Personnel Law: Hiring & Firing
EMPLOYMENT AT WILL

- Defined
- Abrogated By:
  - Statute
  - Common Law
STATUTORY LIMITATIONS ON EMPLOYMENT AT WILL

- National Relations Labor Act
- Title VII
- Americans With Disabilities Act
- Age Discrimination in Employment Act
- Equal Pay Act
- Pregnancy Discrimination Act
- Missouri Human Rights Act
EXPRESS CONTRACTS

- Written
- Verbal
- May limit employer’s right to terminate employment
IMPLIED CONTRACTS

- Handbook Exception
- Probationary Period
- Grievance Procedures
- Company Rules of Conduct
PUBLIC POLICY

- Whistleblowers
- Covenant Of Good Faith And Fair Dealing
- Limits on Public Policy Exceptions
TORT CLAIMS

- Intentional Infliction of Emotional Distress
- Negligent Infliction of Emotional Distress
- Negligent Supervision
- Defamation
- Invasion of Privacy
- Fraud
- Promissory Estoppel
WAYS TO AVOID ABROGATION OF EMPLOYMENT AT WILL

- Place disclaimer statements in employee handbooks
- Ensure employee handbooks do not make promises of continued employment
- Be fair and consistent in disciplining and discharging employees
WAYS TO AVOID ABROGATION OF EMPLOYMENT AT WILL

- Train personnel regularly regarding illegal discrimination, proper documentation of problems and discipline, general employee treatment and the do’s and dont’s of interviewing
- Examine termination procedure
HANDBOOK EXCEPTION?
HANDBOOK EXCEPTION

- Employment contract in Missouri?
  - **Patterson v. Tenet Healthcare, Inc.**, 113 F.2d 832 (8th Cir. 1997).
As Many As

40% of all job applicants misrepresent their qualifications and background

Employers Often

Fail to verify or

Investigate
METHODS OF PREVENTION

- Keep thorough, accurate records of every step of the hiring process:
  - application
  - interview
  - investigation
BACKGROUND CHECKS

- Credit Checks
- Criminal Background Checks
- Reference Checks
- Drug Tests
- Medical Tests
- Polygraph Tests
- Interview
INTERVIEWING DANGER AREAS

- Union Sympathies
- Marital Status
- Reproductive Plans
- Child Care Arrangements
DANGER AREAS

- Social Organizations
- Church/Synagogue Organizations
- Religious Observances
ADA

Absolutely prohibits pre-offer:

- Medical Examinations
- “Disability-Related” Inquiries
EMPLOYER CANNOT ASK PRE-OFFER

- What impairments do you have?
- What medical conditions do you have?
- What disabilities do you have?
- Do you have ____________?
- Have you had any previous work-related injuries?
EMPLOYER CAN ASK PRE-OFFER

- Will you need an accommodation to complete the hiring process?

- *If so, please provide documentation of the existence of a [non-obvious] disability and the need for accommodation you believe is necessary*
EMPLOYER CAN ASK PRE-OFFER

- Can you, with or without reasonable accommodation, perform all of the job functions of this job?
EMPLOYER CANNOT ASK PRE-OFFER

- Do you need reasonable accommodation to perform this job?

- Can you perform all of the job functions of this job ______ with or ______ without reasonable accommodation?
EMPLOYER CAN ASK PRE-OFFER

- Please describe or demonstrate how you will perform this job (including any needed accommodations).
- As long as all applicants are asked this question.
EMPLOYER CAN ASK PRE-OFFER

- Please describe or demonstrate how you will perform this job (including any needed accommodation).

- Even if only asked of a particular applicant IF the employer could reasonably believe that the applicant will not be able to perform the job because of a known or voluntarily disclosed disability.
EMPLOYER CAN ASK PRE-OFFER

- Will you need reasonable accommodation to perform the job, and if so, what type of reasonable accommodation will you need?
- *If the employer reasonably believes applicant will need reasonable accommodation based on applicant’s VOLUNTARY DISCLOSURE of an otherwise HIDDEN disability; or*
EMPLOYER CAN ASK PRE-OFFER

- Will you need reasonable accommodation to perform the job, and if so, what type of reasonable accommodation will you need?

- If the employer reasonably believes the applicant will need accommodation based on OBVIOUS disability; or
Will you need reasonable accommodation to perform the job, and if so, what type of reasonable accommodation will you need?

