



## Human Resources for Anyone with Newly Assigned HR Responsibilities

SEMINAR WORKBOOK

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### Performance Objectives

**The legal principles and HR techniques presented and applied in this seminar will help you to:**

- Understand the basics of major federal laws dealing with both equal employment opportunity and wage and hour regulations.
- Comprehend basic employee benefits.
- Undertake HR document record retention.
- Establish and maintain employee privacy.
- Engage in basic employee coaching, counseling, and discipline.
- Apply critical, need to know, legal info about hiring and firing.

### Your Objectives



## The Essentials of Sound Risk Management in HR

### Tracking System

- Maintain personnel files in an easy-to-use format.
- Secure and maintain employee medical files.
- Track basic personnel data and consider tracking exempt **and** non-exempt employees for FLSA and FMLA purposes and to support the basis of employee discipline for performance/attendance issues.
- Complete required government forms and reports.

### Employee Handbook

- Create sound written policies, update policies, and counsel employees and managers.
- Answer employee questions or concerns regarding benefits and payroll.
- Act as a resource to decision makers by developing policies and procedures.
- Utilize clear policies to provide consistency and fairness.

### Job Descriptions & HR – Related Memoranda

- Develop and maintain job descriptions that are legally sound and describe the essential functions of each position.
- Screen employment candidates and check references.

### Performance Evaluations

- Develop and maintain a minimum level of sophistication in evaluating employees' job performance.
- Support payroll decisions, promotions, demotions, and terminations with objective data.
- Create and counsel management on the use of evaluations, coaching, and counseling notes.

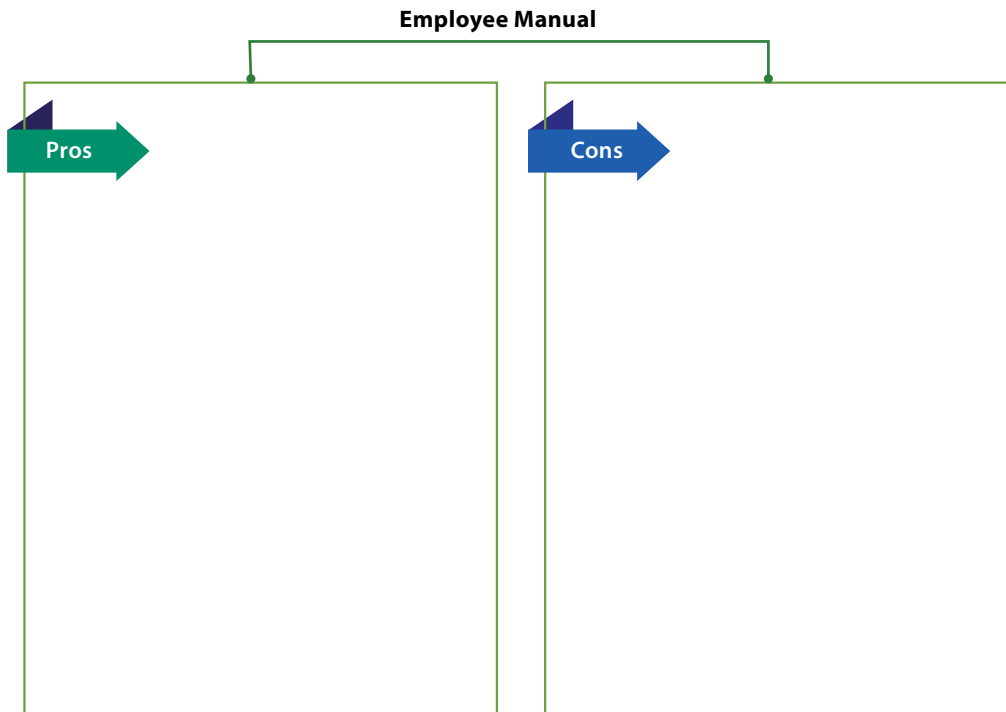
### Training

- Conduct activities to minimize risk to the organization.
- Training related to discrimination, harassment and safety.
- Participate in internal investigations and continue your own training to be up to date on frequent changes in the law.



### The Employee Handbook: Rules for Must-Have Content (and Guidelines on What to Leave Out)

No law requires an organization to actually have an employee handbook, although some laws, e.g., The Family and Medical Leave Act (FMLA) require organizations to provide information, notices, etc., to their employees.



#### Ways to Get Employees to See the HR Department as a Positive Resource

**Assertive Communication:** Policies should be in writing and distributed to workers in a timely manner.

**Relationship Building:** Earn respect of employees. Maintain confidentiality and privacy. Deliver on commitments. Give employees direction to solve problems.

**Knowledge of the Law and Procedures:** Be technically skilled in the law and your organizations policies and procedures.

**Conflict Resolutions Skills:** Be fair, consistent and confident. Follow established policies and procedures. Serve all levels of employees equally well. Dealing with conflict is part of the role. Those who master conflict resolution are often seen as a positive resource.



#### SUCCESS TIP

Educate employees on written and unwritten company policies by personally going over important handbook policies with your direct reports.



