Human Resource Law: What You Need to Know Now

For information on how to become a faculty member for one of our seminars, contact the Planning Department at the address below, by calling **(800) 777-8707,** or emailing us at speakerinfo@nbi-sems.com.

NBI, Inc.
PO Box 3067
Eau Claire, WI 54702

74647

IN-HOUSE TRAINING

Can training your staff be easy **and** individualized?

It can be with NBI.

Your company is unique, and so are your training needs. Let NBI tailor the content of a training program to address the topics and challenges that are relevant to you.

With customized in-house training we will work with you to create a program that helps you meet your particular training objectives. For maximum convenience we will bring the training session right where you need it…to your office. Whether you need to train 5 or 500 employees, we'll help you get everyone up to speed on the topics that impact your organization most!

Spend your valuable time and money on the information and skills you really need! Call us today and we will begin putting our training solutions to work for you.

800.930.6182

Jim Lau | Laurie Johnston

Legal Product Specialists
jim.lau@nbi-sems.com
laurie.johnston@nbi-sems.com

NBI | NATIONAL BUSINESS INSTITUTE

www.nbi-sems.com

Human Resource Law: What You Need to Know Now

Authors

Justin Mueller
Mueller Law Firm
306 St. Pierce Street
Lafayette, LA

Joanne Rinardo
Deutsch Kerrigan LLC
755 Magazine Street
New Orleans, LA

David F. Rutledge Jr.
Law Office of David F. Rutledge, LLC
330 Settlers Trace, Suite A
Lafayette, LA

Scott D. Wilson
Scott D. Wilson, APLC
533 Europe Street
Baton Rouge, LA

Presenters

JUSTIN MUELLER is the managing attorney at the Mueller Law Firm, in Lafayette, Louisiana, and he focuses his practice almost exclusively on labor and employment litigation and counseling. Prior to forming his own firm, Mr. Mueller worked as an employee relations manager, as in-house counsel for a Fortune 250 company, and as an associate attorney for a large, plaintiff-side employment litigation firm based out of Houston, Texas. In these roles, he conducted or oversaw hundreds of internal investigations, and argued a vast array of employment claims both in court and in arbitration. Mr. Mueller's experience both as a human resources professional and attorney provides him with unique insight into common HR mistakes, as well as employer defense strategies. He earned his B.A. degree from the University of Louisiana and his J.D. degree, cum laude, from the Houston College of Law, where he was also a member and associate editor of the college's *Law Review*, and vice president of the Veterans' Law Students Association. He is licensed to practice law in both Texas and Louisiana, is a qualified mediator and conflict resolution specialist, and a professional in human resources (PHR).

JOANNE RINARDO is a partner in the New Orleans law firm of Deutsch Kerrigan LLC, where she defends clients in employment and constitutional claims in state and federal court. She is best known for litigation involving Title VII, Age Discrimination in Employment Act, Americans with Disabilities Act, Fair Labor Standards Act, and Family Medical Leave Act claims, as well as general employment claims. Ms. Rinardo conducts internal investigations, drafts responses to EEOC charges, and reviews and revises clients' employee handbooks and policies. She works with clients to develop best practices, policies, and procedures with the goal of avoiding litigation whenever possible. Ms. Rinardo earned her B.A. degree from Louisiana State University in New Orleans, her M.Ed. degree from the University of New Orleans, her Ph.D. from the University of New Orleans, and her J.D. degree from Loyola University School of Law in New Orleans.

DAVID F. RUTLEDGE JR. is the principal of the Law Office of David F. Rutledge, LLC, in Lafayette. He primarily practices in the areas of personal injury, employment law, contracts, maritime/offshore injuries, and defective products. Mr. Rutledge represents a wide range of clients in his employment law practice that includes small businesses and retail workers, as well as presidents and executives of publicly traded companies. He served as a law clerk for the Honorable Judge Richard Haik of the United States District Court for the Western District of Louisiana and the Honorable Judge Ellis Daigle at the 27th Judicial District Court in Opelousas, Louisiana. Mr. Rutledge earned his B.A. degree from the University of Louisiana at Lafayette and his J.D. degree in both common and civil law from Loyola New Orleans College of Law.

SCOTT D. WILSON is the principal of the law firm of Scott D. Wilson, APLC, in Baton Rouge, where he practices in the areas of labor and employment law, general commercial litigation and personal injury litigation. He earned his B.A. degree from Louisiana State University and his J.D. degree from Boalt Hall School of Law of the University of California at Berkeley. Mr. Wilson is a member of the Louisiana State, American and Federal bar associations. He is admitted to the Western, Eastern and Middle districts of Louisiana, the U.S. 5th Circuit Court of Appeals and the Supreme Court of the United States. Mr. Wilson has been involved as a lawyer in over 150 cases in federal courts, 20 appeals to the United States Court of Appeals for the Fifth Circuit, two petitions for writs to the United States Supreme Court, and numerous appeals to Louisiana state appellate courts and the Louisiana Supreme Court.

Table of Contents

Hiring/Recruiting **1**

Is Your Employee Handbook Up to Date?: Essential Components and Sample Policies for Today's Workplace **13**

Wage and Benefit Issues **71**

Discrimination and Harassment **127**

Employee Discipline and Termination & Workplace Behavior and Privacy Issues **159**

Hiring/Recruiting

Submitted by Justin Mueller

HR HOT TOPICS: Hiring/Recruiting
Speaker/Writer: Justin Mueller (Mueller Employment Law Firm, LLC) (Lafayette, LA)

Introduction: Recruiting is inarguably tedious work. The hours can be long (and often thankless), the deadlines short, and because many recruiters are working alone and in private, they may have little oversight or internal support. Add to this equation impractical internal demands, and it is no surprise that many companies find themselves on the wrong side of state or federal employment law suits resulting from their hiring practices. Unfortunately, we don't have enough time to discuss how to deal with the hunt for "purple squirrels", but we will discuss the legal framework that governs this essential Human Resources function.

A. **Job Descriptions and Advertisements:** The importance of writing accurate (and enticing) job descriptions and advertisements cannot be overstated. Obviously, the main goal of the advertisement is to attract qualified applicants that will be a good fit for your organization, but keep in mind that having an accurate job description drafted ***prior to*** advertising or interviewing for a job is imperative. A good job description is needed for a number of reasons. First, it gets everyone involved in the hiring process on the same page; second, it is the source material for the job advertisement; third, it is used in performance management/evaluation; and finally, it is the first piece of evidence in a number of lawsuits—and not just the frequently-cited Title VII (sex, race, color, national origin and religion), ADEA (age), and ADA/ADAAA (disability) discrimination cases. Job descriptions can also be "Exhibit A" in cases under the Fair Labor Standards Act ("FLSA"), Family Medical Leave Act ("FMLA"), the Fair Credit Reporting Act ("FCRA"), and other federal and state laws. So be diligent in this area—a good job description has the potential to improve your organization and greatly assist it in employment disputes, but a bad one (or not having one at all) can wreak all sorts of costly havoc.

1. **Critical Elements of a Job Description (and what to leave out):** While the style and format of job descriptions varies widely from employer to employer, a job description should generally provide the same basic information about the job. That is, a General Summary of the position, a statement of the Essential and Non-Essential Functions of the job, the Physical Demands or Requirements, if any, a Description of the Work Environment and Conditions, and the Minimum Qualifications for hire.
    a. **General Summary**: This, as the name suggests, is a general description of the nature and purpose of the job. It is the "what" paragraph that states what the person is responsible for doing. It should not get bogged down in details about how the job will be performed, and it must be consistent with the rest of the job description. Despite recent changes to DOL regulations regarding exemptions, we would still recommend stating whether the job is exempt or non-exempt. We would also advise, however, consulting an employment attorney who is very familiar with the new regulations before making your

determination on this issue.

b. Essential Functions of Job: We get the term "essential functions" from the ADA, and it just means the basic duties that an employee **must** be able to perform in the particular role. As a general rule, there are between 3-8 with most jobs. Please note that while courts must give reasonable deference as to what functions the employer deems essential,[1] "an employer may not turn every condition of employment which it elects to adopt into a job function, let alone an essential job function, merely by including it in a job description."[2] In determining whether a job function is essential for ADA purposes, you should consider the factors listed in the EEOC Technical Assistance Manual:[3]

i. **Whether the reason the position exists is to perform that function:** For example, what if a 24-hour pharmacy needs a "relief pharmacist" to substitute when the pharmacists on the day and night shifts are absent? The only reason this position exists is to have someone who can cover for an absent supervisor on either shift, thus the ability to work any time of day is an essential function of the job.

ii. **The number of other employees available to perform the function, or among whom the function can be distributed:** If there are a limited number of employees available to perform the function, it is more likely to be essential.

iii. **The degree of expertise or skill required to perform the function:** E.g., professional licensure/credentials, language skills, etc. If a company wants to hire a sales rep. to work in France, French fluency is most likely an essential function of the job.

Other factors you may want to consider are the frequency with which the function is performed, the amount of time spent on the function, and whether removing the function would fundamentally change the position. Note: "Performs other duties as assigned" is probably never going to be an essential function.

Tip: Using action verbs (e.g., evaluates, moves, communicates, prepares),

---

[1] *See* 42 U.S.C. § 12111(8). (Under the statute, "consideration shall be given to the employer's judgment as to what functions of a job are essential," and an employer's written job description "shall be considered evidence of the essential functions of the job.")

[2] *Hawkins v. Schwan's Home Serv*., 778 F.3d 877, 889 (10th Cir. 2015).

3 EEOC Technical Assistance Manual S 2.3(a); *see also* EEOC Fact Sheet, available online at https://www.eeoc.gov/facts/ada17.html.

and focusing on the results of the activity, not how it is performed, is generally recommended. There may be a number of methods in which an essential function may be performed, and specifying how to do the function can be interpreted as precluding reasonable accommodations. Finally, do not use language that can be interpreted as biased towards employees with disabilities. Some examples are: "communicates" rather than "talks" or "hears", "moves or transports" rather than "carries", and "identifies" rather than "sees."

c. **Non-Essential Functions:** These are the duties that fall short of being essential functions. Although they are sometimes defined as "important duties that are only occasionally performed" this does not mean that a rarely performed function cannot be essential. For example, one of a bar manager's essential functions could be to assist bartenders when the bar is overwhelmed or understaffed. Even if that event rarely occurs, it might still be an essential function of the job. Although there is no huge legal benefit to defining the non-essential functions, from an HR perspective you want to reasonably apprise applicants of their duties and avoid the "that's not in my job description" discussion. This is the place for "performs other duties, as required."
d. **Physical Demands or Requirements:** These should be included only if they are required by the essential functions. Again, use careful wording and unbiased language. Some jobs legitimately require specific physical movements or abilities, and if this is the case, note the frequency, intensity and duration of the movements. It may also be helpful to note the operational importance of the job to further bolster the argument that it's they're legitimate. Just don't go overboard dissecting the job and predicting what percent of time will be spent doing what.
e. **Description of the Work Environment and Conditions:** Many companies find it helpful to describe the physical environment in which the work is performed (if it isn't obvious). This may be an office environment or a warehouse or outdoors. Include any unusual conditions, such as specific hazards, loud noises, or extreme temperatures, if they exist.
f. **Minimum Qualifications:** Every job description should include the minimum qualifications for the job, and this may overlap slightly with the essential functions. HR professionals refer to these as the "KSA's, or knowledge, skills and abilities. Ensure that the minimum qualifications support the essential functions, and avoid exaggerated or overly subjective qualifications. Stick to realistic and specific qualifications that are required of employees in that position within the industry. You may want to include preferences and substitutions (e.g., 4 years of professional experience or a bachelor's degree) to help avoid disparate impact claims.
g. **Other Information:** Although not always included, you may want to tell the applicant of any reporting relationships, as well as a statement that the

position could change in the future due to business demands. Date the description, and record who wrote it and approved it. Keep it updated. Disclaimers that you don't discriminate are sometimes required (e.g., federal contractors).

h. **What to Leave Out**:

i. Obviously, anything that could arguably indicate disparate treatment ("energetic" can be arguably synonymous with "young"), disparate impact ("recent college graduate" vs. "single") or could potentially be used as direct evidence of discrimination ("people of a certain heritage preferred"), shouldn't be included in the job description or advertisement. That is, there should not be any specifications related to sex, race, national origin, color, religion, age, pregnancy, etc., unless the protected characteristic is a bona fide occupational qualification ("BFOQ").

BFOQ is an affirmative defense to Title VII discrimination. That is, you agree that you're giving preferential treatment to a class of applicants, and it would be unlawful under Title VII, but the law allows it because it's reasonably necessary to the normal operation of the particular business and essential to a particular position. (Note that the BFOQ defense does not apply to racial discrimination. [4]

1. *Discussion of the "essence of the business test and Southwest's "Love Campaign"*[5]
2. *Common industries for BFOQs: Fashion, Entertainment, Religion*[6].
3. *Everyone's favorite question: "But what about Hooters?*

ii. Instructions about how to do the job: As discussed above, leave the "how-to's" to the employee.

iii. What not to do: Anything about what the person should not do should probably be left out. They know they shouldn't be late or breach confidentiality or work on a side-business while on the clock. These types of advertisements don't give the best impression of you as an employer, and the list could go on for quite a while (or arguably be "exhaustive" rather than "inclusive".)

2. **Record Keeping Requirements**:

a. **For most employers**: Data must be kept for 1 year following the hiring

[4] *Perez v. FBI*, 707 F. Supp. 891, 896 (W.D. Tex. 1988) ("The exclusion of racial discrimination from the BFOQ results from a deliberate Congressional decision to prohibit all racial classifications in employment.").

[5] *Wilson v. Southwest Airlines Co*., 517 F. Supp. 292, 304 (N.D. Tex. 1981).

[6] Note that religion has its own exception in the statute.

decision. This includes all applications and resumes considered for the job, selection testing (employment tests, drug tests) and investigations (reference checks, background or credit checks).

2. **For Federal Contractors**: Same data must be kept for 2 years, generally, or 1 year for small employers (those with fewer than 150 employees or government contracts of less than $150,000). Also, employers with a contract of $100,000 or more and 50 or more employees must retain records of data pertaining to outreach and recruitment efforts, employee comparisons, and records related to their hiring benchmark requirements for 3 years.
    i. What if you don't? See DOL News Release 10/05/16 re: Chemonics International Inc.[7] Chemonics agrees to pay $482k and engage in other conciliation efforts for discrimination in hiring, failing to keep records, and other violations. According to the OFCCP auditors, 124 African-American applicants applied for "entry-level professional positions" and none were hired. (*How many were hired? How do they know*?)

B. The Interview Process and Avoiding Discrimination:

1. **Interviewer's Oral and Written Questions:** The interviewer should absolutely avoid any questions related to, or that will elicit information about, any protected characteristic. Stick to questions about **experience**, **qualifications**, and **ability** to do the job. Try to ask the same questions of various job applicants, and if you choose to (or have to) maintain notes, remember that they are discoverable.
    i. **Other common questions and issues:**
        1. **What about questions that elicit information about marital status, children, spouse, or spouse's employment?** Neither Louisiana nor federal make it illegal *per se* to inquire about an applicant's marital or parental status. However, the employer may not discriminate on the basis of sex and in some cases, sexual orientation, and questions regarding this information frequently sends a person looking for a lawyer.
            a. E.g., 1) Mahindra, 2) My experience with employer X, 3) My question to woman.
        2. **What if an unlawful question is asked?** The applicant still needs proof that the employer didn't hire the employee because of the information obtained from the question, but that proof can come in a variety of forms, and remember that litigation is costly. *See* Shyam Natarajan v. CLS Bank Int'l,

[7] Source available online at https://www.dol.gov/newsroom/releases/ofccp/ofccp20161005.