If the applicant VOLUNTARILY DISCLOSES need for ACCOMMODATION.
USE OF PERFORMANCE APPRAISALS

- Permits supervisors to inform employees of what is expected of them
- Provides necessary training
- Allows employees to communicate with management
- Provides first step in progressive discipline
OPPORTUNITY FOR CORRECTION

- Clear notice of performance, behavioral, or attendance deficiencies
- Objectivity and specificity in the notice
- Final warning to include notice that job is in jeopardy
EVALUATION SAFEGUARDS

- Use objective, written performance criteria
- Train evaluators
- Limit supervisor discretion.
- Require reviewers to discuss the review with another reviewer (or review in committee)
EVALUATION SAFEGUARDS

- Require managers to review unsatisfactory reviews
- Have a way for employees to appeal their evaluations
MAXIMIZING THE BENEFITS OF A PERFORMANCE REVIEW DISCUSSION WITH EMPLOYEES

- Give the employee a few days advance notice of the review discussion
- Set one or two main objectives for the discussion
- Anticipate questions and have questions in mind to ask
- Establish friendly rapport
THINGS TO REVIEW

- General traits
- Specific tasks in job description
- Potential
- Comments and Recommendations
  - specific examples
  - extenuating circumstances
IMPORTANCE OF CONCRETE EXAMPLES

- It tells the employees exactly what he/she is doing that is objectionable
- It gives the employee a clearer sense of what he/she must do to correct the problem; and
- In the event of litigation, the employer is better prepared to defend against claims of discrimination or unfair treatment
EVALUATION STRATEGIES

- Know what your expectations are
- Tell employees what is expected of them
- Tell employees when they are not measuring up and what they can do to correct their performance
- Act on problems promptly
- Be consistent
EVALUATION STRATEGIES

- Perform regular performance evaluations
- Be clear with employees about performance problems
- Be honest
- Go over the employee’s prior record
- Have the employee sign the review
- Do what you say you will do
EVALUATION STRATEGIES

- Look at mitigating circumstances
- Decide if the problem is one you can solve
- Conduct evaluations in private
- You are not Dr. Bob or Dr. Jane
EVALUATION STRATEGIES

- Document, document, document
RED FLAGS

- Sarcastic, mean-spirited, and/or personal comments
- General comments that contradict specific examples
- Incorporating stereotypes
- Abrupt departures from long-term positive evaluations
ACTUAL QUOTES FROM EMPLOYEE PERFORMANCE EVALUATIONS

(How not to say it)

- This lady has delusions of adequacy.
- He sets low personal standards and then consistently fails to achieve them.
- This employee should go far - and the sooner he starts, the better.
- This employee is depriving a village somewhere of an idiot.
ACTUAL QUOTES FROM EMPLOYEE PERFORMANCE EVALUATIONS

(How not to say it)

- Works well when under constant supervision and cornered like a rat in a trap.
- When he opens his mouth, it seems that this is only to change whichever foot was previously in there.
- He would be out of his depth in a parking lot puddle.
(How **not** to say it)

- Since my last report, he has reached rock bottom and started to dig.
- He doesn’t have ulcers, but he’s a carrier.
- I would not allow this employee to breed.
- When his IQ reaches 50, he should sell.
- A gross ignoramus -- 144 times worse than an ordinary ignoramus.
TRIAL SUPPORT

- Signed by employee
- Legible -- typed or handwritten
- Objective: no sign of emotion
- Seems fair
APPROPRIATE INVESTIGATION OF EMPLOYEE MISCONDUCT
RECEIVING THE COMPLAINT

- Keep it informal
- Take it seriously
- Determine whether a full investigation is necessary
- Tell the employee what you are going to do, and why
INVESTIGATING THE COMPLAINT

- Interview the complainant
  - ask brief, open-ended questions
  - try not to let your opinion of the complaint (or complainant) influence your questioning
  - listen, listen, listen
  - make good notes
INVESTIGATING THE COMPLAINT

- Some questions to ask
  - Was the employee’s ability to work affected?
  - Were there any witnesses?
  - Have similar incidents occurred before?
  - Are there any written records?
INVESTIGATING THE COMPLAINT

- Has the employee discussed the matter with anyone else in the company?
- Do other employees have similar concerns?
INVESTIGATING THE COMPLAINT

- Reassure the employee that the investigation will be as confidential as possible, but that others will be told as the investigation progresses
- Ask the employee not to talk to other employees about the complaint
- Ask the employee to record the circumstances surrounding the complaint in writing
INVESTIGATING THE COMPLAINT

- Document, document, document (and have the complainant read and sign it)
INVESTIGATING THE COMPLAINT

- Interview the Accused
  - Explain the complaint (give details)
  - Ask brief, open-ended questions
  - Don’t accuse
  - Don’t side with the accused
  - Assure the accused that the complaint will remain as confidential as possible
INVESTIGATING THE COMPLAINT

- Document, document, document (and have the accused read and sign it)
INVESTIGATING THE COMPLAINT

- Interview Witnesses
  - Interview every one
  - Keep witnesses’ names and the information given confidential
  - Give as little information as possible
  - Ask the witness to keep the interview to themselves
INVESTIGATING THE COMPLAINT

- Document, document, document (have the witness read and sign)
INVESTIGATING THE COMPLAINT

- Take prompt action to remedy any problem revealed by the complaint
  - be prompt
  - be fair
  - be consistent
- Document, document, document (and have the complainant and accused read and sign it)
INVESTIGATING THE COMPLAINT

- Anti-retaliation
  - Title VII and EEOC charges
  - Other investigations
- Lying
ANATOMY OF A DISCHARGE
IDENTIFYING LEGITIMATE REASONS FOR DISCHARGE
PROGRESSIVE DISCIPLINE v. AUTOMATIC DISCHARGE
ELEMENTS OF PROGRESSIVE DISCIPLINE