### Federal Laws Prohibiting Job Discrimination

**Title VII of the Civil Rights Act of 1964 (Title VII)**, which prohibits employment discrimination based on race, color, religion, sex, and national origin.

**Equal Pay Act of 1963 (EPA)**, which protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination.

**Lilly Ledbetter Fair Pay Act of 2009** extends the timeframe for filing wage-based pay discrimination claims with the EEOC.

**Age Discrimination in Employment Act of 1967 (ADEA)**, which protects individuals who are 40 years of age or older.

**Title I of the Americans with Disabilities Act of 1990 (ADA) and Amendments Act (ADAAA) of 2009**, which prohibits employment discrimination against qualified individuals with disabilities in the private sector, and in state and local governments.

**Sections 501 and 505 of the Rehabilitation Act of 1973**, which prohibits discrimination against qualified individuals with disabilities who work in the federal government.

**Civil Rights Act of 1991**, which, among other things, provides monetary damages in cases of intentional employment discrimination, and the right to a jury trial.

**Pregnancy Discrimination Act of 1978**, which provides that employment discrimination, based on pregnancy, childbirth, and related medical conditions, is prohibited under Title VII.

**The Genetic Information Nondiscrimination Act of 2008 (GINA)**, which prohibits employers from using a person's genetic information in making employment decisions such as hiring, firing, job assignments, or any other terms of employment. GINA prohibits employers from requesting, requiring, or purchasing genetic information about persons or their family members.

The U.S. Equal Employment Opportunity Commission (EEOC) enforces all of these laws. EEOC also provides oversight and coordination of all federal equal employment opportunity regulations, practices, and policies. [www.eeoc.gov](http://www.eeoc.gov).

### State Laws Prohibiting Job Discrimination

- A majority of states have enacted Fair Employment Practice (FEP) statutes that parallel or exceed federal coverage, and are enforced by state fair employment practice agencies (FEPAs). Some cities and counties also have instituted similar laws.
- Whichever law offers the greatest protection to the covered party is the one employers must follow.



## Are Your Current Practices Legally Sound?

### Things an Employer May 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 discrimination laws in an obvious place, and/or to keep it posted.

### Forms of Discrimination

**Disparate Treatment:** Different treatment due to membership in a protected group.

**Disparate Impact:** Seemingly neutral policy or procedure has an unequal effect on members of a protected class.

**Bona Fide Occupational Qualification (BFOQ):** Requirements that go to the heart of a job, which permit an employer to, in effect, discriminate. Example: corresponding sex dressing room security in clothing stores. There are no BFOQs for race.



### SUCCESS TIP

A smart practice that keeps your organization out of legal trouble and minimizes liability is to include job-related requirements only in your job descriptions and recruiting ads.



## Title VII Protected Classes

### Race and Color, and National Origin

- Prohibits discrimination because of racial origins, ethnicity or skin color
- Race and Color Definitions:
  - Race discrimination prohibitions apply to actions against ethnic groups, e.g., Hispanics, Asians
  - Preference for lighter or darker skin is color discrimination
  - Cannot use race of spouse to discriminate
- National Origin Definition: country from which an employee or his/her forbearers came
  - Prohibits discrimination based on cultural differences
  - Prohibits discrimination based on linguistic differences, e.g., accented English

### Sex and Pregnancy

- Sex defined as biology, not sexuality (sexual orientation) or gender identity, e.g., transsexuals
- Rule applied to one sex only is discrimination
- May not measure job performance in terms of sex stereotypes
- Sex includes pregnancy and related conditions
  - Note: Must treat pregnancy the same way the organization treats any other short-term disability**
- States and municipalities may limit discrimination based on sexual preference
- A number of states and cities have created sexual orientation and gender identity protections
- Homosexuality is not a disability under the ADA

### Religion and Religious Practices

- Prohibits religious preferences unless religion is a BFOQ (ministerial exemption)
- Religion defined broadly: "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views"
  - Note: Atheists are protected: EEOC v. Townley Manufacturing, 859 F.2d 610 (9th Cir.1988)**
- Discrimination based on religion by secular employer permitted for closely held, for-profit corporations if there is a less restrictive means of furthering the law's interests *Burwell v. Hobby Lobby Stores, Inc.*, 573 US \_\_\_ (S Ct 2014)
- Membership in Klan or other hate groups not protected religious activity
- Duty to accommodate (Holy Days observance, grooming and clothing practices) unless more than a minimal burden on the operation of the employer's business





## Protected Classes

### ADEA Protected Classes

#### Age

- Over 40
- No ceiling except for a few public safety jobs: police, fire, airline pilots

### ADA Protected Classes

#### Disability

##### Three definitions of covered individuals:

- Mental or physical impairment that limits one or more major life activities
- History of an impairment
- Regarded as having an impairment

### Protected Classes Under State Fair Employment Practice Acts

#### Sexual Orientation

- Homosexuality, heterosexuality, bisexuality

#### Gender Identity

- Transgender individuals

#### 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.

### Types of Signage You Must Display in Your Business

- Most federal and state EEO laws require employers to display posters that explain employees' rights and responsibilities in a conspicuous place where workers are likely to see them.

