messages, responding to phone calls, or making phone calls.

Employees may not use their personal devices for work purposes during periods of unpaid leave without authorization from management. [Employer] reserves the right to deactivate the company's application and access on the employee's personal device during periods of unpaid leave.

An employee may not store information from or related to former employment on the company's application.

Family and friends should not use personal devices that are used for company purposes.

Privacy/company access

No employee using his or her personal device should expect any privacy except that which is governed by law. [Employer] has the right, at any time, to monitor and preserve any communications that use the [Employer]'s networks in any way, including data, voice mail, telephone logs, Internet use and network traffic, to determine proper use.

Management reserves the right to review or retain personal and company-related data on personal devices or to release the data to government agencies or third parties during an investigation or litigation. Management may review the activity and analyze use patterns and may choose to publicize these data to ensure that [Employer]'s resources in these areas are being use according to this policy. Furthermore, no employee may knowingly disable any network software or system identified as a monitoring tool.

Company stipend

Employees authorized to use personal devices under this policy will receive an agreed-on monthly stipend based on the position and estimated use of the device. If an employee obtains or currently has a plan that

exceeds the monthly stipend, [Employer] will not be liable for the cost difference.

Safety

Employees are expected to follow applicable local, state and federal laws and regulations regarding the use of electronic devices at all times.

Employees whose job responsibilities include regular or occasional driving must never use their personal devices while driving. Regardless of the circumstances, including slow or stopped traffic, employees are required to pull off to the side of the road and safely stop the vehicle before placing or accepting a call or texting. Special care should be taken in situations involving traffic, inclement weather or unfamiliar areas.

Employees who are charged with traffic violations resulting from the use of their personal devices while driving will be solely responsible for all liabilities that result from such actions.

Employees who work in hazardous areas must refrain from using personal devices while at work in those areas, as such use can potentially be a major safety hazard.

Lost, stolen, hacked or damaged equipment

Employees are expected to protect personal devices used for work-related purposes from loss, damage or theft.

In an effort to secure sensitive company data, employees are required to have "remote-wipe" software installed on their personal devices by the IT department prior to using the devices for work purposes. This software allows the company-related data to be erased remotely in the event the device is lost or stolen. Wiping company data may affect other applications and data.

[Employer] will not be responsible for loss or damage of personal applications or data resulting from the use of company applications or the wiping of company information. Employees must immediately notify management in the event their personal device is lost, stolen or damaged. If IT is unable to repair the device, the employee will be responsible for the cost of replacement.

Employees may receive disciplinary action up to and including termination of employment for damage to personal devices caused willfully by the employee.

Termination of employment

Upon resignation or termination of employment, or at any time on request, the employee may be asked to produce the personal device for inspection. All company data on personal devices will be removed by IT upon termination of employment.

Violations of policy

Employees who have not received authorization in writing from [Employer] management and who have not provided written consent will not be permitted to use personal devices for work purposes. Failure to follow [Employer] policies and procedures may result in disciplinary action, up to and including termination of employment.

C. Use of Company Equipment

If employees have access to company owned equipment, make sure you have policies that protect your interests from its misuse. The policies should include the following:

1. Employees have no expectation of privacy regarding the use of company equipment and that their use may be monitored.
2. Company equipment is for business use only.
3. Be careful to whom they respond; be aware of spam or viruses.
4. Employees cannot add software to the Employer's system without prior approval

Wage and Benefit Issues

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Wage and Benefit Issues

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General Outline (Slightly Amended)

A. **Fair Labor Standards Act (FLSA)**

1. Misclassification of Employees (Exempt/Non-Exempt)
2. Unpaid Overtime or Prework Time
3. Calculating the "Regular Rate"
4. Meal and Rest Breaks
5. Fluctuating Workweek Pay and Tip Credit
6. Unauthorized Work and Working Off-the-Clock
7. Non-Exempt Employee Travel

B. **Leave Policies: Required by Law?**

1. Vacation and Sick Leave
2. Jury Duty and Voting Leave
3. Military Leave – Uniformed Services Employment and Reemployment Rights Act (USERRA)
4. Pregnancy Leave Under Louisiana Law
5. Family and Medical Leave Act (FMLA)

    a. Covered Employers and Eligible Employees
    b. Qualifying Reasons for Leave
    c. Notice Obligations
    d. Certification and Medical Documentation Requirements
    e. Leave, Reinstatement and Other Employee Rights

C. **Part-Time Employees and Temps: Wage and Benefit Obligations**

D. **Unpaid Internships and Training Programs**

E. **Record-Keeping: What and How Long**

Fair Labor Standards Act (FLSA)

The Fair Labor Standards Act., 29 U.S.C. § 201 *et seq.*, is a 1938 law that regulates minimum wage, overtime pay, and child labor. The FLSA has been amended numerous times during its history, most notably by the Portal-to-Portal Act in 1947 and the Equal Pay Act in 1963. It nevertheless remains, at its core, New Deal-era legislation that is designed with the 1930s industrial workplace in mind. As a result, the FLSA may not always make perfect sense in light of the modern workplace, and the Department of Labor, courts, and employers have struggled to apply its provisions to the modern "knowledge" economy. This presentation addresses some of the common issues companies face with respect to FLSA compliance.

Misclassification of Employees (Exempt/Non-Exempt)

The FLSA generally applies to all employees who work at companies with gross revenues over $500,000 per year, and to employees of smaller companies if the employee directly works in interstate commerce. All covered employees must be paid at least $7.25 an hour, and a time-and-a-half premium for all hours worked past forty in a single workweek.

The FLSA exempts certain categories of employees from these requirements. Some employees are exempted only from the overtime requirement, and other employees are exempted from both the overtime and the minimum wage requirements. There are nearly *fifty* different exemptions, most of which are set forth in Section 7 or Section 13 of the FLSA. Some of these exemptions are extraordinarily specific – for example, announcers working for radio and television stations in towns of less than 100,000 people are not eligible for overtime pay. 29 U.S.C. § 213(b)(9). Some are extraordinarily broad – anyone who is "employed in agriculture by a farmer" is likewise overtime-exempt. 29 U.S.C. § 213(b)(13).

The three most commonly litigated exemptions in the modern workplace are the "white collar" exemptions, covering administrative, executive, or professional employees. All of these exemptions consist of a salary basis test and a duties test, both of which must be satisfied. A common beginner's mistake is assuming that anyone who is paid a salary does not have to be paid overtime. Determining an exemption is never that simple.

The first prong of the white collar exemptions is the salary basis. A white collar employee must be paid at least $455 a week, every week. The salary cannot be subject to deductions for anything less than a whole-day absence. Some businesses will deduct from supposedly "salaried" employees who take off to go to the doctor. If there is a deduction for partial-day absences, the employee is not salaried, he is hourly. That means overtime rules apply. Please note that in 2016 the Department of Labor sought to promulgate a regulation increasing the salary basis to $913 a week. That proposed regulation was stayed and overturned by a court in Texas, and that decision is currently pending before the 5th Circuit. The new administration's Department of Labor has hinted in court filings that it plans to seek an increase of the salary basis from the prior $455 per week, but not to the $913 level. Until the Fifth Circuit rules on the pending appeal, and the Department of Labor provides additional information about its new proposed rule (both of which may occur between the submission of these materials and the date of the seminar), the status of the salary basis test is uncertain at best.

The second prong of the white collar exemption test is the duties test. This is where the grey area lies – does the employee's primary duty qualify as exempt, and does the employee exercise the requisite amount of independent authority and discretion?

Executive Exemption

- The employee's primary duty is managing the enterprise, or a customarily recognized department or subdivision of the enterprise;

- The employee customarily and regularly directs the work of at least two or more other full-time employees or their equivalent; and
- The employee has the authority to hire, fire, promote, or demote other employees, or the employee's suggestions and recommendations must be given particular weight.

Administrative Exemption

- The employee's primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Professional Exemption – Learned Professional and Creative Professional

- The employee's primary duty requires advanced knowledge, is predominantly intellectual in character, and requires the consistent exercise of discretion and judgment;
- The employee works a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

OR

- The employee exercises invention, imagination, originality or talent, and
- The employee works in a "recognized creative endeavor."

The burden of establishing an exemption lies with the employer, so it is critical that employers maintain records showing why they made certain exemption decisions, and what documents or information that decision was based on.

There are also special regulations regarding highly compensated employees, which means anyone who makes more than $100,000 per year. (Under the proposed new regulations, this number would have increased to approximately $134,000). If an employee qualifies as highly compensated, the employer's burden on the duties test is lessened, and the employer must only show that the employee regularly performs at least one exempt task. The employer does not have to prove that the worker's primary duty is exempt. 29 CFR § 541.601.

Unpaid Overtime or Prework Time

Many companies have faced lawsuits alleging unpaid "prework" time, or claiming that employees continued working after they had punched out. These are often referred to as preliminary and postliminary activities. Whether these activities qualify as "hours worked" under the FLSA, and therefore must be paid, is often a difficult question of fact.

The FLSA is full of critical terms that are not meaningfully defined by the statute. It does not define "work" or "workweek," and its definitions of "employer" and "employee" are completely circular and unhelpful. In the 1940s, there was a significant amount of litigation regarding the compensability of time spent by employees between the moment they arrived on the employer's premises and the moment when they began work. In deciding these cases, the Supreme Court generally took a broad and expansive view of the phrase "hours worked." In two seminal cases, it held that miners must be paid for time spent traveling between mine portals and underground work areas, and that workers must be paid for time spent walking from timeclocks to work benches.

Tennessee Coal, Iron & Rail Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944); *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

Congress responded by passing the Portal-to-Portal Act of 1947, with the express intent to end these employee-friendly interpretations which were "bringing about financial ruin of many employers." The Portal-to-Portal Act stated that the following activities were not compensable: (1) walking, riding, or traveling to and from the "actual place of performance" of the employee's duty; and (2) activies that are preliminary or postliminary to the employee's principal activity. In the best tradition of the FLSA, the terms preliminary and postliminary were not defined.

In subsequent decisions interpreting the Portal-to-Portal Act, the Supreme Court has held that activities are compensable if they are an "integral and indispensable part of the principal activities." *Steiner v. Mitchell*, 350 U.S. 247, 252-253(1956). This language does not necessarily lend itself to a "one size fits all" rule. In *Steiner*, the Court held that battery plant workers should be paid for time spent showering and changing clothes after their shift, because the chemicals they handled were toxic. Meatpackers who were required to sharpen their knives before their shifts must be paid for their time, because you cannot cut meat without a sharp knife. *Mitchell v. King Packing Co.*, 350 U.S. 260 (1956). On the other hand, poultry packers need not be paid for time spent <u>waiting</u> to put on their protective gear, since that activity was "two steps" removed from productive activity. *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005).

The Department of Labor regulations follow along the same general lines. For example, these regulations state that changing clothes before or after work is usually not paid time. If the clothing or gear at issue is actually necessary to perform the worker's primary duty, he must be paid for that time. If it is merely a matter of convenience, it is not compensable. *Cf.* 29 C.F.R. 790.7 and 790.8. In short, to determine whether preliminary and postliminary work is compensable, the primary question is whether the

employee could perform his or her principal activity without it. There is a significant body of jurisprudence analyzing this question within a whole host of industries and positions.

The predicate behind the passage the Portal-to-Portal Act – whether miners should be paid for time spent riding in minecars – may seem far removed from the average modern workplace. However, the Act remains highly relevant to this day. For example, in recent years many employers have begun requiring employees to undergo security checks upon entering and exiting the work facility. Courts were sharply divided on whether such time was compensable under the FLSA until 2014, when the Supreme Court issued its opinion in *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513 (2014). The Court held that this time was not compensable because it was not "integral and indispensable" to the employees' actual duties. As the Court noted, "Integrity Staffing could have eliminated the screenings altogether without impairing the employees' ability to complete their work." In overturning the Ninth Circuit, the Court noted that the lower court "erred by focusing on whether an employee *required* a particular activity." Under the Portal-to-Portal Act jurisprudence, whether an activity is required is simply not the determinative question – after all, the mine in *Tennessee Coal* certainly "required" its workers to enter the mine shaft before beginning work, but Congress expressly disapproved of that decision and amended the law to reach the contrary result.

Calculating the "Regular Rate"

Calculating the FLSA regular rate is a deceptively tricky area of FLSA compliance. Section 207 of the FLSA states that an employee shall not work more than forty hours in a workweek "unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the **regular rate at which he is employed**." Employers tend to focus on the

first part of this sentence, and assume that determining the time-and-a-half overtime rate is simple. That is not always the case.

Many employers miscalculate the regular rate because they interpret "regular rate" to mean the employee's nominal hourly rate. If an employee is regularly paid $10 an hour, his overtime pay is $15 an hour. This is accurate for some employees, but not all. As a general rule, the regular rate includes "all remuneration for employment paid to, or on behalf of, the employee," with seven statutory exceptions. That means that the regular rate must include:

- Commissions
- Piece Rate Payments
- Most Production Bonuses
- Payments other than Cash (e.g., food and lodging)

Parties cannot agree to a certain regular rate, or set an artificial regular rate. Instead, the Supreme Court has held that the regular rate must be determined based on the actual payments made to each employee in that particular workweek. The last sentence is critical – if payments such as commissions or bonuses vary from week to week, the regular rate can also vary. While recalculating the regular rate is a question of simple arithmetic that can easily be handled by payroll software, it is crucial to ensure that the software is making the right calculations.