2014 U.S. Dist. LEXIS 60877, *4 (D.N.J. Apr. 30, 2014). (Applying New Jersey's anti-discrimination law, court found sufficient evidence to survive motion to dismiss where an e-mailed job announcement from recruiting firm stated: "Desirable: Please try and submit people other than just the typical indian [sic] H1-b visa guy that he sees all day long, he really needs diversity in the environment!!!"

2. **How to Answer a Candidate's Potentially Dangerous Questions (Religion, Pregnancy, Etc.)** A quick statement that your company doesn't take that information into consideration in the hiring process is fine. Be cautious of patterns, however. (In the union context, particularly).
3. **Skills Tests:** Different laws have different requirements with regard to skill tests, but the various legal requirements are essentially similar. Specifically, the test and selection criteria must be 1) **job-related, 2) consistent with business necessity, and 3) there is no less-discriminatory alternative**. In the Title VII context, the EEOC has adopted the Uniform Guidelines on Employee Selection Procedures or "UGESP".[8] UGESP outlines three different ways employers can show that their employment tests meet these requirements. These methods of demonstrating job-relatedness are called "test validation." Validation must be current, and it remains the employer's responsibility to ensure there is no less-discriminatory alternative in the Title VII context - not the test vendor. Also, the employer must keep abreast of changes in job requirements and update the test accordingly."[9]
4. **Medical and Drug Testing**
    i. The ADA is the main concern with medical/drug testing. Remember that an employer may not conduct medical examinations, ask disability-related questions, or drug test employees until a job offer has already been made.[10]
    ii. After making the job offer, but before the person starts working, the employer can conduct medical exams as long as it does so for all individuals entering the same job category, and the test is job-related and consistent with business necessity.[11]
    iii. Note: Reasonable accommodations must be made for tests.
5. **Background Checks/Arrest and Conviction Inquiries/Credit Checks:**
    i. EEOC: As in all cases, be certain your company is treating everyone equally, regardless of how you obtained the background information. But even so, there has been a flurry of disparate impact litigation involving the use of credit information and/or criminal

[8] *See* 29 C.F.R. Part 1607.

[9] Additional information available online at https://www.eeoc.gov/policy/docs/factemployment_procedures.html.

[10] 42 U.S.C. §12112 (d)(2).

[11] 42 U.S.C. § 12112(b)(6).

background information in hiring decisions. The EEOC's position has been that the blanket prohibition of hiring applicants with a criminal background has a disparate impact against specific classes of applicants and would require an individualized determination based upon the *Green* factors. (These are the nature and gravity of the offense or conduct, the time that has passed since the offense, conduct and/or completion of the sentence, and the nature of the job held or sought.[12])

ii. FCRA: Although we could spend our entire hour on the Fair Credit Reporting Act ("FCRA"), if your company is using information obtained from a consumer report to make an adverse employment decision (such as not hiring the person), you must do the following:[13]

1. Before the adverse action:
    a. Give the applicant a notice that includes a copy of the consumer report you will rely on to make your decision, and
    b. a copy of "A Summary of Your Rights Under the Fair Credit Reporting Act" (which you should have received from the company that sold you the report), and
    c. provide the person a reasonable time to explain any negative information (5 days?).
2. Following the adverse action, you must tell the applicant (orally, in writing, or electronically) that:
    a. He was rejected because of information in the report.
    b. Provide him the name, address, and phone number of the company that sold the report.
    c. State that the company selling the report didn't make the decision, and
    d. That he has the right to dispute the accuracy or completeness of the report, and to get an additional free report from the company within 60 days.
3. Common mistakes:
    a. Not giving the applicant a copy of the report
    b. Making the decision without giving the applicant an opportunity to respond
    c. Not having the consent form separate from the application

6. **Social Media/Networking Checks**

[12] Referring to the case *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977).

[13] Additional information available online at: https://www.ftc.gov/tips-advice/business-center/guidance/using-consumer-reports-what-employers-need-know.

i. Employers use social media in two main ways: to publicize job openings and to conduct mini-background checks on candidates.
ii. When it comes to publicizing job openings, this should only be one of various forms of publication due to potential disparate impact concerns.
iii. For mini-background checks, what will you do with the information you get? If you search one person's background, what then?
    1. Note: (Never ask for passwords, be consistent, and if you are going to do this, do it later in the hiring process.)

C. Hiring Independent Contractors:

1. It is critical that business owners correctly determine whether the individuals providing it services are employees or independent contractors. The Wage and Hour Division of the DOL is working with the IRS and many states to combat employee misclassification and to ensure that workers (and the federal/state governments) are getting the money they believe they're entitled to. The DOL has entered into partnerships with 35 states to work together on this issue in a variety of ways – through, for example, information sharing and coordinated enforcement.
2. What does this mean? If you're using independent contractors, be very certain that you're right about the classification. Challenges to employer classification comes from a variety of sources, including the IRS, the Department of Labor (which enforces federal minimum wage and hour laws), the National Labor Relations Board (which enforces employees' rights to form a union) and the Occupational Safety and Health Administration (which enforces workplace safety laws), as well as similar state agencies and private law firms. At the state level, you could attract the attention of your state's unemployment compensation or workers' compensation agency if a worker you classified as a "1099" independent contractor applies for benefits. This is a multi-million dollar industry.
3. Determining whether the person is an Employee or an IC:
    i. DOL: Uses the Supreme Court's **"Economic Realities"** test for FLSA purposes: These are: 1) The extent to which the work is performed is an integral part of the employer's business. 2) Whether the worker's managerial skills affect his or her opportunity for profit and loss. 3) The relative investments in facilities and equipment by the worker and the employer. 4) The worker's skill and initiative (independent business judgment.) 5) The permanency of the worker's relationship with the employer. 6) The nature and degree of control by the employer.
    ii. IRS: Follows common law factors that provide evidence of the degree of control and independence of the worker.[14]

[14] Additional information available online at: https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee.

D. **Hiring Immigrant Workers**: There are several government agencies involved with granting permission for foreign workers to work in the United States. First, employers must seek certification through the Department of Labor. Once the application is certified/approved, the employer must petition the U.S. Citizen and Immigration Services for a visa. Approval by the Department of Labor does not guarantee a visa issuance. Applicants must also establish that they are admissible to the U.S. under provisions of the Immigration and Nationality Act (INA).[15]

E. Communicating with Unsuccessful Applicants: There is no law that requires your company personally communicate with each unsuccessful applicant. Consequently, whether and how your company decides to communicate this information is a matter of resource allocation. Just remember that communicating nothing at all can be frustrating to applicants, and may lead to litigation. Should you choose to communicate your reasons for choosing one applicant over another, ensure that the justification given is accurate and helpful to the applicant. Failure to do so can be evidence of "pretext" in a discrimination case.

F. Drafting Employment Contracts: Louisiana courts, as in the vast majority of states, will presume that employees have no "employment contract" and in most cases employee handbooks are not deemed contracts barring evidence to the contrary. However, for certain employees or executives your company may want to give certain terms or conditions of employment the force of contract. While the existence of an employment contract does not always mean the employee is not "at-will," it certainly has the potential to alter the at-will relationship. I would strongly encourage seeking the assistance of an employment lawyer before entering into any contractual relationship with an employee.

[15] Additional information available online at: https://www.dol.gov/general/topic/hiring/foreign.

system engineer/Entry level

Save Job Rate Job Report Job

Share Job With Others Like 0 Tweet Share

Location: Dallas, TX **Area Code:** 214 **Telecommute:** no **Travel Required:** none

Skills: unix,linux,networking,engineering ✓

Pay Rate: DOE **Tax Term:** CON_CORP CON_W2 **Length:** 6+ month

Date Posted: 5-15-2013 **Position ID:** 2720 **Dice ID:** itintell

System engineer/ Entry level

Location: Dallas,TX

Duration: 6 mths CTH

Job Description

Reviews, analyzes, and evaluates business systems and user needs.

- Documents requirements, defines scope and objectives, and formulates systems to parallel overall business strategies.
- Supports testing of Unified Systems.

Skills Required

Entry level Position. Fresh Undergraduate/Graduate in computer science will meet the requirement

- Project relates to oriental countries. Candidates from these countries (eg Japan,China, Singapore, Phillipines, South Korea) preferred

JAPAN / CHINA / South Korea

historically friendly?

Thanks and regards

(IT is our business)

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

Submitted by Joanne Rinardo

EMPLOYEE HANDBOOK:

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

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. 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.

   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, beginning with Oklahoma, several states 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.

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

Submitted by Joanne Rinardo

WAGES ISSUES

Presented By

Joanne Rinardo
Deutsch Kerrigan, L.L.P.
755 Magazine Street
New Orleans, Louisiana 70130-3672
Telephone: (504) 593-0616
February 8, 2017

EMPLOYEE WAGE ISSUES

I. NAVIGATING THE MAZE OF FLSA REQUIREMENTS

The Fair Labor Standards Act ("FLSA") is the federal statute governing wage and hour law in the United States. The FLSA's wage and hour provisions are administered and enforced by the Wage and Hour Division of the Department of Labor (DOL). The FLSA requires that covered employees are paid (1) a federally set minimum wage per hour (currently $7.25 per hour), and (2) overtime pay for time worked over 40 hours per week. The FLSA also imposes various child labor restrictions and wage and hour recordkeeping obligations.

A. Who is Covered?

1. Covered Employers and Employees

The FLSA applies to all private employers and employees who, in any workweek, are either:

- Engaged in interstate commerce or in the production of goods for commerce (individual coverage), or
- Employed by an enterprise engaged in commerce or the production of goods for commerce (enterprise coverage).

(29 U.S.C. §§ 203(r), (s), 206(a) and 207(a).)

Each test is interpreted broadly. Most private employers, with the exception of family businesses, are covered by the FLSA as are most public employers. (29 U.S.C. § 203(d) and (e)).

2. Workers Not Subject to the FLSA

Workers who are not employees under the FLSA are not subject to its rules. The FLSA defines an employee as any individual employed by an employer (29 U.S.C. § 203(e)). Non-employee workers not covered by the FLSA include:

- Independent contractors,
- Volunteers,
- Interns, and
- Trainees.

B. Employees Exempt from FLSA Overtime Requirements

Certain categories of employees are exempt from the FLSA minimum wage and overtime pay requirements. Although there are several exemptions, the most common are:

- Administrative employees,
- Executive employees,
- Professional employees,
- Computer professionals,
- Outside sales employees, and
- Highly compensated employees.

(29 C.F.R. §§ 541.0-541.710.)

1. Requirements for Exemption

To be exempt under most of the above exemptions, employees must meet both a duties and salary test.

a. The "duties test" means that the employee spends a sufficient amount of time performing duties that qualify as exempt from the FLSA's overtime provisions. Each exemption classification above requires certain types of exempt duties except that of the highly compensated employee.

b. The salary or fee test is required unless the employee is:

- a business owner;
- a teacher;
- practicing law or medicine; or
- a computer professional earning at least $27.63 per hour for every hour worked.

2. Salary Basis Test

a. Generally

To satisfy the salary test, the employee must regularly receive a predetermined amount constituting all or part of the employee's compensation each pay period. That is, the employee gets a set salary weekly, bi-monthly, or monthly. The salary threshold is $455 per week ($23,660 annually).

b. Highly Compensated Employees

Employees with total annual compensation of at least $100,000 are exempt from

FLSA minimum wage and overtime requirements, if they:

(1) Are compensated on a salary or fee basis of at least $455 per week (or $380 per week, if employed in American Samoa by employers other than the federal government), exclusive of board, lodging, or other facilities,

(2) Perform office or non-manual work, and

(3) Customarily and regularly perform any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee.

(29 C.F.R. § 541.601.)

3. Duties Test

a. Administrative Employees

Employees working in a bona fide administrative capacity are exempt from the federal minimum wage and overtime requirements. To qualify for the administrative exemption, an employee must meet each of these criteria:

(1) Be paid a salary or fee of at least $455 per week (or $380 per week, if employed in American Samoa by employers other than the federal government), exclusive of board, lodging, or other facilities.

(2) Have a primary duty that entails:
(a) 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

(b) the exercise of discretion and independent judgment for matters of significance.

(29 C.F.R. § 541.200(a).)

The administrative exemption is meant to cover individuals with decision-making responsibility, as opposed to workers who merely execute pre-assigned tasks. However, this exemption is highly fact-specific and one of the most commonly misapplied and litigated exemptions under the FLSA.

If any doubt arises about whether an employee is an exempt administrative employee, the person should typically be classified as non-exempt. Counsel can assist in

determining whether the person properly qualifies as an exempt administrative employee.

b. Executive Employees

Employees working in a bona fide executive capacity are exempt from the federal minimum wage and overtime requirements. For the exemption to apply, employees must either qualify as a business owner or meet each of these criteria:

(1) Be paid a salary of at least $455 per week, exclusive of board, lodging, or other activities.

(2) Have a primary duty that is management of:
   (a) the enterprise in which the employee is employed; or
   (b) a customarily recognized department or subdivision of the enterprise.

(3) Customarily and regularly direct the work of two or more other employees.

(4) Have the authority to hire or fire other employees or provide input on the hiring, firing, advancement, promotion, or any other change of status of other employees.

(29 C.F.R. §§ 541.100(a) and 541.101.)

Ordinarily this exemption is relatively straightforward to apply because employees either do or do not supervise two or more other employees. Problems can arise, however, when the workers that the supervisor oversees do not work for the supervisor's employer. A fairly common scenario is to have someone classified as an exempt executive supervising two or more bona fide independent contractors but no other employees of the business. The DOL takes the position that supervising independent contractors or supervising other employers' workers does not satisfy the requirement of directing the work of two or more other employees (See 69 Fed. Reg. 22121, 22135 (Apr. 23, 2004)).

c. Professional Employees

Any employee employed in a bona fide professional capacity is exempt from the federal minimum wage and overtime requirement. To qualify for the professional employee exemption, employees must both:

(1) Be compensated on a salary or fee basis of at least $455 per week,

exclusive of board, lodging, or other facilities.

(2) Have a primary duty that is the performance of work:
   (a) requiring advanced knowledge in a field of science or learning, customarily acquired by a prolonged course of specialized intellectual instruction; or
   (b) requiring invention, imagination, originality, or talent in a recognized field or artistic or creative endeavor.

(29 C.F.R. §§ 541.300(a) and 301(a) and (b).)

d. Computer Professional Employees

Computer professional employees who meet both a salary and duties test are exempt from the minimum wage and overtime requirements of the FLSA. The salary test requires the computer professional employee to be compensated either on:

(1) A salary or fee basis of at least $455 per week, exclusive of board, lodging, or other facilities, or
(2) An hourly basis at a rate not less than $27.63 an hour.

