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The Essentials of HR Law

SEMINAR WORKBOOK

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Pre-Test

1.	The ADA (Americans with Disabilities Act) was enacted to prohibit discrimination against employees with disabilities, but it also addresses discrimination against an individual because of his or her relationship with a person with a disability. ☐ a. True ☐ b. False
2.	To be eligible for FMLA (Family and Medical Leave Act) benefits, an employee must: ☐ a. Work for a covered employer ☐ b. Have worked for the employer for a total of 12 months ☐ c. Have worked at least 1,250 hours over the previous 12 months ☐ d. All of the above ☐ e. None of the above
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5.	Employers are required to post notices to all employees advising them of their rights under the laws that the EEOC enforces and of their right to be free from retaliation. a. True b. False
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8.	Workers' compensation provides benefits to employees injured as a result of their employment. ☐ a. True ☐ b. False
9.	Upon return from FMLA leave, an employee must be restored to his or her original job or to an equivalent job. ☐ a. True ☐ b. False
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An Overview of Federal Employment Laws

Nondiscrimination and Affirmative Action Laws

- Civil Rights Act of 1964 – Title VII
- Age Discrimination in Employment Act of 1967 (ADEA)
- Rehabilitation Act of 1973
- Vietnam Era Veteran's Readjustment Assistance Act of 1974 (VEVRAA)
- Pregnancy Discrimination Act of 1978 (PDA)
- Americans With Disabilities Act of 1990 (ADA)
  - Amendments to the Americans with Disabilities Act of 2009 (ADAAA)
- Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)
- Genetic Information Nondiscrimination Act of 2008 (GINA)

Recently Enacted Anti-Discrimination Laws

- Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act – effective as of March 3, 2022
- SPEAK OUT Act – effective as of December 7, 2022
- PUMP Act of 2022 – effective as of December 29, 2022
- Pregnant Workers Fairness Act of 2023 (PWFA) - effective as of June 27, 2023

Compensation, Benefits and Safety Laws

- Fair Labor Standards Act of 1938 (FLSA)
- Equal Pay Act of 1963 (EPA)
- Lilly Ledbetter Fair Pay Act of 2009
- Social Security Act of 1935 (SSA)
- Employment Retirement Income Security Act of 1974 (ERISA)
- Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA)
- Family and Medical Leave Act of 1993 (FMLA)
- Health Insurance Portability and Accountability Act of 1996 (HIPAA)
- Occupational Safety and Health Act of 1970 (OSHA)
- Veterans' Benefits Improvement Act of 2004 (VBIA)
- Patient Protection and Affordable Care Act of 2008 (ACA, Obamacare)

Americans with Disabilities Act (ADA) and Amendments Act (ADAAA)

Title I of the Americans with Disabilities Act of 1990 prohibits private employers, state and local governments, employment agencies and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment.

The ADA covers the above employers with 15 or more employees.

Definition of Disability

The ADA prohibits employment discrimination against "qualified individuals with disabilities."
Protected are qualified individuals with:

1. A physical or mental impairment that substantially limits one or more major life activities; or
2. Those with a record of such impairment; or
3. Those who are regarded as having such an impairment.

A qualified employee or applicant with a disability is an individual who, with or without reasonable accommodation, can perform the essential functions of the job in question.

Amendments to the Americans with Disabilities Act (ADAAA)

The ADAAA overturned a number of Supreme Court cases that made it difficult for someone to prove he or she had a disability covered by the ADA.

On March 24, 2011, the EEOC released its Final Rule implementing the American with Disabilities Act Amendments Act ("ADAAA"). The Final Rule, which runs 202 pages long, includes many revisions. The most significant revisions are:

- The definition of disability should be interpreted broadly in favor of broad coverage of individuals, in direct contradiction to several Supreme Court decisions that had, according to Congress, too narrowly interpreted the definition of "disability;"
- The determination of whether an individual is disabled should not require an extensive analysis; basically, if common sense dictates that the person cannot perform normal functions as a majority of people can, then they probably have a covered disability.

Amendments to the Americans with Disabilities Act (ADAAA)

- The adoption of "rules of construction" that are to be used when determining whether an individual is "substantially limited" in performing a major life activity.
  Specifically, "substantially limits":
  - Does not mean an impairment that prevents or severely or significantly restricts a major life activity;
  - Is to be construed broadly;
  - Must be assessed on an individualized basis;
  - Must be assessed without regard to the ameliorative effects of mitigating measures, such as medication or hearing aids (with the notable exception of "ordinary eyeglasses or contact lenses" which may be considered);
    - An employer cannot require an individual to use a mitigating measure. Failure to use a mitigating measure, however, may affect whether an individual is qualified for a particular job or poses a direct threat.
  - May include an impairment that is episodic or in remission if it would substantially limit a major life activity when active.
- A refocusing of the analysis of whether an individual was "regarded as" disabled from what the employer may have believed about the nature of the individual's impairment to how a person has been treated because of a physical or mental impairment (that is not transitory or minor); and
- The clarification that an individual must have an actual disability or a record of disability to qualify for a reasonable accommodation.

Accommodation Request

- When an individual decides to request accommodation, the individual or his or her representative must let the employer know that s/he needs an adjustment or change at work for a reason related to a medical condition.
- To request accommodation, an individual may use "plain English" and need not mention the ADA nor use the phrase "reasonable accommodation."

Request Analysis

Scenario	Facts	Is this a request for a reasonable accommodation? Yes / No
1	**An employee tells her supervisor, "I'm having trouble getting to work at my scheduled starting time because of medical treatments I'm undergoing."**	
2	**An employee tells his supervisor, "I need six weeks off to get treatment for a back problem."**	
3	**A new employee, who uses a wheelchair, informs the employer that her wheelchair cannot fit under the desk in her office.**	
4	**An employee tells his supervisor that he would like a new chair because his present one is uncomfortable.**	

Accommodation Request

- While an individual with a disability may request a change due to a medical condition, this request does not necessarily mean that the employer is required to provide the change. A request for reasonable accommodation should be the first step in an informal, interactive process between the individual and the employer.

ADA Interactive Process

The interactive process is the dialogue between the employer and employee with the objective of finding a means by which a disabled employee can perform the essential functions of a job in the employer's workplace.

The EEOC, in a description uniformly adopted by the courts, defines the interactive process as "an informal, interactive process . . . [to] identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."

The EEOC has outlined four steps involved in the interactive process:

1. Analyze the particular job involved and determine its purpose and essential functions;
2. Consult with the disabled individual to ascertain the precise job-related limitations imposed by the disability and how those limitations could be overcome with a reasonable accommodation;
3. In consultation with the disabled individual, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position;
4. Consider the preference of the disabled individual and select and implement the accommodation that is most appropriate for both the employee and the employer.

An ADA accommodation just has to be reasonable – enabling the employee to perform the essential job functions – and not necessarily the employee's first choice.

Reasonable Accommodation

Reasonable accommodation may include, but is not limited to:

- Making existing facilities used by employees readily accessible to and usable by persons with disabilities.
- Job restructuring, modifying work schedules, reassignment to a vacant position;
- Acquiring or modifying equipment or devices, adjusting or modifying examinations, training materials, or policies, and providing qualified readers or interpreters.

No reasonable accommodation is required when:

- It would impose an “undue hardship” on the operation of the employer’s business—an "action requiring significant difficulty or expense" when considered in light of a number of factors, including the nature and cost of the accommodation in relation to the size, resources, nature, and structure of the employer's operation.
  - Undue hardship is determined on a case-by-case basis. In general, a larger employer with greater resources would be expected to make accommodations requiring greater effort or expense than would be required of a smaller employer with fewer resources.
- The individual poses a direct threat to the health or safety of himself or others—"[a] significant risk of substantial harm to health or safety of self or others that cannot be eliminated or reduced by reasonable accommodation."
  - A determination that a direct threat exists must be based on an individualized assessment of the employee's present ability to perform the essential functions of the job safely, considering reasonable medical judgment and/or the best available objective evidence.

Other ADA Title I Coverage

Medical Examinations and Inquiries

- Employers may not ask job applicants about the existence, nature, or severity of a disability.
- Applicants may be asked about their ability to perform specific job functions.
- A job offer may be conditioned on the results of a medical examination, but only if the examination is required for all entering employees in similar jobs.
- Medical examinations of employees must be job related and consistent with the employer's business needs.

Medical Records are Confidential

- With limited exceptions, employers must keep confidential any medical information they learn about an applicant or employee.

Drug and Alcohol Abuse

- Employees and applicants currently engaging in the illegal use of drugs are not covered by the ADA when an employer acts on the basis of such use.
- Tests for illegal drugs are not subject to the ADA's restrictions on medical examinations.
- Employers may hold illegal drug users and alcoholics to the same performance standards as other employees.

ADA and Pregnancy

- Under the Pregnancy Discrimination Act of 1978, an amendment to Title VII, if a woman is temporarily unable to perform her job due to a medical condition related to pregnancy or childbirth, the employer must treat her in the same way it treats any other temporarily disabled employee. For example, the employer may have to provide light duty, alternative assignments, disability leave, or unpaid leave to pregnant employees if it does so for other temporarily disabled employees.
- Additionally, impairments resulting from pregnancy (for example, gestational diabetes or preeclampsia) may be disabilities under the ADA. The ADAAA makes it much easier to show that a medical condition is a covered disability. An employer may have to provide a reasonable accommodation for a disability related to pregnancy, absent undue hardship.
- If sued, an employer must demonstrate its denial of an accommodation was based on a legitimate, non-discriminatory reason. The employer's proffered reason normally cannot consist of a claim that it was more expensive or less convenient to add pregnant women to the category of those whom the employer accommodates.

Associational Discrimination

The ADA, like some other federal discrimination laws, protects employees against discrimination based on their association with someone with a disability with regard to any job-related condition, including, but not limited to:

- Hiring
- Terminations
- Promotions
- Benefits

Family and Medical Leave Act (FMLA)

Overview

The FMLA entitles eligible employees to take up to 12 workweeks of unpaid, job-protected leave in a 12-month period for specified family and medical reasons, or for any "qualifying exigency" arising out of the fact that a covered military member is on active duty, or has been notified of an impending call or order to active duty, in support of a contingency operation. The FMLA also allows eligible employees to take up to 26 workweeks of job-protected leave in a "single 12-month period" to care for a covered servicemember with a serious injury or illness.

Employer Coverage

The FMLA applies to all public agencies, including state, local and federal employers, local education agencies (schools), and private-sector employers who employed 50 or more employees in 20 or more workweeks in the current or preceding calendar year, including joint employers and successors of covered employers.