There are seven statutory exceptions to the regular rate, which are interpreted narrowly. These seven exceptions, set forth in Section 207(e) of the FLSA, are:

- Gifts and payments on special occasions (i.e., Christmas bonus);

- Payments "which are not made as compensation for his hours of employment" including expense reimbursements or payments for occasional periods when no work is performed;
- Certain discretionary bonuses, (as discussed below, the standards for whether a bonus is truly discretionary are extremely strict);
- Contributions by the employer to welfare plans or payments made by the employer pursuant to certain profit-sharing, thrift and savings plans (e.g., 401k match);
- Premiums paid for exceeding certain hours in a workday or workweek;
- Premiums for weekend or holiday pay;
- Premiums for work outside of established hours; and
- Certain value or income from stock grants or rights.

Some of these exceptions are relatively simple and straightforward, some are less so. The most heavily litigated exception involves bonuses. In some industries, a significant portion of an employee's yearly pay comes in an end-of-the-year bonus. If this bonus is included in the regular rate, it must be *retroactively allocated* across workweeks to calculate the regular rate, and the employee must be paid additional overtime for the entire year. To qualify as a discretionary bonus, both the amount of the bonus and the existence of the bonus must be discretionary. If an employee is guaranteed a bonus, but the employer has discretion regarding the amount, it must be considered in the regular rate. Indeed, if there is any "contract, agreement, or promise causing the employee to expect such payments regularly," the bonus is non-discretionary and must be included in the regular rate.

Expense reimbursements are also a common minefield for regular rate issues. Traditional reimbursements are noncontroversial – e.g., the employee spends $100 on a hotel room on a business trip, submits a receipt, and is repaid $100 on the next paycheck. This sum is not included in the regular rate because it not compensation for hours worked,

it is recoupment of expenses actually incurred. In certain industries, the custom is to make lump sum *per diem* payments rather than requiring employees to submit itemized receipts. This is acceptable, provided that the *per diem* is a "reasonable approximation" of the actual expenses incurred by the employee. 29 CFR 778.216. Employers sometimes offer a *per diem* as a sort of extra compensation, meaning that it goes above and beyond the actual expenses incurred. A *per diem* that is not tied, at least loosely, to the employee's actual expenses, must be included in the regular rate.

Meal and Rest Breaks

The FLSA has no specific requirements for meal and rest breaks. While some states, most notably New York and California, do have state laws requiring meal and rest breaks, Louisiana does not (nor do Mississippi or Texas). Therefore, for employees who are 18 years old or older, meal breaks are wholly left to the discretion of the company.

Under Louisiana law, only minor employees are legally required to take meal breaks. For every five hours a minor works, he must take a half-hour meal break. La. Rev. Stat. § 23:213. This break may be unpaid. (Employers who hire minors are subject to a host of additional limitations and record-keeping requirements under Louisiana law, and would do well to read those laws carefully).

The FLSA does have requirements for when meal breaks must be paid. To qualify as a *bona fide* meal break under FLSA regulations, the employee must be relieved of all job responsibilities and have at least 20 minutes off. 29 CFR §§ 785.18-19. If a receptionist is instructed that she must eat lunch at her desk, and doesn't have to work unless someone happens to call, that time must be paid. If a worker sets off for a ½ hour lunch break and is called back to deal with an emergency after 15 minutes, that time must be paid.

One common trouble spot arises when employers take an "automatic" meal break deduction from timecards. There have been dozens of lawsuits where employees later came back and said they were required to work through lunch, and demanded their ½ hour of daily overtime. Any employer who chooses to implement an automatic meal break deduction should have a clear and formal system for employees to reclaim that lost time. The employer must also make sure that employees are *actually relieved of duty* during the lunch break. If the employer has reason to believe that employees are not taking true lunch breaks, it should require employees to punch in and punch out for lunch.

Fluctuating Workweek Pay and Tip Credit

Fluctuating workweeks ("FWW") are one available method for reducing the amount of overtime pay that must be paid to employees whose workweeks are unpredictable. In short, employees are paid a guaranteed salary that is intended to cover all hours actually worked during the week. When the employee works more than 40 hours in a week, he is paid an extra overtime premium that is .5 times his regular rate. The "regular rate" thus fluctuates based on the numbers worked in any given week – because the set salary does not vary, but the hours do, the overtime rate will (counterintuitively) decrease as more hours are worked. (Under no circumstances should the regular rate drop below $7.25). There are 4 requirements which must be met to implement a valid FWW system:

(1) the employee's hours must actually fluctuate from week to week;

(2) the employee must receive a fixed salary that does not vary with the number of hours worked during the week (excluding overtime premiums);

(3) the fixed amount must be sufficient to provide compensation every week at a regular rate that is at least equal to the minimum wage; and

(4) the employer and employee must share a "clear mutual understanding" that the employer will pay that fixed salary regardless of the number of hours worked.

29 CFR 778.114; *Flood v. New Hanover County*, 125 F.3d 249, 252 (4th Cir. 1997).

Each of these four factors must be satisfied; the road to FWW is fraught with pitfalls. Employers should not attempt to implement a FWW system without legal assistance.

Unauthorized Work and Working Off-the-Clock

When an employer requires or pressures an employee to work off the clock without recording all hours worked, the FLSA violation is clear. But what if the employee "volunteers" to work extra hours, without asking permission to do so? In almost all cases, the time must still be paid. An employer can give an employee a warning if he works off the clock; unauthorized overtime may be grounds for suspension, writeup, even termination. *But it must be paid*.

"Employ," according to Section 203 the FLSA, means "to suffer or permit to work." (As noted above, the FLSA definitions provision is not a model of statutory precision.) The Supreme Court has read this section extremely broadly. Notably, the

statute does not say "to *require* to work." Courts have unanimously held that an employer is not excused from its obligation to pay simply because it did not ask the employee to work certain hours. As long as the employer "knows or has reason to believe that [the employee] is continuing to work," the time is working time. 29 C.F.R. 785.11.

Many companies have policies against unauthorized overtime, and the policies often state that an employee must get pre-approval from a supervisor before working overtime. Those policies are lawful; in fact, the FLSA regulations state that "it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed." 29 C.F.R. 785.13. However, management *cannot* enforce this rule by refusing to pay for unauthorized overtime. Even if an employee works unauthorized overtime contrary to explicit and direct instructions, the time must be paid. While an employee may be disciplined for failure to request overtime, that discipline must come later. (One word of caution – in some cases, overly zealous rules against paying for overtime have been used as evidence against companies in overtime lawsuits. Too much emphasis placed on controlling payroll costs can be seen as proof that the company is unwilling to pay for overtime and wants the employees to work extra time for free.)

One modern twist on this rule is off-the-premises work. In days past, the vast majority of workers had to be physically presents at their workplace to perform any work, so tracking hours was relatively easy. An increasing number of individuals are now able to work from home; the cell phone and the blackberry worked a revolution in wage and hour law. Time spent answering calls, reading emails, or logging in to work systems from home is working time. While employers tend to dismiss this time as inconsequential, it can add up. The regulations state: "The rule is also applicable to work performed away from the premises or the job site, or even at home. If the employer knows or has reason to believe that the work is being performed, he must count the time

as hours worked." 29 C.F.R. 785.12. If an employee sends an email after hours, the employer has "reason to believe" that he or she has performed work and is therefore legally obliged to pay.

Non-Exempt Employee Travel

Whether non-exempt employees must be paid for travel time is a complex question subject to a series of complex and seemingly inconsistent rules. The regulations define travel time as working or nonworking based on the location, the time of the travel, the *method* of travel, and the day the travel occurs. Whether or not these regulations make strict logical sense is beside the point, as they must be followed. In brief, the rules are as follows:

Home to Work Travel: An employee who travels from home before the regular workday and returns at the end of the workday is not working.

Travel Within the Day: Travel which occurs during the workday – e.g., a repairman who drives from site to site during the day – is working time.

One Day Assignments : An employee who regularly works at a fixed location in one city is given a special one day assignment in another city and returns home the same day. Time traveling to and returning from the other city is work time, except that the employer may deduct the time the employee would normally spend commuting to the regular work site.

Overnight Travel Away from Home: Travel away from home is clearly work time when it "cuts across the employee's workday." The time is not only hours worked on regular working days during normal working hours but also during corresponding hours on nonworking days (weekends).

The Department of Labor has announced that, as an "enforcement policy," it will not consider as work time time spent travelling outside of regular working hours as a passenger.

Work Performed While Travelling. If the employee actually works while travelling, that time is compensable. This regulation takes on special significance now that the airlines have seen fit to bless us with in-air wifi as a matter of course.

See 29 CFR, part 785.

Leave Policies: Required by Law?

Vacation and Sick Leave

*V*acation and sick leave are not required by federal or Louisiana law, with the exception of the Family and Medical Leave Act discussed below. This is a rapidly changing area of law, however, particularly at the state and municipality level. Many cities have begun passing their own sick leave laws, including San Francisco, New York, Philadelphia, and Washington D.C. In many of these cities, there is something of a "race" to see who can provide the most generous sick leave benefits. For the most part these ordinances have not arrived in the South, but they will soon.

Vacation leave, as opposed to sick leave, is not required in any US jurisdiction. However, if a company agrees to offer employees vacation leave, that leave becomes a vested right, although it can be subject to employer-mandated caps and reasonable "use-it-or-lose-it" policies. Under Louisiana law, vacation leave is considered equivalent to earned wages that must be paid out on termination. La. Rev. Stat. § 23:631(D). Failure to pay vacation pay (or any other wages) on termination creates a significant legal liability for the company. Not only will the employee be entitled to the entire amount of the unpaid wages or vacation, he can also recover for up to *ninety days continuing wages* as penalties. The Louisiana wage statutes also provide for payment of the employee's attorney fees and costs. La. Rev. Stat. § 23:632. Underpaying an employee's final paycheck is an expensive mistake.

Jury Duty and Voting Leave

Federal law has no provisions protecting jury leave or voting leave. However, Louisiana state law does contain limited protections for employers who are called to do either. First, no employee may fire an employer for attending jury duty. There is no limit to this leave; the employee is entitled to keep his job no matter how long the jury remains impaneled. One day of jury duty must be paid, and the employee cannot be forced to use up his vacation or PTO time. La. Rev. Stat. § 23:965. After the first day, jury leave may be unpaid.

Louisiana law does not require employers to offer time off to vote. However, it does forbid employers from taking any action against employees for participating in politics, running for office, or otherwise exercising their political rights. La. Rev. Stat. § 23:961. Arguably, if an employee was terminated or disciplined for voting, the employer's action could run afoul of this law.

Although it does not necessarily fit here, Louisiana also has a little-known school leave statute. Workers with dependent children may take up to 16 hours of leave within a 12 month period to attend school functions for their kids.

Military Leave - Uniformed Services Employment and Reemployment Rights Act (USERRA)

The USERRA, codified at 38 U.S.C. § 4301 *et seq.*, is a federal law intended to protect returning veterans and National Guardsmen who are called to active duty. Employers must be extremely cognizant of these rights before taking any kind of an adverse employment action against a veteran or member of the National Guard.

The core right conferred by the USERRA is the right to reinstatement upon returning from a deployment. Reinstatement must be to the job and benefits the employee would have enjoyed had he or she not been absent – so the employee cannot

"fall behind" in seniority or pension vesting because of his absence. However, this right is certain to certain limitations:

- The employee must provide advance written or verbal notice of service;
- The employee has five years or less of cumulative service in the uniformed services while with that particular employer;
- The employee returns to work or applies for reemployment in a timely manner after conclusion of service (the amount of time deemed "reasonable" depends on the length of the service); and
- The employee is not separated from service with a disqualifying discharge or under other than honorable conditions.

38 U.S.C. § 4312.

The employee is also entitled to retain his or her civilian benefits, such as health benefits, while on service, or to immediate reinstatement to the health plan upon returning from service. Finally, there is a limited time frame (again, depending on the length of the deployment) during which the at-will presumption disappears and the employee may only be fired for good cause. 38 U.S.C. § 4316.

The USERRA also states that employees may not discriminate or retaliate against current or former members of the uniformed services because of their service. This statute reverses the usual burden of proof and states that the employer must provide that the termination would have occurred in the absence of the military connection. The USERRA also allows for recovery of liquidated damages and attorney's fees, and states that no court fees or costs may be assessed against a plaintiff seeking relief under the statute.

Pregnancy Leave Under Louisiana Law (La. Rev. Stat. § 23:341-342)

Louisiana law allows leave for pregnant employees which is, in some ways, more generous than the Family and Medical Leave Act discussed below. This law covers any employer with more than 25 employees in 20 or more calendar weeks within the preceding calendar year. Essentially, this law states that pregnant employees are entitled to whatever leave would otherwise be available to other workers who are, for whatever reason, unable to work. It also requires the employee to offer at least 4 months of unpaid leave to an employee who is affected by pregnancy, childbirth, or related medical conditions, even if such leave is not granted for others with temporary disabilities.

This law also makes it illegal to discriminate against a pregnant employee, or to refuse any promotion, training, or other rights of employment because of pregnancy and childbirth. It also imposes on employers a duty to grant a transfer to a less strenuous or hazardous position for the duration of the pregnancy, upon request.