Under either FLSA Sections 13(a)(1) or 13(a)(17)(29 U.S.C. § 213(a)(1), (a)(17)), the exemptions only apply to computer professional employees whose primary duty includes any one of the following:

(1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;

(2) The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(3) The design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or

(4) A combination of these duties, the performance of which requires the same level of skills.

Because job titles vary widely and change quickly in the computer industry, job titles do not determine whether this exemption applies. (29 C.F.R. § 541.400.)

Employers must be careful not to classify help desk or technology support positions as exempt, unless they are very high-level positions. The computer professional

exemption focuses on employees engaged in creating and designing programs or systems. It does not include employees who replace a broken printer or cable or assist company employees over the phone to reboot their computers when there is a problem.

e. Outside Sales Employees

Outside sales employees are exempt from the federal minimum wage and overtime requirements. To qualify for the outside sales exemption, employees must have a primary duty that is:

(1) Making sales within the meaning of FLSA Section 3(k) (29 U.S.C. § 203(k));

(2) Making sales within the meaning of FLSA Section 3(k) includes the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property. A sale and selling include any:
- Sale.
- Exchange.
- Contract to sell.
- Consignment for sale.
- Shipment for sale.
- Other disposition

or

(3) Obtaining purchase orders or contracts from customers paying for services or the use of facilities, and

(4) Be customarily and regularly engaged away from the employer's place or places of business in performing this primary duty (a highly fact-sensitive analysis).

An employee's primary duty includes work performed incidental to and in conjunction with his own outside sales or solicitations, including incidental deliveries and collections. Other work that furthers the employee's sales efforts is also regarded as exempt work. This includes:

- Drafting sales reports.
- Updating or revising the employee's sales or display catalog.
- Planning itineraries.
- Attending sales conferences.

(29 C.F.R. § 541.500.)

Exempt outside sales work also includes obtaining orders or contracts for services or for the use of facilities for which consideration will be paid by a customer or client. Obtaining orders for the use of facilities includes:

- Selling time on radio or television.
- Soliciting advertising for newspapers and other periodicals.
- Soliciting freight for railroads and other transportation agencies.

(29 C.F.R. § 541.501.)

C. Employees Never Exempt from FLSA Provisions

There are certain occupations under the FLSA that can never be exempt from overtime regulations, regardless of pay, because of the nature of the duties performed. Generally the FLSA states that its exemptions do not apply to manual laborers or other blue collar workers who perform work involving repetitive operations with their hands, physical skill, and energy. The following occupations are never exempt from overtime:

- Non-management production line employees.
- Non-management employees in maintenance and construction.
- Carpenters.
- Electricians.
- Mechanics.
- Plumbers.
- Iron workers.
- Craftsmen.
- Operating engineers.
- Longshoremen.
- Construction workers.
- Laborers.
- Police officers.
- Detectives.
- Deputy sheriffs.
- State troopers.
- Highway patrol officers.
- Investigators.
- Inspectors.
- Correctional officers.
- Parole or probation officers.
- Park rangers.
- Firefighters.
- Paramedics.

- Emergency medical technicians.
- Ambulance personnel.
- Rescue workers.
- Hazardous materials workers.
- Similar employees, regardless of rank or pay level, who perform work such as:
    - preventing, controlling, or extinguishing fires of any type;
    - rescuing fire, crime, or accident victims;
    - preventing or detecting crimes;
    - conducting investigations or inspections for violations of law;
    - performing surveillance;
    - pursuing, restraining, and apprehending suspects;
    - detaining or supervising suspected and convicted criminals (including those on probation or on parole);
    - interviewing witnesses;
    - interrogating and fingerprinting suspects;
    - preparing investigative reports; or
    - other similar work.

(29 C.F.R. § 541.3.)

D. How an FLSA Exemption May be Lost

An employer who makes or has a practice of making improper salary deductions may lose the exemption status of certain employees if the facts demonstrate that the employer did not intend to pay employees on a salary basis. Some factors the court will consider include:

- The number of improper deductions (particularly as compared to the number of employee infractions warranting discipline, including proper deductions, if applicable);
- The time period during which the employer made improper deductions.
- The number and geographic location of employees that had their salary improperly reduced;
- The number and geographic locations of managers responsible for taking the improper deductions; and
- Whether the employer has a clearly communicated policy permitting or prohibiting improper deductions.

(29 C.F.R. § 541.603(a).)

The exemption will be lost during the time when the improper deductions were

made for employees in the same job classification working for the same managers responsible for the actual improper deductions (29 C.F.R. § 541.603(b)). Even if some employees lose their exempt status, employees in different job classifications or employees who work for different managers will not lose their status as exempt employees if no improper deductions had been made for those employees.

For example, if a manager at one company facility routinely docks the pay of engineers at that facility for partial-day personal absences, then all engineers at that facility that may have had their pay improperly docked by the manager would lose the exemption. However, engineers working for different managers at the same facility or at the company's other facilities would remain exempt.

Notably, isolated or inadvertent improper deductions do not result in loss of the exemption for any employees subject to the improper deductions if the employer reimburses the employees for the improper deductions (29 C.F.R. § 541.603(c)).

The only pay deductions allowed for the non-exempt employee includes:

- For one or more full-day absences for personal reasons, other than sickness or disability.
- For one or more full-day absences for sickness or disability in accordance with an employer's bona fide plan, policy or practice of providing compensation for those absences.
- To offset any amount employees receive as jury fees, witness fees or military pay while the exempt employee is on jury duty leave, witness leave or military leave.
- For penalties imposed in good faith for infractions of safety rules of major significance.
- For unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules. The suspensions imposed must be based on a written policy applicable to all employees.
- For pro rata payment of the employee's salary in the first and last week of employment based on the time actually worked in those weeks.
- For full-day or partial-day absences covered by the Family and Medical Leave Act (FMLA).

(29 C.F.R. § 541.602(b).)

II. CHANGES TO THE NEW OVERTIME RULE ON HOLD

A. Proposed Changes

In March 2014, President Obama issued a Presidential Memorandum directing the Secretary of Labor to propose revisions to the FLSA regulations. The DOL published its notice of proposed rulemaking (NPRM) on July 6, 2015, as the agency's response to that directive.

After a comment period that ended September 4, 2015, and during which the DOL received more than 270,000 comments, the DOL reviewed the comments and issued its final rule, which was published in the Federal Register on May 23, 2016 (81 Fed. Reg. 32,391). The final rule was to be effective December 1, 2016. However, on November 22, 2016, a federal court in Texas granted a preliminary injunction placing those changes on hold. Unfortunately, the ruling came so late that many companies had already prepared for or made changes in how employees are paid.

Although the court granted a temporary injunction, based upon the language used, it appears as though the court will strike down the changes. At issue is whether the DOL had exceeded its authority by making such a significant change in the threshold. What is unknown at this time is whether the new administration will impose new and different regulations.

B. Possible Changes

We do not know whether the new administration will make any changes to the wage threshold for exemption. However, if changes are made, it is expected that the cap will be raised far less than what had been proposed. Although the President-elect hinted that smaller businesses will be exempt from the changes, if any are made, it is difficult to understand how that would be implemented because the FLSA already provides criteria for employer eligibility.

III. CALCULATING OVERTIME

Nonexempt employees are entitled to overtime pay for work in excess of 40 hours per work week, "at a rate not less than one and one-half times the regular rate" at which

they are employed during the work week (29 U.S.C. § 207(a)(2)). The DOL has issued extensive regulations defining the regular rate and explaining how to calculate overtime (29 C.F.R. §§ 778.0-778.603). The main challenge for employers is determining which compensation elements to include or to exclude from the regular rate while allotting each item of compensation to the proper work week. In addition, some states require premium pay for hours worked in excess of a certain number in a day or for work on the sixth or seventh day of the work week.

1. Compensation Excluded from the Regular Rate

The regular rate of compensation includes all remuneration paid to or for the employee unless it falls within one of eight statutory exclusions:

- Gifts made at Christmas time or on other special occasions as a reward for service, which are not determined by or dependent on hours worked, production, or efficiency.

- Payments made for:
  - occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause;
  - reasonable traveling or other expenses incurred by the employee in furtherance of the employer's interests and properly reimbursable by the employer; and
  - other similar situations, where the payments are not made as compensation for the employee's hours of employment.

- Discretionary bonuses, payments to a bona fide profit-sharing plan, trust, or thrift savings plan, and talent fees for radio and television performers.

- Contributions to bona fide benefits plans.

- Premium payments for work in excess of eight hours in a day, 40 hours in a week, or the employee's normal working hours.

- Premium payments of at least an additional one half of the employee's regular rate for work on weekends, holidays, regular days of rest, or the sixth or seventh day of the work week.

- Premium payments of at least an additional one half of the employee's regular rate made under an employment contract or collective bargaining agreement for hours worked outside the normal workday or work week.

- Value or income derived from certain stock options, stock appreciation rights, or bona fide employee stock purchase programs.

(29 U.S.C. § 207(e)(1)-(8).)

2. Compensation Included in the Regular Rate

Other than the exclusions listed above, all other compensation for nonexempt employees becomes part of the regular rate for purposes of calculating overtime. Common types of remuneration that must be included in the regular rate include:

- Awards or prizes won for quality, quantity, or efficiency.
- Bonuses and incentives based on quality, quantity, or efficiency.
- Bonuses based on hours worked.
- Commission payments.
- Reasonable cost of employer-provided lodging, meals, and other facilities furnished to employees.
- Shift differentials and "dirty" work premiums.
- Lump sum on-call payments.

3. Discretionary and Nondiscretionary Bonuses

A question that frequently arises is when does a bonus become discretionary (which is excluded from the regular rate) versus nondiscretionary (which is included in the regular rate). A bonus is discretionary **only if**:

- The fact and amount of the payment are determined in the sole discretion of management, and
- The payments are not made under any contract, agreement or promise causing the employee to expect the payments regularly.

29 C.F.R. § 778.211(b).

A discretionary bonus regularly paid each year (for example, a holiday bonus) may lose its discretionary character after some period of time if employees come to expect the payments 29 C.F.R. § 778.212(c).

For a bonus to be considered discretionary, the employer must retain discretion on payment of the bonus until at or near the end of the period it covers. If an employer decides at the beginning of the year to pay a bonus at year end and conveys the decision to employees, the bonus is nondiscretionary. This is true even though the employer retains discretion on the amount to be paid. A bonus is nondiscretionary if the employee

has some vested right to the benefit.

If a bonus is intended to induce or encourage employees to perform or to be productive, the bonus is not discretionary. Examples of nondiscretionary bonuses include:

- Bonuses that are announced to employees to induce them to work more steadily, rapidly, or efficiently.
- Bonuses intended as an incentive to remain with the employer.
- Attendance bonuses.
- Individual or group production bonuses.
- Bonuses for quality and accuracy of work.
- Sales bonuses based on an employee's efforts.
- Cost-of-living bonuses.
- Bonuses intended to attract employees to an isolated or otherwise undesirable job site.

29 C.F.R. § 778.211(c).

A key to maintaining the discretionary status of bonuses is to vary the bonus amounts to coincide with company performance.

4. Overtime for Salaried Nonexempt Employees

Salaried nonexempt employees are entitled to overtime just like hourly employees. That is, even if an employee is paid a weekly salary, they may be entitled to overtime if they do not pass the duties **and** salary tests. Thus, the employer must keep track of all nonexempt employees' working time even if they are salaried.

5. Fluctuating Workweeks

An agreement with salaried non-exempt employers to pay a fixed salary to cover straight time for all hours worked is only valid when the salary is designed to cover short hour work weeks as well as long hour (but less than 40 hours) weeks. Employers that use the fluctuating workweek method to compensate employees must inform the employees in writing that their salary provides straight-time compensation for all hours worked. That is, if a non-exempt employee's hours fluctuate from week to week, he may be paid a straight salary for all hours worked, as long as he never falls below minimum wage for a week with the greatest hours.

A benefit of this pay system is that the employee will receive one-half of his

regular rate for overtime instead of the usual one and a half times rate. Ex.: Bob agrees to work for $1,000 per week whether he works five hours or 40 hours. Assume that he works 42 hours one week. His hourly rate would be $23.81 based upon $1,000 ÷ 42 hours. His overtime rate would be 50% of that hourly rate, or $11.91 per hour. He would be paid $1,000 flat rate plus two hours at $11.91 for a total of $1,023.81.

Employers paying by fluctuating workweek must not make deductions for weeks with less than 40 hours worked. If a nonexempt employee on a fluctuating workweek works at all during the workweek, that employee must receive the entire guaranteed salary or else the salary may be deemed compensation for only the first 40 hours of work. This exposes the employer to liability for full time and a half for all overtime hours, rather than simply paying the additional half-time premium.

In April 2011, the WHD made clear that bonuses and other premium payments will invalidate the use of the fluctuating workweek method for any employee that receives those. Employers must review their pay practices to ensure that bonuses and premium pay are not paid to employees who are compensated by the fluctuating work week method.

6. Employees Working at More Than One Work Site

If a business employs a worker at more than one site, i.e. as at more than one store, restaurant, office, or production facility, the employer must combine all hours that the individual works in a workweek for purposes of overtime. In addition, entities deemed to be joint or integrated employers must combine hours worked by individual employees at all locations.

An employer with multiple worksites should have a centralized payroll system that captures and aggregates time that an employee works at all locations. Supervisors at different sites may not even be aware of the situation, so employers must have a computer or other system that does not rely on employee self-reporting or an affirmative step by a supervisor. Employers must recognize that corporate separateness does not necessarily preclude a finding of joint employer status.

IV. COMMON WAGE AND HOUR TRAPS

There are numerous instances in which the employer unwittingly errs with painful results. These errors may stem from misclassifying an employee, improper deductions, not paying all the actual time worked, or nor paying or miscalculating overtime worked. The penalties are harsh and can include:

- Back pay.
- Liquidated damages. (double damages)
- Punitive damages.
- Interest.
- Attorneys' fees and costs.

In addition, employers may be liable for:

- Taxes not withheld.
- Benefits not provided.
- Workers' compensation contributions or, if the individual sustains a compensable injury, awards.
- Unemployment insurance and benefits.

A. Safe Harbor for Improper Deductions

The overtime regulations contain a safe harbor for improper deductions. If an employer meets the following criteria, it will not lose the exemption for any employees, unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints. The employer must:

- Have a clearly communicated policy prohibiting improper salary deductions.
- Provide a complaint mechanism in the policy.
- Reimburse employees when improper deductions are made.
- Make a good faith commitment to comply in the future.

29 C.F.R. § 541.603(d).

The best evidence of a clearly communicated policy, for example, is a written policy that was distributed before the improper pay deductions to employees by:

- Providing to employees a copy of the policy at the time of hire,
- Publishing the policy in an employee handbook, or
- Publishing the policy on the employer's intranet.

B. What Time Counts As Hours Actually Worked?

One of the most common wage and hour claims in large, multi-plaintiff lawsuits involves allegations by nonexempt employees that they have not been paid for all the hours they have worked. An off-the-clock claim can arise in several ways:

1. A claim may focus on normal work duties performed outside the usual work schedule, with employees contending that their supervisors either pressured them not to record all hours worked or altered time records to omit some amount of working time,

2. Employees may seek compensation for tasks that the employer has regarded as non-compensable such as donning work clothes, or

3. Employees may contest their employer's timekeeping procedures, claiming that they serve to shortchange the employees' wages.