Employee Eligibility

To be eligible for FMLA benefits, an employee must:

- work for a covered employer;
- have worked for the employer for a total of 12 months;
- have worked at least 1,250 hours over the previous 12 months; and
- work at a location in the United States or in any territory or possession of the United States where at least 50 employees are employed by the employer within 75 miles.

TAKE NOTE

While the 12 months of employment need not be consecutive, employment periods prior to a break in service of seven years or more need not be counted unless the break is occasioned by the employee's fulfillment of his or her National Guard or Reserve military obligation (as protected under the Uniformed Services Employment and Reemployment Rights Act (USERRA)), or a written agreement exists concerning the employer's intention to rehire the employee after the break in service, including a collective bargaining agreement.

Leave Entitlement

Entitlements Generally

A covered employer must grant an eligible employee up to a total of 12 workweeks of unpaid leave during any 12-month period for one or more of the following reasons:

- for the birth and care of a newborn child of the employee;
- for placement with the employee of a son or daughter for adoption or foster care;
- to care for a spouse, son, daughter, or parent with a serious health condition;
- to take medical leave when the employee is unable to work because of a serious health condition; or
- for qualifying exigencies arising out of the fact that the employee's spouse, son, daughter, or parent is on active duty or call to active duty status as a member of the National Guard or Reserves in support of a contingency operation.

Caregiver Leave

A covered employer also must grant an eligible employee who is a spouse, son, daughter, parent, or next of kin of a current member of the Armed Forces, including a member of the National Guard or Reserves, with a serious injury or illness up to a total of 26 workweeks of unpaid leave during a "single 12-month period" to care for the servicemember.

Spouses Employed by the Same Employer

Limited in the amount of family leave they may take for the birth and care of a newborn child, placement of a child for adoption or foster care, or to care for a parent who has a serious health condition to a combined total of 12 workweeks (or 26 workweeks if leave to care for a covered servicemember with a serious injury or illness). FMLA leave for birth and care, or placement for adoption or foster care must conclude within 12 months of the birth or placement.

Intermittent Leave

Under some circumstances, employees may take FMLA leave intermittently – taking leave in separate blocks of time for a single qualifying reason – or on a reduced leave schedule – reducing the employee's usual weekly or daily work schedule. When intermittent leave is needed for planned medical treatment, the employee must make a reasonable effort to schedule treatment so as not to unduly disrupt the employer's operation. If FMLA leave is sought for after the birth of a healthy newborn, or placement for adoption or foster care, use of intermittent leave is subject to the employer's approval.

"Substitution" of Paid Leave

Under certain conditions, employees or employers may choose to "substitute" (run concurrently) accrued paid leave (such as sick or vacation leave) to cover some or all of the FMLA leave. An employee's ability to substitute accrued paid leave is determined by the terms and conditions of the employer's normal leave policy.

Maintenance of Health Benefits

- A covered employer is required to maintain group health insurance coverage for an employee on FMLA leave whenever such insurance was provided before the leave was taken and on the same terms as if the employee had continued to work.
- If applicable, arrangements will need to be made for employees to pay their share of health insurance premiums while on leave.
- In some instances, the employer may recover premiums it paid to maintain health coverage for an employee who fails to return to work from FMLA leave.

Job Restoration

- Upon return from FMLA leave, an employee must be restored to the employee's original job, or to an equivalent job with equivalent pay, benefits, and other terms and conditions of employment.
- An employee has no greater right to restoration or to other benefits and conditions of employment than if the employee had been continuously employed.

Unlawful Acts

It is unlawful for any employer to:

- Interfere with, restrain, or deny the exercise of any right provided by the FMLA.
- Discharge or discriminate against any individual for opposing any practice, or because of involvement in any proceeding, related to the FMLA.

Enforcement

The Wage and Hour Division of the U.S. Department of Labor investigates complaints. If violations cannot be satisfactorily resolved, the DOL may bring action in court to compel compliance. Individuals may also be able to bring a private civil action against an employer for violations.

Special Situations

State Paid Family Leave Programs

States that have passed various from of mandatory or voluntary Paid Family Leave programs include, California, Colorado, Connecticut, Delaware, Hawaii, Maryland, Massachusetts, *New Hampshire, New Jersey, New York, Oregon, Rhode Island, *Vermont, Washington, Puerto Rico, and the District of Columbia.

The qualification requirements and the amounts of paid family leave available different vastly under each law. However, most allow for up to 12 weeks of paid leave within a 12-month period. Also, some states cover all employees working at any size company and have fewer requirements to be eligible than those required by the federal FMLA.

**** Voluntary enrollment only (is not mandated by the state)***

Stacking Leave

Because some states allow for leave to be taken for reasons that are not allowed under the federal FMLA, employees may be able to take additional leaves beyond the 12 weeks available under the federal FMLA.

Legal Tip! **An employee who is working in a state where family leave may be taken under state for in-laws, siblings, or any "designated person" may be able, if taken in the correct order, to take days or weeks under the state law then later on within the same 12-month period be able to take leave under the federal law for another unrelated, covered reason.**

Uniformed Services and Veterans' Benefits Protection

Uniformed Services Employment and Reemployment Rights Act (USERRA)

- Re-employment rights for veterans
- Prohibits employer discrimination for:
  - Past military service;
  - Current obligations; and
  - Intent to join

Veterans' Benefits Improvement Act (VBIA)

- Inform employees of USERRA rights annually
- Extension of COBRA from 18 to 24 months

Tips for Handling Military Leave:

1. Specify number of days to report back to work depending on leave of absence.
2. Consider furlough or leave of absence.
3. Permit employee to use accrued vacation pay, annual leave, or other accrued pay during leave.
4. Provide COBRA up to 24 months.
5. Offer reemployment by reinstating to position individual would have had if s/he had not been on leave.

   Exceptions:

   - Civilian job held for brief, nonrecurrent period, no expectation of continuing
   - Didn't give written or verbal notice prior to leaving job
   - More than five years cumulative service in the military while employed
   - Dishonorable discharge
   - Didn't report back in a timely manner

6. Continue benefits as if the individual had been employed without leave, except for accrued vacation and accrued sick leave.

Consolidated Omnibus Budget Reconciliation Act (COBRA)

The Consolidated Omnibus Budget Reconciliation Act (COBRA) gives workers who lose their health benefits the right to choose to continue group health benefits provided by their employer's plan under certain circumstances.

COBRA generally requires that group health plans sponsored by employers with 20 or more employees in the prior year offer employees and their families the opportunity for a temporary extension of health coverage (called continuation coverage) in certain instances where coverage under the plan would otherwise end.

As with COBRA, many state have laws requiring that group insurance policies provide certain employees and their dependents with the opportunity to continue their health benefit coverage under the employer's plan or convert to an individual policy if, because of certain events, they would otherwise lose coverage under their employer's group health plan.

Triggers

Several events can cause workers and/or their family members to lose group health coverage and may result in the right to COBRA coverage. These include:

1. Voluntary or involuntary termination of the covered employee's employment for reasons other than gross misconduct
2. Reduced hours of work for the covered employee resulting in loss of coverage
3. Covered employee becoming entitled to Medicare
4. Divorce or legal separation of a covered employee
5. Death of a covered employee
6. Loss of status as a dependent child under plan rules

Under COBRA, the employee or family member may qualify to keep their group health plan benefits for a set period of time, depending on the reason for losing the health coverage. The following represents some basic information on periods of continuation coverage:

Coverage Periods

Qualifying Events	Beneficiary	Coverage
1. Termination **2. Reduced Hours**	**Employee** **Spouse** **Dependent Child**	**18 months**
3. Employee entitled to Medicare **4. Divorce or legal separation** **5. Death of covered employee**	**Spouse** **Dependent Child**	**36 months**
6. Loss of "dependent child" status	**Dependent Child**	**36 months**

TAKE NOTE

In the case of individuals who qualify for Social Security disability benefits, special rules apply to extend coverage an additional 11 months.

COBRA Notices

Notices should be sent out as follows:

General (or Initial) Notice

Plan Administrator to employee/beneficiary within 90 days after coverage begins.

Summary Plan Description (SPD)

Employer/Plan Administrator to employee/beneficiary within 90 days after employee becomes a plan participant.

Summary of Material Modifications (SMM)

Plan Administrator to employee/beneficiary not later than 210 days after the end of plan year in which changes become effective. If there is a material reduction in covered services or benefits, then notice within 60 days after reduction is adopted.

Qualifying Events Notice

- Employer to Plan Administrator within 30 days after qualifying event.
- Employee/beneficiary to Plan Administrator within 60 days after qualifying event.

Election Notice

Plan Administrator to employee/beneficiary within 14 days after notice of qualifying event or 44 days if employer is the administrator.

Notice of Unavailability of Continuation Coverage

Plan Administrator to employee/beneficiary within 14 days or 44 days if employer is the administrator, with an explanation.

Notice of Early Termination of Continuation Coverage

Plan Administrator to employee/beneficiary ASAP.

Premium Payments

Qualified individuals may be required to pay the entire premium for coverage, up to 102% of the cost to the plan The applicable cost if fully insured, is the full insured rate (average by tier if age rated.) If partially self-funded, projected rates provided based on actuarial basis or past cost methods. Premiums may be higher for persons exercising the disability provisions of COBRA. Failure to make timely payments may result in loss of coverage. Premiums may be increased by the plan; however, premiums generally must be set in advance of each 12-month premium cycle.

Two Definitions Exist

Sexual Quid Pro Quo:

Hostile Work Environment/Bullying:

TAKE NOTE

Unwelcome is defined as the recipient didn't solicit or provoke the conduct and regarded it as undesirable.

Conducting a Harassment Investigation

1. **Take all complaints seriously.**
   - Do not discount anyone's concern(s)
   - Investigation must be conducted promptly, thoroughly, and impartially
2. **Conduct the interview with the complainant.**
   - Use the "4 W's and an H". Avoid Why questions – they provide less objective data since they move from the observable to inferable.
3. **Summarize the interview.**
   - Is there anything you'd like to add?
   - Is there anyone I should speak with to obtain information about the situation?
   - Review your "no retaliation policy" and the limits of confidentiality

Do not promise outcomes—yet ask the complainant how they would like to see the matter addressed.