Federal posters may be ordered or downloaded from: <https://www.dol.gov/oasam/boc/osdbu/sbrefa/poster/matrix.htm>



## Legal Hiring Practices – What You May and May Not Ask In an Interview

	Acceptable	Unacceptable
Name	Can ask if applicant has ever worked for company under another name.	Have you ever had any other names?
Birthplace	No acceptable questions.	Where were you born? Where were your parents born? Requiring a birth certificate.
Age	Can ask if they meet all age-required conditions of the job.	How old are you? Any questions attempting to determine the age of the applicant are unacceptable, unless BFOQ-related e.g., being at least 21 to serve hard liquor in a lounge.
Religion	No acceptable questions unless BFOQ-related, e.g., teaching a parochial school.	Questions about religion generally or about what days they may need off for religious observance unless discussing a reasonable accommodation requested by applicant.
Work Schedule	Can ask if they meet the attendance requirements of the position.	Any questions about health conditions that would lead to absences from work.
Race	No acceptable questions.	Any questions seeking to elicit what race the applicant is or other questions indicating race or color.
Photographs	Unacceptable unless BFOQ, e.g., some sort of acting role.	Please attach a photograph.
Citizenship	The only acceptable question is whether the applicant will be able to prove that they are authorized to work in the U.S. as part of Form I-9 verification.	Any questions asking or seeking to elicit what nationality the applicant is.
National Origin	Languages that the applicant can read, write, or speak and their level of fluency if job-related.	Any questions about their national lineage or date of entry into the U.S. Any questions concerning the national origin of the applicant's spouse or mother. Any questions such as, "What is your mother tongue?"
Education	Applicant's educational background.	When did you graduate from high school? When did you receive your college degree?
Experience	Can ask questions like: What is your work experience? Why did you leave your last job?	What type of discharge did you receive from the military?
Arrests	No acceptable questions.	Have you ever been arrested?
Felony Convictions	Can ask about felony convictions in all states. In many states, may only disqualify applicant for a job-related reason and not just because of the conviction itself.	Have you ever been indicted for a crime?
Relatives	Name of any relatives employed by the company.	Are you married? What relatives live with you? With whom do you reside?
Physical Condition	Can you perform the essential functions of the position for which you are interviewing with or without a reasonable accommodation?	Are you disabled? Are you healthy? Any pre-job offer questions concerning worker's compensation.
Misc.	A statement that any material misstatements made by the applicant may result in immediate dismissal.	Any questions that are not related to the position or necessary to evaluate the applicant's capability to perform the job.



## Americans with Disabilities Act Hiring Do's and Don'ts

The ADA does not allow you to ask questions about disability or perform a medical examination until after you make someone a conditional job offer.



**Note:** Employers have the obligation to protect potential employees from discrimination. Is your application in compliance with EEO laws?

**Tip:** Include an accommodation statement on applications.

### Pre-Job Offer

Examples – What you can ask:	Examples – What you can't ask:
<ul style="list-style-type: none"><li>• Whether s/he has the right education, training, and skills for the position.</li><li>• Whether s/he can satisfy the job's requirements or essential functions (create and use ADA compliant job descriptions that set forth the BFOQ's, ergonomic, environmental, and physical conditions of the job).</li><li>• How much time off the applicant took in a previous job (but not why), the reason s/he left a previous job, and any past disciplinary actions.</li></ul>	<ul style="list-style-type: none"><li>• <b>Nature and/or duration of disability</b> – questions about an applicant's physical or mental impairment or how s/he became disabled (for example: questions about why the applicant uses a wheelchair).</li><li>• <b>Use of medication</b> – questions about an applicant's use of medication.</li><li>• <b>Worker's compensation history</b> – questions about an applicant's prior workers' compensation claims/history.</li></ul>



### GOOD TO KNOW

**Exception:** Where it seems likely that an applicant has an observable disability that will require a reasonable accommodation, you may ask whether s/he will need one. This is an exception to the usual rule that questions regarding disability and reasonable accommodation should come after making a conditional job offer.



## Post-Job Offer

You can condition a job offer on the applicant successfully passing a medical exam that tests their ability to perform the essential functions of the job. After making a job offer, you may ask any disability-related questions and conduct medical examinations as long as you do this for everybody in the same job category.

Examples – What you can do:	Examples – What you can't do:
<ul style="list-style-type: none"><li>• If you want to give a medical examination to someone who has been offered a job that involves heavy labor, you must give the same exam to anyone who is offered the same kind of job.</li><li>• You may withdraw an offer of a manufacturing job involving the use of dangerous machinery if you learn during a post-offer medical exam that the applicant has frequent and unpredictable seizures.</li></ul>	<ul style="list-style-type: none"><li>• You can't withdraw an offer to an HIV-positive applicant because you are concerned about customer and client reactions or because you assume that anyone with HIV infection will be unable to work long and stressful hours.</li></ul>

## Privacy and the HR Function – Best practices of human resources professionals

With limited exceptions, you must keep private any medical information you learn about an applicant or employee. Privacy rights can attach to information even if it contains no medical diagnosis or treatment course and even if it is not generated by a health care professional.