Such actions can create substantial liability for the employer when considering FLSA damages.

C. Employees Claiming Failure to Pay for Time Spent on Compensable Tasks

Another common off-the-clock claim may concern alleged nonpayment for the performance of job duties that are compensable. Cases often arise where employees allege that their supervisors directed them not to record all of their working hours, to work off-the-clock or when a supervisor alters employees' time cards to reflect fewer than the actual hours worked. In other cases, employers were aware of work being done even though the employee had been instructed not to do so, i.e. taking work home.

If an employer knows or has reason to know that an employee is performing services for the employer, the employer must compensate the employee for that time. In *Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 287 (2d Cir. 2008), the court held that the employer:

- Must pay for overtime hours worked by employees who failed to follow the employer's policy requiring approval for work beyond the normal schedule.

- Could not deny payment based on its policy (requiring approval for work beyond normal schedule) because it knew that the overtime work was **being performed despite the lack of approval.**

The lesson learned is that simply having a policy that unauthorized overtime will not be paid does not insulate the employer from liability. For this reason, some businesses block non-exempt employees' computer access after work.

In these disputes, the focus is generally on whether the employees worked during the hours that they claim. If they worked during these hours, and if the employer had actual or constructive knowledge of that work, the employees are entitled to payment for that time.

1. Employees Seeking Compensation for Ordinarily Uncompensated Tasks

One example of an off-the-clock claim involves time spent on tasks that are not part of an employee's core job duties and that the employer treats as non-compensable, but is part of their duties. Some examples include:

a. Preparatory activities before or after the work shift,
b. Donning and doffing of uniforms,
c. Checking emails from outside the workplace, and
d. Travel time.

2. When does work start?

The Supreme Court of the United States has determined in several cases when the workday begins and ends. Tasks "performed either before or after the regular work shift, on or off the production line" must be treated as work "if those activities are an integral and indispensable part of the principal activities" of an employee's position. (See *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956)).

In a 2005 ruling, the Supreme Court created the continuous workday rule, concluding that "during a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity" is compensable. (See *IBP, Inc. v. Alvarez*, 546 U.S. 21, 37 (2005)). The Supreme Court's endorsement of the continuous workday rule, including compensation for many otherwise non-compensable tasks occurring between the workdays' first and last principal activity, underscores the importance of determining exactly when the workday starts and concludes.

3. Donning and Doffing Protective Gear, Clothing, and Uniforms

Whether time spent putting on (donning) and removing (doffing) protective gear, clothing and uniforms is compensable working time depends on the nature of the specific items. For example, donning and doffing specialized protective gear are compensable activities (*Alvarez*, 546 U.S. at 30). Some examples of protective gear may include hard hats, sleeves, aprons, vests, and boots.

Where protective gear is not unique or specialized, courts have split regarding the compensability of donning and doffing. In *Gorman v. Consolidated Edison Corp.*, the Second Circuit concluded that the time that workers at a nuclear power station spent donning and doffing a helmet, safety glasses, and steel-toed boots was not compensable work because these duties involved generic protective gear and were not integral to the workers' principal activities (488 F.3d 586, 594 (2d Cir. 2007)).

However, in *Spoerle v. Kraft Foods Global, Inc*., 527 F. Supp. 2d 860, 862 (W.D. Wis. 2007) the time that meat processing workers spent donning and doffing the following gear was found to be compensable:

> a hard hat or bump-cap, steel-toed shoes or sanitation boots, ear plugs, hairnet and beard net, safety glasses, a freezer coat (if necessary), gloves, plastic gloves, paper frock or plastic apron, sleeves, slickers (for employees that work in wet areas) or a cotton frock."

The *Spoerle* court dismissed the *Gorman* holding as "truly bizarre," finding that:

> [b]ecause plaintiffs need to put on the equipment in order to perform their job safely, their doing so is 'an integral and indispensable part' of a 'principal activity'"

Under this analysis, donning and doffing necessary protective gear would usually be compensable.

4. Security Checks

To date, courts have generally treated time spent passing through security checks as non-compensable. The US Supreme Court recently overturned the Ninth Circuit in *Integrity Staffing Solutions, Inc. v. Busk*, 2014 WL 6885951 (Dec. 9, 2014) concluding that post-shift security screenings of workers employed to package products were not

compensable. The court explained that pre- and post-shift activities are compensable if they are "integral and indispensable" to the employees' principal activities. The court also concluded that the "integral and indispensable" test can only be satisfied if the activity is an "intrinsic element" of the job.

For employees whose principal activity is packaging products for shipment, the court determined that post-shift security screenings, even if required by the employer, are not "integral and indispensable" to that principal activity. As the court noted, the employer could have eliminated the screenings entirely without affecting the employees' ability to do their work. In addition, the court rejected as irrelevant the plaintiffs' argument that the employer could have shortened the time required for the screenings.

The Second Circuit held that the 10 to 30 minutes a day that nuclear power station employees spent passing through security screening (including waiting in line at a vehicle entrance, swiping an employee card, and undergoing handprint analysis) were analogous to traveling to work and not integral to the employees' principal activities (See *Gorman*, 488 F.3d at 591, 593-94).

Similarly, the Eleventh Circuit concluded that the time construction workers on an airport project spent passing through a federally required security checkpoint before proceeding to the tarmac was neither integral nor indispensable to their job duties and did not benefit the employer and therefore was non-compensable (See *Bonilla v. Baker Concrete Constr., Inc*., 487 F.3d 1340, 1345 (11th Cir. 2007)). The court also held that time the employees spent before and after the checkpoint riding in employer-provided vehicles to the work site was non-compensable.

5. Travel

Whether time spent traveling is compensable depends on the facts. Some of the general rules regarding travel include:

- Regular commuting to and from work, outside the employee's normal working hours, is ordinarily not compensable working time (29 C.F.R. § 785.35).

- Time spent going from home to work and back, outside normal working hours, on a special one-day assignment in another city **is** compensable, at

least to the extent that the time in transit exceeds the employee's usual commuting time (29 C.F.R. § 785.37).

- Time spent traveling during the employee's normal working hours, such as travel from job site to job site or travel after the first principal activity of the day, is compensable working time (29 C.F.R. § 785.38).

- Travel that keeps the employee away from home overnight is working time if the travel is during the employee's normal working hours, including during those same hours on days, such as weekends, when the employee does not ordinarily work (29 C.F.R. § 785.39).

- Any actual work that an employee performs while traveling must be compensated (29 C.F.R. § 785.41).

Certain issues remain unsettled. For example, there has been significant litigation regarding whether commuting from home to work after an employee engages in some amount of work at home is compensable. Some courts have found it is part of the continuous workday and compensable whereas others found it is not compensable because it is the type of travel generally deemed not working time under the Portal-to-Portal Act. The Portal–to–Portal Act provides that certain preliminary and after work activities are non-compensable:

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such **principal activity or activities**....

29 U.S.C. § 254(a) (emphasis added).

There is also uncertainty regarding the status of time spent commuting in an employer-owned vehicle. Under a 1996 law, the time that an employee spends traveling in an employer-owned vehicle is not part of the employee's principal activities where the use of the vehicle is:

- Within the normal commuting area for the employer's business, and
- Subject to an agreement between the employer and the employee or employee's representative.

(29 U.S.C. § 254(a).)

On the other hand, the Washington Supreme Court has interpreted that state's law as requiring compensation for the time that the employees spend commuting in a company vehicle, at least where the employer exercises some amount of control over the use of the vehicle (See *Stevens v. Brink's Home Sec., Inc*., 169 P.3d 473 (Wash. 2007)). The court in Stevens concluded that technicians were on duty while driving company trucks because the employer:

- Prohibited them from using the trucks for personal business,
- Required them to remain available to assist at other job sites while en route, and
- Prescribed rules regarding carrying passengers, parking, and locking the vehicle, among other things.

Another situation that has arisen locally is whether employees are on the clock when riding employer-provided buses to and from the job site. The Fifth Circuit, in *Vega v. Gasper*, 36 F.3d 417 (5th Cir. 1994), held that employees' time spent on the employer's buses traveling between remote job site and community where the employees lived was a non-compensable "extended home-to-work-and-back commute," rather than an indispensable part of performing their job, because the workers were not required to use the buses and did not load tools or engage in activities for the benefit of the employer while riding on the buses. See also *Dolan v. Project Construction Corporation*, 558 F.Supp. 1308, 1311 (D.Col. 1983) (holding that employees were not entitled to compensation for the 20–30 minute bus ride from the main camp to the job site).

6. Breaks and Meals

The general rule is that rest periods of less than 20 minutes are compensable. These short breaks are considered primarily for the employer's benefit because they promote the efficiency of the employee. Where a rest period exceeds 20 minutes, the waiting time rules apply and the time is compensable. (29 C.F.R. § 785.18 and WHD Field Operations Handbook (FOH) § 31a01.)

By contrast, bona fide meal periods are not considered working time. The employee must have sufficient time to eat the meal (ordinarily at least 30 minutes) and be **completely relieved** of work duties during this time (29 C.F.R. § 785.19(a) and FOH § 31b23). Under special conditions a meal period of less than 30 minutes may be sufficient to be considered a *bona fide* meal period, although this depends on the facts of each case. The WHD (Wage and Hour Division) applies "special scrutiny" to meal periods of less than 20 minutes (29 C.F.R. § 785.19(a) and FOH 31b23(b)).

7. Checking Email, Voice Mail, and Assignments and Related Activities From Home

In *Dooley v. Liberty Mutual Insurance Co*., the court held that checking e-mail from home and related activities can be a principal activity for purposes of the continuous workday, rendering commuting time after the first principal activity and before the final principal activity of the workday compensable as well (307 F. Supp. 2d 234 (D. Mass. 2004)). The case concerned Liberty Mutual's automobile damage appraisers, who, while at home, were required at the start or end of each workday, to:

- Check their email and voice mail.
- Make various telephone calls.
- Download their assignments for the following day.
- Perform other work-related tasks.
- Logging in to the work computer form home.

The employer paid for these tasks if the employees reported spending time on those duties. The employees, however, also sought compensation for the time spent driving from home to their first appointment of the day and from their last appointment back home. The court agreed that the driving time was compensable because the employer **required** the employees to perform these various tasks before and after driving, rendering those principal activities.

8. Waiting Time

Employees who are on call (also called stand-by time) must be compensated for their time if the employer's control over the employee prevents the employee from using the time effectively for their own purposes (29 C.F.R. § 785.17). Determining whether on-call time is controlled and therefore compensable, or uncontrolled and therefore non-

compensable, depends on the facts of each situation and the state in which the employee works.

A variety of factors affect whether restrictions on an employee's movements and activities transform on-call time into work. These factors include whether:

- The employee must remain on the employer's premises.
- There are excessive geographical restrictions on the employer's premises.
- The frequency of calls is unduly restrictive.
- A fixed response time is unduly restrictive.
- The employee can trade on-call responsibilities with another employee.
- The employee engages in personal activities during on-call periods and to what extent.

(See *Berry v. County of Sonoma*, 30 F.3d 1174 (9th Cir. 1994).

Each situation will be reviewed on a case-by-case basis. In one case, on-call time was not found compensable by the Seventh Circuit in an "on call" program in which utility linemen and other workers had to be reachable when away from the workplace, and had two hours to report to a worksite if called on to do so. The employees had the option of not reporting for every call, but they were subject to discipline if they failed to answer more than 50% of their calls or refused to accept more than 35% of their calls. The frequency of the calls ranged from once every 5.5 days to no more than once per month. The court affirmed summary judgment in the employer's favor, concluding that the time spent on call was not unduly restrictive and therefore was not compensable working time. (See *Jonites v. Exelon Corp*., 522 F.3d 721 (7th Cir. 2008).)

As technological advances improve an employer's ability to predict the changes in staffing needs, the issue of compensable on-call time may become of increasing interest to class action plaintiffs' attorneys. For example, some retailers are considering scheduling software to monitor the number of customers present in a store and using that data to determine whether to call more employees into work. This system is likely to require a number of employees to be subject to an immediate call to work in the event of a surge in shoppers. When implementing practices that rely on these kinds of technologies, employers must carefully consider the factors that govern whether an employee is "waiting to be engaged" (non-compensable) or "engaged to wait" (compensable).

9. Training

Attendance at lectures, meetings, training programs, and similar activities is not compensable and is not counted as working time when four conditions are met:

- Attendance is outside of the employee's regular working hours,
- Attendance is truly voluntary,
- The event is not directly related to the employee's job, and
- The employee does not perform any productive work during attendance.

(29 C.F.R. § 785.27.) If any of these conditions are not satisfied, an employer must treat this time as hours worked.

In recent years the DOL's Wage and Hour Division has issued opinion letters addressing the following scenarios:

> A restaurant provided English language lesson materials to its employees. The employees expressed an interest in taking the materials home for further study and to share with their relatives outside of normal working hours. The WHD determined that the time the employees voluntarily spend at home studying the materials, which were similar to English proficiency courses available at community colleges, is not work. (Opinion Letter FLSA 2006-5, 2006 WL 940661 (Mar. 3, 2006).)

> A county asked whether time police recruits spent typing their class notes constituted working time. During months of academic and firearms training, the recruits had taken notes in class and prepared a typed notebook. The recruits typed at home after class, as one purpose of this typing was to prepare for the job requirement of typing police reports. The WHD concluded that the typing was not voluntary and that the training was directly related to the recruits' job, making the time compensable. (Opinion Letter FLSA 2006-2NA, 2006 WL 4512944 (Jan. 17, 2006).)

V. PART-TIMERS, TEMPS, INTERNS: EMPLOYER OBLIGATIONS

College students and recent graduates are often willing to work as unpaid interns in exchange for gaining valuable professional experience. Similarly, job applicants may be willing to participate in unpaid training programs required by their prospective employer to gain marketable skills and find work. When allowing interns and/or trainees, employers must either comply with the minimum wage, overtime pay, and other requirements under the FLSA, or ensure that all unpaid interns and trainees do not perform work that benefits the employer.

In addition, employers may ask or encourage employees to volunteer time and services for charitable, civic or humanitarian purposes. However, employers still must pay employees for compensable time spent performing volunteer activities that do not qualify for exclusion from the FLSA's minimum wage and overtime pay requirements.

A. Part-Timers

The FLSA does not specifically address part-time employment and does not define part-time or full-time employment. Whether an employee is considered full-time or part-time does not change the application of the FLSA. The only relevance to the classification for the employer is that some benefits, such as PTO, might not be available to part-time employees.

B. Temporary or Seasonal Employees

The FLSA does not limit the number of hours per day or per week that employees aged 16 years and older can be required to work. Whether an employee is considered temporary does not change the application of the FLSA, and overtime compensation requirements apply for hours worked over 40 in a work week.

C. Interns, Volunteers, and Trainees

1. Definitions

a. Interns

Interns typically are students or recent graduates seeking to:

- Get practical, hands-on experience in a particular job or professional field,
- Improve their resume and job prospects, and
- Network at a particular employer or in a particular professional field.