4. **Interview the accused harasser.**

   Possible opening statements:

Review your "no retaliation policy" and the duty of confidentiality

5. **Gather additional information.**
   - Contact witnesses
   - Gather witness testimony
   - Second or more interviews with complainant and alleged harasser
   - Document observations and facts
6. **Conclude the investigation.**
   - Reach a final decision and document your decision
   - Take the appropriate disciplinary action
   - Counsel everyone involved regarding your company policy and your final decision
   - Assure everyone involved that your organization will not tolerate retaliation
   - Revisit the involved parties to ensure the problem has been remediated after the conclusion of the investigation and document follow-up

BEST PRACTICE

Organizations would be well served to have a policy that specifically outlines the requirements of all employees (associates, supervisors, and executives) to cooperate fully with all investigations conducted by the organization, regardless of subject matter. Additionally, organizations should have standardized forms to capture statements made during the inquiry.

The National Labor Relations Act (NLRA)

The NLRA was passed in 1935 and pertains to most private organizations with one or more employees. The NLRA does not apply to federal, state, or local governments; employers who employ only agricultural workers; and employers subject to the Railway Labor Act (interstate railroads and airlines).

The act protects employees' right to band together with coworkers to improve their lives at work.

Employees have the right to act with coworkers to address work-related issues in many ways, including talking with one or more coworkers about wages and benefits or other working conditions, circulating a petition asking for better hours, participating in a concerted refusal to work in unsafe conditions, and joining with coworkers to talk directly to the employer, to a government agency, or to the media about problems in the workplace.

Employers cannot discharge, discipline, or threaten employees for, or coercively question employees about, this "protected concerted" activity. However, employees can lose protection by saying things about their employer that are egregiously offensive or knowingly and maliciously false, or by publicly disparaging their employer's products or services without relating their complaints to any labor controversy.

The act affects an employer's rights regarding its:

- written policies
- day-to-day practices
- off-work rules regarding speech and social media post
- some privacy rights

A thorough understanding of the law is needed when dealing with potential protected activities by employees. The NLRB (National Labor Relations Board) oversees the law and can impose various penalties for an employer's violations of the law.

Protected Concerted Activity Statements

To be protected under Section 7 of the NLRA, employee conduct must be both "concerted" and "for the purpose of…mutual aid or protection." Protected concerted activity (at work, off work, including online) includes:

(1) statements by lone employees addressing their coworkers to initiate, induce, or prepare for group action;

(2) a solitary employee's communications with management to convey a truly group complaint;

(3) statements made to elicit group action from like-minded coworkers for a personally held view about working conditions; and

(4) communications involving "inherently concerted" discussions about vital aspects of workplace life.

Consider This!

Could then (using the protections provided by the NLRA) an employee (or group of employees) working for a covered private employer go on any social media platform and use harsh language to address their total displeasure with the company's safety practices. Could this happen even if those post could potentially damage the company's reputation in society/local community, or possibly the company's financial prospects? YES/NO, Why?

The Health Insurance Portability and Accountability Act (HIPAA)

HIPAA, or the Health Insurance Portability and Accountability Act of 1996, covers both individuals and organizations. Those who must comply with HIPAA are often called HIPAA covered entities.

HIPAA covered entities include health plans, clearinghouses, and certain health care providers. Employee medical records are rarely covered by HIPAA unless the employer maintains a self-insured Employer-sponsored Health Plan or, perhaps, an employer in the medical industry who might offer treatment of its employees by its own Health Care Providers (employee becomes a patient).

For HIPAA purposes, health plans include:

- Health insurance companies
- HMOs, or health maintenance organizations
- Employer-sponsored health plans
- Government programs that pay for health care, like Medicare, Medicaid, and military and veterans' health programs

HIPAA Addresses

1. Reduction of exclusionary periods for preexisting conditions
2. The standards for privacy of individually identifiable health information (PHI)

Reduction of Exclusionary Periods for Preexisting Conditions

Portability Rules

HIPAA limits the circumstances under which coverage may be excluded for medical conditions present before an employee enrolls in a group plan.

Portability rules require any plan with a pre-existing condition limitation (PCL) to count a person's prior coverage periods toward his or her PCL period.

- A pre-existing condition exclusion generally may not be imposed for more than 12 months (18 months for a late enrollee).
- The 12-month (or 18-month) exclusion period is reduced by one month for each month of an employee's prior health coverage.
- The employee is entitled to a certificate that will show evidences of prior health coverage.
- If the employee buys health insurance other than through an employer group health plan, a certificate of prior coverage may help the employee obtain coverage without a pre-existing condition exclusion.

Documentation Required When Coverage Ends

To ensure that individuals receive proper credit for prior coverage, employers and carriers must provide:

- Certification of creditable coverage periods.
- Certification for the individual's or family's active coverage period and COBRA coverage period.
- Certification of prior coverage—may be requested by individual or family any time during 24 months after all coverage ends.

Health-Related Discrimination Prohibited

Health plan eligibility, premium, and benefits for a group enrollee cannot be based on the enrollee's:

- Health status or health history.
- Physical or mental medical condition.
- Claim experience or receipt of health care.
- Disability, genetic information, or evidence of risk (i.e., for domestic violence).

Guaranteed Renewability

Contracts for coverage must be renewable at the option of the covered individual. Carriers are allowed to terminate plans for the following reasons only:

- Non-payment of group premium or fraud
- Termination of individual's membership in an association
- A network plan enrollee leaves the network service area
- Carrier withdrawal from the state market

The Privacy Rule

A major goal of the Privacy Rule is to assure that individuals' health information is properly protected while allowing the flow of health information needed to provide and promote high quality health care and to protect the public's health and well-being.

Covered Entities

The Privacy Rule applies to health plans, health care clearinghouses, and to any health care provider who transmits health information in electronic form in connection with transactions for which the Secretary of Health and Human Services (HHS) has adopted standards under HIPAA (the "covered entities").

Protected Health Information

The Privacy Rule protects all "individually identifiable health information" held or transmitted by a covered entity or its business associate, in any form or media, whether electronic, paper, or oral. The Privacy Rule calls this information "protected health information (PHI)."

Individually Identifiable Health Information

Information, including demographic data, that relates to:

- Individual's past, present or future physical or mental health or condition,
- Provision of health care to the individual, or
- Past, present, or future payment for the provision of health care to the individual, AND

that identifies the individual or for which there is a reasonable basis to believe can be used to identify the individual. Individually identifiable health information includes many common identifiers (e.g., name, address, birth date, Social Security Number).

TAKE NOTE

The Privacy Rule excludes from protected health information employment records that a covered entity maintains in its capacity as an employer and education and certain other records subject to, or defined in, the Family Educational Rights and Privacy Act, 20 U.S.C. §1232g.

The Privacy Rule

De-Identified Health Information

There are no restrictions on the use or disclosure of de-identified health information.
De-identified health information neither identifies nor provides a reasonable basis to identify an individual. There are two ways to de-identify information:

- A formal determination by a qualified statistician; or
- The removal of specified identifiers of the individual and of the individual's relatives, household members, and employers is required, and is adequate only if the covered entity has no actual knowledge that the remaining information could be used to identify the individual.

Uses and Disclosures

Basic Principle

A major purpose of the Privacy Rule is to define and limit the circumstances in which an individual's protected heath information may be used or disclosed by covered entities. A covered entity may not use or disclose protected health information, except either:

1. As the Privacy Rule permits or requires; or
2. As the individual who is the subject of the information (or the individual's personal representative) authorizes in writing.

Authorization

A covered entity must obtain the individual's written authorization for any use or disclosure of protected health information that is not for treatment, payment or health care operations or otherwise permitted or required by the Privacy Rule.

A covered entity may not condition treatment, payment, enrollment, or benefits eligibility on an individual granting an authorization, except in limited circumstances.

Fair Labor Standards Act (FLSA)

Overview

The FLSA establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in Federal, State, and local governments.

Minimum Wage

- Federal minimum wage is $_____ per hour effective _____, 20____.
- Many states also have minimum wage laws.
- In cases where an employee is covered by both state and federal minimum wage laws, the employee is entitled to the higher minimum wage.

Overtime

- Covered nonexempt employees must receive overtime pay for any hours worked over 40 per workweek (any fixed and regularly recurring period of 168 hours — seven consecutive 24-hour periods) at a rate not less than one and one-half times the employee's regular rate of pay.
- No limit on the number of hours employees 16 years or older may work in any workweek. (State laws may differ).
- FLSA does not require overtime pay for work on weekends, holidays, or regular days of rest, unless overtime is worked on such days.

Compensable Work Time

Hours worked ordinarily include all the time during which an employee is required to be on the employer's premises, on duty, or at a prescribed workplace.

Major Employee Categories Exempt from Overtime

- Major overtime exemptions contained in Section 13(a)(1) of the FLSA and apply to employees employed as bona fide executive, administrative, professional and outside sales employees.
- Section 13(a)(1) and Section 13(a)(17) also exempt certain computer employees.

Exemption Qualifications

To qualify for exemption, employees must pass three tests: salary basis, salary level, and job duties.

TAKE NOTE

In order for an exemption to apply, an employee's specific job duties, salary amount and how that salary is paid must meet all the requirements of the Department's regulations. Neither simply being paid on a salary basis nor having a particular job title determines exempt status.

Salary Basis

- In order for an employee to be exempt from the minimum wage and overtime requirements, he or she must be paid on a "salary basis."
- A person is paid a salary if he or she receives each pay period a set amount constituting all or part of the compensation, the amount of which is "not subject to reduction because of variations in the quality or quantity of the work performed."
- Generally, an employee "must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked." The regulation recognizes "the general rule that an employee need not be paid for any workweek in which he performs no work."

Allowable Salary Deductions from Exempt Employees

Seven exceptions from the "no pay-docking" rule:

1. **Absence from work for one or more full days for personal reasons, other than sickness or disability.**
2. **Absence from work for one or more full days due to sickness or disability if deductions made under a bona fide plan, policy or practice of providing wage replacement benefits for these types of absences.**

   ***Note:** Employers may require salaried exempt employees who miss partial days or partial weeks to apply paid leave time to such absences. In a letter ruling dated April 9, 1993 (BNA, WHM 99:8003), DOL stated "where an employer has bona fide vacation and sick time benefits, it is permissible to substitute or reduce the accrued benefits for the time an employee is absent from work, even if it is less than a full day, without affecting the salary basis of payment, if by substituting or reducing such benefits, the employee receives in payment an amount equal to his or her guaranteed salary."*
3. **To offset any amounts received as payment for jury fees, witness fees, or military pay.**
4. **Penalties imposed in good faith for violating safety rules of "major significance."**
5. **Unpaid disciplinary suspension of one or more full days imposed in good faith for violations of workplace conduct rules.**
6. **Proportionate part of an employee's full salary may be paid for time actually worked in the first and last weeks of employment.**
7. **Unpaid leave taken pursuant to the Family and Medical Leave Act.**

Exemption Qualifications

Salary Level

- The minimum salary amount is $_____ per week.