- Verbal warning
- Written warning
- Suspension
- Termination
AUTOMATIC DISCHARGE

- Employees receive notice that the company views some forms of misconduct as so serious that punishment will be immediate and ultimate.
- Employers eliminate the delays associated with progressive discipline of lesser offenses.
The company reinforces its employment-at-will policy and minimizes the chances a court will view failure to follow elaborate disciplinary procedures as grounds for a wrongful discharge claim.
POSSIBLE GROUNDS FOR DISCHARGE

◆ Making false statements or omitting pertinent facts on an employment application;
◆ Threatening, assaulting, fighting with, or harassing another employee or anyone else encountered during the course of business
◆ Stealing or deliberately damaging the company’s or other employees’ property;
POSSIBLE GROUNDS FOR DISCHARGE

- Possessing a weapon at work;
- Reporting to work under the influence of alcohol, narcotics, or other non-prescription drug;
- Falsifying or destroying company documents or computer files;
- Conviction of a felony offense and/or imprisonment; and
- Taking unauthorized leave or failing to show up at work without notifying a supervisor for more than two consecutive days.
“RED-FLAGS” SUGGESTING TERMINATION MAY BE HASTY

- Decision-maker’s anger
- On-the-spot terminations
- Decision by an inexperienced or new supervisor
- Long-term employee
“RED-FLAGS” SUGGESTING TERMINATION MAY BE HASTY

- Employee who is a member of a protected group is to be replaced by an individual outside the protected group
- Employee who has made a recent change in his life in reliance upon job security
ESTABLISHING A REVIEW POLICY

- Who should conduct the review?
- What authority should the reviewer have?
- How much investigation should the reviewer perform?
- What actions should the supervisor take pending review?
CONDUCTING THE REVIEW

- Does adequate documentation justify the discharge?
- Did the employee receive feedback about performance problems?
- Have similarly situated employees received equal treatment?
- Does the employee have a long-standing record of satisfactory or superior service?
CONDUCTING THE REVIEW

- Do extenuating circumstances exist?
- Has the employee suffered illegal harassment or retaliation?
- Does a personality conflict underlie the discharge?
TIMING OF THE DISCHARGE -- PATIENCE IS THE KEY
“FACTORS” THAT COULD CALL INTO QUESTION THE TIMING OF DISCHARGE

- Has the employee complained of discrimination, harassment or retaliation?
- Is the employee a whistleblower?
- Has the employee participated in an investigation of alleged unlawful employment practices?
“FACTORS” THAT COULD CALL INTO QUESTION THE TIMING OF DISCHARGE

- Has the employee disclosed a disability or requested reasonable accommodation?
- Is the employee currently on leave and/or recently returned from leave?
ALTERNATIVES TO DISCHARGE

- Transfer
- Demotion
- Referral to Counseling
- Resignation
DOCUMENT REASONS FOR DISCHARGE
A SUPERVISOR’S CHECKLIST

- Is the rule or standard the employee violated published?
- Did the employee ever receive a personal, written copy of the rule violated?
- Did you give the employee adequate warning about his or her behavior? Did you make it clear what the consequences would be if the behavior continued?
A SUPERVISOR’S CHECKLIST

- If other employees have violated this rule or standard, did they receive the same disciplinary action as the employee?
- Does the employee’s behavior hamper the orderly, efficient, or safe operation of business? Is the employee’s performance bad enough to warrant discharge?
A SUPERVISOR’S CHECKLIST

- Did you make every effort to determine whether the employee did, in fact, break the rules?
- Did you conduct a fair and objective investigation? Is the investigation documented?
- Have you and your company enforced rules and standards consistently and without discrimination?
A SUPERVISOR’S CHECKLIST

- Do you have enough evidence to prove that the employee violated the company’s rules or has performed badly enough to deserve discipline?
- Does the punishment fit the crime? Have you considered the employee’s service record?
PLANNING FOR THE TERMINATION MEETING

- Plan exactly what to say
- Provide privacy -- within limits
- Accommodate employee’s requests to the extent possible to eliminate embarrassment
FACTORS TO CONSIDER IN DETERMINING WHETHER TO SEEK A WRITTEN SEPARATION AGREEMENT

- Whether the employee’s protected class status and the circumstances suggest potential cause of action;
- Whether the employee seems disgruntled;
- Whether requesting a release may raise the possibility or value of a lawsuit in the employee’s mind, thus creating expectations that might increase the risk of litigation;
FACTORS TO CONSIDER IN DETERMINING WHETHER TO SEEK A WRITTEN SEPARATION AGREEMENT

- Whether there are alternatives to a release that also might deter litigation, such as providing outplacement assistance or simply asking for a signed resignation; and
- The plaintiff’s likelihood of success if a claim were filed.
“MUST HAVE” PROVISIONS IN SEPARATION AGREEMENT

- Complete Release
  - CAUTION: prior non-compete agreements
- Confidentiality
- Consideration and Revocation period for valid waiver of ADEA claims
POST-TERMINATION ISSUES

- Payments due upon termination
- Employment references
- COBRA
- Retaliation protections --
  - Anti-retaliation rules protect former employees
COBRA