Do not place medical information in regular personnel files. Rather, keep medical information (ADA-covered, FMLA-covered, HIPAA, Workers Compensation, benefits enrollment forms, etc.) in a separate medical file that is accessible only to designated personnel. Medical information stored electronically must be similarly protected (e.g., by storing it on a separate database).



## ADA Interactive Process

The ADA requires covered employers to provide effective, reasonable accommodations for employees with disabilities.

Source: [www.askjan.org](http://www.askjan.org)

### Step 1: Recognize an Accommodation Request

The interactive process starts with an accommodation request from an employee with a disability. According to the EEOC, an individual may use "plain English" and does not need to mention the ADA or use the phrase "reasonable accommodation" when requesting an accommodation.

#### Request Analysis

Scenario	Facts	Is this a request for a reasonable accommodation?
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.	



#### Tips

- Err on the side of caution
- Act quickly
- Assign responsibility
- Conduct training

### Step 2: Gather Information

After receiving the request, the employer should gather necessary information to process the request.



#### Tips

- Find out the limitation and problem
- Get information from the employee when possible
- Remember ADA rules for medical inquiries



## ADA Interactive Process

### Step 3: Explore Accommodation Options

After gathering the necessary information, the employer is ready to explore accommodation options.



#### Tips

- Keep an open mind
- Invite the employee to suggest accommodations
- Ask the employee's medical provider for ideas

### Step 4: Choose an Accommodation

If there is more than one option, the employer should consider the preference of the employee. However, the employer gets to choose among effective options and can choose, for example, the lowest cost accommodation.



#### Tips

- Consider the employee's preference
- Consider a trial period

### Step 5: Implement the Accommodation



#### Tips

- Make sure all necessary steps are taken to implement the accommodation
- Communicate with essential personnel about the accommodation

### Step 6: Monitor the Accommodation

An important but often forgotten part of the interactive process is monitoring accommodations after they are in place.



#### Tips

- Check on effectiveness
- Maintain the accommodation
- Encourage ongoing communication
- Recognize that needs change and a new accommodation may be required subsequently

## 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.



## Interview Questions and Techniques that Will Yield the Best Hires

You cannot interview the person until you've analyzed the job. Identify and determine in detail the particular job duties and requirements and the relative importance of these duties for a given job.

- ☐ Review job description
- ☐ Interview incumbents
- ☐ Conduct supervisor interviews
- ☐ Develop performance-based questions:
  - ***“Describe a time when you...”***
  - ***“Describe the circumstances under which you most recently...”***
  - ***“Tell me about a specific job experience in which you...”***
  - ***“Give me an example of a specific occasion when you...”***
  - ***“What did you do in your last job in order to...”***
  - ***“How often in the past year were you called upon to...”***
- ☐ Get a background check release
- ☐ Ask:
  1. Did the applicant work for you?
  2. What were the applicant's dates of employment?
  3. What was the applicant's job title or general job duties?
- ☐ Inquire about (examples)
  - ***How did the candidate get along with superiors, peers and subordinates?***
  - ***Describe the candidate's attitudes and other personality factors.***
  - ***What were some of the candidate's outstanding accomplishments?***
  - ***How effective was the candidate in terms of quantity and quality of work?***
  - ***How creative was the candidate?***
  - ***How much initiative did s/he display? Motivation level? Resourcefulness?***



### GOOD TO KNOW

References, background checks, and drug tests –  
The legally safe way to get the information you need.



## Benefits Essentials

### Medical Benefits

- Covers the costs of surgeon and physician fees, hospital rooms, and pharmaceuticals.
- Dental and optical care is generally not included, but might be offered as part of an overall benefits package.
- Coverage can be extended to the employee's family (dependents).

### The Family and Medical Leave Act

FMLA provides two major employee benefits: Job restoration and maintenance of benefits. A covered employer must grant an eligible employee up to a total of 12 workweeks of unpaid leave during the employer-designated leave year (military caregiver leave must be counted on a 12-month period measured forward) for one or more of the following reasons:

- For the birth and care of the newborn child of the employee;
- For placement with the employee of a son or daughter for adoption or foster care;
  - Leave for birth and care, or placement for adoption or foster care must conclude within 12 months following the birth or placement.
- To care for an immediate family member (spouse, child, or parent) with a serious health condition; or
- To take medical leave when the employee is unable to work because of a serious health condition.
  - Spouses employed by the same employer are jointly entitled to a combined total of 12 workweeks of family leave for the birth and care of the newborn child, for placement of a child for adoption or foster care, and to care for a parent who has a serious health condition.
- Up to 12 weeks of leave for an “exigency” related to active military duty service by the employee’s spouse, son, daughter, or parent; and
- Up to 26 weeks of leave to care for a spouse, son, daughter, parent, or next of kin who is a covered veteran member of the armed forces and who is a covered veteran and who is undergoing medical treatment or who is medically unfit to perform military duties due to an injury or illness incurred or aggravated while on active duty.