Job Duties

- The DOL has set forth special tests for the executive, administrative, and professional exemption categories.

  In each category, the employee's "primary duty" must be exempt in nature. Primary duty is a duty in which the employee spends "more than 50 percent" of their work time. In cases where the employee spend 50 percent or less of the workweek in exempt duties, however, the exempt duties may still be the primary duties depending upon the following criteria:

  1. The relative importance of the managerial duties as compared with other types of duties;

  2. The amount of time spent performing exempt work;

  3. The employee's relative freedom from direct supervision; and

  4. The relationship between the employee's salary and the wages paid other employees for the kind of non-exempt work performed by a supervisor (or other type of exempt employee).

Executive Exemption

To qualify for the executive exemption, all of the following tests must be met:

- An employee must earn a salary of at least $_____ per week or $_____ annually.
- The employee's primary duty must be managing the employing enterprise or one of its recognized departments or subdivisions.
- The employee must customarily or regularly direct the work of two or more other employees.
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

There is an additional category of exempt executive that includes employees who own at least a 20% equity interest in a business if they also are actively engaged in managing the business, regardless of what they earn weekly.

Administrative Exemption

To qualify for the administrative exemption, all of the following tests must be met:

- An employee must earn a salary of at least $_____ per week or $_____ annually.
- The employee's primary duty must be the performance of office or non-manual work directly related to the management policies or general business operations of the employer or its customers, such as work in functional areas such as tax, finance, accounting, auditing; insurance; quality control; purchasing, procurement; advertising, marketing; research; safety and health; human resources, employee benefits, labor relations; public relations; government relations; computer network, Internet and database administration; legal and regulatory compliance; and similar activities.
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to significant matters, involving the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. Generally, it means the employee has authority to make an independent choice, free from immediate direction or supervision.

Professional Exemption

To qualify for the professional exemption, the following tests must be met:

- An exempt professional must earn a salary of at least $_____ per week or $_____ annually.
- In addition to the salary requirement, an exempt professional must have a primary duty of performing office or non-manual work that requires one of the following:
  - Knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.
  - Invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

The first prong of the above duties test is commonly referred to as the duties test for "learned professionals," while the second prong sets forth the test for "artistic professionals."

Highly-Compensated Workers

The regulations contain a special rule for "highly-compensated" workers who are:

- Paid total annual compensation of $_____ or more, which includes at least $_____ per week paid on a salary basis.
- The employee's primary duty includes performing office or non-manual work; and
- The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

So, an employee may qualify as an exempt highly-compensated executive if the employee customarily and regularly directs the work of two or more other employees, even though the employee does not meet all of the other requirements in the standard test for exemption as an executive.

Outside Salespeople

- Outside salespeople fall into a special category of exempt employees who do not have to be paid a salary nor receive minimum wages or overtime pay.
- An outside sales employee is someone who is "customarily and regularly engaged" away from the employer's place of business in making sales or obtaining orders for the sale of goods or services, and that such person's pay is determined by a compensation agreement.
- Outside sales for exemption purposes do not include sales made by mail, telephone or the internet unless such contact is used in addition to personal calls.

Computer Professional

Another "white collar" exemption that does not necessarily require a salary to be valid is an exempt "computer professional." The definitions found in 29 C.F.R. 541.400 apply the exemption to any computer employee paid on a salary or fee basis at least $_____ per week, exclusive of board, lodging, or other facilities, or else paid an hourly wage of not less than $_____ an hour.

In addition, the exemptions apply only to computer employees whose primary duty consists of:

- The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
- 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;
- The design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
- A combination of the aforementioned duties, the performance of which requires the same level of skills.

The regulations exclude workers who build or install computer hardware or who are merely skilled computer operators. The exemption applies only to the true software programming, design, or systems analysis experts.

Child Labor

- Generally, children younger than 14 may not work for an employer.
- Children ages 14 and 15 may work, but only in non-hazardous occupations and only during non-school hours; and, there is a significant limit on the number of hours they can work each day and week.
- Children ages 16 and 17 may work any hours without restriction, but may not work in hazardous occupations.
- Once a person reaches age 18, there is no limitation on either hours or duties (other than whatever rules may apply pursuant to regulations promulgated under the Occupational Safety and Health Act [OSHA]).
- State laws may differ on these requirements, providing enhanced protections for younger workers.

SCENARIOS

1.	Maria is a manager of two employees. Although her recommendations regarding firing one of her employees is considered, and given particular weight, she does not have the authority to make the ultimate decision. Her manager's recommendation has greater weight. Maria ***does not*** qualify for executive exempt status. ☐ True or ☐ False
2.	Jeff, who works in a production line, occasionally has some responsibility for directing the work of other employees when the supervisor is unavailable. This ***qualifies*** Jeff for the executive exemption. ☐ True or ☐ False
3.	The decisions Jane, executive assistant to the President, makes as a result of her exercise of discretion and independent judgment consists of recommendations for action rather than the actual taking of action. Jane ***does not qualify*** for the administrative exemption. ☐ True or ☐ False
4.	Larry is an administrative assistant. He must often refer to policy and procedures in complex report creation and handling customer calls. He compiles the weekly newsletter, writes memos and letters from sketchy verbiage, and stays on top of industry news. Larry ***qualifies*** as an exempt administrative employee. ☐ True or ☐ False
5.	Jamie works in the Human Resources department. He interviews applicants and rejects those who do not meet minimum standards for the particular job or for employment by the company. He then refers those who do qualify on to the hiring manager for a final interview. When not screening applicants, Jamie keeps files up to date, makes follow-up calls, and creates follow up correspondence. Jamie ***qualifies*** under the administrative exemption. ☐ True or ☐ False
6.	Wanda inspects complex widgets which require special techniques and skills acquired after extensive training and experience. She is allowed leeway in her judgment. Wanda ***qualifies*** under the administrative exemption. ☐ True or ☐ False
7.	George's title is accountant but he's not a CPA or a CMA. He maintains the books, keeps management informed via various financial reports, makes deposits, and handles A/P, A/R and collection calls. George ***qualifies*** under the learned professionals exemption or the administrative exemption. ☐ True or ☐ False
8.	John is a non-management production line worker who makes over $140,000 a year after bonuses. John qualifies under the Highly Compensated Employee exemption. ☐ True or ☐ False

Avoiding Discrimination

Protected classes are a group of people distinguished by the special characteristic(s).

Federal Protected Classes

Federal law applies to organizations with 15 or more employees. Federal age discrimination applies to organizations with 20 or more employees. Federal Protected Groups include:

- Age (40+)
- Disability
- Sex/Gender (As of 2020, includes Sexual Orientation/Gender Identity)
- National Origin
- Pregnancy
- Race/Color
- Religion
- Veteran Status
- Genetic Information

Protected Classes Under Some State Fair Employment Practice Acts

Marital Status – The status of being married, single, separated, divorced or widowed

Lifestyle – Employer cannot take an adverse action due to the employee using lawful products (e.g., tobacco, alcohol) during non-duty hours away from the workplace

Natural Hair – Adds natural hair as a protected characteristic associated with race and can limit grooming/dress code rules.

In light of the number of cities, counties, and states that have passed specific discrimination laws across the U.S., employers should review their policies, handbooks, practices, and diversity training programs to ensure they are aligned with their local and state's laws.

SCENARIO

Situational Case Analysis: ***Tammy and Donna work in sales for "We Look Great" Retailers, Inc., who have offices in over 30 states nation-wide. Tammy works in New Jersey and Donna in Alabama. The company has strict dress code and grooming policies. Both women have been counseled and disciplined for issues of appearance related to their hair. A new CEO has recently taken over WLG and suggest that appearance is a main key to success in any sales driven industry, so future grooming violations will be punished accordingly. Both Donna and Tammy are terminated over the next few months for continued violations of the company's grooming policy. They were cited for having braids, cornrows, and twists in their hair. Will they be able to sue WLG for race discrimination and potentially recover damages?***

Two Types of Discrimination

Disparate Treatment

Refers to practices in which an employer intentionally treats similarly situated members of protected groups less favorably than others, either openly or covertly.

Disparate Impact

Addresses employment practices that appear to be neutral on their face but result in disadvantageous treatment of members of protected groups at a substantially higher rate than such treatment for others. Eliminating an entire group from interviewing, hiring, or promotional consideration.

Bona Fide Occupational Qualification (BFOQ)

A BFOQ is a characteristic that employers are allowed to consider when making decisions on the hiring and retention of employees – a quality that when assessed in other contexts would constitute unlawful discrimination. Employers may discriminate based on a valid BFOQ. *Example: security guards in stores whose gender corresponds to those they are observing in fitting rooms.*

CAUTION

What You Must Not Do

- **Fail or refuse to hire because an individual is a member of a protected class.**
- **Fire an individual because s/he is a member of a protected class.**
- **Deprive an individual of employment opportunities because s/he is a member of a protected class.**
- **Fail to provide training to an individual because s/he is a member of protected class.**
- **Retaliate because an individual made a charge, testified, assisted, or participated in any manner in an action protected by law.**
- **Print or publish (or cause to be printed or published) an ad that may adversely affect a member of a protected class.**
- **Fail to post a notice about the contents of the civil rights laws in an obvious place, and/or to keep it posted.**

Legal Tip! Associational Discrimination

Title VII of the Civil Rights Act as also been found by several Circuit Courts to protect employees against discrimination based on their association with someone in another protected class.

At least five circuits (the Second, Third, Fifth, Sixth and Eleventh Circuits) hold that Title VII forbids an employer from discriminating against an employee because of their association with another person who is a member of a different protected class. *See Kengerski v. Harper, 6 F.4th 531 (3d. Cir. 2021).*

Questions to Ask Yourself

1. Where areyou recruiting your candidates from?

2. Could recruiting methods be discriminatory?

3. What new ways can you use to recruit your candidates?

Résumé Red Flags

What to look for:	How to Handle:
• Employment gaps • Poor spelling, etc. • Failed attention to detail • Career gone backwards or plateaued • Failed to follow directions like including cover letter	

SCENARIO

A new position is opening up in your company and a manager wants to hire someone from outside the organization. Legally, must you offer it to internal staff members first?