Family and Medical Leave Act (FMLA) (29 U.S.C. § 2601 et seq.)

The Family and Medical Leave Act, or FMLA, is a federal law that provides employees with the right to leave for serious health conditions – both their own and those of close family members.

The FMLA only applies to "covered employers," which are (1) private companies who employed more than 50 workers in 20 or more weeks within the last two calendar years, (2) certain public entities, and (3) schools. 29 U.S.C. § 2611. The Act only covers employees who work in locations with more than 50 employees within 75 miles. *Id.* Therefore, employees at small and isolated branches of large companies may not be covered by the FMLA, even if other employees in the main office are covered.

There are also individual eligibility requirements which each worker must meet to become eligible for leave. The employee must have worked for the employer for at least 12 months. In addition, within the most recent 12 months before requesting leave, the employee must have worked at least 1,250 "hours of service." (This translates to about 31

full forty-hour weeks). Therefore, new employees and part-time employees are generally not eligible for FMLA leave.

Employees may request leave because of their own serious health condition, to care for a close family member with a serious health condition, or for the birth or adoption of a child (both men and women are eligible for this leave – it is not limited to maternity leave). 29 U.S.C. § 2612(a). An employee may also take leave to deal with "exigencies" if a close family member is called for military service.

An employee is allowed to take up to 12 weeks of leave per FMLA year. 29 U.S.C. § 2612(a). While this seems like a simple and straightforward calculation, many companies misapply it. Employers often think of FMLA leave as a single discrete block of time, but an employee is under no obligation to take the full amount of leave all at once. In fact, an employee may take "intermittent" leave, which may mean taking off one day a week, or working half-days. Companies often also make the mistake of firing an employee as soon as the 12 weeks of leave are up. Abruptly firing an employee based on a strict 12-week cutoff could give rise to a lawsuit for FMLA retaliation or Americans with Disabilities Act discrimination, and employers must tread carefully here.

Employers must also track how much leave an employee has used, and how much is still available. There are several ways that an employer can calculate a year for FMLA purposes. The simplest method is to use a calendar year or fiscal year. However, that means that an employee who takes 12 weeks of leave at the end of one year will have a fresh 12 weeks of leave on January 1st. Most employers prefer to use a "rolling" FMLA year that looks one year forward (or backward) from the day that each employee's FMLA leave begins, even though this method of calculation is more administratively complex.

FMLA leave is unpaid, unless a company policy states that it will be paid. Companies have discretion to pay for all, part, or none of an FMLA leave period. An employer may also require the employee to use up accrued paid time off during his or her FMLA leave. This means that, if an employee has ten days accrued vacation, the leave will be paid for the first ten days, then will switch to unpaid

leave. Sometimes FMLA leave may be paid, or partially paid, through a workers' compensation or short-term disability insurance policy.

The FMLA also requires employers to provide both general and specific notice of employees' rights under the Act. General notice is fairly simple. Any employer with more than 50 employees must display posters providing general information about the FMLA. 29 U.S.C. § 2619. The employer must also provide this same information in its employee handbook, or any other written materials explaining the leave and benefits policies. An employer may use one of the many commercially available posters, or print out the official poster provided by the Department of Labor.

Specific notice is more complex. An employer must provide an eligibility notice to any employee who requests leave under the FMLA. Even if the employee does not specifically refer to the FMLA, the employer must give notice if it believes that the Act may apply. This notice must also provide the employee with a list of his or her rights and responsibilities under the FMLA. An employer must comply with these requirements precisely, or the notification is invalid, and the notice must be provided again every time an employee requests medical leave.

There are two types of lawsuits available under the FMLA. An interference claim arises when an employer refuses to allow an eligible employee to take leave or otherwise interferes with an employee's leave. 29 U.S.C. § 2615(a). A retaliation claim arises when an employer punishes or retaliates against an employee for taking FMLA leave. 29 U.S.C. § 2615(b). Successful FMLA plaintiffs are entitled to reinstatement to their position as well as lost pay and benefits, any out-of-pocket expenses, and attorneys' fees related to filing the lawsuit. They may also be entitled to an equal amount of liquidated damages, effectively doubling their potential recovery.

Part-Time Employees and Temps: Wage and Benefit Obligations

There is no general rule stating that a worker is exempt from employment laws because he or she is designated as a "part time employee" or a "temp." For the most part, part time workers and temps are subject to the same wage and benefit rights as regular or

long-term employees. There are some exceptions – for instance, the 1,250 hour requirement of the FMLA means it generally will not apply to these employees. And, as a purely practical matter, a part-time employee may be unlikely to work over forty hours a week to accrue overtime.

Many companies hire temp workers from staffing agencies specifically because they wish to avoid the administrative burden of handling wage payments and benefit obligations. For the most part, this arrangement works. The company pays the staffing agency, and the staffing agency pays the employee. But what if it is determined that the staffing agency is *not* paying the employee? Can the employee then sue both the staffing agency and the company? In many cases, yes.

"Joint employer" is a hot topic in wage and hour law. Joint employment occurs when an individual is employed by two or more entities simultaneously, such that both are liable for any violations of the FLSA. Under the broad "suffer or permit" standard discussed above, an employee may be legally employed by more than one company at a time. In determining whether the joint employer liability, courts have used different tests. The Fifth Circuit has utilized a simple "economic" reality test to determine whether a particular company qualifies as an employer under the FLSA:

> (1) whether it possessed the power to hire and fire the employees,
>
> (2) whether it supervised and controlled employee work schedules or conditions of employment,
>
> (3) whether it determined the rate and method of payment, and
>
> (4) whether it maintained employment records.

Gray v. Powers, 673 F.3d at 354-55 (5th Cir. 2012).

Other courts have taken a broader view and look to numerous factors including:

> (1) which company's premises and equipment were used for the plaintiffs' work;
> (2) whether the staffing agencies had a business that could or did shift as a unit from one putative joint employer to another;
> (3) the extent to which plaintiffs performed a discrete job that was integral to the company's process of production;
> (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes;
> (5) the degree to which the company or its agents supervised plaintiffs' work; and
> (6) whether plaintiffs worked exclusively or predominantly for one particular company.

Zheng v. Liberty Apparel Co. Inc., 355 F. 3d 61 (2d Cir. 2003).

Under either test, the pendulum seems to be swinging towards broader application of the joint employer liability standard. In part this is a reaction to the more widespread use of staffing agencies – according to the New York Times, the second largest private employer in America (after Walmart) is Kelly Services, a job placement agency. A company may be able to mitigate some of the risk of joint employer liability with a well-drafted agreement ensuring that the staffing agency will indemnify the company for any lawsuits arising from overtime violations. However, if the staffing agency becomes insolvent or bankrupt, the employer may still be left holding the bag. Companies seeking to hire temporary help should make efforts to ensure that the staffing agency is compliant with all wage payment and overtime laws.

Unpaid Internships and Training Programs

When it comes to unpaid internships, many companies seem to assume that the use of the word "intern" exempts them from wage and hour compliance. However, the FLSA makes no express distinction between employees and interns, and many companies have been sued by former interns who were required to work 50 or 60 hour weeks as part of their internship.

Parties cannot simply agree, among themselves, that the intern will not be paid. The provisions of the FLSA are unwaivable, and a signed internship agreement will not prevent a later lawsuit. Even if the intern has signed a notarized document acknowledging that she will be unpaid, that she doesn't mind not being paid, and that she promises never to file a lawsuit seeking a cent, that document will not stand up in court.

In determining whether someone is an intern or an employee under the law, the core question is which party is the "primary beneficiary" of the relationship. This test comes from in the Supreme Court's decision in *Walling v. Portland Terminal Co.*, 67 S. Ct. 639 (1947), a case which involved a railway company that offered a seven day unpaid training period to potential job applicants. Under the *Portland Terminal* reasoning, if the company benefits more from the relationship than the intern does, he or she is an employee.

For many years, the best authority regarding unpaid internships was a 1967 Department of Labor non-binding guideline listing the following 6 factors to take into account to determine whether an internship was *bona fide*:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

The seminal decision on unpaid interns in the modern context is *Glatt v. Fox Searchlight Pictures, Inc*., 811 F. 3d 528 (2d Cir. 2015). In *Glatt*, the Second Circuit rejected these DOL guidelines and imposed its own non-exhaustive set of seven factors for lower courts to consider:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee — and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.

3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

Glatt, supra, 811 F.3d at 537. *See also Schumann v. Collier Anesthesia, PA,* 803 F. 3d 1199 (11th Cir. 2015) (adopting the same test).

Given that the Fifth Circuit has not weighed in on this issues, any Louisiana companies considering an internship program should take into account both tests in making their decision. Under either test, the company should not lose sight of the "primary beneficiary" question, and think hard about whether the company or the intern truly benefits more from the relationship.

Record-Keeping: What and How Long

In the modern, computerized world, there is rarely if ever a valid excuse for not keeping good employment records under the FLSA. The FLSA record-keeping regulations can be found in Title 29, part 516 of the CFR. In short, companies must keep the following records for each employee:

1. Full names;
2. Home address;
3. Date of birth (under 19 only)
4. Sex and occupation
5. Time when the workweek begins
6. Regular hourly pay and explanation of how pay is calculated
7. Hours worked each workday
8. Total daily or weekly straight-time earnings
9. Total daily or weekly overtime earnings
10. Any additions to or deductions from wages
11. Total wages paid
12. Date of payment, and pay period covered by the payment

Not coincidentally, these are the same categories of information that are found on a standard pay stub. Similar records must also be kept for exempt employees, although there is no need to track their hours, or to differentiate between their straight time and overtime pay. Companies should also keep copies of any employment agreements, collective bargaining agreements, or any other contract related to pay or wages.

These records must be kept for three years, which is the maximum prescriptive period for an FLSA claim. Some states have longer statutes of limitation for wage claims, such as California (four years) and New York (six years), so companies operating in

those states should keep their records for longer. Neither federal law nor Louisiana law requires employers to make these records available for inspection by employees, although this varies from state to state.

If an FLSA lawsuit proceeds to litigation, an employer's failure to keep records will seriously impede its ability to contradict the plaintiffs' testimony regarding damages and hours worked. In *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 688 (1946), the Supreme Court held that, where an employer fails to keep records of all hours worked, the employee may prove his damages through a lessened "just and reasonable inference" standard.

Discrimination and Harassment

Submitted by David F. Rutledge Jr.

HUMAN RESOURCES LAW: WHAT YOU NEED TO KNOW NOW

DISCRIMINATION AND HARASSMENT

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Article I. TITLE VII

Section 1.01 What is Title VII?

(a) Title VII refers to the section under the Civil Rights Act of 1964 and its amended parts. It is specifically found in volume 42 of the United States Code under section 2000e. It is more commonly referred to as "Title 7."

(b) It is a Federal Law. This means it was passed by the United States Congress and signed into law by the President of the United States. As a result, this law applies to every State in the nation.

(c) Title VII is the main law that prohibits employment discrimination based on race, color, sex, religion and national origin.

Section 1.02 Who is covered by Title VII?

(a) In general, all employers with fifteen (15) or more employees are covered by Title VII.

(b) Who is an "employer?"

(i) Generally any private company or governmental agency that has at least fifteen (15) employees, other than the United States, an Indian Tribe, or Private Club that has applied for and received 501(c) status under the IRS.

1) Practice Tip: You are more than likely a covered employer/employee if your company has 15 or more employees.

(ii) Technical definition for Employer: Generally an employer means:

1) A person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5 [United States Code]), or

2) (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26 [the Internal Revenue Code of 1986], except that during the first year after March 24, 1972 [the date of enactment of the Equal Employment Opportunity Act of 1972], persons having fewer than twenty--five employees (and their agents) shall not be considered employers. https://www.eeoc.gov/laws/statutes/titlevii.cfm

(iii) Who is considered an "employee?"

1) Generally any person who is employed by a company with fifteen (15) or more employees including those who work in State Civil Service but excluded are public officials.

2) Technical definition for Employee: General means:

a) An individual employed by an employer, except that the term “employee” shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer’s personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.

b) The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States. https://www.eeoc.gov/laws/statutes/titlevii.cfm

Section 1.03 Most Common Title VII Complaints:

(a) Racial Discrimination:

(i) Under Title VII, "The law forbids discrimination when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment." https://www.eeoc.gov/laws/types/race_color.cfm

(ii) Title VII prohibits both intentional discrimination (known as "disparate treatment") as well as, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as "disparate impact"). Ricci v. DeStefano, 557 U.S. 557, 577, 129 S. Ct. 2658, 2672, 174 L. Ed. 2d 490 (2009).

1) What is considered "racial discrimination?"

a) Well, most know that an employer cannot discriminate against an employee or applicant based on that person's race or color.

b) Specifically, an employer cannot refuse to hire or promote an employee due to their race or color. This is what we know as "intentional discrimination," aka disparate treatment.

i) Examples: We find this happens more often where an employer just says to his managers, we don't hire African Americans or Hispanic people. It is also commonly found where an employer refuses to hire a person of color to an executive or upper management position.