- Qualifying Events
- Election of Coverage
- Termination of Coverage
HIPAA CONSIDERATIONS

- Health Insurance Portability and Accountability Act - effective January 1, 1997
- Purpose of the law
- Reporting requirements
  - certificates of creditable coverage
  - contents of a specific certificate
PAYMENT TO TERMINATED EMPLOYEES

- Missouri Statute (RSMo. § 290.110)
  - Discharge of employee with or without cause
  - Unpaid wages then earned
  - Due on date of discharge
PAYMENT TO TERMINATED EMPLOYEES

- Employee requests in writing
- To foreman or “keeper of time”
- Where to send money
- Employer to forward check within seven (7) days
- Employer’s failure
  - Penalty → wages continue from discharge date until paid (not to exceed sixty (60) days)
SERVICE LETTER STATUTE

- Missouri Statute (RSMo. § 290.140)
  - An employee of any corporation in this state
  - Employer with seven (7) or more employees
  - Employee worked for a minimum of ninety (90) days
  - Employee discharged or voluntarily quits
SERVICE LETTER STATUTE

- Employee requests in writing by certified mail
- To the superintendent, manager or registered agent
- Specific reference to the statute
SERVICE LETTER STATUTE

- Employer’s Obligations
  - Must forward a response signed by the superintendent or manager
  - Within forty-five (45) days after receipt of employee requests
  - Setting forth nature and character of service by employee
  - Duration of employment
  - Truly stating for what cause, if any, for the employee’s discharge or quit
SERVICE LETTER STATUTE

- Inappropriate Response
  - Corporation liable for compensatory but not punitive damages

- Failure to Respond
  - Employer may be liable for nominal and punitive damages
  - No award of punitive damages shall be based on content of any letter
REFERENCE LETTER STATUTE

- Missouri: Statute (RSMO, 290.152)
  - Effective August 28, 1999
  - Employer may respond to written request from a prospective employer
  - Information to be provided-similar to service letter statutory information
  - Copy to employee
REFERENCE LETTER STATUTE

- Qualified immunity
- Damages allowed-compensatory
- Reference letter not to be admitted as evidence in an unemployment compensation claim
REFERENCE LETTER STATUTE

- Practical effect of new statue
- Any benefits?
- Any risks?
Short definition of sexual harassment

- Equal Employment Opportunity Commission’s definition of sexual harassment:
  - Unwelcome sexual advances
  - Requests for sexual favors
  - Other verbal or physical conduct of sexual nature
HARASSMENT ON THE BASIS OF AN INDIVIDUAL’S SEX IS UNLAWFUL, WHEN IT:

- Has the purpose or effect or creating an intimidating, hostile, abusive or offensive working environment;
- Had the purpose or effect of unreasonably interfering with an individual’s work performance; or
- Otherwise adversely affects an individual’s work performance.
HOSTILE ENVIRONMENT HARASSMENT

- Supervisor/co-worker/third party
- Unwelcome conduct
- Based on protected status
- Severe and pervasive
EXAMPLES OF HOSTILE ENVIRONMENT HARASSMENT

- Derogatory or vulgar comments about someone’s gender or physical anatomy
- Sexually suggestive or vulgar language
- Offensive, derogatory, or suggestive pictures, magazines, or other materials.
EXAMPLES OF HOSTILE ENVIRONMENT HARASSMENT

- Inappropriate touching, such as touching someone in a sexually suggestive way, pushing, shoving, “bumping,” or in a way calculated to invade his/her personal space.
QUID PRO QUO SEXUAL HARASSMENT

- Supervisor/Perpetrator
- Unwelcome conduct
- Tangible job benefit or detriment required
- Can be isolated incident
- Strict liability
EXAMPLES OF QUID PRO QUO HARASSMENT

- Demanding sexual favors in exchange for a promotion or a raise
- Disciplining or firing a subordinate who ends a romantic relationship
- Changing job performance expectations after a subordinate refuses repeated requests for a date
EMployment Liability for Acts of Supervisors

Quid Pro Quo Sexual Harassment Strict Liability for the Employer if:

- Supervisor has sufficient authority to affect terms and conditions of victim’s employment.

- Tangible job benefit/detriment actually results from victim’s consent to/rejection of the sexual advances
EMPLOYMENT LIABILITY FOR ACTS OF SUPERVISORS

- Employer’s knowledge of the harassment is not required.
- Employer’s remedial actions do not mitigate liability.
- If not tangible job action, claim treated like hostile environment sexual harassment.
For purposes of automatic liability “tangible employment action” constitutes a significant change in employment status, e.g.