Safe Interviewing Practices

1. **Ask only job-related questions to all candidates**
   - Consider what you want the successful new hire to accomplish within the first 6 months to 1 year in the job
   - Create questions which address specific skills, knowledge and abilities required for successful performance in the position
   - Differentiate between skills candidate must possess upon hire versus abilities which can be trained; ask candidates questions about their ability to learn new things and adapt to changes
2. **Ask all candidates the same baseline questions; follow-up, probing questions will differ based upon the candidate's answers**
   - Create an interview checklist
3. **When can you test?**

• **Medical test**		• **Psychological**	
• **Drug test**		• **Lie detector**	
• **Aptitude**		• **Honesty test**	

GOOD TO KNOW

The requirement that applicants submit to aptitude or psychological testing is lawful, when the employer can demonstrate the attributes sought are related to successful job performance. (Examples: emotional resilience, ability to adapt to change, independence). In all cases, the test must be validated for the job in question. In addition, the test must not have an unequal impact on protected groups.

Three Key Areas of Employee Performance Gaps

Three Key Areas	Possible Solutions
Attendance/ Tardiness/ Presenteeism: Failure to be at work on time every day and stay focused on the job.	
Performance: Failure to meet goals or deadlines Excessive waste Customer complaints	
Conduct/Inappropriate Behavior Smoking Safety violations Theft of company property Harassment	

Drug Testing

Under federal law, mandatory, *random* screening of current employees for drug use is legal under certain circumstances. (State laws may impose greater employee protections – see Connecticut, Iowa, Arizona as examples).

Circumstances for Legal Drug Testing

- Where the suspicion exists that the employee has been using drugs or was under the influence of them while at work
- When an employee has been involved in an accident or has given someone sufficient cause to suspect him or her of wrongdoing
- For members of the armed forces or government personnel in top-secret or other sensitive jobs
- For persons engaged in a hazardous occupation, or involved in public safety, such as air traffic control, or for other employees falling under the public safety mandates imposed under the U.S. Department of Transportation's regulation (53 Federal Register 47,002) requiring public or private sector employers to conduct random urine tests

You may struggle to justify such screening in the absence of some "reasonable suspicion" that widespread drug (including alcohol) abuse exists and could interfere with your organization's ability to conduct its business.

Examples:

On the other hand, random testing of current employees may be a costly waste of time and resources. It may also be inconsistent with your organization's trust culture.

GOOD TO KNOW

If your think drug testing serves your organization's or the public's best interests, test all applicants for initial hire or for promotion. The courts will probably uphold this testing, as did the U.S. Supreme Court in 1989. ***See Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) and National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).***

Drug Testing Guidelines

If this list of rules governs what you can and cannot do, failure to do what is required could hurt you as well as your company. Also, check to see if the specific agency to which your industry or company reports to has targeted regulations not included in the generalized DOT list.

1. Publish in an accessible manner (e.g., handbook or permanent bulletin board) all regulations related to alcohol and other drug use.
2. Define who is in a safety sensitive position covered by applicable regulations.
3. Define all terms, including unfamiliar ones: e.g., Breath Alcohol Technician (BAT), Substance Abuse Professional (SAP), and Evidentiary Breath Testing Device (EBT).
4. Identify the specific types of tests that will be required of safety sensitive employees.
5. Specifically state what is prohibited by the applicable DOT regulations (e.g., the use of alcohol within four hours before performing the duties of a covered position, or reporting for duty or remaining on duty with an alcohol concentration of 0.04 percent or more).
6. Appoint key personnel the responsibility for keeping all reference materials current, maintaining all records, and ensuring confidentiality.
7. Identify types of testing categories (e.g., post accident or reasonable cause).
8. Identify to whom and how test results will be transmitted.
9. Identify procedures that support employees who self disclose an alcohol or drug abuse problem before you direct them to take a screening test.
10. Establish guidelines for processing and handling inpatient or outpatient care, and how records will be handled to ensure confidentiality.
11. Advise employees of resources available to them (e.g. through an Employee Assistance Program (EAP), for evaluating and resolving problems with substance abuse).
12. Provide supervisory training. Any supervisor involved in a DOT reasonable suspicion or reasonable cause situation must have attended this type of training.
13. Describe procedures for hiring and auditing contractors who will administer a drug abuse testing and monitoring program.
14. Develop an information system that includes the address of the DOT agency to which the reports are required to be sent and identify the deadline date. List required procedures used in the program, number of covered employees, types of tests performed and their results, along with the types of actions taken for substance abuse or violations of other provisions or prohibitions, and information about employees who refuse to submit to testing.

Effective Disciplinary Sessions

Step 1: Preparation

- Write down specific behavioral problems
- Know your company policy on progressive discipline

Step 2: The Discussion

- State the problem and the desired behavior
- Keep it short, to the point, and stick to recent events
- Generate a variety of possible solutions
- Reach an agreement with the employee

Step 3: Documentation

- Remember the burden of proof is on the company
- Have the employee sign the warnings or performance improvement plans
- Avoid vague words like "frequently" or "several;" use instead, "six times in the last three weeks"

What role does HR play in getting managers to adhere to consistent compliance practices?

Know your organization's disciplinary actions and/or progressive discipline policy. Follow it consistently, follow the letter of the law, and provide feedback and support to all employees

CAUTION

The subtle way your organization can appear guilty of discrimination in disciplinary actions: INCONSISTENCY!

Termination Guidelines

Accusations of wrongful discharge land many employers in court. Regardless of whether you operate in an "at will" state, employers cannot depend on this doctrine to protect the company from charges of discrimination or unfair treatment related to termination. Fighting these charges is costly — it is better to avoid them completely, if at all possible.

Sidesteps Charges of Wrongful Discharge

1. Treat the employee fairly and with dignity.
2. Have a witness present.
3. Only terminate for violation of a policy or if the employee has been counseled consistently on previous company practices/policies or performance issues.
4. Begin by stating the reason for the termination.
5. Provide documentation to the employee.
6. Document this meeting.
7. Discreetly escort the employee from the workplace.
8. Protect confidential matters, even when you are not required to do so — respect the employee's privacy.
9. Do not apologize for the decision to terminate.
10. Follow all your company's policies on terminations.
11. Be consistent.

SCENARIO

One of your company's managers has fired an employee who once had a stellar performance record with the organization. If she sues, what will you need to do to make this termination stand up in court?

Keep Legal-Safe Documentation

Knowing what documentation to provide when required by the courts, what documentation to keep, and what can be destroyed is critical to your company's legal protection.

Elements of Good Documentation

- Objective and factual
- Completed paperwork – no blanks or incomplete forms
- First hand testimony or accountings
- Dated and signed

The danger of building a file or paper trail after the fact:

What to Destroy

1. Documents dated beyond record keeping requirement periods
2. Inaccurate or false information

Create Legal Safe Files

How you keep documentation and files is just as important as what you keep.

1. Personnel files
2. Medical files
3. Benefits files
4. Payroll files
5. Confidential files

Outsourcing

Outsourcing is the practice of contracting with an outside vendor to provide services or serve a function that has traditionally been provided by employees. With downsizing and changing technology, outsourcing has become more popular and efficient in recent years for many cost effective reasons.

Caveat: **Outsource task/functions, but never outsource responsibility for knowledge. The employer is still jointly and severally liable for a vendor's negligence. The employer must exercise reasonable care in the management of all vendors. AUDIT routinely.**

Reasons for Outsourcing

- Control legal risk
- Short/long-term projects
- Eliminate permanent staff
- Reduce overhead expenses
- Need additional staff
- Take advantage of new technology
- Creative energy
- Access to expertise your organization does not have

GOOD TO KNOW

Working with Temporary and Contract Workers

Performance Appraisal Systems

Performance appraisal systems make good management sense. A well-designed and judiciously implemented system does not impose a hardship on employees and is often seen by employees as a tool that helps them succeed.

The Criticism:

Do's:

Don'ts:

The Goal or Purpose of the Appraisal Determines the System's Value

1. Evaluate an employer's performance at a given moment (e.g., at this time).
   - Addresses a performance problem or commends the employee for an accomplishment.
2. Evaluate an employee's performance over a given and identifiable period of time (e.g., during the past year).
   - Should be well documented throughout the year with specific behavior examples or accomplishments to support the rating marks.

Measuring Against Goals and Standards

A job description should drive the appraisal process or you have nothing to measure performance against.

1. The job's criteria – knowledge, skills, and abilities needed to do the job should be related to the goal.
2. The job's standards should be the measures by which an employee's performance relative to the goals is measured.

GOOD TO KNOW

Job standards and documentation are the two legal protections of a good appraisal system.

Documentation

Several methods of evaluation contribute to the documentation of an employer's job performance.

Ratings	**Quality of work, quantity of work, attendance, leadership abilities, etc. are scored on a scale, usually from 1 to 5.**
Narratives	**Describe what a person did and how well or poorly s/he did it and explains the reason why he/she received the rating.**
Performance	**Maintain a file of critical or significant incidents during the entire year.**
Audit Systems	**A built in method for checking out an evaluation's validity.**
Grievance	**Give employees the opportunity to review their evaluation files and rebut them if necessary.**

There should be no surprises during a year-end evaluation, and communication about the contents of the performance file prevents this from happening.

Performance Systems

Every organization should have a minimum level of sophistication in its performance system.

1. Up-to-date, written, clear job or position descriptions that have been given to the employee at the start of the employee's tenure in a given job or position.
2. Job standards communicated clearly to each employee at the start of each rating period.
3. Training for supervisors on how to evaluate employee performance and how to administer the organization's appraisal system.
4. Performance feedback, both informally on a daily, weekly, or monthly basis but definitely on an annual basis.
5. A review audit system to prevent unlawful bias or subjective feelings from infiltrating the system.
6. Performance coaching and counseling systems administered by managers trained to give effective feedback and coaching or counseling.
7. Documentation through performance files, job-related testing, rating systems, appraisal forms, signed memoranda, etc.
8. Written policy statements approving only a specific procedure for conducting appraisals.
9. Ongoing communication between managers and employees about goal-focused job performance.

Unemployment Compensation

The purpose of the Federal Unemployment Tax Act (FUTA) is to insure diligent workers against the uncertainties of enforced unemployment not voluntarily created by the worker.

Unemployment insurance is based on a dual program of federal and state statutes. Each state administers a separate unemployment insurance program based on federal standards. There are special federal rules for nonprofit organizations and governmental entities. A combination of federal and state law determine which employees are eligible.

What Will be Examined in a Claim?

- Treatment of the employee
- Circumstance of the termination
- Reasonableness of the company's policies and standards
- Just cause for termination
- Employee's control of the situation

Who Is Usually Disqualified?