2) Disparate Impact: However, another action that is illegal under Title VII is known as disparate impact. This is known as unintentional-intentional discrimination.

a) Mostly seen in Public Employment but can be applied to private companies.

b) Technically, this is where an employer creates a policy that doesn't single out any one group or employee BUT its practicality ends up harming mostly people of color.

c) I call this unintentional-intentional because although the law does not require the intent of the policy to be intentionally adverse to people of color, sometimes it ends up being the motive.

d) This can happen when employers' try to outsmart the "system" in order to effectuate a discriminatory action.

   i) Don't try to "outsmart" the system.

e) Examples: 1. Most famous comes from the 1971 United States Supreme Court case of Griggs v. Duke Power Co. Here, the power company put in place a policy that required its workers to pass an aptitude test and have a high school diploma in order to receive any type of promotion. Well, the result was that the African American workers overwhelmingly were precluded from getting promoted because they were predominately the ones who were hurt by this policy.

f) The Supreme Court found that the policy was discriminatory in its operation and that the test and requirement had no "demonstrable relationship to the successful performance of the jobs for which it was used."

   i) In other words, the policy had nothing to do with the work the employees were actually doing and upon which they should be evaluated.

   ii) The Supreme Court reasoned that even if the Company did not intend to discriminate against the African American workers, it still did so and employer was liable.

g) Practice Tip: EEOC has set guidelines regarding any type of employment tests. Regardless of whether the tests appear neutral on its face if the results of the tests or selection procedure disproportionally excludes people of color then it will likely be found to be in violation of Title 7.

h) Practice Tip: Also, the test MUST be job related and consistent with business necessity.

(b) Racial Harassment:

(i) Title VII makes it unlawful to harass an employee because of that person's race or color.

(ii) What is considered racial harassment?

1) Harassment can include racial slurs, offensive or derogatory remarks or comments about a person's race or color, or the display of racially-offensive symbols.

(iii) What is generally not considered racial harassment under Title VII?

1) The law doesn't prohibit simple teasing, offhand comments, or isolated incidents that are not very serious.

2) Practice Tip: There is a difference between an action being illegal under Title VII and it being inappropriate but not illegal. Whether the action rises to the level of it being illegal under Title VII should not be the standard for whether or not your company finds it appropriate for the work place.

(iv) Hostile Work Environment.

1) Under Title VII, an employee can have a claim of racial discrimination or racial harassment if the racial slurs or offensive or derogatory remarks or actions that are predicated on the employee's race create a hostile environment.

2) What is considered a hostile work environment?

a) Legal definition is when "the work environment was so pervaded by discrimination that the terms and conditions of employment were altered." Vance v. Ball State Univ., 133 S. Ct. 2434, 2441, 186 L. Ed. 2d 565 (2013).

i) Now what the heck does that actually mean in practice?

ii) This basically means that the conduct is so severe and pervasive that it interferes with the employee's ability to do their job.

b) Examples:

i) Hispanic employee works in an office setting and on a weekly basis receives emails from his supervisor depicting Mexicans in a negative light such as lazy or criminals. Does this create a hostile work environment?

ii) If the email was sent just once then unlikely, but if the worker is getting similar emails on a weekly or monthly basis for a long period of time, then it could create a hostile work environment.

(v) Who can create a hostile work environment?

1) A co-worker as well as a Supervisor/Manager.

(vi) What is the difference between harassment conducted by a Supervisor vs conducted by a co-worker or non-Supervisor?

1) Generally, if the harassment is done by a supervisor then the company is strictly liable.

2) The Supreme Court recently ruled "an employee is a "supervisor" for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim." Vance v. Ball State Univ., 133 S. Ct. 2434, 2454, 186 L. Ed. 2d 565 (2013).

3) Tangible employment action means basically the ability to hire, fire, or alter an employee's work schedule or cut or raise their pay.

4) However, if the harassment was not done by a Supervisor then the company can still be liable if employee proves it had notice of the harassment and failed to take actions to stop it.

(vii) Practice Tip: ALWAYS take a charge of harassment or discrimination very seriously. Immediately separate the employee charged with doing the harassment from the employee who is claiming to be the victim of said harassment.

(c) Sexual Harassment:

(i) There are two types of sexual harassment under Title VII.

(ii) First type is called Quid Pro Quo.

1) This is generally the kind of sexual harassment most think of when they think about sexual harassment.

2) It involves a supervisor or manager offering favors or punishment if the employee conforms to their sexual wishes or desire.

3) Please note that to be Quid Pro Quo it doesn't have to be a sexual act. We are seeing more and more cases of Quid Pro Quo pertaining to sexual pictures or nude pictures of an employee.

(iii) Second type is called hostile work environment.

1) It involves the same process and standard as found under racial harassment except in this instance the conduct must be based on the sex of the victim instead of the victim's race or color.

2) One question often asked to help determine if the conduct rises to the level of sexual harassment by creating a hostile work environment is: Would the harasser have done the action if the victim were of a different sex? If no, then there is a good chance it will not be considered sexual harassment under a hostile environment claim.

(iv) What is the legal difference in terms of liability between Quid Pro Quo sexual harassment and sexual harassment under a hostile work environment claim?

1) Generally, the company will be strictly liable for sexual harassment under Quid pro Quo.

2) However, under hostile work environment claim, a company will be liable if it had notice of the harassment and it failed to take action to stop it.

3) A company can also mitigate damages and possibly exclude liability if it can show that it took action to stop the harassment once it received notice and that the employee unreasonably failed to take advantage corrective measure the company provided.

(v) Can there be same sex sexual harassment? Yes.

1) The 5th Circuit in EEOC v. Bros. Construction Co (2013), held that same sex sexual harassment is also illegal under Title VII.

2) In this case a male worker was being harassed by his supervisor by calling him sexual derogatory names and mimicking having sex with the worker.

(vi) Practice Tip: Be extremely mindful of the type of corrective measure(s) you offer the employee because if the measure is a detriment to that employee than it can be retaliation.

1) Ex: Female employee working in a supervisory position makes a complaint of sexual harassment by claiming that her boss created a hostile work environment and the company offers to fix her work environment by offering her the option of working in a different position for less pay. This could be retaliation.

(d) Constructive Discharge: This can result from both sexual harassment and racial harassment as well as any other types of discrimination under Title VII.

(i) Can an employee have a claim under Title VII for retaliation even if they quit their job rather than being fired? YES.

1) This is called being Constructively Discharged.

(ii) What is the legal definition of Constructive Discharge?

1) "Plaintiff who advances compound hostile-environment constructive discharge claim, under Title VII, must show working conditions so intolerable that reasonable person would have felt compelled to resign. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq. Pennsylvania State Police v. Suders, 542 U.S. 129, 124 S. Ct. 2342, 159 L. Ed. 2d 204 (2004)

(iii) What does this mean in practice?

1) The United States Supreme Court has basically argued that an employee should not have to choose between going to work each day and being discriminated/harassed or quitting her job just to avoid it. This makes sense both economically and ethically.

(iv) Practice Tip: Is there an Employer Defense to a Constructive Discharge Claim under Title 7? YES. There is a two-part Defense-commonly referred to as the Ellerth/Faragher Affirmative Defense: An employer may defend against such a claim of Constructive Discharge by showing both:

1) (1) that it had installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and

2) (2) that the plaintiff unreasonably failed to avail herself of that employer-provided preventive or remedial apparatus.

(e) Retaliation under Title VII (as well as other Acts herein):

(i) An employer may not retaliate against an employee who files a claim of discrimination, or opposes to discrimination in their workplace, or who participates in an investigation or lawsuit concerning any type of discrimination.

(ii) Generally, an employer will be liable when a supervisor takes a tangible employment action against a person for doing one of the three above in (e)(i).

1) A tangible employment action is a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.

Article II. Americans with Disabilities Act (ADA)

Section 2.01 The ADA was originally signed into law in 1990.

Section 2.02 It was modeled after the Civil Rights Act of 1964 which we discussed above.

Section 2.03 The ADA prohibits employers from discriminating against qualified individuals due to their disabilities.

(a) This applies to both applicants as well as current employees.

(b) In fact, the ADA prohibits employers from asking questions to a job applicant about his or her disability until AFTER the employer offers the applicant the job.

(c) However, after the employer offers the person the position and before that person starts to work, the employer can ask questions regarding the disability and ask the new employee to pass a medical exam IF it is one all employees must take.

(i) Ex: Applicant is offered a job and accepts but is required to pass a drug screen prior to starting his employment.

Section 2.04 Who is covered?

(a) Generally all employers with 15 or more employees.

Section 2.05 The first determination made regarding any disability as it pertains to the ADA is whether the disability at issue is one that is recognized under the ADA.

(a) A disability can be qualified under the ADA in one of three ways:

(i) If the disability is a physical or mental condition that substantially limits a major life activity (such as eyesight, standing, walking, hearing, learning),

(ii) If the employee has a history of a disability or serious illness (such as cancer).

(iii) If the disability is not permeant but is regarded by a covered entity as being an impairment and the entity takes adverse action against that person.

Section 2.06 What can be considered discrimination based on a disability under the ADA?

(a) The Supreme Court has held that there are two types of claims recognized under the ADA:

(i) Disparate Treatment-when employer treats a person less favorably because of their disability, and

1) Under this claim, a person can prove discrimination by either direct evidence of discrimination or by utilizing the McDonnell Douglas test (see below).

(ii) Disparate Impact-involve employment practices that are facially neutral but that in fact fall more harshly on a group or person with a disability and cannot be justified by business necessity.

1) Under this claim or theory, the employer's practice can be liable as being illegally discriminatory without evidence of the employer's subjective intent to discriminate.

2) Under the disparate-impact, a plaintiff establishes a prima facie violation by showing that an employer uses "a particular employment practice that causes a disparate impact on the basis of that person's disability." Ricci v. DeStefano, 557 U.S. 557, 578, 129 S. Ct. 2658, 2673, 174 L. Ed. 2d 490 (2009).

(iii) We've discussed both types in the context of racial discrimination under Title VII. The analysis for both are the same except the issue involves a person with a disability rather than based on the person's race or color of their skin.

Section 2.07 What is the initial legal analysis to determine discrimination under the ADA?

(a) The McDonnell Douglas Analysis is utilized: The person must first establish what is called a "prima facie" case of discrimination within the meaning of the ADA (as we discussed above).

(i) In order to accomplish this feat, the person must show:

1) That he is disabled within the meaning of the ADA,

2) That he is qualified to perform the job with or without reasonable accommodations, and

3) He suffered from an adverse employment decision because of his disability.

(ii) If the person can meet that initial burden then the burden shifts to the employer to prove it acted with a legitimate and non-discriminatory reason for its adverse employment decision against the person.

(iii) If the employer cannot meet its burden then it can be found liable under the ADA.

(iv) Things to consider: Timing is always an important factor in every discrimination case.

(v) How to handle accommodation requests.

1) The ADA requires a qualified employer must provide "reasonable accommodations" to a person with a disability.

2) What are reasonable accommodations will depend on the facts of the matter.

3) If a person has a severe bladder problem that makes it hard for that person to control their bladder then a reasonable accommodation would be moving that person's office to a floor with a bathroom on it or moving their desk closer to the bathroom. This is reasonable.

(vi) Do you always have to provide accommodations? No.

1) The ADA does not require an employer to provide an accommodation if doing so would present an undue hardship on the employer.

2) Factors to consider to determine if an accommodation would present undue hardship:

   a) The nature and costs of the accommodation,

   b) The overall revenue and resources the employer has annually,

   c) The impact the accommodation will have on the operation of the employer,

   d) The number of employees the company has annually.

Article III. Age Discrimination in Employment Act of 1967 (ADEA)

Section 3.01 The ADEA provides that "it shall be unlawful for an employer to fail or refuse to hire or to discharge an individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such said individual's age." Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176, 129 S. Ct. 2343, 2350, 174 L. Ed. 2d 119 (2009).

Section 3.02 Who is covered?

(a) Employers with 20 or more employees.

(b) Notice this threshold is higher than that found in Title VII or ADA.

Section 3.03 What age is covered? Employees 40 years or older.

Section 3.04 Two types of claims fall under ADEA:

(a) Disparate Treatment and

(i) New Burden of proof see below.

(b) Disparate Impact-same analysis required as found in other discrimination cases.

Section 3.05 Important Note: Prior to 2009, the United States Supreme Court would analyze discrimination claims under the ADEA under the same burden of proof framework as it would for claims brought under Title VII or ADA, as it pertains to claims under Disparate Treatment.

(a) However, the Supreme Court in Gross v. FBL Financial Services, Inc. (2009), changed the burden of proof an employee must prove to be successful in claims brought under disparate treatment theory under the ADEA.

(b) Specifically, a plaintiff must prove by preponderance of the evidence (direct or circumstantial) that the employer took the adverse employment action against him because of the age of the employee.

(c) The rule is now called the "But For" rule. The employee must prove that "but for" his age, the employer would not have taken adverse action against him.

(i) Importantly, ultimately the burden does not shift back to the employer to prove a legitimate, non-discriminatory reason for the adverse action under the ADEA like it does under Title VII and ADA.

Section 3.06 What is the practical significance of this change of burden of proof for ADEA?

(a) It makes it harder for an employee to prove his employer took action against him because of his age.

(b) Prior to 2009, an employee need only prove with a preponderance of the evidence that age was a motivating factor in his employer's decision, not necessarily the "be all" reason.

Section 3.07 Reduction-In-Force Issues under ADEA

(a) An employer can perform a reduction in force (RIF) and be in compliant of the ADEA.