- Hiring
- Firing
- Failing to promote
- Reassignment with significantly different responsibilities
- Decision causing a significant change in benefits
EMPLOYMENT LIABILITY FOR ACTS OF SUPERVISORS

- Hostile Environment Harassment
  - Employer vicariously liable for supervisor’s conduct if supervisor “aided in” the commission of harassment by virtue of his/her relationship with employer.
EMPLOYMENT LIABILITY FOR ACTS OF SUPERVISORS

- Hostile Environment Harassment
  - Employer affirmative defense available
    - Employer acted with reasonable care to prevent and/or correct any harassing behavior; and
    - Complaining employee unreasonably failed to take advantage of company’s grievance procedure and/or other corrective measure.
EMPLOYER’S REASONABLE CARE

- Strong policy prohibiting sexual harassment
- Training
- Meaningful complaint procedure
- Prompt, meaningful investigation
- Practice of prompt, appropriate remedial measures
EMPLOYEE’S UNREASONABLE CARE

- Failure to complain about harassing situation.
- Unless the silence is made reasonable by believable threats or a history of retaliation.
EMPLOYER LIABILITY FOR ACTS OF CO-WORKERS AND/OR THIRD PARTIES – A NEGLIGENCE STANDARD

- Actual or constructive notice required.
- Employer failed to take prompt remedial action.
EMPLOYER LIABILITY FOR ACTS OF CO-WORKERS AND/OR THIRD PARTIES

“Actual Notice” Includes:

- First hand observation
- A written or verbal complaint
- A charge filed with the EEOC
EMPLOYER LIABILITY FOR ACTS OF CO-WORKERS AND/OR THIRD PARTIES

“Constructive Notice” Includes:

- Evidence that the harassment is pervasive.
- Evidence that the harassment is openly practiced or well-known among the employees.
CRITICAL QUESTIONS

- Tangible employment action
- Preventative employer actions
- Employee/”victim” reporting
- Status
  - Manager/Supervisor
  - Co-employee
  - Third party
HARASSMENT POLICIES

- Define prohibited conduct.
- Set up reporting mechanism with several reporting routes.
- Encourage reporting.
HARASSMENT POLICIES

- Assure employees of prompt investigation and remedial action when proper.
- Assure confidentiality to extent possible.
- Assure non-retaliation.
TRAINING

- Employees
  - Opportunity to report
  - Change behaviors
  - Different focus
WHAT IS A COMPLAINT?

- A formal grievance to the appropriate supervisor and/or human resources representative.
- A informal complaint by the victim who “wants to let the organization know” the conduct is occurring but does not want to take action.
- A complaint by a co-worker or other witness to the harassment.
- Rumors that inappropriate conduct is occurring.
Company prohibits retaliation against employees who:

- Oppose unlawful discrimination and/or harassment
- Make good faith complaints of discrimination and/or harassment
- Cooperate or participate in a harassment investigation.
What is prohibited retaliation?
- Ignoring an employee
- Spreading rumors about an employee
- Undesirable work assignments
- Withholding pay increases
- Failure to hire or promote
- Demotion, discharge, elimination of position
- Further harassment
The “DO’S”

- DO educate employees on (Company)’s policy against discrimination and harassment;
- DO maintain good communication with employees and an open door policy;
- Upon learning of inappropriate conduct DO notify Human Resources;
DO conduct/participate in investigation;
DO administer corrective course of action;
DO periodically check in with complainant, witnesses and other employees to ensure any inappropriate conduct has not continued or retaliation has not occurred.
“DON’TS”

- DO NOT treat the complaint lightly, or suggest that the employee “go along” with it or disregard it;
- DO NOT unnecessarily disclose the name of the alleged harasser in conducting the investigation. A carelessly conducted investigation can lead to claims of defamation by the individual accused, when the complaint is unfounded;
 DO NOT permit circumstances to occur where it is possible for the alleged harasser to retaliate against the individual who complained about him/her;
 DO NOT casually discuss the complaint within the organization or outside it;
 DO NOT guarantee the complainant complete confidentiality.
COVERED EMPLOYERS

- 15 or more employees for five months or longer during one year
- Private employers and stated and local government employers
WHO IS COVERED BY THE ADA?

- Employees and applicants with a disability if they are otherwise qualified to perform the position held or sought.

- Persons related to, or associated with, an individual with a disability are protected.
WHAT IS A DISABILITY?

- Physical or mental impairment that substantially limits one or more major life activities (e.g. walking, seeing, hearing, speaking, or working)
- Record of impairment or are regarded as having an impairment
- Not temporary conditions (i.e. broken limb)
- Illegal uses of drugs and use of alcohol – not a disability unless rehabilitation program
NOT A DISABILITY

- Homosexuality, bisexuality, transvestism, compulsive gambling, kleptomania, pyromania, pedophilia, exhibitionism, voyeurism, gender identity disorders
WHAT IS REASONABLE ACCOMMODATION?