### Consolidated Omnibus Budget Reconciliation Act (COBRA)

The Consolidated Omnibus Budget Reconciliation Act of 1985, commonly called COBRA, applies to employers who employ 20 or more workers on 50 percent of the business days during the preceding calendar year. Provides certain former employees, retirees, spouses, former spouses, and dependent children the right to temporary continuation of health coverage at a more expensive rate than the group rate since the person may be charged the full premium.

#### COBRA Qualifying Events

##### Employees (*like spouses and dependent children appears on the page*)

- Voluntary or involuntary termination of employment for reasons other than gross misconduct
- Reduction in the number of hours of employment

##### Spouses

- Voluntary or involuntary termination of the covered employee's employment for any reason other than gross misconduct
- Reduction in the hours worked by the covered employee
- Covered employee becoming entitled to Medicare
- Divorce or legal separation of the covered employee
- Death of the covered employee

##### Dependent Children

- Same as those for a spouse
- Loss of dependent child status under the plan rule. Under the Patient Protection and Affordable Care Act, plans that offer coverage to children on their parents' plan must make the coverage available until the adult child reaches the age of 26.

#### COBRA Coverage Periods

Qualifying Event	Qualifying Beneficiaries	Maximum Period of Continuation Coverage
<ul style="list-style-type: none"><li>• Termination (for reasons other than gross misconduct)</li><li>• Reduction in hours of employment</li></ul>	<ul style="list-style-type: none"><li>• Employee</li><li>• Spouse</li><li>• Dependent Child</li></ul>	18 months
Employee enrollment in Medicare	<ul style="list-style-type: none"><li>• Spouse</li><li>• Dependent Child</li></ul>	36 months
Divorce or legal separation	<ul style="list-style-type: none"><li>• Spouse</li><li>• Dependent Child</li></ul>	36 months
Death of employee	<ul style="list-style-type: none"><li>• Spouse</li><li>• Dependent Child</li></ul>	36 months
Loss of "dependent child" status under the plan	<ul style="list-style-type: none"><li>• Dependent Child</li></ul>	36 months



## Workers' Compensation

- Covers the cost of medical care and rehabilitation for workers injured on the job.
- Compensates employees for lost wages and provides death benefits for their dependents if they are killed in work-related accidents.
- Workers compensation systems vary from state to state.

## Retirement Benefits

## Disability Benefits

## Life Insurance

## Paid Time Off ("PTO")

## Fringe Benefits

## Bonuses

## Stock Options



## **Ways to Get Employees to See the HR Department as a Positive Resource**

- Face-to-face meetings with HR
- Phone conversations with CSR
- Internet/Intranet
- Phone conversation with HR
- Email

## **Training Methods to Familiarize Your Employees with Available Benefits**

- Side-by-side comparisons of the user's eligible plans
- Insurance and retirement calculators
- Medical cost calculators

## **Steps to Take When Benefits Change...for the Better or the Worse**

- Send information about renewal 2-3 months in advance
- Conduct presentations
- Have employee benefit clinics
- Set up employee help lines
- Use the internet to make information available at home
- Explain the business rationale for the change



# Sexual Harassment

Sexual harassment training is the training every supervisor and employee must receive to ensure a safe work environment and policy adherence within your organization.

## EEO Guidelines Definition

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

### Quid Pro Quo

- Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,
- Submission to or rejection of such conduct is used as the basis for employment decisions affecting such individual, or

### Hostile Environment

- Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

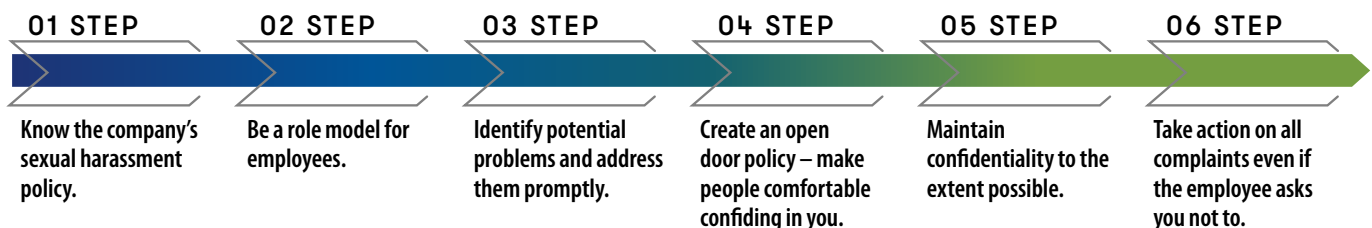
***EEOC Guidelines on Discrimination because of Sex, 29 CFR §1604.11***

## **Burlington Industries, Inc. v. Ellerth, 118 s. ct. 2257 (1998), and Faragher v. City of Boca Raton, 118 s. ct. 2275 (1998)**

- Strict liability for supervisory sexual harassment that results in a tangible job action
- If no tangible job action, employer may avoid liability if it can prove that:
  1. There was a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and
  2. The plaintiff unreasonably failed to avail herself of that employer-provided preventive or remedial apparatus,
  3. The employer acted promptly to stop the alleged harassment.