- An employee who voluntary quits without cause attributed to the employer
- An employee who was terminated due to misconduct or gross misconduct
- An employee who refused suitable work, after leaving one employer

SCENARIO

You hired a contract art director to work on site for the past year and he used your materials. Now that his contract is up, he's filing for unemployment benefits. Does he have a shot at getting the money?

Getting Through a DOL or EEOC Investigation

Step 1: Begin with proper company compliance practices.

Step 2: Ensure proper disciplinary documentation in all your employee files.

Step 3: Complete all company paperwork to initiate the new hire or termination process on every employee.

Step 4: Periodically purge your files, using an established retention and destruction schedule.

Communicating Policies and Procedures

A policy by itself is a guideline for making sound business decisions, it is not necessarily a call to take specific action. Make sure your organization's policies cannot be construed as establishing a contractual obligation – that is the *real* purpose of having an At-Will employment policy.

Policy	**The policy statement itself**
Procedures	**Steps used to apply or implement the policy**
Management Responsibilities	**What managers are expected to do, methods for monitoring or controlling how the policy statement is implemented**
Consequences	**Statements concerning what will happen in the event the policy is not enforced**
References	**To laws or legislation that may be involved**

A Policy Should Be:

Broad:

Comprehensive:

Livable:

Inviolate:

Authoritative:

Applicable:

SCENARIO

There's a change to a policy in your employee handbook. You want to send it out in an email notice to all employees. Is that good enough?

Right and Wrong Policy Statement Examples

Wrong Way	Right Way
Technical jargon or other complex language that employees (or jurors!) may not understand	Short sentences using simple language that employees are familiar with
Legalistic language, even when it explains the law	A friendly, responsive tone
A choppy or abrupt style, using words like "obvious" and "of course"	Personal pronouns, like "you," rather than "the manager"
Ambiguous or fuzzy descriptions	Clear, ordinary statements that describe and convey exactly what the organization intends
Overuse of lists and outlines	Action-oriented language expressed by active verbs

SUCCESS TIPS

Recommended Resources

Books

Resolving Conflicts at Work. Kenneth Cloke and Joan Goldsmith. New York, NY: Jossey-Bass.

Preventing Violence In the Workplace. Charles E. Labig, PhD. New York, NY: AMACOM, 1995.

The Manager's Guide to HR. Max Muller. AMACOM Books and SHRM, New York City, January.

The Gregg Reference Manual, 9th Edition. William Sabin. New York, NY: Glencoe McGraw-Hill.

Mandated Benefits 2009 Edition. Aspen Publishing

The Complete Guide to Human Resources and the Law 2009 Edition. Aspen Publishing

Fair, Square and Legal. Donald H. Weiss

Finding & Hiring the Right People. Robert W. Wendover

Downloadable Media on Pryor.com:

Digital Downloads

21 Ways to Defuse Anger and Calm People Down

Assertive Communication Skills for Professionals

Dealing With Conflict and Confrontation

How to Deal With Difficult People

How to Deal With Negativity in the Workplace

How to Organize Your Life and Get Rid of Clutter

How to Overcome Negativity in the Workplace

Interpersonal Communication Skills

How to Identify and Prevent Workplace Sexual Harassment

Self-Discipline and Emotional Control

Self-Esteem and Peak Performance

The Ultimate Book of HR Checklists

The Guide to Best Employement Practices for Small Businesses, Entrepreneurs, and Non-Profits

Downloadable Software

HelpDesk Suite Complaince Toolkits

Downloadable Workbook, Video, and Audio

Evelyn Wood Reading Dynamics

Appendix

Federal Laws Summary

Civil Rights Act of 1964 – Title VII
Title VII of the Civil Rights Acts of 1964, as amended, prohibits employment discrimination based on race, color, religion, sex or national origin. Title VII prohibits not only intentional discrimination but also practices that have the effect of discriminating against individuals because of race, color, religion, sex or national origin.

Age Discrimination in Employment Act of 1967
ADEA protects older people who want to stay in the workforce and are still capable of working from discrimination involving arbitrary age limits. The ADEA's aim is to promote employment of older persons based on their ability rather than age.

Rehabilitation Act of 1973
The Rehab Act protects qualified handicapped applicants against discrimination in employment practices in programs run by federal agencies; programs that receive federal financial assistance; in federal employment; and in the employment practices of federal contractors.

Vietnam Era Veteran's Readjustment Assistance Act of 1974
This act requires federal contractors to take affirmative action to employ and advance in employment two classes of veterans: veterans of the Vietnam War and special disabled veterans.

Pregnancy Discrimination Act of 1978
This act forbids treating a qualified pregnant employee on less favorable terms than a comparably situated, non-pregnant employee.

Americans with Disabilities Act of 1990/ADA Amendments Act of 2008
ADA as amended was initiated to protect people with physical and mental disabilities from discrimination in employment, public services, public accommodations, private services, and telecommunications.

Civil Rights Act of 1991
This act authorizes compensatory and punitive damages in cases of intentional discrimination based on sex, religion, or disability, and provides for obtaining attorney's fees and the possibility of jury trials.

Executive Order 11246
Prohibits race discrimination by federal contractors and subcontractors. The order also requires them to take affirmative action in the employment of racial and ethnic minorities. It was amended in 1967 to include women.

Genetic Information Act of 2008
Title I: Genetic Nondiscrimination in Health Insurance protects against genetic discrimination in health insurance.

Title II: Genetic Nondiscrimination in Employment prohibits employers from using genetic information to make decisions about hiring, firing, or promotion. Decisions in regard to compensation, terms, conditions, or privileges of employment also cannot be based on genetic information. Furthermore, employers cannot request or require an employee to undergo genetic testing, nor can they purchase genetic information about an employee or their family members.

Appendix

Federal Laws Summary

Fair Labor Standards Act of 1938

Enacted in 1938, the FLSA governs the procedural aspects of paying employees by setting overtime pay regulations and minimum wage requirements. It also sets standards for recordkeeping and child labor laws.

Equal Pay Act of 1963

This act prohibits sex-based wage discrimination between men and women in the same establishment who perform jobs that require substantially equal skill, effort and responsibility under similar working conditions.

Social Security Act of 1935

The original purpose of the program was to ensure continuing income to workers when their earnings either stopped or were reduced because of disability or retirement.

Employment Retirement Income Security Act of 1974

This act was enacted to implement a federal regulatory framework for pension and welfare benefit plans, with the primary purpose of protecting employees' rights with regard to such plans.

Consolidated Omnibus Budget Reconciliation Act of 1985

Employers required to offer employees and family members covered under an employer sponsored group health plan the opportunity to continue to receive the same coverage they were receiving before the occurrence of certain life events that would otherwise have resulted in termination of their group health coverage.

Family and Medical Leave Act of 1993

FMLA provides eligible employees up to 12 weeks* of unpaid leaves of absences in a 12 month period for:

- The birth of a child or placement for adoption or foster care;
- To care for a spouse, son, daughter, or parent who has a serious health condition;
- For an employee's own serious health condition;
- For qualifying military exigencies;
- Up to 26 weeks* of leave to care for a covered servicemember with a serious injury or illness

Health Insurance Portability and Accountability Act of 1996

HIPAA created national standards to protect individual's medical records and other personal health information. The goal and objectives of this legislation are to simplify industry inefficiencies and diminish paperwork.

Occupational Safety and Health Act of 1970

OSHA regulations guarantee every worker safe and healthy working conditions, and preserve human resources in the process.

The Patient Protection and Affordable Care Act of 2010

The ACA seeks to reform health insurance provision in the United States by:

- Eliminating lifetime and constrained annual limits on benefits
- Prohibiting rescissions of health insurance policies
- Providing assistance for uninsured because of a pre-existing condition
- Requiring coverage of preventive services and immunizations
- Extending dependent coverage up to age 26
- Capping insurance company non-medical, administrative expenditures
- Ensure consumers have access to an appeals process

Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2022

The "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act" prohibits enforcement of mandatory pre-dispute arbitration agreements, as well as agreements prohibiting participation in a joint, class or collective action in any forum by an alleged victim(s) of sexual harassment/assualt.

Speak Out Act of 2022

The "Speak Out Act," was signed into law on December 7, 2022, and renders pre-dispute non-disclosure and non-disparagement clauses judicially unenforceable with respect to sexual assault or sexual harassment.

Pregnant Workers Fairness Act (PWFA) of 2023

The Act, effective June 27, 2023, requires covered employers to provide "reasonable accommodations" to a worker's known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an "undue hardship."

Providing Urgent Maternal Protections For Nursing Mothers Act (PUMP ACT) of 2022

Enacted December 2022, the PUMP Act requires most employers (with 50+ employees) to provide breastfeeding accommodations for all employees, whether salaried and/or hourly.

Avoid RIF Litigation

A reduction in force – abolishing employees' jobs – is used to address an organization's financial difficulties, eliminating redundancies following a change in organizational structure, or due changes in products and processes, among others. Litigation can arise, however, if downsized employees feel they were discriminated against or if the company did not follow the required processes for a reduction.

SUCCESS TIPS

- **The organization has developed a business plan with business driven goals for laying off employees.**
- **The organization's plan does not create an adverse impact on any protected group(s), or violate any contractual agreements, or any employee benefit plans.**
- **The organization has objective methods for selecting the employees.**
- **The organization has well documented information on performance criteria to offset any subjectivity questions.**
- **The organization is able to identify and document any marginally performing employees, employees with the least amount of knowledge or skills related to the newly created work.**
- **The organization can apply the criteria for downsizing to your company's seniority system, if necessary.**
- **Organization representatives can effectively communicate with all affected employees.**
- **The organization minimizes benefit losses, perhaps offering early retirement incentives.**
- **Other avenues for cost savings are available considered and rejected.**
- **Employees are not pressured or coerced into accepting the reduction or being fired.**
- **Employees will be given sufficient time and proper counseling as to the terms of the offer and career counseling.**

Answer for Case Analysis on page 25: **Tammy will be able to pursue her case, but Donna will not likely have a valid cause of action. Tammy can sue under the NJ CROWN law and seek damages that include equitable relief, recovery for economic losses, compensatory and punitive damages, court costs, and attorney fees. Donna, however, isn't protected under either a federal or state law at this time and will likely not have a lawful cause of action even though she works for the same company as Tammy.**

See Equal Employment Opportunity Commission v. Catastrophe Management Solutions, No. 14-13482 (September 15, 2016). **The 11th Circuit Court (covering Alabama, Georgia, and Florida) found that mutable, or changeable, characteristics, such as hair style and facial hair, even if associated culturally with a protected class, are not protected characteristics under Title VII.**

Appendix

Recently Enacted Federal Employment Laws We Need to Know!