(b) Methods to be in compliant:

(i) The employer must show that its determining factor or factors for those affected by the RIF stem from a neutral criterion that is broad based.

1) Examples that are in compliant: Seniority, removal of an entire department or job function, and performance based.

2) Utilizing performance based reductions can be tricky. It is important to make sure the reductions are compatible with performance evaluations. Any disparity could be used as evidence of discrimination under the ADEA.

(ii) Employer must also be mindful of the Disparate Impact of its RIF. If even under an objective basis for the RIF, the employer finds that the result of the RIF would impact a high percentage of employees in the protected class under ADEA then the employer should take a hard look at reforming its basis.

(iii) Remember, under a theory of Disparate Impact, employer need not intentionally take adverse action against an employee who is 40 years of age or older in order for it to be a violation under the law.

Article IV. Equal Pay Act (EPA):

Section 4.01 The EPA Act was originally passed under the FLSA of 1963.

(a) The EPA Prohibits discrimination on account of sex in the payment of wages by employers.

(b) Specifically, the EPA provides that employers may not pay unequal wages to men and women who perform substantially equal jobs and work at the same establishment.

(i) "Substantially equal jobs" has been interpreted to mean jobs that require similar skill (experience, ability, education, and training), effort (physical and mental) and responsibility, and are performed under similar working conditions.http://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/discrimination/the-paycheck-fairness-act.html#equalpay

(c) Who is covered? Pretty much all employers.

(d) Benefit: Employee does not need to first file with the EEOC. Can go straight to Court.

(e) There are Four Affirmative Defenses in which an employer can justify paying unequal pay for equal work. It can do so if the unequal pay results from:

1) A Seniority System;

2) A system which measures earnings by quality or quantity of production or output;

3) A merit based system;

4) Or the catch all, which is based on any factor other than sex.

(f) More often the Defense most used is the final catch all defense: Any factor other than sex.

(g) Lilly Ledbetter Fair Pay Act: This Act (LLFPA) passed in 2009 provided employees with more protections under the EPA.

(i) The main component of the LLFPA was that it clarified that each paycheck that contains discriminatory compensation is a separate violation regardless of when the discrimination began. This meant the statute of limitations would begin to run from that last paycheck rather than from when discrimination started.

Article V. Family and Medical Leave Act of 1993 (FMLA).

Section 5.01 FMLA provides covered employees with up to 12 weeks of unpaid, but job protected leave per year. The employee's health benefits must also be maintained by the employer while said employee is on leave.

Section 5.02 Who is covered:

(a) Employers with 50 or more employees within 75 miles.

(b) Employees who have worked for their employer for at least 12 months or at least 1,250 hours over the previous year.

(c) Employees who work for public agencies or public and/or private elementary and secondary schools are covered regardless of the number of employees their employer has within 75 miles.

(d) Reasons an employee can use FMLA? This is not an exhaustive list

(i) For the birth AND care of the newborn (both male and female employees), including adoption services.

(ii) To care for an immediate family member or spouse with a serious health condition or

(iii) When the employee is unable to work because of a serious health condition

Section 5.03 Two Types of FMLA Claims

(a) Interference

(i) FMLA prohibits an employer from interfering with, restraining or denying the right or the attempted right to exercise rights under FMLA.

(ii) Under Interference, the employee need only show that (1) he was entitled to FMLA and (2) his employer prevented him from exercising that right.

1) Important to note: Under claim of interference under FMLA, an employee need not show that the employer intentionally interfered with his rights.

(b) Discrimination

(i) To prove discrimination under FMLA, an employee must show:

1) He triggered his FMLA rights,

2) He was subjected to an adverse employment decision and

3) That adverse employment decision was "causally connected" to him triggering or requesting to invoke his rights under FMLA.

a) Courts utilize the all familiar McDonnell Douglas burden shifting analysis in making this determination.

Section 5.04 Things to Consider under FMLA:

(a) Notice: An employee need not specifically request FMLA in order to be entitled to its benefits. If an employee request what sounds like FMLA then it is on the employer to inform the employee of his rights under FMLA.

(i) In other words, an employer will not escape liability by arguing that the employee failed to fill out the proper paperwork or failed to specifically request leave under FMLA.

Section 5.05 Reduction in Force under FMLA:

(a) As was the case in other claims of discrimination, FMLA does not provide additional protections to a covered employee than they would otherwise have had absent the leave.

(b) In other words, an employee can be terminated in compliance of the law resulting from a RIF provided it is done carefully. However, be aware that unlike under the ADEA where the employee has the higher burden of proving the "but for" standard, a claim of discrimination under the FMLA need only show proof that the employee invoking his FMLA rights merely played a part in the decision.

Section 5.06 Practice Tip:

(a) Timing is always a main factor in determining whether there was FMLA discrimination. The closer in time of the adverse action by the employer to when the employee invoked his FMLA rights, the more likely it will be seen as discriminatory.

Article VI. Handling EEOC Complaints

Section 6.01 Majority of the discrimination claims require the employee to first seek an Administrative Remedy. This means the person must first file his complaint with the EEOC.

Section 6.02 The complaint in Louisiana must be filed within 360 days of the last alleged act of discrimination.

Section 6.03 The EEOC complaint operates similar to a BBB complaint. The complaining party makes the complaint to the EEOC. The EEOC will then inform the employer of the complaint and a brief description of it and require a response from the employer.

Section 6.04 New to Know: Under new EEOC rules, the complainant can obtain a copy of the employer's response to its original complaint. This is something new. So be mindful of how you draft your response to a complaint.

Section 6.05 Practice Tip: When you receive a complaint, do NOT allow someone working for the employer who is or might be a witness or an alleged defendant in the complaint to draft the response.

(a) I have seen this happen and it can hurt the validity of the employer's response.

Section 6.06 Before drafting the response, please make sure you gather all information regarding the complaint. This seems self-evident but be mindful that the response and its documents could be obtained by the complaining party and/or their attorney.

Article VII. Record Keeping

Section 7.01 Department of Labor requires an employer to keep adequate employment records of its employees. This includes time sheets.

Section 7.02 This will be covered more under FLSA.

Article VIII. Preventing Discrimination and Harassment

Section 8.01 Education, education, education.

Section 8.02 Preventing discrimination and harassment is all about educating your employees about the things that could rise to either claims.

Section 8.03 Please also remember to make sure executives are required to attend any seminars or receive educational materials regarding the policies of the company and the laws pertaining to discrimination.

Section 8.04 Please be mindful of the type of environment your employees operate in.

(a) What might be viewed as conduct creating a hostile environment might be different for a worker who is employed for a doctor's office vs a worker who is employed by a construction company.

Article IX. Worker's Compensation Discrimination

Section 9.01 LSA–R.S. 23:1361 prohibits discrimination by employers in their hiring and firing policies against those who have exercised their right to worker's compensation benefits. Sampson v. Wendy's Mgmt., Inc., 593 So. 2d 336, 338 (La. 1992).

Section 9.02 Being an At Will employee does not remove this right.

Section 9.03 What is the burden of proof?

(a) The employee need only prove by preponderance of the evidence that he received an adverse employment action because he asserted his right to worker's compensation benefits.

Section 9.04 What the Court looks for in determining whether discrimination has occurred?

(a) Timing. The closer in time the retaliation took place after filing for worker's compensation or receiving worker's compensation, then the stronger the case is for claiming discrimination.

Section 9.05 Can an employer terminate a worker who has received worker's compensation? Yes.

(a) “Employee will not recover on workers' compensation retaliatory discharge claim if the employer provides a non-discriminatory reason for the discharge and presents evidence sufficient to prove more probably than not that the discharge was related to something other than the assertion of a claim for workers' compensation benefits.” Graham v. Amberg Trucking, Inc., App. 3 Cir.2007, 969 So.2d 718, 2007-573 (La.App. 3 Cir. 10/31/07), rehearing denied, writ not considered 977 So.2d 943, 2008-0233 (La. 3/24/08).

Article X. The Best Defense: Policies, Handbooks and Training

Section 10.01 This was covered in more depth earlier today by Joanne Rinardo.

Section 10.02 However, the best defense is making sure your handbook is up to date, always ensuring that your employees, including executives, receive and understand the information in the handbook so that it can be adequately applied in the workplace.

Employee Discipline and Termination

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VI. EMPLOYEE DISCIPLINE AND TERMINATION

Despite the fact that Louisiana is an at-will-employment state, and in principle, an employer can terminate or discipline an employee for any reason or for no reason, as long as it is not illegal, disciplining and terminating employees requires careful consideration of business and legal issues.

While the law does not mandate the employer to have any reviews, warnings, disciplinary documents, or suspensions prior to discharge, there are many reasons why it is best practice to do just that to avoid of wrongful termination litigation. There are numerous laws protecting employees' rights in the employment setting, for example, Title VII of the Civil Rights Act of 1964 and parallel Louisiana Employment Discrimination laws prohibit employers from discharging an employee on the basis of race, color, religion, sex, and national origin. The ADEA prohibits discrimination based on an employee's age of over forty, the ADA and parallel Louisiana Employment Discrimination laws prohibit discrimination based on a person's disability.

The most common mistakes made by employers is a failure to effectively document the issues that may ultimately lead to discipline and termination, such as shortcomings in employee performance, tardiness, or violation of company rules. Typically, juries are suspicious of a lack of relevant documents, which can indicate to them that discrimination or other unlawful motives are the actual basis for the employment decision. Documents are critically important to employers because their burden in a discrimination case is to offer a facially nondiscriminatory reason for its employment decision. An employer must be able to support its termination decision through:

- Written performance evaluations.
- Minutes of management meetings at which the terminated employee was discussed.
- Disciplinary or poor attendance records
- Demonstration of a clear violation of specific employer policies.
- Other documentary evidence of the company's dissatisfaction with the employee.

A. Evaluating Employee Performance While Mitigating Liability

Through performance reviews, an employer can learn about a particular employee's actual performance, such as whether the employee met identified targets. A performance review also can help an employer make a decision or support an employer's decision to take action, such as promote an employee, increase an employee's base compensation, place an employee on a performance improvement plan, or take adverse action against the employee, such as discipline, demotion; or termination of employment.

Unsatisfactory performance is one of the most common reasons that employers discharge employees. For that reason, performance reviews frequently are used as evidence in employment litigation to show that the employee's performance was either inadequate or satisfactory. Proper documentation of performance reviews and implementation of an employer's policies and procedures are central to an employer's success in avoiding or defending against wrongful discharge claims as performance reviews are typically the employer's first and, in some cases, only formal and written communication to the employee about job performance. Although much of what the employer or supervisor remember about the employee's job performance may be in dispute, the performance review is a recorded and concrete statement from the employer about the employee's performance.

1. The Importance of Honest Performance Evaluations

Even when unsatisfactory performance is the stated reason for an employee's termination, often the employee's performance reviews do not adequately reflect the employee's performance shortcomings. Supervisors reviewing employees' performance are often reluctant to be critical and prefer to describe only the positive aspects of the performance. This reluctance not only prevents an employee from improving, but it also prevents an employer from defending against a termination claim by citing to that employee's performance problems. Although employers should be courteous and thoughtful in their review of employees, they must be honest about employee shortcomings. By recording genuine performance issues accurately and in a timely fashion, employers preserve a legal argument that performance, rather than an unlawful motive, was the reason for the termination. On the flip side, an employer will have a litigation risk when trying to prove an employee's long-term performance issues when all annual performance evaluations were positive and , according to the performance evaluation, the employee "met expectations."

2. Benefits of regular performance evaluations

Many employers perform quarterly, twice yearly or annual performance reviews. Where the employer's policies or practices require reviews to be conducted according to a specific schedule, the employer should adhere to that schedule. Conducting the reviews late can upset employees and signal to judges and juries that the employer does not take performance reviews seriously. Employers who choose to conduct performance are in a better position to defend against wrongful termination or discrimination lawsuits.

3. Train the Evaluators

The difficulty of conducting reviews and the importance of ensuring reviews are well executed should not be underestimated by the supervisors conducting such reviews. Employers should train reviewers how best to execute performance reviews and how to avoid common pitfalls. Training should emphasize the importance of ensuring that reviews are:

- Objective.
- Clear.
- Accurate.
- Timely.

Training also should address reviewers' common concerns, such as how to:

- Effectively convey the employer's expectations.
- Confront an employee with a negative review.
- Answer common questions, such as questions about:
- compensation; and
- opportunities for advancement.

Finally, training should address legal requirements, such as avoiding any consideration of prohibited factors, including the employee's sex, age, race, national origin, religion, and membership in any other protected class.

Reviewers should also be trained to avoid soliciting information from employees during performance reviews about their supervisors in a manner that would infringe on their Section 7 rights under the NLRA.

4. *The Importance of Objectivity, clear Communication of expectations and Specificity of the Performance Evaluation*

An objective and productive performance evaluation is only possible if the employer sets clear expectations of the employee. For example, it is advisable to have written job descriptions and objective checklists that assists the supervisor to evaluate the employee’s performance. Reviews should be as objective and specific as possible. Employers do not need to design a performance review for each employee, but should consider designing a review for particular:

- Job titles.
- Categories of employees.

Each review should assess:

- particular job duties and responsibilities.
- the employee's achievement (or lack of achievement) of specified targets and goals.
- other aspects of the job, such as:
- ability to take instruction;
- ability to communicate and work effectively with co-workers;
- whether the employee demonstrates initiative; and
- attitude in the workplace (for example, if an employee's negative attitude is affecting morale in the workplace).