## What You Should Do

**Follow these six steps to eliminate harassment and prevent it in the future:**





## Coaching and Counseling

- Provide new employees with a copy of employee handbook
- Explain general conduct requirements
- Orient employees in the specific conduct requirements of their positions.
- Counsel employees in a timely manner
- Offer to assist the employee in improving his/her conduct and to be available, within reasonable limitations, for any further consultation that the employee may request.
- Advise the employee of the availability of the EAP
- Document behavior using objective data and verifiable facts

## How to Conduct a Performance Review that is Effective, Motivating, and Legally Sound

### 1. Use a legally valid performance review process

- Job-related;
- Based on a thorough analysis of the job;
- Standardized for all employees;
- Not biased based upon protected class status;
- A route for recourse if an employee feels s/he has been dealt with unfairly; and,
- Process should be clearly described in a personnel policy.

### 2. Use a standard form

- Name of the employee;
- Date the performance form was completed;
- Dates specifying the time interval over which the employee is being evaluated;
- Performance dimensions (include responsibilities from the job description, any assigned goals from the strategic plan, along with needed skills, such as communications, teamwork, etc.);
- A rating system (e.g., poor, average, good, excellent);
- Space for commentary for each dimension evaluated;
- Section for overall commentary;
- Section for action plans to address improvements; and,
- Lines for signatures of the supervisor and employee.



- 3. Have the employee rate themselves**
- 4. Document your input – reference the job description and performance goals**
- 5. Hold the performance appraisal meeting**
- 6. Update and finalize the performance appraisal form**
- 7. Nothing should be new information to the employee during the appraisal meeting—an annual appraisal is not a substitute for timely supervisory feedback**

### Guidelines for Legal Termination of an Employee

- Review alternatives to termination
- Review final event carefully
- Anticipate and plan for this employee's most likely reactions
- Prepare what you will say ahead of time
- Give an adequate reason for the discharge
- Allow employee to speak
- Make it clear that the decision is final
- Briefly run through the company benefits, if any, including COBRA
- Provide last paycheck
- Obtain release if timing is right
- Discuss the company's job reference policy
- Collect any keys, phones, computers, company car, company credit cards, etc.



# Occupational Safety and Health Act (OSHA)

Applies to any employer engaged in a business which affects interstate commerce, and imposes general duty to maintain safe place to work and to comply with OSHA regulations issued by the Labor Department.

## The General Duty Clause – OSH §5(a)

Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause serious injury or death.

- **Employer** – Any person in a business affecting commerce who has even one employee. Does not include any state or political subdivision of a state. Twenty-six states and territories, however, have approved OSHA programs which are equal to or stricter than the federal model; and, in those states/territories, all workers, including public service workers, are covered by the law. By Presidential Order, in 1980, federal workplaces became subject to the OSH Act.
- **Employee** – Anyone who works on behalf of an employer, whether paid or unpaid.

### **OSH §5(b)**

Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.

- **The Standards**

### **OSH §5(a)(2)**

Each employer shall comply with occupational safety and health standards promulgated under this Act which apply to his own actions and conduct.

- **Major Themes Running Through the OSH Act and Standards**

- Hazard Assessment
- Written Programs
- Training



# Understanding the Fair Labor Standards Act (FLSA)

## Exempt vs. Non-exempt Classifications

- Nonexempt employees are entitled to minimum wage and overtime pay. Exempt employees are not.
- Exempt
  - Salary test – True salary of at least \$\_\_\_\_\_ week
  - Duties Test
    - Executive
    - Professional
    - Administrative
    - Computer
    - Outside Sales

## Wage and Hour Basics

- Minimum wage and overtime
  - Both the FLSA and state wage and hour laws establish a minimum wage which must be paid to non-exempt employees for each hour worked. Whichever law provides for a higher wage governs. There is no maximum wage.
  - Under the FLSA, employees must be paid at the rate of time and one-half their regular hourly rate for compensable hours over forty during a workweek. Some states provide a daily overtime rate after a certain number of hours worked.
  - A workweek is comprised of a fixed and regularly recurring period of 168 hours, or seven consecutive 24-hour periods. The workweek can begin any hour of the day and day of the week. The beginning of the workweek may be changed only if the change is intended to be permanent and not to circumvent the law. Each workweek stands alone.
- “Comp” time
  - Public sector: Yes
  - Private sector: No
- On-call time



## SUCCESS TIP

**Review and revise job descriptions routinely to ensure proper classification of employees according to actual job duties, not just job title. Fines for improper classification include back wages and overtime, fines, penalties, and attorney’s fees.**





### The EEOC ADA guidelines for managing employee personal and medical information are:

- Keep the information in a separate, locked cabinet apart from the personnel file.
- If computer files are used, store the information on a database separate from personnel files; and
- Designate only a specific person or persons to have access to the medical file.