Speak Out Act (2022)

The "Speak Out Act," was signed into law on December 7, 2022, and renders pre-dispute non-disclosure and non-disparagement clauses judicially unenforceable with respect to sexual assault or sexual harassment.

The law defines a "non-disclosure clause" as "a provision in a contract or agreement that requires the parties to the contract or agreement not to disclose or discuss conduct, the existence of a settlement involving conduct, or information covered by the terms and conditions of the contract or agreement."

A "non-disparagement clause" is defined as "a provision in a contract or agreement that requires 1 or more parties to the contract or agreement not to make a negative statement about another party that relates to the contract, agreement, claim, or case."

What Can't Be Done

- Non-disclosure provisions by which employees agree to keep confidential the details of any future sexual assault or harassment disputes are unenforceable.
- Non-disparagement provisions, which limit employees' ability to speak out against, or say anything negative about, their employer in the context of future sexual assault or harassment disputes are unenforceable.
- The Act applies to all contracts past, present, and future, as long as the claim of sexual assault or harassment is brought under state, federal or tribal law.
- States may enforce their laws that are equally or more protective of an employee's ability to speak out about alleged sexual assault or harassment in the workplace, and those state laws are not superseded by the Act.

What Can Be Done

- Allows employers and employees to enter into non-disclosure and non-disparagement agreements regarding alleged sexual assault or harassment as a result of a settlement, as long as otherwise permitted by applicable state law.
- Allows employers and employees to enter into non-disclosure and non-disparagement agreements at the outset of employment if the provisions don't include sexual assault or harassment.
- Allows employers to protect trade secrets or proprietary information with nondisclosure agreements.

Tax Info: Note that the IRS does not allow a deduction for settlement payments made in sexual harassment and assault cases if the payment is subject to a nondisclosure agreement.

Appendix

Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (2022)

The "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act prohibits enforcement of mandatory pre-dispute arbitration agreements, as well as agreements prohibiting participation in a joint, class or collective action in any forum "by the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct."

A "sexual harassment dispute" is defined as one "relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law."

A "sexual assault dispute" is defined as one "involving a nonconsensual sexual act or sexual contact, as such terms are defined in section 2246 of title 18 or similar applicable Tribal or State law, including when the victim lacks capacity to consent."

On a local note: In addition, similar laws in several states, e.g., California, Hawaii, Illinois, Maine, New Jersey, New Mexico, New York, Oregon, and Washington State have recently enacted more expansive laws regarding non-disclosure and arbitration agreements.

Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act)

Enacted December 2022, the PUMP Act requires most employers (50+) to provide breastfeeding accommodations for all employees, whether salaried and/or hourly, as follows:

An employer shall provide:

A reasonable break time for an employee to express breast milk for such employee's nursing child for 1 year after the child's birth each time such employee has need to express the milk; and

A place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.

Workers who telework must also be free from observation by any employer-provided or required video system, including computer camera, security camera, or web conferencing platform.

Compensation:

An employer shall not be required to compensate an employee receiving reasonable break time for any time spent during the workday for such purpose unless otherwise required by Federal or State law or municipal ordinance. However, the break time provided shall be considered hours worked if the employee is not completely relieved from duty during the entirety of such break.

Exemptions:

An employer that employs less than 50 employees shall not be subject to the requirements, if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business.

Important Legal Notice: If an employer has violated the break time requirement or has indicated that they have no intention of providing private space to pump, or if an employee has been fired for requesting break time or space to pump the employee is able to file a lawsuit immediately. Additionally, if an employer has not provided adequate space to pump, employees must notify their employer, and the employer then has 10 days to comply.

SCENARIOS

Situational Analysis: ***Susan, who gave birth eight weeks ago, request two 15-minute breaks to express breast milk and a place to store the express milk. Her request is granted, and her employer begins deducting the two breaks (30 minutes) from her pay. Susan then points out to her employer that other employees in her workgroup are taking at least two 15-minute breaks a day for rest, smoking, etc., and their pay isn't being docked. She feels that she is being singled out by the employer. She is fired for her complaints, and files a lawsuit alleging retaliation under the PUMP Act. Does Susan have a valid complaint?***

Answer: Yes, and she may seek various legal remedies including, but not limited to, reinstatement, lost wages and an additional equal amount as liquidated damages (double damages), compensatory damages and make-whole relief, such as economic losses that resulted from violations, as well as punitive damages where appropriate.

Pregnant Workers Fairness Act (PWFA) of 2023

The Act, which is effective June 27, 2023, requires covered employers to provide "reasonable accommodations" to a worker's known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an "undue hardship." An "undue hardship" is significant difficulty or expense for the employer.

The PWFA protects employees and applicants of private and public sector employers with at least 15 employees, Congress, Federal agencies, employment agencies, and labor organizations.

Employers cannot:

- Require an employee to accept an accommodation without a discussion about the accommodation between the worker and the employer
- Deny a job or other employment opportunities to a qualified employee or applicant based on the person's need for a reasonable accommodation
- Require an employee to take leave if another reasonable accommodation can be provided that would let the employee keep working
- Retaliate against an individual for reporting or opposing unlawful discrimination under the PWFA or participating in a PWFA proceeding (such as an investigation)
- Interfere with any individual's rights under the PWFA

Potential reasonable accommodations include, but are not limited to, the ability to sit or drink water; receive closer parking; have flexible hours; receive appropriately sized uniforms and safety apparel; receive additional break time to use the bathroom, eat, and rest; take leave or time off to recover from childbirth; and be excused from strenuous activities and/or activities that involve exposure to compounds not safe for pregnancy.

Legal Notice: Other federal laws, e.g., FMLA, Title VII, PDA, PUMP Act, ADA, as well as state Pregnancy Discrimination and leave laws may also protect pregnant workers in regard to their pregnancy, childbirth, or related medical situations.

Situational Case Analysis: ***Peggy works as a delivery driver and is required to be able to lift up to 70 pounds as a part of her job duties. After becoming pregnant, her doctor advised she should not lift more than 20 pounds. She then asked for a light duty position, but her employer refused. However, her employer did provide light duty positions for certain workers, such as those injured on the job or who suffered from a disability recognized by the ADA, but it did not make such accommodations for those who were pregnant.***

After losing her medical coverage and being placed on unpaid leave, Peggy sued. Will she likely prevail in her case? Why or Why Not?

Answer: She will, as her employer's refusal to provide light duty work to accommodate her violated the PDA. The PDA states that employees "affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes…as other persons not so affected but similar in their ability or inability to work…"

Reference: See Young v. UPS, Inc. In this high-profile case, the Supreme Court made clear that an employer may not refuse to accommodate a pregnant worker based on considerations of cost or convenience when they accommodate other similar workers.

Recordkeeping and Reporting Requirements

Record Type and Retention Period	Legislation
Payroll records/records containing name, address, DOB, occupation, pay rate, and compensation/week **Retention:** 3 years	Fair Labor Standards Act (FLSA) Child Labor Law Equal Pay Act Age in Discrimination in Employment Act (ADEA)
Certificates, agreements, contracts, plans, sales and expense records **Retention:** 3 years	FLSA
Employment earnings records: timesheets, wage tables, work schedules, established hours **Retention:** 2 years	FLSA Equal Pay Act
Personnel or employment records, job applications, descriptions, records related to failure or refusal to hire, promotions, demotions, recalls, transfers, layoff, or termination, rates of pay and selection for training or apprenticeship **Retention:** ADEA 1 year, Title VII 6 months from date of record or action Executive Order 11246 – period not specified	ADEA Title VII Executive Order 11246
Work schedules, established hours and days of employment, wage rate tables for piece rates or other applicable rates **Retention:** 2 years	FLSA
Order, shipping, billing records, customer orders, invoices received, delivery records, bills of lading, and customer billings **Retention:** 2 years	FLSA
Certificates of age **Retention:** until employment termination	FLSA Child Labor Laws
Records of wage additions or deductions **Retention:** 2 years	FLSA Child Labor Laws
Records of wage additions or deductions **Retention:** 2 years	FLSA
Recruitment advertisements, employment agency or union job orders for recruitment **Retention:** 1 year	ADEA
Employment tests, results of physical examinations used regarding personnel actions **Retention:** 1 year	ADEA
Pre-employment records for temporary positions **Retention:** 90 days	ADEA
EEO 1 Employer Information Report **Retention:** Indefinitely	Title VII

Appendix

Recordkeeping and Reporting Requirements

Record Type and Retention Period	Legislation
Written affirmative action plans (including EEO required records on testing, validation of tests and results) **Retention:** Not specified – keep indefinitely	Executive Order 11246
Records of complaints and actions taken **Retention:** Executive Order 11246 – not specified Rehabilitation Act of 1973 – 1 year, Vietnam Era Veterans Readjustment Act – 1 year	Executive Order 11246 Rehabilitation Act of 1973 Vietnam Era Veterans Readjustment Act
Occupational injuries, illnesses, and fatalities including annual summary and record in detail **Retention:** 5 years	Occupational Safety and Health Act (OSHA)
Plan descriptions, annual reports, and summary annual reports (records of disclosure) **Retention:** 6 years after filing date of report	Employee Retirement Income Security Act (ERISA)
Documents and records regarding employment and advancement in employment of the handicapped, veterans, and veterans of the Vietnam era **Retention:** Rehabilitation Act of 1973 – not specified, Americans with Disabilities Act – 1 year, Vietnam Era Veterans Readjustment Act – 1 year after final payment under federal contract	Rehabilitation Act of 1973 Americans with Disabilities Act (ADA) Vietnam Era Veterans Readjustment Act
Basic payroll and identifying employee data, records of FMLA leave taken by FMLA eligible employees, hours of FMLA leave taken if less than one full day, copies of employee notices of leave and written notices given to employees, premium payments made by an employee for health insurance or other benefits during leave, dispute records, benefit plans, policies, and practices regarding taking of paid and unpaid leave **Retention:** 3 years	Family and Medical Leave Act (FMLA)
Designation of privacy officer and contact person, policies and procedures regarding the use and disclosure of protected health information, notice of privacy practices, employee training materials, signed authorizations, records of disclosures of protected information, individual complaints, records of sanctions, plan documents and sponsor certifications **Retention:** 6 years from the date created or last in effect, whichever is later	Health Insurance Portability and Accountability Act (HIPAA)
I-9 Form on terminated employees **Retention:** Later of 3 years after date of hire or 1 year after employment is terminated. Keep indefinitely for all active employees	Immigration Reform and Control Act of 1986 (IRCA)