Some employers hire student interns through a formal academic program. For example, several colleges and universities have intern or externship programs in which they partner with one or more employers to provide experience-based learning to students. These programs frequently:

- Provide academic credit,
- Are paired with classroom learning and other academic requirements. For

example, students may be required to attend a weekly class and write a paper about their internship experience,

- Relate to a particular course of study or curriculum, and
- Last for a specified duration, such as a semester.

b. Trainees

Trainees generally are individuals participating in pre-employment training for a particular skill or job. The training is usually both provided and required by the prospective employer. For example, some airlines admit a certain number of applicants into flight attendant training programs. These trainees generally are required to attend the training before they can be hired as flight attendants. Although these trainees may be offered meals and housing during the training course, they typically are neither paid during the training nor guaranteed a job after completion of the training. (See, for example, *Donovan v. Trans World Airlines, Inc*., 726 F.2d 415 (8th Cir. 1984) and *Donovan v. Am. Airlines, Inc*., 686 F.2d 267 (5th Cir. 1982).)

c. Volunteers

According to the DOL, employees and other individuals may never volunteer to perform work for private, for-profit employers. Be careful - merely characterizing the work as a volunteer activity is not enough to avoid the FLSA's requirements, even if the employer and the worker agree to that characterization **(**see *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302 (1985)). However, individuals may volunteer for public or non-profit employers in limited circumstances (29 U.S.C. § 203(e)(4)-(5)).) Remember - any work performed on behalf of a for-profit employer is subject to the FLSA's minimum wage, overtime pay, and other requirements, unless an exception or exemption applies.

2. Most Interns and Trainees Should Be Paid

Although internships and pre-employment training programs are frequently treated as unpaid, there is no specific exemption from the FLSA for interns or trainees. Notably, an intern or trainee's willingness to work without pay in exchange for experience or training is irrelevant to whether the intern or trainee must be paid under the

FLSA.

Employers must pay interns and trainees minimum wage and overtime compensation (and otherwise comply with the FLSA) if the intern or trainee is an employee for purposes of the FLSA. "Employee" is defined broadly to include any individual employed by an employer (29 U.S.C. § 203(e)). Similarly, the FLSA defines "employ" broadly to mean to "suffer or permit to work" (29 U.S.C. § 203(g)).

The DOL has developed a six-part test to determine whether an intern or trainee is covered by the FLSA's definition of employee. Under the DOL's interpretation of the FLSA, an unpaid intern or trainee is not an employee covered by the FLSA if **all** of the following requirements are satisfied:

(a) **Academic or vocational environment.** The internship or training is similar to training that would be given in an academic or vocational education environment, even though the internship or training includes actual employer operations. An internship or training program is more likely to satisfy this requirement if it is structured like a classroom experience, such as an internship through a formal university program that:

(1) gives the intern academic credit after they complete the internship and related classroom work; and

(2) allows the student to observe the practical application of classroom instruction to workplace activities.

(b) **The internship or training is for the benefit of the intern or trainee.** The intern or trainee will be deemed to be the primary beneficiary of an internship or training program that provides skills "that can be used in multiple employment settings," as opposed to skills that can only be used for one employer. Similarly, if the employer's burden of planning and administering the internship or training program is greater than any incidental benefit the employer receives from the interns or trainees, this requirement is likely to be satisfied.

(c) **Regular employees are not displaced by interns or trainees.** Instead, the interns and trainees work under the close supervision of existing staff. For example, if an intern shadows a regular employee without doing any work for the employer, this requirement is more likely to be satisfied. However, if an employer uses interns or trainees to avoid either hiring additional employees

or increasing the hours of existing employees, the interns or trainees are likely to be employees under the FLSA.

(d) **Employer derives no immediate advantage from interns or trainees.** This is critical. If the intern does any work that helps with the employee's operations, he/she must be paid.

(e) **No job entitlement.** The intern or trainee is not necessarily entitled to a job at the end of the internship or training program.

(f) **No compensation.** All parties understand that the intern or trainee is not entitled to wages for any time spent in the internship or training program.

Federal courts do not necessarily rely on the DOL's six-part test to determine the employment status of unpaid interns and trainees under the FLSA. However, the Fifth Circuit gives substantial deference to the DOL's six-part test. (*Atkins v. Gen. Motors Corp*., 701 F.2d 1124, 1128 (5th Cir. Apr. 7, 1983)).

3. Best Practices for Using Unpaid Interns and Trainees

Employers should understand and evaluate the requirements under federal, state, and local wage and hour laws for unpaid intern and trainee programs, keeping in mind that exceptions to the FLSA's minimum wage and overtime pay protections are construed narrowly in favor of an employment relationship. Employers must satisfy the requirements under applicable law when developing all aspects of the internship or training program, including:

- The length of the internship or training program, such as by academic semester.
- The nature of services or work to be performed by interns or trainees and their level of responsibility (if any). For example, employers should determine whether interns or trainees will:
  - help more experienced employees;
  - work unsupervised;
  - shadow experienced employees; or
  - work only on special projects.
- The daily or weekly schedule of interns or trainees.

- Any compensation for interns or trainees, including wages, overtime pay, benefits, and other types of payments.
- Interference with the rights of existing employees (for example, by displacing employees covered by a collective bargaining agreement (CBA)).

Employers should identify the program criteria in a written agreement and obtain a signed acknowledgement of understanding and acceptance from interns and trainees. The written agreement, also called a learning contract when used with interns, should be signed by both parties. While not conclusive, the agreement may support a finding that the relationship is for the primary benefit of the intern or trainee. Employers that frequently use interns or trainees should consider developing a written program document that outlines the duties and responsibilities of the employer and the interns or trainees.

D. When Volunteering is On-The-Clock

Private, for-profit employers cannot use volunteers but they may encourage employees to volunteer time and services to unrelated charitable, civic, or humanitarian non-profit organizations as a public service. Although not explicitly addressed by the FLSA, some authority suggests that the following conditions must be satisfied:

- The employer does not require employees to volunteer for these charitable activities.
- The employer does not direct or control the time spent on these charitable activities.
- The employee's continued employment is not impacted by their decision to participate in the volunteer activities.
- The volunteer work is not performed during normal working hours or on the employer's premises.
- The employees would be compensated in compliance with the FLSA for any time spent on volunteer activities during normal working hours.

(See, for example, *Liebesman v. Competitor Grp., Inc*., 2015 WL 2195093, at *6 (E.D. Mo. May 11, 2015); *Saphos v. Grosse Pointe Dev. Co*., 2008 WL 976839 (M.D. Fla. Apr. 9, 2008) and Wage and Hour Opinion Letter FLSA 2006-4 (Jan. 27, 2006).) That is, a private, for-profit employer may encourage its employees to volunteer at a local soup

kitchen that is not related to the employer during non-working hours, as long as the above criteria are satisfied.

Remember, employers must not **require** employees to perform volunteer work without pay even if during off hours.

VI. EMPLOYEE V. INDEPENDENT CONTRACTOR

Companies can avoid significant wage, tax and other obligations by engaging independent contractors instead of employees. Using independent contractors can result in considerable cost savings and increased workforce flexibility. These advantages are particularly beneficial during times of economic downturn. In addition, independent contractors are a major component of the on-demand economy, in which companies like Uber rely almost exclusively on contractors to deliver the services customers request.

Individuals often choose to become independent contractors because they desire greater control over their work environment and schedules. Others prefer more variety in their day-to-day work and more control over the methods they use to accomplish that work. In addition, some workers are interested in operating their own business and using their entrepreneurial skills to more directly impact their earning capacity.

While it can be advantageous for both parties, independent contractor classification involves careful consideration of several factors, application of multiple standards, and exposure to liability in several areas, including potential liability for years of unpaid overtime pay, taxes, and employee benefits.

Simply referring to a worker as an independent contractor, even in a written agreement, does not prevent legal challenges to that classification by workers, the Department of Labor (DOL), the Internal Revenue Service (IRS), or state and local authorities. In addition, the DOL and its state counterparts have made independent contractor misclassification a top enforcement priority. Misclassification audits, investigations, and lawsuits are increasingly common and can result in steep costs and penalties. Uber just settled a huge case in California and Massachusetts on this issue in which it paid almost $100 million to the plaintiff drivers, who will keep their independent contractor status as part of the settlement. However, Uber will be required to change

certain practices regarding drivers and rating to lessen their control over the drivers and their working conditions.

A. What Is an Independent Contractor?

An independent contractor is a worker who contracts with individuals or entities to provide services in exchange for compensation. An independent contractor does not work regularly for any single company and is not an employee. An independent contractor typically:

- Charges fees for service.
- Is engaged only for the term required to perform an identified service or task.
- Retains control over the method and manner of work.
- Retains economic independence.
- Is responsible for paying his income, Social Security, and Medicare taxes.
- Is not protected by most federal, state, or local laws designed to protect employees.

An entity contracting with an independent contractor generally has the right to control only the end result of the project, but not how the independent contractor accomplishes it.

Companies that engage independent contractors issue them IRS **Form 1099s** for income-reporting purposes. The contracting company has no obligation to provide benefits to the independent contractor or withhold or pay employment taxes on the contractor's behalf (except when backup withholding is required, in the case of a missing or incorrect tax identification number for the independent contractor).

In addition, independent contractors are generally free to offer their services to the public and to perform work for other clients. Independent contractors often own their own businesses and provide services according to their own terms.

An employee, by comparison, is subject to significant oversight by a company. The company has the right to control the method and manner of the employee's work. In addition, an employee:

- Is paid wages (which may include overtime compensation) and company-sponsored benefits.
- Is employed for a continuous period of time and performs whatever tasks

the company requires.

- Pays the full amount of his income taxes and a portion of his Social Security and Medicare taxes, generally through the amounts his employer is obligated to withhold from his wages.
- Is economically dependent on the employer.
- Is protected by applicable federal, state, and local employment laws.

Companies cannot rely on generalizations to determine employee or independent contractor status. Classification depends on the facts of each case, application of the appropriate independent contractor tests, and differences in the judicial and administrative interpretation of those tests.

1. Advantages: Federal, State, and Local Employment Law Compliance

Various federal, state, and local employment laws, including laws governing health and safety, wage and hour, and equal employment standards, protect employees but not independent contractors. Independent contractors are not counted for purposes of determining coverage under these statutes and they cannot pursue the statutory remedies available to employees. Federal employment laws that cover employees but generally not independent contractors include, for example:

- **Fair Labor Standards Act** (FLSA). The FLSA includes **minimum wage** and overtime pay requirements for **nonexempt employees** generally. For example, while the FLSA generally requires companies to pay nonexempt employees overtime compensation for hours worked over 40 in a workweek, it does not require that companies do the same for independent contractors (see 29 U.S.C. §§ 203(e) and 207(a)).
- **Title VII of the Civil Rights Act** (Title VII). (However, independent contractors do have some legal protections under 42 U.S.C. § 1981, prohibiting racial discrimination in contracts.)
- **Equal Pay Act** (EPA).
- **Age Discrimination in Employment** (ADEA).

- **Americans with Disabilities** (ADA).
- **Genetic Information Nondiscrimination Act** (GINA).
- **Uniformed Services Employment Reemployment Rights Act** (USERRA).
- **Occupational Safety and Health Act** (OSH Act). The OSH Act protects employees' right to complain about safety conditions.
- **Worker Adjustment Retraining Notification Act** (WARN).
- **Family and Medical Leave Act** (FMLA).
- **Employee Retirement Income Security Act** (ERISA). In the retirement plans context, ERISA requires companies to make 401(k) and retirement benefits available to all employees on the same basis. In addition, retirement plans can lose their tax qualification if they cover non-employees, such as independent contractors. Regarding health plans, independent contractor issues may arise in the plan eligibility context. Also, the **Affordable Care Act** (ACA) expanded ERISA to require large employers to either provide health coverage that is affordable and provides minimum value, or pay a penalty. Misclassification issues could affect whether employers are subject to this "play or pay" requirement (also known as the employer mandate).
- **National Labor Relations Act** (NLRA). Employees have the right to form or join labor organizations, to bargain collectively through their representatives, and to engage in other concerted activities. The NLRA's definition of employee expressly excludes independent contractors. (See 29 U.S.C. §§ 152(3) and 157.)

2. Consequences of Misclassification

The benefits of using independent contractors are often significant, but the financial costs and penalties of misclassification can be staggering. The DOL, the IRS, state government agencies and courts construe independent contractor status narrowly and impose large penalties for misclassification. A contributing factor to this narrow view is that companies using independent contractors have the advantage of avoiding many of the obligations of an employment relationship. In addition, exemptions and exclusions

from the employee protections granted by employment statutes like the FLSA are construed narrowly to preserve the statute's intentionally broad reach.

In addition to ensuring compliance going forward, a company that misclassifies employees as independent contractors may be liable for:

- Back wages and overtime pay.
- Employee benefits, including stock options, retirement benefits, and health plan coverage (for example, penalties involving the ACA employer mandate and information reporting requirements).
- Disability payments and workers' compensation.
- Tax and insurance obligations.
- Liquidated damages.
- Civil monetary penalties.

3. Employee Benefits

A company that has misclassified an employee as an independent contractor can be made to pay the benefits the employee would have otherwise been owed over the course of the working relationship. Thus, a company can be liable for benefits it intended to offer only to employees.

For example, in a landmark decision, Microsoft was required to pay benefits under its employee stock purchase plan to workers it had improperly classified as independent contractors. Microsoft paid $97 million to settle that case and a related lawsuit (*Vizcaino v. Microsoft Corp.,* 120 F.3d 1006 (9th Cir. 1997) and *Hughes v. Microsoft,* 2001 WL 34089697 (W.D. Wash. Mar. 26, 2001)).

Similarly, the DOL filed a well-publicized suit against Time Warner seeking health insurance, pension benefits, and stock compensation for workers that had been misclassified as independent contractors. The case settled for $5.5 million, with $500,000 specifically earmarked for reimbursement of uninsured and unreimbursed medical expenses. (*Herman v. Time Warner*, 56 F. Supp. 2d 411 (S.D.N.Y Sept. 3, 1999)).

4. The Affordable Care Act

Misclassification of employees as independent contractors directly impacts both a company's compliance obligations under the ACA and its exposure to related penalties. For example, a large employer may be subject to penalties if it fails to offer employees

and their dependents health coverage under an employer-sponsored plan. Penalties under the ACA's employer mandate generally are calculated by multiplying the number of full-time employees (less the first 30) by the applicable payment amount. (26 U.S.C. § 4980H(a)(1), (c)(2)(D).) A different penalty applies if the employer offers coverage that does not provide minimum value or satisfy affordability standards. For 2015, employers with fewer than 100 employees that otherwise satisfy the requirements of IRS transition relief are not subject to employer mandate penalties.

Thus, under the ACA, reclassifying as employees those workers who were previously treated as independent contractors can mean:

- The company now has a sufficiently large population of full-time employees to qualify as a large employer for:
- employer mandate purposes; and
- additional requirements involving ACA information reporting.
- Non-compliance penalties under the ACA increase as the number of full-time employees used to calculate those penalties increases.