Any change in work environment or the way things are customarily done that will allow an individual with a disability to:

- Enjoy equal employment opportunities in application process and performing essential functions of the job; and
- Enjoy benefits and privileges of employment equal to those of non-disabled employees.
EXAMPLES OF REASONABLE ACCOMMODATIONS

- Make existing facility accessible to individuals with disabilities
- Reserved parking spaces
- Provide qualified readers or interpreters
- Acquiring or modifying equipment or devices
- Restructuring jobs
- Moving an individual to an office closer to the ground floor
- Providing part-time or modified work schedule
- Reassigning an employee with a disability to a vacant position
DETERMINING APPROPRIATE ACCOMMODATION

- Reasonable effort to determine appropriate accommodation for “known” physical or mental disabilities

- Reasonable accommodation in the present or immediate future, not in the distant future
PERMISSIBLE INQUIRIES OF CURRENT EMPLOYEES UNDER ADA

- Employer must make reasonable effort to determine appropriate accommodation if a current employee requests reasonable accommodation.
- Duty to accommodate is generally triggered by request from employee.
- May discuss possibility of reasonable accommodation with employee who is known to have a disability if that employee is having difficulty performing job duties.
EMPLOYEE REQUESTS REASONABLE ACCOMMODATION

- Employer should discuss the purpose and essential functions of the particular job;
- Determine the precise job-related limitations and whether these can be overcome with a reasonable accommodation;
- Identify potential accommodation and assess effectiveness each would have in allowing individual to perform essential functions of job;
- Consider preference of individual
  - If two effective accommodations, employer is allowed to choose least expensive or easier accommodation.
ADA DOES NOT REQUIRE

- Employer to make best possible accommodation;
- Reallocate essential job functions;
- Provide personal use items (i.e. eyeglasses, hearing aids);
- Employee to accept employer’s accommodation.
Medical Records – Employer must treat as confidential and keep in separate file from personnel files

Records made during normal course of business must be maintained for one year

Access to files restricted to:
- Supervisors and managers, when needed to be informed about job accommodations or work restrictions;
- First aid and safety personnel
FAIR LABOR STANDARDS ACT

30 FREQUENTLY ASKED QUESTIONS
DO I HAVE TO GIVE MY EMPLOYEES COFFEE BREAKS?
2. DO I HAVE TO GIVE MY EMPLOYEE 30 MINUTES FOR LUNCH?
3. CAN I FORCE MY EMPLOYEES TO WORK OVER 8 HOURS PER DAY?
4. DO I HAVE TO PAY VACATION?
5. DO I HAVE TO PAY HOLIDAY PAY?
6. DO I HAVE TO PAY SEVERANCE PAY?
7. IS AN EMPLOYEE REQUIRED TO GIVE 2 WEEKS’ NOTICE?
8. WHEN DO I HAVE TO PAY FINAL WAGES TO A TERMINATED EMPLOYEE?
9. DO I HAVE TO HAVE A TIME CLOCK?
10. DO EMPLOYEES HAVE TO SIGN THEIR TIME CARD?
11. DO I HAVE TO PAY FOR ALL TIME ON THE TIME CARD?
12. DO I HAVE TO PAY AN EMPLOYEE OVERTIME FOR WORKING ON A HOLIDAY, SATURDAY, OR SUNDAY?
13. CAN I CUT AN EMPLOYEE’S WAGES OR SALARY?
14. IF AN EMPLOYEE WORKS 40 HOURS AND GETS 8 HOURS HOLIDAY PAY = 48, DO I HAVE TO PAY OVERTIME FOR THE HOURS OVER 40?
15. DO I HAVE TO PAY OVERTIME FOR WORK OVER 8 HOURS PER DAY?
16. IF AN EMPLOYEE WANTS TO WORK OVERTIME AND WILL ACCEPT STRAIGHT TIME, CAN HE WAIVE HIS RIGHT TO OVERTIME PAY?
17. CAN I PAY YOUNG PEOPLE UNDER 20 LESS THAN THE MINIMUM WAGE?
18. CAN I GIVE COMPENSATORY TIME OFF RATHER THAN PAY OVERTIME?
19. HOW LONG DO I HAVE TO KEEP TIME RECORDS?
20. DO I HAVE TO PAY FOR WORK I DID NOT REQUEST?
21. WHAT MUST BE INCLUDED IN COMPUTING OVERTIME?
22. WHAT MAY BE EXCLUDED WHEN COMPUTING OVERTIME?
23. HOW IS OVERTIME COMPUTED FOR AN EMPLOYEE PERFORMING TWO OR MORE DIFFERENT TYPES OF WORK FOR WHICH DIFFERENT RATES ARE PAID?
24. IS ON CALL TIME COMPENSABLE?
25. DO I HAVE TO COUNT ALL TIME WORKED AT ALL LOCATIONS WHEN COMPUTING OVERTIME EVEN IF THE WORK WAS FOR DIFFERENT COMPANIES?
26. MAY AN EMPLOYEE ALSO BE A VOLUNTEER?
27. MAY I DEDUCT FOR LOANS OR ADVANCES?
28. MAY I DEDUCT FROM THE LEAVE BANK OF AN EXEMPT EMPLOYEE WITHOUT IMPACTING THE EXEMPT STATUS?
29. IS TIME ON FAMILY AND MEDICAL LEAVE PAID OR UNPAID?
30. MAY AN EMPLOYEE ON FAMILY AND MEDICAL LEAVE BE REQUIRED TO USE ACCRUED VACATION OR SICK PAY?
FMLA

- 50+ Employees
- Employed at least 12 months
- 1250 Hours of service in 12 months before LOA commences
- 50 Employees within 75-mile radius
FMLA