Pre-Test Answers

1.	The ADA (Americans with Disabilities Act) was enacted to prohibit discrimination against employees with disabilities, but it also addresses discrimination against an individual because of his or her relationship with a person with a disability. ☑ a. True ☐ b. False
2.	To be eligible for FMLA (Family and Medical Leave Act) benefits, an employee must: ☐ a. Work for a covered employer ☐ b. Have worked for the employer for a total of 12 months ☐ c. Have worked at least 1,250 hours over the previous 12 months ☑ d. All of the above ☐ e. None of the above
3.	Which of the following laws, if any, prohibits employment discrimination based on race and/or color? ☑ a. Title VII of the Civil Rights Act of 1964 ☐ b. Age Discrimination in Employment Act of 1967 ☐ c. Title I of the Americans with Disabilities Act ☐ d. All of the above ☐ e. None of the above
4.	Which of the following states that union employees have a right to union representation at investigatory interviews? ☐ a. Workers' Compensation ☐ b. FMLA ☐ c. ADA ☑ d. Weingarten rights ☐ e. All of the above ☐ f. None of the above
5.	Employers are required to post notices to all employees advising them of their rights under the laws that the EEOC enforces and of their right to be free from retaliation. ☑ a. True ☐ b. False
6.	The ADEA (Age Discrimination in Employment Act) applies to all companies with one or more employees. ☐ a. True ☑ b. False
7.	Which of the following are major themes running through OSHA (Occupational Safety and Health Act) standards? ☐ a. Fear, protection, headgear ☑ b. Hazard assessment, written programs, training ☐ c. Wishful thinking, paperwork, hospital visitation ☐ d. All of the above ☐ e. None of the above
8.	Workers' compensation provides benefits to employees injured as a result of their employment. ☑ a. True ☐ b. False
9.	Upon return from FMLA leave, an employee must be restored to his or her original job or to an equivalent job. ☑ a. True ☐ b. False
10.	Employees currently abusing drugs or alcohol at work are not protected by the ADA when an employer takes disciplinary action, up to and including termination on that basis? ☑ a. True (see page 6) ☐ b. False

FMLA — Serious Health Condition

"Serious health condition" means an illness, injury, impairment, or physical or mental condition that involves either:

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

1. A period of incapacity lasting more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition that also includes:
   - treatment two or more times by or under the supervision of a health care provider (i.e., in-person visits, the first within 7 days and both within 30 days of the first day of incapacity); or
   - one treatment by a health care provider (i.e., an in-person visit within 7 days of the first day of incapacity) with a continuing regimen of treatment (e.g., prescription medication, physical therapy); or
2. Any period of incapacity related to pregnancy or for prenatal care. A visit to the health care provider is not necessary for each absence; or
3. Any period of incapacity or treatment for a chronic serious health condition which continues over an extended period of time, requires periodic visits (at least twice a year) to a health care provider, and may involve occasional episodes of incapacity. A visit to a health care provider is not necessary for each absence; or
4. A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective. Only supervision by a health care provider is required, rather than active treatment; or
5. Any absences to receive multiple treatments for restorative surgery or for a condition that would likely result in a period of incapacity of more than three days if not treated.

FMLA Notice and Certification

Employee Notice

Employees seeking to use FMLA leave are required to provide 30-day advance notice of the need to take FMLA leave when the need is foreseeable and such notice is practicable. If leave is foreseeable less than 30 days in advance, the employee must provide notice as soon as practicable – generally, either the same or next business day. When the need for leave is not foreseeable, the employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case. Absent unusual circumstances, employees must comply with the employer's usual and customary notice and procedural requirements for requesting leave.

Employees must provide sufficient information for an employer reasonably to determine whether the FMLA may apply to the leave request. Depending on the situation, such information may include that the employee is incapacitated due to pregnancy, has been hospitalized overnight, is unable to perform the functions of the job, and/or that the employee or employee's qualifying family member is under the continuing care of a health care provider.

When an employee seeks leave for a FMLA-qualifying reason for the first time, the employee need not expressly assert FMLA rights or even mention the FMLA. When an employee seeks leave, however, due to a FMLA-qualifying reason for which the employer has previously provided the employee FMLA-protected leave, the employee must specifically reference either the qualifying reason for leave or the need for FMLA leave.

Employer Notice

Covered employers must post a notice approved by the Secretary of Labor explaining rights and responsibilities under the FMLA. An employer that willfully violates this posting requirement may be subject to a civil money penalty of up to $110 for each separate offense. Additionally, employers must either include this general notice in employee handbooks or other written guidance to employees concerning benefits, or must distribute a copy of the notice to each new employee upon hiring. Employers may use the notice prepared by U.S. Department of Labor to meet this requirement.

When an employee requests FMLA leave or the employer acquires knowledge that leave may be for a FMLA purpose, the employer must notify the employee of his or her eligibility to take leave, and inform the employee of his/her rights and responsibilities under the FMLA. When the employer has enough information to determine that leave is being taken for a FMLA-qualifying reason, the employer must notify the employee that the leave is designated and will be counted as FMLA leave. Employers may use the optional forms WH-381 AND WH-382 prepared by the U.S. Department of Labor to meet these notification requirements.

FMLA Notice and Certification

Certification

Employers may require that an employee's request for leave due to a serious health condition affecting the employee or a covered family member be supported by a certification from a health care provider. An employer may require second or third medical opinions (at the employer's expense) and periodic recertification of a serious health condition. An employer may use a health care provider, a human resource professional, a leave administrator, or a management official – but not the employee's direct supervisor – to authenticate or clarify a medical certification of a serious health condition. An employer may have a uniformly-applied policy requiring employees returning from leave for their own serious health condition to submit a certification that they are able to resume work. If reasonable safety concerns exist, an employer may, under certain circumstances, require such a certification for employees returning from intermittent FMLA leave. Employers may use the optional forms WH-380-E AND WH-380-F prepared by the U.S. Department of Labor for obtaining medical certifications of serious health conditions.

FLSA Compensable Hours

Compensable hours of work generally include all of the time during which an employee is on duty on the employer's premises or at a prescribed workplace, as well as all other time during which the employee is suffered or permitted to work for the employer.

Such time includes all pre-shift and post-shift activities which are an integral part of the employee's principal activity or which are closely related to the performance of the principal activity, such as attending roll call, writing up and completing tickets or reports, and washing and re-racking fire hoses.

Waiting (On Call) Time

Whether waiting time is time worked under the Act depends upon the particular circumstances. Generally, the facts may show that the employee was engaged to wait (which is work time) or the facts may show that the employee was waiting to be engaged (which is not work time).

On Duty Waiting Time

When your employee is waiting for work to do, for repairs to be made, etc. while on duty, he or she is engaged to wait and the time is hours worked.

Off Duty Waiting Time

Off duty waiting time or layover time is a period during which the employee is waiting to be engaged and is not hours worked if:

- Your employee is completely relieved from duty;
- The periods are long enough to enable your employee to use the time effectively for his or her own purposes, e.g., more than 30 minutes;
- Your employee is definitely told in advance that he or she may leave the job; and
- Your employee is advised of the time that he or she is required to return to work.

FLSA Compensable Hours

Rest and Meal Periods

Rest and meal periods are not required under the FLSA, although those periods may be required under state laws.

Rest Periods

Rest periods of short duration, usually 20 minutes or less, are common in industry and are customarily paid as working time.

Unauthorized extensions of authorized work breaks need not be counted as hours worked when the employer has expressly and unambiguously communicated to the employee that the authorized break may only last for a specific length of time, that any extension of the break is contrary to the employer's rules, and any extension of the break will be punished.

Bona Fide Meal Periods

Bona fide meal periods (typically 30 minutes or more) generally need not be compensated as work time. The employee must be completely relieved from duty for the purpose of eating regular meals. The employee is not relieved if he/she is required to perform any duties, whether active or inactive, while eating, e.g., answering telephone calls.

Sleeping Time and Certain Other Activities

An employee who is required to be on duty for less than 24 hours is working even though he or she is permitted to sleep or engage in other personal activities when not busy.

An employee required to be on duty for 24 hours or more may agree with the employer to exclude from hours worked bona fide regularly scheduled sleeping periods of not more than 8 hours, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. No reduction is permitted unless at least 5 hours of sleep is taken.

Lectures, Meetings and Training Programs

Attendance at lectures, meetings, training programs and similar activities need not be counted as working time only if the following four criteria are met:

1. It is outside normal hours,
2. It is voluntary,
3. It is not job related, and
4. No other work is concurrently performed.

FLSA Compensable Hours

Travel Time

The principles which apply in determining whether time spent in travel is compensable time depends upon the kind of travel involved.

Home to Work Travel

An employee who travels from home before the regular workday and returns to his or her home at the end of the workday is engaged in ordinary home to work travel, which is not work time.

Home to Work on a Special One Day Assignment in Another City

This is a situation where an employee who regularly works at a fixed location in one city is given a special one day assignment in another city and returns home the same day. The time spent in traveling to and returning from the other city is work time, except that the employer may deduct/not count that time the employee would normally spend commuting to the regular work site.

Travel that Is All in the Day's Work

Time spent by an employee in travel as part of his or her principal activity, such as travel from job site to job site during the workday, is work time and must be counted as hours worked.

Travel Away from Home Community

Travel that keeps an employee away from home overnight is called, "travel away from home."

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

As an enforcement policy, the Division will not consider as work time that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.

RIFs and Older Workers

When obtaining releases and waivers from departing employees as part of a RIF, be aware that The Older Workers Benefit Protection Act of 1990 (OWBPA) contains amendments to the Age Discrimination in Employment Act (ADEA) that establish strict criteria for determining the sufficiency of a waiver under the ADEA. In short, to be effective, a waiver must:

- Be part of a written agreement that is easily understandable by the employee;
- Refer specifically to claims under the ADEA;
- Not encompass future ADEA claims;
- Be given in exchange for consideration beyond any benefit to which the employee is already entitled;
- Provide in writing that the employee is advised to consult with an attorney before signing the waiver; and
- Give the employee adequate time to consider the waiver before signing it. For individual terminations, the employee has 21 days; for a group, exit-incentive program, s/he has at least 45 days. In either case, the employee has seven days after signing in which to revoke the waiver.

In cases of a group-incentive program, the employer must also disclose in writing:

- The groups of employees eligible for the program;
- The program requirements;
- Any time limitations under the program; and
- The job titles and ages of all employees eligible or selected for the program and the same information for those not eligible or selected.