5. Targets of Enforcement and Litigation

Regulatory agencies such as the DOL and the IRS and their state equivalents have identified industries subject to targeted enforcement of independent contractor misclassification. Those industries include:

- Construction.
- Transportation and trucking.
- Cable companies.
- Janitorial services.
- Landscaping and nurseries.
- Security services.
- Nursing.
- Child care.
- Home health care.
- Internet services.
- Restaurants and catering services.
- Staffing services.
- Hotels and motels.
- Oil and gas.

The DOL generally focuses its enforcement efforts on industries characterized by a fissured workplace. In other words, the DOL targets industries with a business model that relies on independent contractor or other contingent workforce arrangements where the relationship between the worker and the beneficiary of that work is increasingly attenuated and sometimes even obscured such as

- Delivery drivers (see *Hargrove v. Sleepy's LLC*, 612 F. App'x 116 (3d Cir. 2015); *Badia v. HomeDeliveryLink, Inc*., 2015 WL 5666077 (D.N.J. Sept. 25, 2015); *Montoya v. 3PD, Inc*., 2015 WL 1469752 (D. Ariz. Mar. 31, 2015) and *Browning v. Ceva Freight, LLC*, 885 F. Supp. 2d 590 (E.D.N.Y. 2012)).
- Janitorial workers (see *Myers v. Jani-King of Philadelphia, Inc*., 2015 WL 1055700 (E.D. Pa. Mar. 11, 2015) and *Harris v. SMI Bldg. Srvcs. LLC*, 2013 WL 942591 (W.D. Wash. Mar. 11, 2013)).
- Housekeepers (see *Perez v. Super Maid LLC*, 2014 WL 3512613 (N.D. Ill. July 14, 2014)).
- Installation services (see *Keller v. Miri Microsystems LLC*, 781 F.3d 799 (6th Cir. 2015); *Awuah v. Coverall N. Am*., 554 F.3d 7 (1st Cir. Jan. 23, 2009) and *Shepard v. Lowe's HIW, Inc.*, 2013 WL 4488802 (N.D. Cal. Aug. 19, 2013)).
- US Open tennis umpires (*Meyer v. U.S. Tennis Ass'n*, 607 F. App'x 121 (2d Cir. 2015)).
- Exotic dancers (see *Encarnacion v. J.W. Lee, Inc., d/b/a Scarlett's Cabaret*, 2015 WL 6437686 (S.D. Fla. Oct. 22, 2015); *Stevenson v. Great Am. Dream, Inc*., 2015 WL 2353094 (N.D. Ga. May 15, 2015) and *Hart v. Rick's Cabaret Int'l, Inc*., 967 F. Supp. 2d 901 (S.D.N.Y. 2013)).

B. Tests for Independent Contractor Status

There is no single test to evaluate independent contractor status for all purposes and compliance is often complicated by the fact that different tests may apply. For example, the test to determine independent contractor status under federal tax law is not the same as the test applied under the FLSA. Different tests and interpretations can mean:

- A worker is an independent contractor for some purposes and an employee for others (such as under state and federal law, for example).

- A worker who provides two different services to the employer is an employee for one and an independent contractor for the other (for example, an employee in the company's shipping department who does graphic design outside of work and who occasionally provides graphic design services to the company as an independent contractor).
- Courts applying the same test to the same position may arrive at different results.

The tests for independent contractor status often share some common characteristics. For example, most:

- Involve an analysis of the same or similar factors. For example, the US Court of Appeals for the Ninth Circuit has held that its tests for purposes of independent contractor status under Title VII, ERISA, and the ADEA were "virtually indistinguishable" (*Murray v. Principal Financial Group, Inc*., 613 F.3d 943, 945 (9th Cir. 2010)).
- Are a balancing test and no single factor is determinative.
- Analyze the degree of control the company has over the manner and means by which the worker accomplishes the work.
- Afford little weight to the parties' characterization of the relationship, including in a written agreement.

1. The Economic Realities Test: The FLSA Standard

The FLSA's definition of "employee" is vague. It states that "[a]n employee is "any individual employed by an employer" who is "suffered or permitted" to work. (29 U.S.C. § 203.) With little guidance from the statute, the DOL and the courts have developed the economic realities test to determine if an employment relationship exists under the FLSA. The test focuses on whether the worker is dependent on the company to which he provides services.

The economic realities test is always used to assess independent contractor status under the FLSA and, depending on the jurisdiction, is sometimes used to assess independent contractor status under other federal employment statutes, including Title VII, the ADA, and the ADEA.

An individual's specific work circumstances will determine his employment status under the FLSA, as opposed to any single factor. Contractual language, the

worker's title or label, and common law factors evaluated in isolation do not define the relationship. Courts analyze the totality of the parties' relationship and nearly all use a balancing test to evaluate various factors, including the five factors originally identified by the US Supreme Court (sometimes referred to as the *Silk* factors):

(1) The degree of control.

Courts focus on the degree of control the company has over the worker performing the service. In an employment relationship, the employer controls the manner and means by which employees perform their work. In an independent contractor relationship, the contractor controls the work. The company controls the result, not the how the work is performed. The right to control is the focus of this inquiry, not whether the company actually exercises that control. Some examples of control over the manner and means of the work include:

- establishing the cost of the work to be performed (the employer establishes the amount of the worker's pay in a typical employment relationship);
- hiring and firing workers to assist with the project;
- delegating tasks (an independent contractor often has the freedom to determine who performs the services for the company if he chooses not to do the work himself);
- having responsibility for licenses, taxes and other administrative obligations;
- advertising;
- preparing work schedules (a flexible work schedule is not necessarily sufficient to rule out an employment relationship, but not having fixed hours and being free to leave the work site suggest the worker is an independent contractor); and
- working without close supervision or frequent status reports.

(2) The relative investment in facilities.

(3) The worker's opportunity for profit and loss.

(4) The permanency of the parties' relationship.

(5) The skill required.

(*United States v. Silk,* 331 U.S. 704, 717-19 (1947).)

Courts generally consider these five (or similar) factors and most have added a sixth:

(6) Whether the worker's services are integral to the company's business.

2. The DOL's Interpretation

The US Department of Labor (DOL) administers and enforces the FLSA. The agency generally relies on the above six elements identified by the US Supreme Court and subsequent case law. In addition, drawing from case law, the DOL takes the position that:

- The time and mode of payment are not conclusive of employee status.
- Whether the worker has signed an agreement stating that he is an independent contractor is not controlling because it is the parties' working relationship that is determinative, not the labels the parties choose.
- Whether the worker has incorporated a business or is licensed by a state or local agency "has little bearing" on the worker's status as an employee or independent contractor.

In July 2015, the DOL issued Administrator's Interpretation No. 2015-1, The Application of the Fair Labor Standards Acts "Suffer or Permit" Standard in the Identification of Employees Who are Misclassified as Independent Contractors. The 15-page interpretive guidance does not announce a new test or change the generally accepted list of six factors used to determine employment status. Rather, the DOL's guidance restates the six factors and emphasizes the importance of a worker's economic dependence on the company. Economic dependence is sufficient to find an employment relationship, according to the DOL.

The interpretive guidance discusses the six factors and explains the DOL's position on each, as follows:

(1) **If the work performed is integral to the hiring entity's business.** If so, it is more likely the worker is economically dependent on the employer and is an employee. According to the

DOL, a true independent contractor's work is unlikely to be integral to the hiring entity's business.

(2) **If the worker's managerial skill affects his opportunity for profit or loss.** The DOL takes the position that this factor is not satisfied by a worker's ability or decision to work more hours, for example. To be properly classified as an independent contractor, the worker's managerial skills must include his decisions concerning:
- hiring others;
- purchasing materials and equipment;
- advertising;
- renting space; and
- managing time tables.

(3) **If the worker's relative investment compares to that of the hiring entity.** The DOL states that the worker's investment should not be relatively minor compared to that of the hiring entity. Also, the comparison should not be limited to the parties' investment in the particular job performed by the worker.

(4) **Whether the work performed requires special skill and initiative.** The DOL explains that the worker's business skills, judgment and initiative are at issue, not his technical skills. Technical skills alone are not sufficient to demonstrate independence or business initiative.

(5) **If the working relationship is permanent or indefinite.** If so, the DOL is likely to find an employment relationship. However, the DOL notes that simply because the relationship lacks permanency or is of a specified duration, the worker is not necessarily an independent contractor.

(6) **The nature and degree of the hiring entity's control over the worker.** Generally courts (and historically the DOL) distinguish between control only over the outcome of the work (supporting an independent contractor relationship) and control over how the work is performed (supporting an employment relationship). Control factors may include:
- setting the rate of pay and working hours;
- determining how the work is performed; and
- being free to work for others and hire helpers.

However, in its interpretive guidance, the DOL states that a worker must have "meaningful control" over certain aspects of his work. Simply having control over his hours of work or working remotely does not satisfy this requirement. In addition, DOL requires that the worker's control must actually be exercised, not simply theoretical. (See

Administrator's Interpretation No. 2015-1, What is the Nature and Degree of the Employer's Control?)

While the DOL acknowledges the US Supreme Court's precedent that no single rule or test can determine if a worker is an employee or an independent contractor, and that the totality of the work circumstances must be considered, the DOL's interpretive guidance focuses on only these six factors. In addition, the DOL de-emphasizes the importance of the control factor, saying that control is just one consideration and should not play an oversized role in evaluating whether a worker is an independent contractor.

3. The Control Test: The IRS Standard

The IRS standard is used to determine whether a worker is an employee for federal tax purposes. Historically, the IRS Standard was the 20-Factor Test (see The Common Law 20-Factor Test), but more recently, the IRS has grouped the 20 factors into three primary categories.

a. Behavioral control

A worker is an employee when the company (or other third party) has the right to direct and control the worker. The company need not actually exercise this control, but only have the right to do so. To test whether behavioral control exists in a particular situation, a company should ask, "does the company control or have the right to control, not only what the worker does, but also how the worker does it?"

Behavioral control falls into four categories:

- Type of instructions given.
- Degree of instruction.
- The way the work is evaluated.
- The training needed or given.

If the company instructs the worker about when, where, and how to work, this factor favors a finding that he is an employee, not an independent contractor. Similarly, if the worker is given fairly detailed instructions, the worker is more likely an employee, and less-detailed instructions reflect less control, suggesting that the worker is more likely an independent contractor.

An evaluation system for an independent contractor generally measures the end

result only. If the company's evaluation system measures the details of how the work is performed, it suggests an employee relationship.

Finally, if the company provides the worker with substantial training (particularly ongoing training) about how tasks should be performed, the training is evidence that the worker is an employee. An independent contractor, by contrast, is free to use his own methods of performing the work. The following types of instructions tend to support the finding of an employment relationship:

- When and where to do the work.
- Which tools or equipment to use.
- Which workers to hire or use to assist with the work.
- Where to purchase supplies and services.
- What work must be performed by a particular individual.
- The order or sequence to follow when performing the work.

b. Financial Control

Financial control refers to whether the company has the right to control the economic aspects of the worker's job. To test this factor, a company should ask, "are the business aspects of the worker's job controlled by the company or client (including, for example, how the worker is paid, whether expenses are reimbursed, who provides tools and supplies, and so on)?"

The IRS expects that independent contractors will:

- **Have a significant investment in tools, training, office space, and the like.** A significant investment in these resources indicates independent contractor status. There is no dollar amount that must be achieved for an investment to be considered significant. A significant investment is not always necessary, however, particularly for work that does not require large expenditures.

- **Pay their own expenses.** While employees are generally reimbursed for work-related expenses, independent contractors are much more likely to have unreimbursed expenses in connection with their work. For example, an independent contractor is not reimbursed for the cost of operating their equipment to perform their service.

- **Have the opportunity to make a profit or sustain a loss on the project.** An independent contractor has an opportunity to experience a loss or a profit as a result of his investment in tools and other resources. An employee, by contrast, typically does not have an opportunity to do so.

- **Offer their services to the general public.** An independent contractor can generally market and offer his services to the general public as he chooses.

- **Receive payment based on the task and not by the hour.** An employee is generally paid on an hourly or salary basis and receives regular compensation regardless of the tasks he accomplishes. An independent contractor is generally paid by the job or on a flat-fee basis.

c. Type of Relationship

The type of relationship factor refers to how the relationship is perceived by the worker and company. It depends to a large extent on how the relationship is structured. To test this factor, a company should ask:

- **Are there written contracts between the parties?** A written contract is a starting point for the IRS to examine the nature of the relationship. However it is not conclusive. Even if an agreement states that the worker is an independent contractor, the IRS may still determine the worker is an employee based on the nature of the actual relationship.

- **Does the worker receive employee-type benefits (for example, pension plan, insurance, or vacation pay)?** Receipt of these benefits indicates an employment relationship.

- **Will the relationship continue indefinitely?** An independent contractor should be hired for a specific project or period of time, not indefinitely. An indefinite working relationship indicates that the intent was to create an employment relationship.

- **Are the services provided a key activity of the business?** Provision of services that are key to the business indicate that the worker providing them is an employee and not an independent contractor, as businesses are more likely to direct and control the activities of a worker providing key services.

The IRS examines written agreements in addition to other information about the working relationship to determine whether the terms clearly provide for an independent contractor relationship (although statements characterizing the worker as an independent contractor in a contract do not suffice as proof of that status). Some facts suggesting an employment relationship include:

- Employee-type benefits are provided under the agreement.

- The service the worker provides is integral to the company's business.
- The service the worker provides is similar to services employees provide.
- The contract is at-will.

In contrast, an independent contractor agreement generally contains terms specifying the following:

- That the relationship is an independent contractor relationship and that the worker is not eligible to receive any employee-type benefits.
- A defined service or set of services the worker is being hired to perform.
- A fixed fee payable when those services are complete.
- That the company may terminate the contract in the event of a material breach.

C. Minimizing the Risk

1. Avoid Misclassification

To minimize the risk of potentially significant misclassification liability, companies should implement these best practices:

- **Conduct an audit.** Counsel should review existing worker classifications to determine if they comply with applicable federal, state, and local laws. Companies should promptly correct any misclassifications to cut off future exposure. Counsel should be engaged in the reclassification process to minimize the risk of litigation.

- **Train personnel on classification issues.** Training managers and employees, including those who interact directly with independent contractors, to ensure proper classification at the time the contractor is engaged and to reduce the possibility that the independent contractor status will subsequently be undermined by changes in company policies or practice.

- **Obtain a ruling from the IRS.** A company can file a Form SS-8 Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding with the IRS. It can take six months or more to get a determination from the IRS, but the company can rely on the ruling as a reasonable basis under the Section 530 safe harbor. Companies should be aware that an IRS ruling that the worker is actually an employee is also conclusive, however.

- **Draft agreements that document the independent contractor distinction.**

2. Section 530 Safe Harbor

Employers have several options for mitigating the consequences of misclassification. The most important is having a Section 530 Safe Harbor. A safe harbor from the tax consequences of misclassification is available in some instances where a company can show it meets certain relief requirements. The safe harbor under Section 530 of the Revenue Act of 1978 applies where the company:

- Had a reasonable basis for the misclassification.
- Treated the worker and all similarly situated workers consistently as independent contractors.
- Reported all federal tax returns in a manner substantially consistent with the independent contractor classification (for example, by using Form 1099-MISC). This criterion cannot be met for a particular year if the company did not file the required returns for that year.