- 12 Weeks unpaid leave
- Benefits continued
- Must restore to same or equivalent position
- May not retaliate
FAMILY MEDICAL LEAVE ACT (FMLA)
12/12 RULE
12 WEEKS LEAVE IN 12 MONTHS UNPAID

A. Births and Care
B. Placement of a Child
C. Care of Relative Serious Health Condition
D. Employee’s Serious Health Condition
A “serious health condition” is defined as an illness, injury, impairment, or physical or mental condition that involves:

- Inpatient care (i.e., overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity (defined as an inability to work, attend school or perform other regular daily activities) or any subsequent treatment in connection with such inpatient care; or
- Continuing treatment by a health care provider.
A serious health condition involving continuing treatment by a health care provider includes:

- A period of incapacity of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:
  - Treatment two or more times by a health care provider
  - Treatment by a health care provider on at least one occasion that results in a regimen of continuing treatment
SERIOUS HEALTH CONDITION

- Pregnancy or prenatal care. A visit to the health care provider is not necessary for each absence;
SERIOUS HEALTH CONDITION

- A chronic serious health condition which continues over an extended period of time, requires periodic visits to a health care provider, and many involve occasional episodes of incapacity (e.g., asthma, diabetes). A visit to a health care provider is not necessary for each absence;
SERIOUS HEALTH CONDITION

- A permanent or long-term condition for which treatment may not be effective (e.g. Alzheimer’s, a severe stroke, terminal cancer). Only supervision by a health care provider is required, rather than active treatment.
SERIOUS HEALTH CONDITION

- Any absences to receive multiple treatments for restorative surgery of a condition which would likely result in a period of incapacity or more than three days if not treated (e.g. chemotherapy or radiation treatments for cancer.)
EMPLOYER NOTICE OF RIGHTS

Specific Expectations and Obligations
- Leave will be counted against FMLA
- Need for medical certification and consequences
- Right to substitute paid leave
- Any requirement that employee pay part of the insurance premiums
- Requirement of fitness for duty certificate
- Status of key employee, if applicable
- Right to restoration
- Employee’s potential repayment of premiums if fails to return to work
EMPLOYER NOTICE REQUIREMENTS

- Change in method of calculating leave year – At least 60 days notice to employees
- Notice to employees on FMLA leave of any opportunity to change plans or benefits
FMLA POLICY DEVELOPMENT
Policy Options for Employers

- Provide more than 12 weeks leave to employees?
  - Employers with employees in multiple states
- Provide leave benefits for FMLA-covered purposes only?
  - Leave to care for domestic partners? Grandparents?
  - Leave taken for non-FMLA purposes may not be counted against leave available for FMLA purposes
 FMLA POLICY DEVELOPMENT
Policy Options for Employers

- Measuring the 12 month period within which employees may take up to 12 weeks FMLA leave
  1. Rolling 12 month period
  2. Calendar year
  3. Any fixed 12 month leave year (fiscal year, year required by state law, year starting on Employee’s anniversary year)
  4. Employee’s first FMLA leave – 12 months forwarded
Handling co-payments for healthcare premiums while employee is on FMLA leave

- Employers may require employees to continue co-payments
Policy Options for Employers

支付可能不会在休假前被要求

支付可能被要求

- 同样支付与薪酬扣除本应作出的时间相同
- 同样支付与COBRA支付的计划相同
- 预付根据自助餐厅计划由员工选择
- 自愿协议-预付保费允许
EMPLOYEE NOTIFICATION REQUIREMENTS

- Oral notice sufficient (with exceptions)
- 30 days if foreseeable
- As “soon as practicable” if not foreseeable (one or two business days)
- IL/RLS one notice sufficient (with exceptions)
WHEN TO PROVIDE EMPLOYER NOTICE

- Within two business days
- At least every six months
- When circumstances change
EMPLOYER’S FAILURE TO DESIGNATE

- Employer’s responsibility
- Can’t draw down
- Can’t discipline
Generally – No!

Allowed before Employee returns
- When employer learns of FMLA reason during leave

Allowed after employer returns
- When employer learns of FMLA reason after return
HEALTH INSURANCE ISSUES UNDER THE FMLA

- Employer shall maintain coverage under group health plan for employee on FMLA leave
  - Duration of leave
  - Level at which coverage would have been provided if employee continued in employment
- Employer must provide the employee on FMLA leave the opportunity to receive or obtain any benefits added
HEALTH INSURANCE ISSUES UNDER THE FMLA

- Maintain coverage under ‘group health plan’ for employee on FMLA leave
- Provide opportunity to receive or obtain any benefits added
- If employee elects not to retain coverage while on leave, **reinstate** coverage when employee returns from leave (no qualifying period, physical exam, or exclusion of pre-existing conditions)
HEALTH INSURANCE ISSUES UNDER THE FMLA

- Premium payments
  - Employee responsible for same amount would be paying if not on FMLA leave
  - Employee responsible for any changes in premium rate as would be paying if not of FMLA leave
  - Employer may require payment of premium to either employer or insurance carrier, but may not add “administrative expenses”
  - Employer may drop coverage if employee more than 30 days behind in premium payment
    - with NOTICE at least 15 days specifying date coverage will be dropped unless payment received that date
FMLA/ADA/WC OVERLAP

Trigger

- FMLA: Serious health condition that makes employee unable to perform functions of job?
- ADA: Qualified individual with a disability?
- Workers’ Compensation: Did injury arise out of or in the course of employment?
FMLA/ADA/WC OVERLAP
Verification and Certification Right to Leave

- **FMLA:** No exam, but employer may require a certification from a health care provider if the employer gave proper notice of this requirement.