The reviewer should be a supervisor or manager with first-hand knowledge of the employee's work performance and any other factors considered in the review, such as the employee's:

- Strengths.
- Weaknesses.
- Attitude.
- Goals.

However, if the employer has any concern that the reviewer is biased, the employer should consider developing an alternate review and decision-making process to ensure any

related employment decisions are based on factors free of discriminatory bias. For example, employers can consider designating a different supervisor or manager to conduct the review.

Finally, the reviewer should:

- Assess each aspect of the employee's performance independently.
- Not allow good or poor performance in one area to influence the assessment of other criteria.
- Be as specific as possible.

The final draft of any performance review should be reviewed by a third party, such as a human resources representative, to ensure compliance with the employer's policies, any applicable collective bargaining agreements, and all applicable federal, state and local laws.

5. Retention of Documents

Finally, the retention of an employee's performance evaluations in his or her personnel file is key to reducing litigation risk. Performance evaluations never become too old to stay in a long-term employee's personnel file.

B. Employee Discipline Plan and Documentation

Where wrongful behavior leads to an employee's termination, employers can often undercut an employee's burden to prove that he was fired because of unlawful conduct by using a clear and concise policy prohibiting the behavior for which the employee was disciplined.

1. Progressive Discipline Policy or Not?

While it is a good practice for employers should practice progressive discipline with their employees, it need not be written in a policy. If a progressive discipline provision is included in a handbook, it should be drafted carefully so that it does not create a presumption that an employer

may only terminate an employee for cause or after all the steps in the progressive discipline policy have been taken.[1] Specifically, a progressive discipline policy should:

- avoid a detailed listing of disciplinary steps;
- clearly state that the procedure is discretionary, reserving the employer's absolute right to bypass the disciplinary procedure;
- note that it does not apply to reductions in force or during a probationary or introductory period; and
- include a statement that it does not change the at-will nature of the employment.

2. The importance of workplace policies

In order to discipline employees for inappropriate conduct, an employer needs to have clear and objective workplace policies in place. There needs to be a clear expectation from the employer to the employee about what is appropriate behavior in the work place. For example,

- An Attendance and Punctuality Policy helps employers justify discipline and termination decisions based on an employee's excessive tardiness and unexcused absences. An objective system to monitor employees' attendance should be in place.
- A Cell Phone and Social Media Policies help employers justify discipline and termination decisions based on inappropriate use of technology.
- A Standards of Conduct Policy helps employers defend discipline and termination decisions related to inappropriate personal conduct. It is advisable to provide examples of inappropriate behavior, such as theft, altercation or horseplay in the work place, violation of the dress code, bullying, inappropriate language, insubordination, etc.

[1] *O'Brien v. New England Tel. & Tel. Co*., 664 N.E.2d 843, 847 (Mass. 1996).

- An Anti-Harassment Policy helps employers defend against discipline and termination decisions based on an employee's engaging in harassment.

3. *Obtain Employee Acknowledgment*

Most employers have replaced hard copies of an employee handbook with electronic policies accessible on the employer's intranet. While there are sound reasons for doing so, this often fails to support the most important reason for the policies: to ensure that employees read and understand them. Companies with electronic handbooks should require each employee to sign and date a printed acknowledgment that he received, reviewed, and understood the handbook. Without this acknowledgement, an employee may be able to claim that he was unaware of the particular policy for which he was disciplined or terminated.

4. *Apply Policies Consistently*

Policies are only useful to employers if they are actually followed consistently and in a non-discriminatory manner. Employers that impose severe discipline on one employee for a specific infraction and little or no discipline on another employee for the same infraction increase their risk of litigation. For example, employees subject to inconsistent and unduly harsh discipline may allege that the employer followed the policy in a discriminatory manner or that the employer should not be believed when claiming that a particular practice was standard operating procedure.

5. *Keep a record of all discipline*

Keeping a complete record of employees' discipline is important. It will help employees understand the reason for potential adverse employment actions, such as a demotion or termination or for not getting the promotion desired. Discipline records should be kept in the employees' personnel files. It is advisable for all employers to reduce even verbal counsellings to writing in form of counseling notes to create a paper trail in case of litigation. Notes about a number of verbal coachings is just as good evidence and standard write-ups.

C. Legal vs. Illegal Reasons for Terminating an Employee

While the default rule for private employers in the US, including in Louisiana, is at-will employment, an employer should evaluate its reasons for a termination to ensure it does not violate anti-discrimination laws and other legal limits on discharging employees. By proactively identifying and addressing the legal risks before making a final decision, an employer can reduce its chances of wrongful termination litigation and strengthen its defenses if a claim is filed.

In evaluating whether to terminate an employee, the employer should consider whether termination is the most appropriate course of action and in the best interests of the employer. For example, the employer may discover that the employee's supervisor has a history of conflict and is the actual problem. Other considerations are:

- Whether the possible adverse publicity from the termination outweighs the consequences of continuing to employ the employee.
- Whether employer bears any responsibility for failing to appropriately prevent the conditions or address the circumstances that led to the termination proposal.
- Whether the employer has given the employee an opportunity to address any problems that may have led to the termination proposal.
- Whether the termination will adversely impact employee morale or employer credibility within the organization.
- Whether the employer has properly documented and implemented its employment policies and procedures.

1. Illegal reasons for termination

An employer may face a claim for wrongful termination if it terminates an employee as a result of:

- Discrimination based on the employee's race, ethnicity, gender, gender orientation, age, disability, national origin.

- Retaliation against the employee for engaging in protected activity, such as reporting or complaining about unlawful conduct, requesting a reasonable accommodation for a disability, or whistleblowing.

- Workplace harassment, such as quid pro quo harassment and termination because the employee refused to submit to sexual advances

- The employee seeking or taking protected leave, such as Family Medical Leave, Pregnancy Leave, Military Leave.

- The employee's pregnancy (Louisianan has a pregnancy discrimination law)

- The employee filed a workers compensation claim or got injured on the job and is expected to file a Workers' Compensation Claim.

- The employee's union activities

- The employee seeking to enforce wage rights

2. Legal Reasons for Termination

The most common legal reasons for termination are:

a. Poor performance.

Poor performance is one of the most common reasons for termination. Before terminating an employee for poor performance, it is recommended that employers have to ensured that that the following was done:

- accurately and objectively evaluated the employee's job duties and performance using written performance reviews;

- created a clear record of the employee's poor performance, including examples to support a poor performance rating;

- considered implementing a performance improvement plan to help the employee correct performance shortcomings; and
- ensured that performance issues are handled consistently throughout the organization without regarding to age, gender, race, national origin, disability and other protected characteristics.

b. Inappropriate conduct or a violation of employer policy.

Inappropriate conduct and violation of Company policy is a common and perfectly legal reasons for termination. However, before terminating an employee for policy violation, employers/counsel should check that the employer performed the following tasks:

- properly communicated expected standards of conduct in the workplace
- thoroughly investigated the misconduct;
- discussed the issue with the employee and offered the employee an opportunity to be heard (if appropriate under the circumstances);
- applied disciplinary measures that are appropriate to the circumstances; and
- ensured that discipline for similar infractions have been enforced consistently (without regard to an employee's race, gender, religion, national origin, age, disability, etc),
- ensured that any progressive discipline policy was followed.

c. An economic downturn or other circumstances that change the employer's employment needs.

Before eliminating a position or conducting a Reduction in Force (RIF), it is recommended to ensure that the employer:

- has a well-documented basis for the job elimination or RIF based on legitimate business reasons;

- used objective criteria to select the employees for job elimination, such as seniority with the company, importance of the position for the operation of the company, even performance;

- conducted a disparate impact analysis to make sure no protected class is disproportionately affected;

- adhered to the notice requirements under the federal Worker Adjustment and Retraining Notification Act (WARN Act) and state-specific WARN acts for plant closings or mass layoffs.

3. *Best Practice Tips for How to Conduct a Termination*

If the employer decides to terminate an employee, a well-executed, carefully planned termination helps to reduce the risk of potential lawsuits and minimizes the disruption in the workplace.

a. Considerations before termination

Before the termination, the employer should collect and review all documents relating to the employment relationship, including employment agreements if applicable. The employer should also its employee benefits obligations. For example, the employer may need to offer group health plan continuation coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) to qualified beneficiaries; pay the reasonable cost of return transportation abroad, if the employee is a sponsored foreign worker; or determining its obligations relating to the final payment of wages, including bonuses, commission payments, and accrued but unused vacation and sick days and other paid time off.

b. Whether to Offer Severance Payments

While most employers are not obligated to provide severance pay to the employee under an employment agreement, offer letter, or severance plan, policy, or practice, offering severance pay in exchange for a release of claims against the employer, can reduce or eliminate the litigation risk. Employers should take past practices and the soundness of the termination reason,

including the existing documentation supporting the reason for termination into consideration when deciding whether to offer severance pay.

c. Practical tips for the termination meeting.

When a termination decision has been made, the employer should promptly carry out that decision. The managers and supervisors involved in a termination meeting should coordinate with the employer's legal, human resources, and other appropriate departments so that they are prepared and well-rehearsed to deliver the termination message. Consider having the manager or supervisor trained on organizational precedent to learn how the employer has handled similar terminations in the past. It is a good practice to draft talking points for the meeting and have relevant documentation ready to present to the employee at the meeting. Documentation may include a:

- termination letter, if the employer uses one to document the lawful reason for termination;
- documents such as poor performance evaluations, discipline, or company policies, which support the reason for the termination;
- severance agreement, if the employer offers to or must provide a severance package (see Consider Severance Obligations); and
- other information and services that may be helpful to the employee, such as contact information for the state unemployment agency, if the employee is eligible, counseling services through an employee assistance program, outplacement services to help the employee find another job.

d. The importance of objective documentation

Terminations should be documented in an objective and professional fashion. Employers who have no documentation about the reason for disciplining an employee or terminating an employee, have a difficult time to show that their motives for termination or discipline was a

legitimate reason – and not discriminatory. It is a best practice for employers to have practices and procedures in place for disciplining and terminating employees.

However, bad or subjective documentation can damage the employer in litigation. For example, comments such as "employee is too old to grasp new software updates" can be interpreted as discriminatory based on an employee's age. Documents that include any of the following may undermine a company's defense in a wrongful termination case:

- personal comments.
- overstatements.
- speculation or assumptions.
- emotionally charged language.
- incomplete documents.
- incorrect documents.

The more an employer makes these documentation mistakes, the more likely a jury is to find the termination based on something other than lawful business-related motives.

D. Disciplining an Employee Without Fearing a Retaliation Claim

Federal and state law prohibit an employer from retaliating against an employee for making a complaint about discrimination, harassment, or policy violations by the employer. In order to establish a *prima facie* case of retaliation under Title VII, a plaintiff must establish that: (1) he engaged in a protected activity; (2) there was an adverse employment action; and (3) a causal link existed between the protected activity and the adverse employment action.[2] If the former employee meets his or her burden of proof, the employer can bring forward its legitimate, non-discriminatory treason for termination and the burden then shifts back to the former employee to prove that the employer's proffered reason was a pretext for retaliation.

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[2] *Holtzclaw v. DCS Corp*., 255 F.3d 254, 259 (5th Cir. 2001); *see also, Bullard v. Texas Dept. of Aging & Disability Servs.*, 19 F.Supp. 3d 699, 706-07 (E.D. Tx. 2013) (granting 12(b)(6) motion to dismiss for failure to plead the minimum requirements to state a retaliation claim under Title VII.); *Williams v. Recovery School District,* 859 F.Supp.2d 824, 831-832 (E.D. La. 2012) (granting 12(b)(6) motion to dismiss for failure to state facts establishing a causal connection between the alleged protected activity and adverse employment action.)

Title VII's ant retaliation provision defines two types of protected activity: The "opposition" clause prohibits retaliation against employees who oppose any practice made unlawful while the participation clause protects activity that occurs with or after the filing of a Charge of Discrimination or a lawsuit.[3]

To discipline an employee without fear of a retaliation claim, employers must ensure that they have a solid, well documented legitimate reason for the discipline. Documentation is key. Additionally, employers should ensure that company policies are being enforced unilaterally and consistently to show that potential complaints by the disciplined employee were not the reason for the discipline. It is not uncommon for underperforming employees to make a complaint about discrimination, harassment or policy violation by the company, shortly before they receive a discipline or get terminated, knowing that they will receive a discipline in the near future.

While temporal proximity between the engagement in the protected activity and the adverse employment action weighs in favor of retaliation, the law does not allow an employee to use the engaging in a protected activity (and the threat of filing a retaliation claim) as a shield to protect them from legitimate discipline and termination.

Again, documentation of all events that lead to the discipline or termination is the best defense against retaliation claims.

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[3] *See Mota v. Univ. of Tex. Hous. Health Sci. Ctr.*, 261 F.3d 512, 520 (5th Cir. 2001).