The IRS provides a few justifications that constitute a reasonable basis for a misclassification, including, for example, that the company:

- Reasonably relied on a court case or IRS ruling.
- Relied on a past IRS audit that:
  - began before January 1, 1997; or
  - included an examination of whether the relevant individual (or an individual in a substantially similar position) should be treated as an employee.
- Knew that a significant segment of the relevant industry practices the same misclassification.
- Relied on some other reasonable basis (for example, on advice from a lawyer or an accountant who knew about the company's business).

The requirement of substantial consistency would not be met, for example, where the company withheld FICA or income tax on behalf of the worker, but treated the worker as an independent contractor for other purposes.

The Section 530 safe harbor only applies to employer-owed taxes. Qualifying workers are judged as employees for other federal tax purposes, including for payment of their own income taxes. If the safe harbor rules do not apply, no presumption of employment status is made and status must be analyzed using the IRS standard (see The Control Test: The IRS Standard) to determine whether the worker is properly classified

as an independent contractor.

Companies that fulfill the requirements of the Section 530 safe harbor can obtain tax relief through the Classification Settlement Program (CSP), which offers a settlement agreement to companies eligible for the Section 530 safe harbor. The program gives some measure of tax relief, the amount of which depends on the strength of a company's safe harbor position. Generally, a company can obtain terms allowing it to avoid tax assessments over one year. If a company meets the reporting requirements, and likely can meet the remaining safe harbor requirements, the settlement offer may be an adjustment of 25%.

3. Recordkeeping Requirements

Company recordkeeping requirements for workers are most often found in applicable federal, state, and local employment laws. For example, the FLSA imposes specific requirements about the information and records employers must keep for each nonexempt employee, but does not require those records for independent contractors.

Because independent contractors are generally not covered by employment law statutes, companies engaging them are subject to fewer recordkeeping obligations. However, companies should maintain records that evidence a worker's independent contractor status and document compliance. For example, companies are required to provide Form 1099 to any independent contractor paid $600 or more in the previous year. Companies issuing Forms 1099 should retain a copy.

In addition, companies may be liable for failing to maintain adequate records of employment during periods in which employees were misclassified as independent contractors. Companies should consider retaining the following records and information for each independent contractor:

- The parties' written agreement, including expired and revised agreements.
- The contractor's federal Employer Identification Number (EIN or FEIN) and its state equivalent. Federal EINs are the corporate equivalent of a Social Security number and are issued to every organization by the IRS. State governments issue similar unique numbers to identify the organization for tax and other purposes. (Sole proprietorships generally use the owner's Social Security number.) Companies are responsible for

backup withholding for any independent contractor that does not provide an EIN or provides an incorrect EIN.

- Payments made to the independent contractor, including the amounts and dates paid. (Companies should require invoices and payments to independent contractors should be made from accounts payable, not payroll.)
- Copies of Forms 1099-MISC, including any that are returned by the post office as undeliverable. Companies must provide a completed Form 1099-MISC to independent contractors for each year in which the contractor was paid $600 or more.
- Contact information, including name, address and dates of engagement.
- Documents that may evidence the worker's independent contractor status, including:
- certifications of the contractor's insurance coverage, such as general liability coverage; and
- business cards, letterhead, invoices, and other indicia of the contractor's business.

Independent contractor records should be maintained in vendor files, not in employee personnel files. Companies should ensure that independent contractor documentation is standardized and used consistently.

Because the risk is so high, an employee should seek an outside opinion if unsure of an individual's classification.

Appendix I

Overtime Calculations: Simple Examples

Hourly Pay Only

An employee's regular hourly rate is $10 per hour and works 45 hours in a workweek.

The employee is entitled to $10 of straight-time pay for all 45 hours, plus an extra $5 per hour for the five overtime hours. This means $450 of straight time, plus $25 in overtime, for a total of $475 for the week. Another interpretation: the employee is entitled to $10 per hour for the first 40 hours and $15 per hour for the five overtime hours, which is $400, plus $75, or $475.

Hourly Pay Plus Weekend Overtime

An employee's regular hourly rate is $10 per hour Monday through Friday and the employer pays time and a half on Saturdays and Sundays. The employee works 45 hours between Monday and Friday and 10 hours on Saturday.

The employee's regular rate remains $10 per hour. The $50 in time-and-a-half premium pay (that amount above and beyond the regular rate) that the employer provides for the 10 weekend hours does not affect the employee's regular rate and the employer gets credit for those payments regarding the requirement of paying weekly overtime. Therefore, for the 55 hours of work, the employee is entitled to $550 in straight-time compensation, plus 15 hours of premium overtime pay (5 overtime hours Monday to Friday and 10 premium hours on Saturday) at $5 per hour or an additional $75, for a total of $625.

Hourly Pay Plus Shift Differential

An employee has an hourly rate of $10 and during the workweek works five ten-hour shifts. Two of those shifts are on the night shift, when the employee receives a 25% shift differential.

The employee's total straight-time compensation for the work week is as follows: 30 hours times $10 per hour or $300, plus 20 hours times $12.50 per hour or $250, for a total of $550. To calculate the regular rate, divide the total straight-time compensation by the total hours worked in the workweek: $550 for 50 hours, which equals $11 per hour. Because the employee worked 50 hours, the employer must pay overtime equal to one half of the regular rate for each of those overtime hours: 0.5 times $11 per hour times ten hours, which equals $55. Therefore, the employee is entitled to total compensation of $605 for the workweek: $550 in straight time, plus $55 in overtime.

Hourly Pay Plus Nondiscretionary Bonus

An employee has an hourly rate of $10 per hour and works 50 hours during the workweek. The employee also receives a production bonus of $100 for achieving a particular work goal during the workweek.

The employee's total includable compensation for purposes of calculating the regular rate is 50 hours times $10 per hour or $500 in straight-time hourly pay, plus the $100 nondiscretionary bonus, for a total of $600. The regular rate for this workweek is $600 for 50 hours worked or $12 per hour. Therefore, the employee is entitled to premium overtime pay of an additional $6 per overtime hour worked: 0.5 times $12 per hour times ten hours, which equals $60. The employee is therefore entitled to total compensation of $660 for the workweek: $500 in straight-time hourly pay, the $100 bonus and $60 in overtime.

Hourly Pay Plus Commissions Plus Bonus

An employee has an hourly rate of $10 per hour and works 50 hours during the workweek. The employee also receives $200 in commissions for the workweek, plus a $50 nondiscretionary bonus for achieving a sales goal for the workweek.

The employee's total includable compensation for purposes of calculating the regular rate is 50 hours times $10 per hour or $500 in straight-time hourly pay, plus $200 in commissions, plus the $50 bonus payment, for a total of $750 for the workweek. The regular rate for this week is $750 for 50 hours or $15 per hour. Therefore, the employee is entitled to premium overtime pay of an additional $7.50 per overtime hour worked: 0.5 times $15 per hour times ten hours, which equals $75. The employee is entitled to total compensation of $825 for the workweek: $500 in straight-time hourly pay, plus $200 in commissions, plus the $50 bonus, plus $75 in overtime.

Hourly Pay Plus Bi-Weekly Commissions

An employee earns hourly pay of $10 per hour, plus commissions of $450 for a two-week period. In that two-week period, the employee worked 42 hours the first week and 48 hours the second week.

The straight-time hourly pay component of the regular rate is straightforward: $10 per hour. When elements of compensation span more than one workweek, they need to be broken down and allotted to the appropriate workweeks. Here, the commission was earned over two workweeks. Therefore, the employer must divide the commission by the combined hours worked in those two workweeks to determine the effect on the regular rate. The employee earned $450 in commissions over a total of 90 hours worked, for a net effect of increasing the regular rate for those 90 hours by $5 per hour. So, for these two workweeks, the employee's regular rate is $15 per hour.

For the first workweek, the employee is entitled to premium overtime pay of 0.5 times $15 per hour times two hours or $15. For the second workweek, the employee is entitled to premium overtime pay of 0.5 times $15 per hour times eight hours or $60. So, the employee's total compensation for the first workweek is $645: $420 in straight-time hourly pay, plus $210 of the bonus (42 hours times $5 per hour), plus $15. For the second

workweek, the employee's total compensation is $780: $480 in straight-time hourly pay, plus $240 of the bonus (48 hours times $5 per hour), plus $60 in overtime.

Salary Plus Monthly Bonus

An employee works for a guaranteed weekly salary of $600, which the employer and the employee understand and agree covers straight time for all hours worked, whether the workweek is shorter or longer than 40 hours. In the four workweeks that end in the current month, the employee works 35, 50, 55, and 60 hours. The employee also receives a $2,000 nondiscretionary bonus for achieving certain work goals for the month.

The portion of the regular rate attributable to the salary varies by workweek based on the hours worked. Here, the regular rate for these four weeks based on the salary alone is:

- $600 for 35 hours or $17.14 per hour in the first week.
- $600 for 50 hours or $12 per hour in the second week.
- $600 for 55 hours or $10.91 per hour in the third week.
- $600 for 60 hours or $10 per hour, in the fourth week.

The monthly bonus must then be allocated across all hours worked during the period for which the bonus provides compensation. In this case, it is the 200 hours worked during these four workweeks. This means that the portion of the regular rate attributable to the bonus is $2,000 for 200 hours or $10 per hour. The calculation is as follows:

- The first workweek. The regular rate is $17.14 per hour based on the salary, plus $10 per hour attributable to the bonus, for a total of $27.14 per hour. Because the employee did not work more than 40 hours, no overtime is due. Total compensation for the week equals $950: the $600 salary, plus the $350 apportionment of the bonus (35 hours times $10 per hour).

- The second workweek. The regular rate is $12 per hour based on the salary, plus $10 per hour attributable to the bonus, for a total of $22 per hour. The employee is entitled to overtime in the amount of 0.5 x $22 per hour times ten hours or $110. Total compensation for the week is $1,210: $600 in salary, plus the $500 apportionment of the bonus (50 hours times $10 per hour), plus $110 in overtime.

- The third workweek. The regular rate is $10.91 per hour based on the salary, plus $10 per hour attributable to the bonus, for a total of $20.91 per hour. The employee is entitled to overtime in the amount of 0.5 times $20.91 per hour times 15 hours or $156.83. Total compensation for the week is $1,306.83: $600 in salary, plus the $550 apportionment of the bonus (55 hours times $10 per hour), plus $156.83 in overtime.

- The fourth workweek. The regular rate is $10 per hour based on the salary, plus $10 per hour attributable to the bonus, for a total of $20 per hour. The employee is entitled to overtime in the amount of 0.5 times $20 per hour times 20 hours or $200. Total compensation for the week is $1,400: $600 in salary, plus the $600 apportionment of the bonus (60 hours times $10 per hour), plus $200 in overtime.

However, when bonuses, commissions, or other items of compensation cover a period longer than a workweek, it is necessary to assign them to particular workweeks. Examples such as monthly, quarterly and annual bonuses are common. In those circumstances, there will almost always be workweeks that do not align exactly with the start or end (or both) of the period covered by the bonus. The way to handle these situations is to adopt a uniformly applied rule so that the period covered by the bonus or other payment will be deemed to include all workweeks either beginning or ending (but not both) in the period.

For example, when an employer's workweek begins on Sunday and ends on Saturday and the employer wishes to pay a quarterly bonus, the employer would include all workweeks that end (or begin) during the quarter covered by the bonus. Then the employer divides the item of compensation by all hours worked during the workweeks contained within that quarter (or year or whatever the period may be) to determine the increase to the regular rate for that period attributable to that item of compensation.

Discrimination and Harassment

Submitted by David F. Rutledge Jr.

HUMAN RESOURCES LAW: WHAT YOU NEED TO KNOW NOW

DISCRIMINATION AND HARASSMENT

BY DAVID RUTLEDGE, ESQ.

DAVID@DAVIDRUTLEDGE.COM

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
&
Workplace Behavior and Privacy Issues

Submitted by Scott D. Wilson

V. Employee Discipline and Termination

A. Evaluating Employee Performance While Mitigating Liability

Performance reviews can be a great tool for mitigating employment liability. Handled properly, they provide a clear and detailed history of an employee's productivity, work habits and achievements within the organization.

And should an employee be terminated, a well-written, accurate performance assessment can help support the company in case of legal action.

SMART
Specific
Measurable
Attainable
Relevant
Timely
Employees must be aware of the criteria and know where they stand. There should be no surprises.
Record both the positives and negatives for all employees. Document everything. Point out inadequacies and praise productivity. Consistent treatment of all employees helps a company develop a highly productive workforce and keep it out of legal trouble.

Treat all employees fairly and uniformly. A company cannot discrimination on the basis of age, sex, color, race, religion, nationality, or disability. Documentation should back up disciplinary actions. And the company must address an employee's subpar work practices.

Don't wait too long between reviews, so you can address problem and stimulate improvements as they arise.
Tell the truth, don't pull punches. Don't give raises and bonuses to underperforming employees.
Evaluate the performance, not the person.
Be detailed, avoid assessing performance by numerical rating alone.

Outline future expectations or goals of the employee and provide specific recommendations for improvements of weaknesses.
Meet with the employee regarding the performance review.

B. Employee Discipline Plan and Documentation

If an employee is consistently underperforming, consider a Performance Improvement Plan, which sets specific goals for the employee to reach by a specific date, so there will be no confusion as to what is expected of him.
Document all write-ups and counseling sessions and warnings that provide the employee opportunity to correct the deficiencies.
Review employee's personnel file and identify complaints, charges or grievances made by the employee that could affect the employer's right to terminate the employee.

C. Legal and Illegal Reasons for Terminating an Employee

Generally, in Louisiana, an employer is free to terminate an employee's employment "at-will," i.e., for any reason or no reason.
An employer may terminate an employee for poor performance or violation of company policy or other misconduct.
An employer may not terminate an employee based on unlawful discrimination based on race, sex, national origin, color, age, or disability.
An employer may not terminate an employee in retaliation for making a good faith complaint of unlawful discrimination.
Other whistleblower laws outlaw termination based on filing reports or making complaints– OSHA, Louisiana environmental statutes, Sarbanes Oxley and other federal laws, etc.

D. Disciplining an Employee Without Fearing a Retaliation Claim

Have an impartial member of senior management review the employee's personnel file and make the disciplinary or termination decision, but do not inform him of the employee's previous grievance or complaint.
This scenario will insulate the employer from liability, because a viable retaliation claim requires that the decision maker was aware of the employee's protected activity and the discipline/termination would not have occurred but for the protected activity.

VI. Workplace Behavior and Privacy Issues

A. Employee Surveillance

Companies often utilize employee monitoring software that allow them to track everything employees do on their computers. For example, what emails were received, what applications were used and what keys were pressed.
Employees' phone call details as well as actual conversations can be recorded. The exact number and duration of each call, and the idle time between calls, can go into an automatic log for analysis.
Video surveillance: Video feeds of employee activities are fed back to a central location where they are either recorded or monitored live by another person. Management can review the performance of an employee by checking the surveillance and detecting problems before they become too costly.

B. Searches of Desks, Smartphones, Lockers, Vehicles, Equipment, Briefcases, etc.

Public employees

O'Connor v. Ortega

Timmerman v. LSU

Private employees

Considerations: the degree of intrusiveness of the search, the context, the employer's objectives, the place into which the employer intrudes, and the employee's reasonable expectation of privacy.