- **ADA:** If the need for accommodation is not obvious, employer may request documentation from a doctor. An employer may not require an exam merely to determine severity of disability, but may require an exam only if job-related and consistent with business necessity.

- **Workers’ Compensation:** Once employee has claimed benefits, employer may require medical examination to evaluate injury.
FMLA/ADA/WC OVERLAP

No Certification

- **FMLA:** If leave is not foreseeable, must be conditionally granted. If leave is foreseeable, employer may delay leave until certification is provided. If ultimately not provided in either case, leave is not FMLA leave.

- **ADA:** Only duty to make accommodation to known disabilities.

- **Workers’ Compensation:** In some states, compensation may be suspended until employee submits to an examination.
FMLA/ADA/WC OVERLAP

Question Certification

- **FMLA**: Employer may request a second opinion at employer’s expense but the second opinion must be from a healthcare provider the employer does not regularly utilize or contract with. If second differs from first, employer may require a third opinion at employer’s expense. The third opinion is binding.

- **ADA**: Employer may request a second opinion if job-related and consistent with business necessity. Second opinion may be healthcare provider selected by the employer.

- **Workers’ Compensation**: Yes
FMLA/ADA/WC OVERLAP
Require Light Duty Instead

- FMLA: No.
- ADA: An employer must first attempt to accommodate the employee in his/her current position. Light duty (removing essential functions or a make work job) must be considered as a reasonable accommodation only if such an employer has light duty jobs in general with occupational injuries. Reassignment to a vacant position for which the employee is otherwise qualified must be considered as an accommodation of last resort.
- Workers’ Compensation: Generally not instead of leave, but employer may offer return to light duty if employee is certified as able to return to light duty or otherwise employee risks termination of TTD benefits.
FMLA/ADA/WC OVERLAP

Entitlement to Intermittent Leave

- FMLA: If medically necessary, absolute right.
- ADA: As a reasonable accommodation.
- Workers’ Compensation: No, but as a practical matter, employer may encourage employee to remain on the job.
FMLA/ADA/WC OVERLAP
Fitness for Duty Certificate to Return

- **FMLA:** If employer has a uniformity applied practice or policy and has given proper notice, yes. However, employer may not require one for a return from intermittent or reduced schedule leave.

- **ADA:** Must be job-related and consistent with business necessity.

- **Workers’ Compensation:** Employer has the right to require a medical examination; limits on this will vary.
FMLA/ADA/WC OVERLAP

Failure to Provide Fitness for Duty Certificate

- **FMLA:** If proper notice was given, reinstatement may be delayed until certificate is received. If employer’s policy so provides and certificate not received, employee may be terminated at end of leave.
- **ADA:** Nondiscrimination principles govern.
- **Workers’ Compensation:** In some states (Illinois) compensation may be suspended until employees submits to examination.
FMLA/ADA/WC OVERLAP

Reinstatement Obligations

- **FMLA:** Employee must be returned to same or equivalent position upon return from leave.
- **ADA:** Employer’s actions limited by nondiscrimination and undue hardship provisions. Reassignment to a vacant position for which the employee is otherwise qualified also must be considered.
- **Workers’ Compensation:** Depends on state law (e.g. retaliation)
FMLA/ADA/WC OVERLAP

Ability Only for Light Duty

- **FMLA:** If employee cannot perform essential functions of his job after 12 weeks of leave, employee has no right to reinstatement to same or alternative position.
- **ADA:** Reasonable accommodation may include reinstatement to vacant light duty position.
- **Workers’ Compensation:** Employer usually encourages return in this capacity so as to terminate TTD benefits.
FMLA/ADA/WC OVERLAP

Extension of Leave Requested

- **FMLA**: Employer may request recertification if beyond 12 weeks. Employer has a right to recoup its benefit costs unless failure to return is due to continuation of employee’s serious health condition or other reason beyond employee’s control. If not beyond 12 weeks, employee can request recertification.

- **ADA**: Extending leave of absence as an accommodation is limited by undue hardship. Generally, no duty to give indefinite leave.

- **Workers’ Compensation**: Continuation of TTD or permanent total disability subject to medical verification.
FMLA/ADA/WC OVERLAP

**Paid Leave**

- **FMLA:** Employer may require or employee may elect to substitute paid vacation, personal or medical or sick leave for unpaid FMLA leave. Employer should designate short term disability or workers’ compensation leave as FMLA leaves.

- **ADA:** Paid leave may be used as a reasonable accommodation, but employer is not required to provide additional paid leave.

- **Workers’ Compensation:** Paid according to rate specified in state workers’ compensation statute.