### The EEOC recognizes certain exceptions to the privacy requirement:

1. Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
2. First aid and safety personnel may be informed, when appropriate, if a disability might require emergency treatment or special procedures;
3. Government officials investigating compliance with the ADA and other federal and state laws prohibiting discrimination on the basis of disability should be provided relevant information on request;
4. Relevant information may be provided to state workers' compensation offices or second injury funds, in compliance with state workers' compensation laws; and
5. Relevant information may be disclosed to insurance companies where the company requires a medical examination to provide health or life insurance to employees.

### HIPAA Privacy Rule

The federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) sets a national standard for privacy of health information.

HIPAA only applies to medical records maintained by health care providers, health plans, and health clearinghouses and only if the facility maintains and transmits records in electronic form.

**Example:** *If a company is merely a participant in a health care program, is not self-insured, and the health plan intakes and processes claims, the company is not covered by HIPAA.*

A great deal of health-related information exists outside of health care facilities and the files of health plans, and is not covered by HIPAA.



### Example Background Check Release Form

*In connection with my application for employment with \_\_\_\_\_ (Company), I understand and agree that investigative inquiries are to be made on myself including, but not limited to, consumer credit, criminal convictions, motor vehicle history, educational transcripts, and other reports of any nature and type, including information in the public domain. These reports will include information as to my character, work, habits, performance, and experience together with reasons for termination of past employment.*

*I understand and agree that Company can and will be requesting information from various federal, state, and other agencies that maintain records concerning my past activities related to my driving, credit, criminal, education, and other experiences. I authorize without reservation all corporations, companies, credit agencies, persons, educational institutions, law enforcement agencies, and former employers to release information they may have about me, and release them from any liability and responsibility for doing so; further, I authorize the procurement of an investigative consumer report related to me and acknowledge my understanding that such report may contain information as to my background, mode of living, character, and personal reputation.*

*This authorization, in original and copy form, shall be valid for this and any future reports that may be requested.*

*I hereby authorize investigation of all statements made by me with no liability arising there from.*

**Printed Name:** \_\_\_\_\_ **Date:** \_\_\_\_\_

**Signature:** \_\_\_\_\_



## FLSA Exemptions

	Executive Employees	Administrative Employees	Learned Professional Employees	Creative Professional Employees	Computer Employees	Outside Sales Employees
Salary	\$_____ per week	\$_____ per week	\$_____ per week	\$_____ per week	\$_____ per week or \$_____ an hour	None Required
Duties	Primary duty is the management of the enterprise or a recognized department or subdivision of the enterprise. Customarily and regularly directs the work of at least two or more other full-time or equivalent employees. Has authority to hire or fire other employees (or recommendations as to hiring, firing, promotion, or other change of status of other employees are given particular weight).	Primary duty of performing office or non-manual work directly related to the management or general business operations of the employer or the employer's customers. Holds a "position of responsibility" with the employer, defined as either (1) performing work of substantial importance or (2) performing work requiring a high level of skill or training. Customarily and regularly exercises discretion and independent judgment.	Primary duty of performing office or non-manual work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience.	Primary duty of performing work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.	Primary duty of (A) application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional applications; or (B) 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; or (C) design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or (D) a combination of duties described in (A), (B) and (C), the performance of which requires the same level of skills. Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field.	Primary duty of making sales; or of obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer. Customarily and regularly engaged away from the employer's place or places of business.



### Employee Files – What Goes In, What Stays Out, Who Has Access

#### Recommended Contents of Personnel Files

An employee's personnel file contains all records related to their history with an employer. Maintaining accurate and complete personnel files ensures compliance, supports hiring decisions, and protects in the case of a lawsuit or complaint.

##### Employment

- Request for application
- Employee's original employment application
- Education verification
- Employment verification
- Other background verification
- Rejection letter
- Employment offer letter
- Employment agency agreement if hired through an agency
- Employee handbook acknowledgment form showing receipt of handbook
- Mandatory arbitration acknowledgement (if applicable)
- New employee orientation topic checklist
- Transfer requests
- Relocation offer records
- Relocation report
- Security clearance status

##### Payroll

- Weekly time sheets
- Individual attendance record
- Pay advance request record
- Authorization for release of private information
- Authorization for all other payroll actions

##### Performance Appraisals

- New employee progress reports
- Performance appraisal forms
- Performance improvement program records

##### Employee Relations

- Report of coaching/counseling session (non-medical)
- Employee Assistance Program consent form
- Commendations
- Employee written warning notice

##### Training and Development

- Training history records
- Training program applications/requests
- Skills inventory questionnaire
- Training evaluation forms
- In-house training notification letters
- Training expense reimbursement records

##### Employee Separations

- Exit interview form
- Final employee performance appraisal
- Exit interviewer's comment form
- Record of documents given with final paycheck

##### Benefits

- Emergency contact form
- Vacation accrual/taken form
- Request for non-medical leave of absence
- Retirement application
- COBRA notification/election
- Hazardous substance notification and or reports
- Tuition reimbursement application and/or payment records
- Employer concession and or discount authorization
- Annual benefits statement acknowledgment
- Safety training/meeting attendance/summary forms

##### Wage/Salary Administration

- Job description form
- Job analysis questionnaire
- Fair Labor Standards Act exemption test
- Compensation history record
- Compensation recommendations
- Notification of wage and or salary increase/decrease



#### GOOD TO KNOW

Only permit individuals with a business-related reason to see any portion of an employee's personnel file. Be particularly vigilant with regard to medical information and personally identifying information such as Social Security Numbers.