C. Monitoring Employee Communications: Calls, Email and Internet Use

18 USC 2510-2521 prohibits "the intentional interception by any person of any wire, oral or electronic communication; and the intentional use of any electronic, mechanical or other device to intercept any oral communications under any circumstances."
A telephone conversation is a wire communication. Oral communication is any "oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." These may not be intercepted without a warrant based on probable cause, or consent.
An employer may monitor business calls but may not listen in on personal calls.

Email

Obtain employees' express written permission to inspect their email. To retrieve, inspect or disclose an employee's email without his permission could make the company liable for monetary damages under the Electronic Communications Privacy Act of 1986. (Email systems that are totally internal to the company may not be covered by the ECPA). There is an exemption for interceptions considered to have been gathered "in the ordinary course of business."
Other garden-variety invasion of privacy claims are available, but courts tend to find that an employee should not expect much privacy in the workplace. Obtain written consent from all employees for any type of monitoring or surveillance you intend to conduct.
La. R.S. 15:1302 and 1312.

Internet

A survey of more than 500 companies found that 61 percent disciplined employees for inappropriate Internet use; one-quarter of them went as far as firing a worker. Three out of five employees admit to personal Websurfing while on the clock, according to another survey of 500 employees.
Many firms have set policies regulating what employees can and can't do on company time:
— 84 percent regulate personal e-mail use
— 81 percent regulate personal Web use
Again, obtain written consent to monitor internet use.

D. Dress Code/Personal Appearance

Reports in the media have high-lighted the case of a temporary worker who was sent home without pay for refusing to wear high heels at work. Although staff can be dismissed for failing to comply with a dress code, employers should be cautious when operating a dress code in this way. Any dress code should not be stricter, or lead to a detriment, for one gender over the other. It has been reported that wearing high heels can cause physical pain and even harm, and therefore may lead to a successful claim of direct discrimination on grounds of sex.
Employers may wish to promote a certain image through their workers which they believe reflects the ethos of their organizations. Sometimes this can mean that they ask workers to remove piercings or cover tattoos while at work, especially when dealing with customers. If an employer does decide to adopt a dress code or

appearance code it should be written down in a policy which should be communicated to all staff so they understand what standards are expected from them. Some employers have started to reconsider their strict "no tattoo" policies following media reports and online petitions.

A dress code can often be used by employers to ensure workers are safe and dressed appropriately. It should, however, relate to the job and be reasonable in nature, for example workers may be required to tie their hair back or cover it for hygiene reasons if working in a kitchen.
Employers should allow groups or individual employees to wear articles of clothing etc that manifest their religious faith. Employers will need to justify the reasons for banning such items and should ensure they are not indirectly discriminating against these employees. Any restriction should be connected to a real business or safety requirement.
Employers must avoid unlawful discrimination in any dress code policy.
Employers may have health and safety reasons for having certain standards.
Dress codes must apply to both men and women equally, although they may have different requirements.
Reasonable adjustments must be made for disabled people when dress codes are in place.

E. Drug and Alcohol Testing

Drug testing is one action an employer can take to determine if employees or job applicants are using drugs. It can identify evidence of recent use of alcohol, prescription drugs and illicit drugs. Currently, drug testing does not test for *impairment* or whether a person's behavior is, or was, impacted by drugs. Drug testing works best when implemented based on a clear, written policy that is shared with all employees, along with employee education about the dangers of alcohol and drug abuse, supervisor training on the signs and symptoms of alcohol and drug abuse, and an Employee Assistance Program (EAP) to provide help for employees who may have an alcohol or drug problem.

Generally, most private employers have a fair amount of latitude in implementing drug testing as they see fit for their organization, unless they are subject to certain Federal regulations, such as the U.S. Department of Transportation's (DOT) drug-testing rules for employees in safety-sensitive positions. However, Federal agencies conducting drug testing must follow standardized procedures established by the Substance Abuse and Mental Health Services Administration (SAMHSA), part of the

U.S. Department of Health and Human Services (DHHS).
While private employers are not required to follow these guidelines, doing so can help them stay on safe legal ground. Court decisions have supported following these guidelines, and as a result, many employers choose to follow them.

F. Psychological and Personality Tests

The use of online personality tests by employers has surged in the past decade as they try to streamline the hiring process, especially for customer-service jobs. Such tests are used to assess the personality, skills, cognitive abilities and other traits of 60% to 70% of prospective workers in the U.S., up from 30% to 40% about five years ago.
The Equal Employment Opportunity commission is investigating whether personality tests discriminate against people with disabilities. As part of the investigation, officials are trying to determine if the tests shut out people suffering from mental illnesses such as depression or bipolar disorder, even if they have the right skills for the job, according to EEOC documents.
EEOC officials won't comment on the investigation. In general, though, if a person's results are affected by the fact that they have an impairment and the results are used to exclude the person from a job, the employer needs to defend its use of the test even if the test was lawful and administered correctly.

G. Workplace Violence

In most workplaces where risk factors can be identified, the risk of assault can be prevented or minimized if employers take appropriate precautions. One of the best protections employers can offer their workers is to establish a zero-tolerance policy toward workplace violence. This policy should cover all workers, patients, clients, visitors, contractors, and anyone else who may come in contact with company personnel.
A well-written and implemented workplace violence prevention program, combined with training, can reduce the incidence of workplace violence.
This can be a separate workplace violence prevention program or can be incorporated into a safety and health program, employee handbook, or manual of standard operating procedures. It is critical to ensure that all workers know the policy and understand that all claims of workplace violence will be investigated and remedied promptly.
Under the legal *theory of negligence*, an employer that has knowledge, or should have had knowledge, about an employee's dangerous attributes, could be liable for failing to prevent foreseeable harm to others.

H. Off-Duty Behavior and Activities

The right of privacy embraces four different interests, each of which may be invaded in a distinct fashion; *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975); Prosser, Law of Torts, 4th ed. (1971); Prosser, Privacy, 48 Calif.L.Rev. 383 (1960); Restatement Second of the Law of Torts (1959). One type of invasion takes the form of the appropriation of an individual's name or likeness, for the use or benefit of the defendant. While it is not necessary that the use or benefit be commercial or pecuniary in nature, the mere fact that a newspaper is published for sale does not constitute such use or benefit on the part of the publisher. Another type of invasion occurs when the defendant unreasonably intrudes upon the plaintiff's physical solitude or seclusion. Because the situation or activity which is intruded upon must be private, an invasion does not occur when an individual makes a photograph of a public sight which any one is free to see; Prosser, Law of Torts, 809. A third type of invasion consists of publicity which unreasonably places the plaintiff in a false light before the public. While the publicity need not be defamatory in nature, but only objectionable to a reasonable person under the circumstances, it must contain either falsity or fiction. A fourth type of invasion is represented by unreasonable public disclosure of embarrassing private facts. With reference to this category, Prosser states that "[i]t seems to be generally agreed that anything visible in a public place can be recorded and given circulation by means of a photograph, to the same extent as by a written description, since this amounts to nothing more than giving publicity to what is already public and what anyone present would be free to see." Law of Torts, 811. Similarly, the Restatement Second of the Law of Torts indicates that "there is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye." Supra at 386.

In Louisiana jurisprudence, the right to privacy has been variously defined as "the right to be let alone" and "the right to an `inviolate personality.'" *Pack v. Wise,* 155 So.2d 909, 913 (La.App. 3d Cir. 1963), quoting *Hamilton v. Lumbermen's Mut. Cas. Co.,* 82 So.2d 61, 63 (La.App. 1st Cir. 1955), writ denied 1955. Where an individual has such a right, in the form of one of the interests outlined above, other members of society have a corresponding duty not to violate that right. A violation constitutes a breach of duty, or fault, and may be actionable.

Even where a right to privacy is found to exist, Louisiana courts have distinguished between invasions of that right which are actionable and those which are not. An actionable invasion of privacy occurs only when the defendant's conduct is unreasonable[4] and seriously interferes with the plaintiff's privacy interest. Comment, The Right of Privacy in Louisiana, 28 La.L. Rev. 469 (1968). For an invasion to be actionable, it is not necessary that there be malicious intent on the part of the

defendant. *Lucas v. Ludwig,* 313 So.2d 12 (La. App. 4th Cir. 1975), writ denied 1975. The reasonableness of the defendant's conduct is determined by balancing the conflicting interests at stake; the plaintiff's interest in protecting his privacy from serious invasions, and the defendant's interest in pursuing his course of conduct. Jaubert v. Crowley Post-Signal, Inc., 375 So.2d 1386 (La. 1979)

May an employer physically enter your home without your consent, if searching for allegedly stolen company property?
May an employer ask an employee about her sex life with her husband?
May an employer send a supervisor to a meeting among employees to discuss their working conditions or terms of employment?
What about medical marijuana? If employee has a valid prescription and tests positive, can employer refuse to hire him?
Religious beliefs? Political affiliation?
Moonlighting
DWI, other crime, tax evasion?

I. Policies to Have in Place

Zero tolerance for workplace violence and harassment and discrimination
Written permission to monitor/conduct surveillance/inspect email and internet use, and search personal areas
Moonlighting
Standards of Performance and Conduct
Employment at Will
Social Media Usage Policy
Corrective Counseling
Progressive Discipline Policy
Dress Code/Appearance Policy
Procedures for reporting and addressing complaints of discrimination and harassment
No Retaliation Policy

La. R.S. 15:1302:
§1302. Definitions

As used in this Chapter:

(1) "Aggrieved person" means a person who was party to any intercepted wire or oral communication or a person against whom the interception was directed.

(2) "Attorney for a governmental entity" means an attorney on the staff or under the direct supervision of the district attorney authorized by law to prosecute such offenses as are subject of the pen register, a trap and trace device, or a cellular tracking device.

(3) "Aural transfer" means a transfer containing the human voice at any point between and including the point of origin and the point of reception.

(4) "Cellular tracking device" means a device that transmits or receives radio waves to or from a communications device in a manner that interferes with the normal functioning of the communications device or communications network and that can be used to intercept, collect, access, transfer, or forward the data transmitted or received by the communications device, or stored on the communications device; includes an international mobile subscriber identity (IMSI) catcher or other cell phone or telephone surveillance or eavesdropping device that mimics a cellular base station and transmits radio waves that cause cell phones or other communications devices in the area to transmit or receive radio waves, electronic data, location data, information used to calculate location, identifying information, communications content, or metadata, or otherwise obtains this information through passive means, such as through the use of a digital analyzer or other passive interception device; and does not include any device used or installed by an electric utility solely to the extent such device is used by that utility to measure electrical usage, to provide services to customers, or to operate the electric grid.

(5) "Communications common carrier" means any person engaged as a common carrier for hire in communication by wire, radio, or electronic communications; however, a person engaged in commercial radio broadcasting which is supervised by the Federal Communications Commission shall not, insofar as such person is so engaged, be deemed a common carrier.

(6) "Contents" when used with respect to any wire, electronic, or oral

communication includes any information concerning the substance, purport, or meaning of that communication.

(7) "Court of competent jurisdiction" means state district courts of general criminal jurisdiction and those courts exercising appellate jurisdiction thereof.

(8)(a) "Electronic communication" means any transfer of signs, signals, writings, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system, but does not include any of the following:

(i) Any oral communication.

(ii) Any communication made through a tone-only paging device.

(iii) Any communication from a tracking device used to locate a mobile object by emission of a sound signal.

(b) "Electronic communication" specifically includes the radio portion of a cordless, portable, or cellular telephone communication that is transmitted between the cordless, portable, or cellular handset and the base or transmitting tower or unit.

(9) "Electronic communications service" means any service which provides to users thereof the ability to send or receive wire or electronic communications.

(10) "Electronic communications system" means any wire, radio, electromagnetic, photo-optical, or photoelectronic facilities used for the transmission of wire or electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communication.

(11) "Electronic, mechanical, or other device or means" denotes any device or apparatus which can be used to intercept a wire, electronic, or oral communication other than:

(a) Any telephone or telegraph instrument, equipment, or facility, or any component thereof, either:

(i) Furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the

ordinary course of its business, or

(ii) Being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties.

(b) A hearing aid or similar device being used to correct subnormal hearing to not better than normal.

(12) "Intercept" means the aural or other acquisition of the contents of any wire, oral, or electronic communication through the use of any electronic, mechanical, or other device.

(13) "Investigative or law enforcement officer" means any commissioned state police officer of the Department of Public Safety and Corrections who, in the normal course of his law enforcement duties, is investigating an offense enumerated in this Chapter, and the district attorney authorized by law to prosecute or participate in the prosecution of such offense.

(14) "Judge" means the senior judge of a judicial district court of the state, any judge of the Orleans Parish Criminal District Court, or a judge designated by a majority vote of the court in writing in advance to consider applications for warrants or orders under this Chapter.

(15) "Oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication.

(16) "Pen register" means a device which records and decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted, if the information does not include the contents of the communication. The term does not include a device used by a provider or customer of a wire or electronic communication service in the ordinary course of the provider's or customer's business for either of the following purposes:

(a) Billing or recording as an incident to billing for communications services.

(b) Cost accounting, security control, or other ordinary business purposes.

(17) "Person" means any employee or agent of the state or a political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation.

(18) "Telecommunications device" or "communications device" means any type of instrument, device, or machine that is capable of transmitting or receiving telephonic, electronic, radio, text, or data communications, including but not limited to a cellular telephone, a text-messaging device, a personal digital assistant, a computer, or any other similar wireless device that is designed to engage in a call or communicate text or data. It does not include citizens band radios, citizens band radio hybrids, commercial two-way radio communication devices, or electronic communication devices with a push-to-talk function.

(19) "Trap and trace device" means a device or electronic means which captures the incoming electronic or other impulses which identify the originating number of an instrument or device from which a wire or electronic communication was transmitted, except that it shall not include a service, device, or electronic means tariffed by the Louisiana Public Service Commission, used by a subscriber of telecommunicational services to receive the telephone numbers for calls placed to the subscriber.

(20) "Wire communication" or "communication by wire" means any aural transfer made in whole or in part through the use of facilities used for the transmission of communications by aid of wire, cable, or other like connection between the points of origin and reception, including the use of such connection in a switching station, furnished or operated by any person licensed to engage in providing or operating such facilities for the transmission of communications and such term includes any electronic storage of such communication, and such term includes the radio portion of a cordless, portable, or cellular telephone communication that is transmitted between the cordless, portable, or cellular handset and the base or transmitting tower or unit.

La. R.S. 15:1312:
§1312. Recovery of civil damages authorized

A. Any person whose wire, electronic, or oral communication is intercepted, disclosed, or used in violation of this Chapter shall have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and be entitled to recover from any such person:

(1) Actual damages, but not less than liquidated damages computed at the rate of one hundred dollars a day for each day of violation or one thousand dollars, whichever is greater.

(2) A reasonable attorney's fee and other litigation costs reasonably incurred.

(3) Punitive damages.

B. A good faith reliance on a court order shall constitute a complete defense to any civil or criminal action brought under this Chapter.

THANK YOU

for choosing NBI for your
continuing education needs.

Please visit our website at
www.nbi-sems.com
for a complete list of
upcoming learning opportunities.

NBI | NATIONAL BUSINESS INSTITUTE™