Workplace Behavior and Privacy Issues

Submitted by Susan Fahey Desmond

WORKPLACE BEHAVIOR AND PRIVACY ISSUES

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I. INTRODUCTION

Employers frequently need to monitor employee activities to ensure that the employees are performing their assigned tasks or even to ensure that employees are not committing fraud by filing frivolous workers' compensation claims or taking fraudulent leave. Additionally, employers need to ensure that they are protecting their investments such as trade secrets or other proprietary information. The ability to download large amounts of materials or send information quickly via electronic communications often proves tempting to disgruntled employees or those who have decide to work for a competitor. Employers have strong interests in ensuring their workplaces are safe; their trade secrets, confidential and proprietary information are secure; their employees properly are using the company's electronic and communication devices for company purposes; that employees are performing to the highest quality, professional and ethical standards set by the employer; and to ensure productivity and efficiency. Of course, the question often arises "When does the employer's legitimate business needs end and the employee's privacy rights begin?"

Under Louisiana law, a claim for an invasion of privacy requires a showing that the employer's conduct is unreasonable and that it seriously interfered with the plaintiff's privacy interests.[2] In addition to Louisiana law, there are a number of federal laws that are implicated when employers desire to monitor their employees' conduct.

II. EMPLOYEE SURVEILLANCE

Whether an employer can conduct surveillance of employees is often dependent on whether the employer is a governmental entity or a private employer. Governmental employers' ability

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[2] *See Young v. St. Landry School Board*, 95-1480 (La. App. 3 Cir. 5/1/96); 673 So.2d 1272, 1275.

to conduct surveillance will implicate the Fourth Amendment to the United States Constitution. Employees do not lose their Fourth Amendment rights merely because they work for a governmental employer.[3] On the other hand, the Supreme Court has recognized that probable cause requirements typically required of law enforcement would be impracticable for government employers.[4] Thus, a government employer's surveillance would be considered reasonable if it was justified and if the measures adopted are "reasonably related to the objectives of the search and not excessively intrusive in light of the circumstances giving rise to the search."[5] As for private employers, their ability to conduct surveillance may implicate the National Labor Relations Act. The Board has consistently found that employee surveillance is a mandatory subject of bargaining for union employers.[6]

III. SEARCHES OF DESKS, SMARTPHONES, LOCKERS, VEHICLES, EQUIPMENT, BRIEFCASE

Generally speaking, employers have a right to monitor and inspect company owned or company provided desks, lockers, vehicles, and equipment. Employee lawsuits alleging invasion of privacy based on employer searches are largely resolved in favor of employers. Courts typically reason that if the employer owns the equipment, it has a right to set the terms and conditions for use. Such rights, however, are not unfettered. The overriding factor for employer success in such matters concerns whether the employee had a reasonable expectation of privacy. Thus, the steps the employer has taken to minimize or eliminate any expectation of privacy remain significant.

When consistently applied, written policies may effectively disavow employees of any notion of an expectation of privacy when they: (1) explicitly identify which work-related items and systems are the sole property of the employer and have been provided solely for the employee's use in performing his or her duties and responsibilities; (2) expressly state that the employee has no right to any personal or private use of such property; (3) make clear that the employer retains the right to monitor all use of such property or systems; (4) dictates that the employer shall at all times have the right to immediate access to its property; (5) provides examples of under what circumstances employees can expect a search to occur; and (6) notifies

[3] *City of Ontario v. Quon*, 2010 U.S. LEXIS 4972 (S.Ct. June 17, 2010).
[4] Id. at *23.
[5] Id.
[6] *See Colgate-Palmolive Company,* 323 N.L.R.B. 515 (N.L.R.B. 1997).

employees that their failure to provide immediate access to such property constitutes a violation of company policy and may subject the employee to disciplinary action, up to and including termination of employment.[7] A successful policy is accompanied by a requirement that employees sign an "Acknowledgement of Receipt and Understanding" of the company's equipment use policy, with a signed copy of the acknowledgement maintained in the employee personnel file. With such armor, employers typically are able to successfully defend invasion of privacy claims as they relate to the use of company property.

Employers that provide lockers or desks should consider whether employees will be given keys to the desks or permitted to use their own key or combination locks for lockers. To minimize expectations of privacy, employers should consider providing desks that do not lock or provide lockers with built in combinations that are maintained by the Company. If an employee's role requires him or her to secure certain files or records, the employer should maintain duplicate keys for all desks or cabinets. If employees are permitted to provide their own locking mechanisms, a "locker" acknowledgement should make clear that a personal locking device does not render the locker off-hands to the employer; they remain the company's property, and the company retains the right to enter into such property at all times even if it means the employer is forced to break the lock if the employee refuses access.

Employers also have the right to demand immediate possession of its company owned or provided electronic equipment such as smartphones and laptops, and to monitor their use. As with physical property, employees should be provided with specific written guidelines regarding proper use of technology in the workplace, and the means the employer will use to monitor such use. Ideally, the policy will set forth the types of monitoring that will be used, how frequently monitoring will occur, and what purpose the employer hopes to accomplish through the monitoring. When such explicit policies are in place – and employers can prove their employees are aware of the policies, courts generally find that employees have no expectation of privacy, thus finding no grounds to hold employers liable for invasion of privacy.

[7] *See, e.g., Shefts v. Petrakis*, 758 F.Supp.2d 220 (C.D. Ill. 2010) (employee gave implied consent to monitoring of office emails and text messages from his Blackberry based upon the combination of his knowledge that messages could be monitored and the notice in the employee handbook).

IV. MONITORING EMPLOYEE COMMUNICATIONS: CALLS, EMAIL AND INTERNET USE

Three federal statutes primarily implicate employer monitoring of employee communications.

The Wiretap Act created privacy protections for oral and wire communications. The Electronic Communications Privacy Act (ECPA) amended the Wiretap Act to extend its protections to electronic communications, and prohibited interceptions of those communications, among other things. The Stored Communications Act added protections for stored communications. These statutes can have significant consequences when taking certain steps to protect company assets, conduct investigations, monitor employee and customer relations, and enforce restrictive covenants. The laws are particularly challenging to interpret because they are outdated as compared to today's technologies.

The Wiretap Act frequently comes up in connection with the recording of telephone calls, usually in a call center context. The federal law generally permits recording where at least one party to the call has consented. At least 11 states, however, require all parties to the call to consent to its recording. Note further that these states may require their law be applied even if the call originates from a one-party consent state to reach a resident of their state.

The ECPA is concerned with the *intentional* interception, use, and disclosure of the content of electronic communications. ECPA places some limitations on an employer's right to monitor its employees' telephone usage at work. Under ECPA, an employer usually may not monitor an employee's personal phone calls, even those made from telephones on work premises. An employer may only monitor a personal call if the employee knows the particular call is being monitored and consents to it. An employer may not intercept an employee's voice mail, but it may be allowed to access voice mail messages that are in "electronic storage" on the company system.

Because ECPA concerns intentional interceptions of electronic communications, it has been found that information concerning the times when emails are sent, how many emails are sent, or the amount of time spent on a computer network is not covered by ECPA. In addition, under this statute, a provider of electronic communication services to the public may not intentionally divulge the contents of any communication while in transmission on that service to anyone other than the addressee. Although courts have struggled with what constitutes an

interception of an email and when it is permissible to access emails in storage, ECPA's contains three statutory exceptions: (1) consent; (2) business extension; and (3) system provider – one or more of which applies to many employers.

Because most employers typically provide the systems or program over which employee communication takes place, the ECPA provides the least protection to employees in terms of employer intrusions. Under the consent exception, the employer need only acquire the implied or express consent of the employee to avoid ECPA violations. Given that most employers routinely require employees to acknowledge (and in some instances, sign away any residual rights to privacy), that the employer may monitor computer usage including internet and email access, most employers fall within the consent exception, thus avoiding liability under the ECPA.

The federal Stored Communications Act defines the circumstances under which persons may gain access to emails and other electronic communications that are stored on a service provider's facilities. The SCA generally prohibits accessing the online account of another without that individual's consent, such as an employer accessing an employee's private web or cloud-based email (e.g., Gmail). It is fairly well established, however, that whatever an employee sends or receives on a *company* email account is the property of the employer and can be accessed or viewed by the employer without notice, so long as the employer is not surreptitiously accessing the materials via the employee's password-protected account. This also assumes there is a written policy communicated to employees that addresses the employees' expectation of privacy with respect to such communications.

Ultimately, these statutes notwithstanding, employees who use company computers and other electronic communication systems generally do not have a reasonable expectation of privacy regarding what they do on those systems. Employers have a right to search, monitor and view employee email stored on its systems as long as there is a valid business purpose for doing so. Employees may be disciplined or fired if their emails violate company policy or the law. Likewise, employers have the right to monitor and track Internet websites visited by their employees on company computers; to block employees from visiting specific Internet sites; and to limit the amount of time an employee may spend on a specific Web site.

A 2010 decision by the New Jersey Supreme Court caused a bit of stir in the generally accepted belief that the employer gets to monitor and act on communications stored on its

systems. *Stengart v. Loving Care Agency, Inc.*,[8] concerned whether the plaintiff had a reasonable expectation of privacy when she accessed her Yahoo email account via the employer's computer system to retrieve communications with her attorney. Ms. Stengart had been emailing with her counsel about a discrimination lawsuit she planned to file against her employer. The company's lawyers came across the emails and attempted to use the emails to defend Ms. Stengart's claim. The New Jersey Supreme Court found that the employer invaded Ms. Stengart's privacy and held that employee did not waive attorney-client privilege simply because she accessed the emails via her company provided laptop.

By contrast, a California state court in *Holmes v. Petrovich Development Co., LLC*, 191 Cal. App. 4th 1047 (Cal. App. 3d Dist. 2011),[9] found that an employee's emails to her attorney were not protected by attorney-client privilege and were not confidential because the employee used the employer's computer to send these e-mails, after being expressly advised that personal e-mails were not private and were accessible by the employer. Specifically denouncing the Stengart ruling, the California court reasoned that this form of communication was akin to the "employee consulting her attorney in one of the employer's conference rooms, in a loud voice, with the door open, yet expecting that the conversation overheard by her employer would be privileged."

The United States Supreme Court weighed in on the issue of employee privacy versus employee monitoring in the matter of *City of Ontario, Calif. v. Quon.*[10] Police officer Jeff Quon and others, including his wife and his girlfriend, sued the City of Ontario, California alleging violations of their Fourth Amendment rights against unreasonable searches when he was disciplined for sending sexually explicit text messages via his City-issued pager. Although the decision was based on public employee Fourth Amendment rights, the court's reasoning proves instructive and helpful in the private employment context as well.

The Court pointed to at least five factors demonstrating a lack of excessive intrusion on Quon's privacy:

1. The City limited its transcript review to only a two-month period rather than the full nine or ten months the pager was in service.

[8] 201 N.J. 300 (N.J. 2010).
[9] 191 Cal. App. 4th 1047 (Cal. App. 3d Dist. 2011).
[10] See footnote 3 supra.

2. The City redacted any messages Quon sent or received while he was off duty and did not consider them.
3. The City reviewed text messages sent over an employer-provided device and account and not Quon's personal device or account.
4. Quon was informed by the lieutenant that his text messages could be reviewed.
5. Quon had constructive knowledge that his text messages could be reviewed because "a reasonable employee would be aware that sound management principles might require the audit of messages to determine whether the pager was being appropriately used."

According to the Court, the search had a clear non-investigatory, work-related purpose at its inception – to evaluate whether the monthly character limit was sufficient for the City's needs and to ensure that employees were not paying out of pocket for work-related expenses. The Court avoided deciding whether public employees have a reasonable expectation of privacy in text messages sent on employer-owned equipment. The Court acknowledged that rapid changes in the means by which information is transmitted, as illustrated by advancements in technology and what society views as proper behavior, created significant challenges to setting legal standards for the workplace that would survive the test of time.

As more employees perform more of their work on a computer, smart phone, or tablet, employers are increasingly tempted to monitor email communications, to record employee activity through a technique known as "key-logging," or to use software to view, save and access activity on the system, including "cached" files saved on a company's hard drive. These new techniques are continuing to drive litigation in this area.

V. DRESS CODE/PERSONAL APPEARANCE

Employees in the private sector are generally required to follow the employer's dress and grooming standards. Such codes typically do not implicate privacy laws. More often, however, they implicate discrimination laws when the dress and grooming standards place greater burdens on one sex than the other or they intrude on religious practices.

Exceptions may apply, however, where dress code policies restrict an employee's ability to wear garments that are required by his or her religion. With the exception of narrowly defined safety concerns, the United States Supreme Court has concluded that employers have

no overwhelming legitimate business interest in prohibiting Muslim women from wearing hijabs in the workplace. *See EEOC v. Abercrombie & Fitch*, 575 U.S. __ (2015).

Similarly, generally, an employer may impose restrictions on employees' display of tattoos in the workplace provided that such restrictions are evenly applied. Employer policies regarding body piercing and tattoos have come under fire, however, via federal anti-discrimination statutes. In *Cloutier v. Costco,* Kimberly Cloutier, a cashier at Costco and a member of the "Church of Body Modification", brought suit after she was terminated for refusing to remove her facial piercings based on religious grounds and declining to accept any of the Company's offered accommodations. Costco's dress code policy prohibited the wearing of any facial jewelry other than earrings. Ms. Cloutier was asked to remove an eyebrow piercing to conform to Costco's policy. She refused, claiming that she was required to display her facial jewelry at all times as part of her religious beliefs. When Costco attempted to accommodate Ms. Cloutier's religious belief, she refused the accommodation. The district court ruled in Costco's favor that it was not required to excuse Ms. Cloutier from its dress code policy, as Ms. Cloutier's request would cause an undue hardship on Costco. The Court was persuaded that Costco had a legitimate interest in presenting a workforce to its customers that was reasonably professional in appearance. The Court also noted, "[a] religious accommodation constitutes an undue hardship when it would impose upon an employer more than a de minimis cost."

In *EEOC v. Red Robin Diner*, the EEOC brought suit against Red Robin Gourmet Burgers on behalf of server Edward Rangel, alleging the burger chain failed to accommodate his religious practice, a practice that required he be tattooed with quarter-inch wide religious inscriptions encircling each wrist. Rangel practiced the Kemetic religion, an ancient Egyptian faith. Red Robin's dress code prohibited employees from having visible tattoos and asked Mr. Rangel to cover his tattoos with wrist bans or bracelets. Mr. Rangel refused, stating that covering his tattoos was a sin. Although Mr. Rangel had multiple conversations with management explaining his faith, he ultimately was terminated for failing to conceal his tattoos.

In the lawsuit, Red Robin argued that exempting Mr. Rangel from its dress code policy would create an undue hardship to the employer because it had a certain image it wanted to portray to customers. The district court disagreed, stating that allowing the employee to show

his tattoos must not be much of a hardship given that Mr. Rangel worked for six months before being asked to cover his tattoos, no customers complained, and the tattoos were small. The case ultimately was settled, with Red Robin paying $150,000 and making substantial policy and procedural changes.

The Red Robin case notwithstanding, employers should not be afraid to implement and enforce their dress codes, grooming and personal appearance standards, yet keeping in mind the potential need for religious accommodation. As such, employers should consider the following:

- Avoiding a "my way or the highway" approach to the policy.
- Reviewing its business related justifications for the policy when an accommodation is requested and in what ways, if any, those justifications cannot be met by providing an accommodation.
- Maintaining and documenting an interactive dialogue with employees who make accommodation requests on the basis of their religion, including the nature and bases for the concern and potential alternatives to the policy.
- Keeping a record of customer surveys, marketing reports, customer complaints, OSHA requirements, injury records and other data that would potentially support the need for particular dress code standards.

VI. DRUG AND ALCOHOL TESTING

The rules regarding drug and alcohol testing are different dependent on whether an employer is governmental or private. In *Skinner v. Ry Labor Executive Assn.*,[11] the Supreme Court found that the Fourth Amendment prohibits random drug testing except for those position that can be considered "safety sensitive." In one case, the Fifth Circuit found that requiring drug testing after a routine accident with no evidence of drug use violates the Fourth Amendment.[12] In a similar case, however, the Fifth Circuit found that a governmental entity did not violate the Fourth Amendment by requiring a drug test after a vehicular accident when the employee had a reduced expectation of privacy given that the employee was in a safety sensitive position.[13]

[11] 489 U.S. 602 (1989).
[12] *United Teachers v. Orleans Parish School Bd.,* 142 F.3d 853 (5th Cir. 1998).
[13] *Bryant v. City of Monroe*, 2013 U.S. Dist. LEXIS 156627 (W.D. La. Oct. 31, 2013).

Louisiana also regulates governmental employers' ability to test their employees for drugs. Under a state statute, a public employer can require a drug test after an accident as long as there are circumstances to suggest reasonable suspicion that drugs are being used.[14]

Private employers have much more leeway with regard to drug testing. Louisiana also provides immunity from claims such as defamation, libel, slander or damage to reputation or privacy if it has a drug testing program that complies with the state statute.[15]

VII. PSYCHOLOGICAL AND PERSONALITY TESTS

Pre-employment testing helps employers determine the applicant's suitability for a particular position. These tests might include drug and alcohol tests, medical examinations, skills tests, physical agility tests, honesty/integrity tests or personality tests. While there has been little litigation challenging such tests on privacy grounds, federal and state anti-discrimination laws limit the use of psychological testing in a few significant ways. Some psychological tests, for example, have had separate scoring systems for males and females, and use of such systems would appear to be illegal.

To avoid running afoul of EEO and state anti-discrimination laws, an employer must be able to show that the particular pre-employment test is both reliable (i.e., having a high degree of consistency) and valid (i.e., that the conclusions drawn from the test are accurate in that the test shows a strong relationship between the findings and success on the job.) The Equal Employment Opportunity Commission addressed this issue of validity in its Uniform Guidelines on Employee Selection Procedures. [These guidelines are located at www.uniformguidelines.com/uniformguidelines.html.]

In the Uniform Guidelines, the EEOC states that the use of any selection procedure that has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines. Thus, an employer should examine the type of validity test that is applicable to a certain test before putting that test into place as part of its selection process.

[14] La.Rev.St. 49:1015.
[15] La.Rev.St. 49:1012.

Pre-employment testing is a particularly sensitive matter under the Americans with Disabilities Act. The ADA prohibits medical examines prior to a conditional offer of employment. To determine whether the test is medical, courts may look at the information that is elicited as well as who is conducting the examination. If a test is designed and used to determine traits such as poor judgment, chronic lateness, and temper, it is most likely not going to be considered a medical examination. Federal guidelines indicate, however, that psychological tests would be considered medical examinations "to the extent that they provide evidence concerning whether an applicant has a mental disorder or impairment," or if the exam is used by an employer "to assess an applicant's general psychological health." For avoidance of ADA violations, even if the test does not constitute a medical examination, employers must be careful that there are no "individual inquiries on the test that concern the existence, nature, or severity of a disability are prohibited at the pre-offer [of employment] stage."

Similar guidelines apply to "personality tests," which are increasingly being used by employers. The EEOC has noted that a test used to "identify traits such as poor judgment, chronic lateness, poor impulse control, and quick temper are not medical examinations." If, however, such a personality test seeks to measure, or could be used to determine, whether the individual suffers from emotional disorders such as excessive anxiety or depression or has other mental impairments that are listed in the Diagnostic and Statistical Manual of Mental Disorders, the test could constitute an illegal medical examination under the ADA.

VIII. WORKPLACE VIOLENCE

Employers face multiple overlapping legal and ethical considerations when weighing workplace violence interventions: Employment law claims (ADA, Title VII, GINA, HIPAA); Common law claims (e.g., Defamation); Negligence claims (negligent retention, negligent misrepresentation; OSHA; state workplace safety laws); and Moral Responsibility (to employee; co-workers, staff and their families; customers and clients; and to the general public). Given the amount of time spent in the workplace, employers often have a unique view into how their employees function and, thus, employers may be the first to recognize a concerning change in mood, behavior, or functioning. Although most people who threaten violence do not actually act on it, people who commit acts of violence rarely just "snap." Thus, the question for employers is – when, or can I, act?

Individuals who create concerns may have disabilities under the Americans with Disabilities Act, as amended (ADA), state or local law. The ADA addresses an employer's right to enforce conduct rules and imposes specific standards for proving individuals pose a "direct threat". The ADA's rules impact the right to request and conduct fitness for duty evaluations and they may offer protections to employees with co-existing substance abuse issues. Thus, initial questions concern whether employee conduct is covered by the ADA. Ask yourself, "Is the individual posing the risk protected by the ADA because he/she has an actual disability (a physical or mental impairment that substantially limits one or more major life activities)? If so, this might trigger reasonable accommodation obligations. If not, ask, "will the company's actions pose the risk that the individual likely would be covered because the individual has: (a) a record of a disability (reasonable accommodation required); or (b) was regarded as having a disability. Comments or expressions of concern about an employee's potential to become violent may be evidence that the employer "regarded" the employee as having an impairment.

The ADA, however, does not mean employer conduct rules must be ignored. Employers need not forgive or excuse misconduct, even if it is caused by a disability, as long as the conduct rule is job-related and consistent with business necessity. Certain conduct standards will always meet this "job-related and consistent with business necessity" standard, such as prohibitions on violence, threats of violence, stealing, or destruction of property. In addition, employers may prohibit insubordination towards supervisors and managers and also require that employees show respect for, and deal appropriately with, clients and customers.

The ADA also allows employers to take action without a risk of violating its rules where the facts demonstrate there is a direct threat of harm. An employer need not hire or employ individuals with disabilities if they pose a "direct threat"; keep in mind, however, that a "direct threat" is a high standard to meet and requires an individual assessment. A "direct threat" means a "significant risk of substantial harm that cannot be eliminated or reduced through reasonable accommodation." A finding of "direct threat" must be based on the best available objective medical evidence that relies upon the most current medical knowledge. Factors to consider in making direct threat determinations: severity of harm; likelihood of harm; and imminence of harm. To avoid potential ADA liability under the direct threat analysis, imminence of harm is often a key determining factor.

For example, an employer learns that a long-term employee is viewing websites in the workplace that would allow him to buy firearms. Employee's best friend (also a co-worker) notifies management that he saw employee on the website. Best friend further tells their manager that the employee has been stressed because he believes his wife is cheating on him with her boss, he recently mentioned harming himself, he has not been sleeping well, and he's afraid he will be fired because he has not been meeting his sales goals. Tensions are high, and the employer wants to notify the local authorities right away. Is this a privacy issue? Are other legal ramifications at issue?

Likely, yes. These circumstances likely will not constitute a direct threat under the ADA and, thus, the Company's disclosure of the information to local authorities (or the employee's wife) may have both common law privacy and ADA implications. Nevertheless, there appear to be real workplace concerns and a potentially violent situation that needs to be addressed. No one wants a situation where no action was taken and a violent episode occurred. Consider an intervention.

Have a conference with the employee that focuses on his overall well-being. If possible, two managers should be present in the meeting (or manager and HR). Health care professionals call this meeting the "three As" approach – Ask, Acknowledge, Arrange. The end goal is to remove the employee away from the workplace to address his stressors and the employer's safety concerns while minimizing our potential ADA and other legal exposure. Some employers offer (but do not require) paid time away from the workplace to allow the employee an opportunity to begin the process of addressing his stress issues while at the same time getting back on track with performance and following the Company's policies (to wit, not using the Company's internet to search for guns).

1. If the employer has an EAP, a call to the EAP hotline in advance of the meeting should occur to apprise them of the circumstances and to let them know that, hopefully, someone will be calling back with the employer.

2. Offer to call EAP with the employee and to get him started on the call. Company manager can leave once he feels comfortable on the call and it appears he will talk to someone. Manager should nonetheless check on employee every so often to be sure he does not wander off on his own.

3. If the employee does not buy into the paid leave, tell him that because of the Company's concerns, he will be placed on an Administrative Leave of Absence for a period of time. Stress that the company sincerely hopes that he will take the time to reconsider the resources available to him to begin the process of dealing with the stressors he identified and to be ready to address the issues involving compliance with workplace issues.

4. In either event, ask if the company can call an emergency contact (probably not a good idea to call the wife) to give him a ride home. If the wife is his emergency contact person, then simply ask him if there is someone the company can call to come pick him up or if the company can provide a taxi or UBER service if he prefers.

5. Refrain from having a company employee drive him home.

6. Have ready and provide him with phone numbers for your EAP as well as the Suicide Prevention Hotline (1-800-273-TALK (8255)).

7. Stress to the employee that the company is not trying to regulate his life, but these are very serious concerns, the company is very concerned about him, and is present to help as best as we can. Hopefully, the employee gets the help he needs and is back on track.

8. Depending on outcome of the intervention meeting, discuss (preferably with legal counsel) whether local authorities need to be advised.

Finally, what can employers say about a violence prone employee who leaves the Company? Negative employee references have long been breeding grounds for lawsuits against employers for invasion of privacy and defamation of character. Consequently, most employers have been relegated to providing prospective employers with nothing more than the proverbial "name, rank and serial number" (otherwise known as confirmation of dates of employment and position held). Following horrific incidents of workplace massacres, former employers were being "called on the carpet" to explain what they knew of the workers' potential for violence and why weren't they more forthcoming when contacted for references.

IX. OFF-DUTY BEHAVIOR AND ACTIVITIES

From a privacy perspective, however, there are legitimate circumstances by which certain off-duty conduct may have an impact on the workplace for which such intrusions may be reasonable. For instance, if the off-duty conduct has a direct impact on the employee's ability to perform his or her duties, then the employer may be able to take action. By way of example, a company may be obligated to investigate circumstances under which employees who drive

for the employer are required to surrender their drivers licenses or employees who handle personal data information such as social security numbers and dates of birth are arrested for forgery and identity theft.]

Similarly, employers may be obligated to take action if they learn of off duty conduct involving threatening, physically violent or harassing behavior – particularly if such conduct is directed to someone connected to the business (i.e., another employee, customer, or vendor.) Purported victims of such conduct often will attempt to hold employers liable on the grounds the employer knew or should have known about an employee's propensity to engage in violent or harassing conduct – regardless of how the employer learns of such conduct – but failed to take appropriate action. The question of where to draw the line for employers becomes a balancing act between avoiding privacy claims by the employee versus avoiding potential liability under other legal theories such as federal sexual harassment law or state law theories of negligent hiring, retention, or supervision, assault and battery from potential victims. In such circumstances, employers need to weigh carefully the source and validity of information they receive; consider the employee's conduct while with the company; determine the immediacy of such threatened violence; consider the nature and severity of the alleged off-duty conduct; how much time has passed since the alleged off-duty conduct and whether the conduct is a "one off" occurrence or it is illustrative of a series of bad conduct.

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