### Employee Files – What Goes In, What Stays Out, Who Has Access

#### Files to Secure in a Separate Location

Many types of records only need to be accessed by certain individuals. Some are required by law to be kept in a separate location. Any record that contains an employee Social Security number, medical information, family medical history, financial and banking information, or immigration and citizenship status must be kept separate from the personnel file in a locked (or, if kept digitally, encrypted) location. Some examples of these records include:

#### General Records

- Prescreening application notes
- College recruiting interview report form
- Employment interview report form

#### Medical Records

- Veterans/Disability self-identification form
- Physician records of examination
- Diagnostic records
- Laboratory test records
- Drug screening records
- Any of the records covered by HIPAA
- FMLA forms and certifications
- Workers Compensation data
- Occupational Safety and Health data
- Any other medical records with personally identifiable information about individual employees

#### Confidential Records

- Discrimination complaint investigation information
- Legal case data
- Accusations of policy/legal violations
- Background investigation information
- Personal credit history
- Personal criminal conviction history
- I-9 forms

#### Payroll Records

- W4 forms
- Garnishment orders and records
- Payroll authorization forms



### Pre-Employment and Employment Records You Must Keep Under Title VII and the ADA

#### **29 CFR 1602.14 Preservation of Records Made or Kept**

Any personnel or employment record made or kept by an employer (including but not necessarily limited to requests for reasonable accommodation, application forms submitted by applicants, and other records having to do with hiring, promotion, demotion, transfer, layoff or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship) shall be preserved by the employer for a period of one year from the date of the making of the record or the personnel action involved, whichever occurs later. In the case of involuntary termination of an employee, the personnel records of the individual terminated shall be kept for a period of one year from the date of termination. Where a charge of discrimination has been filed, or an action brought by the Commission or the Attorney General, against an employer under title VII or the ADA, the respondent employer shall preserve all personnel records relevant to the charge or action until final disposition of the charge or the action.

The term “personnel records relevant to the charge,” for example, would include personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person and application forms or test papers completed by an unsuccessful applicant and by all other candidates for the same position as that for which the aggrieved person applied and was rejected.

The date of final disposition of the charge or the action means the date of expiration of the statutory period within which the aggrieved person may bring an action in a U.S. District Court or, where an action is brought against an employer either by the aggrieved person, the Commission, or by the Attorney General, the date on which such litigation is terminated.

#### **EEOC Documentation Update – Electronic Applicants**

**In order for an individual to be an applicant in the context of the internet and related electronic data processing technologies, the following must have occurred:**

- The employer has acted to fill a particular position;
- The individual has followed the employer's standard procedures for submitting applications; and
- The individual has indicated an interest in the particular position.



### Employee Records

#### Job Advertisements and Internal Job Postings

- Retain for a minimum of one year
- Per the ADA, ADEA, and FLSA

#### Resumes and Applications

- Retain all resumes and employee job applications for one year
- Per the ADA, Rehabilitation Act, Title VII, and ADEA

#### Employment Action Records

- Retain a minimum of one year
- Record types: training, promotions, demotions, transfers, and terminations
- Per the ADA, ADEA, and Title VII

#### Safety and Health Records

- Retain training related to safety and health for three years
- Per OSHA guidelines

#### Wage and Hour Records

- Retain basic employment and earnings records for two years
- Retain payroll records for three years
- Per the FLSA and Equal Pay Act

#### Tax Records

- Retain income tax withholdings information for four years
- Per the Federal Insurance Contribution Act (FICA) and Federal Unemployment Tax Act (FUTA)

#### Retirement and Pension Records

- Retain employee benefit plan information, including summary plan descriptions (SPDs) and annual reports, for six years
- Per the Employee Retirement Income Security Act (ERISA)

#### Leave Records

- Retain leaves of absence, such as employee time off and medical certification records, for three years
- Per the FMLA

#### Job-Related Illness and Injury Records

- Retain job-related illnesses and injuries (Forms 300, 300A and 301) for five years
- Retain medical exam results for 30 years after the employee's termination in cases of exposure to toxic substances or bloodborne pathogens
- Per OSHA guidelines



### Photocopying and Retaining Form I-9

#### I-9 Forms

- Retain employees' completed Forms I-9 for the length of employment
- When an individual's employment is terminated, the Form I-9 is retained for either:
  - three years after the date of hire, or
  - one year after the date employment is terminated, whichever is later
- Per the Immigration Reform and Control Act of 1986 (IRCA)

1. Enter date employee started work: \_\_\_\_\_

Add 3 years to line 1

A. \_\_\_\_\_

2. Termination date: \_\_\_\_\_

Add 1 year to line 2

B. \_\_\_\_\_

Which date is later: A or B?

Enter later date here »

C. \_\_\_\_\_

*Store Form I-9 until this date*





### Photocopying and Retaining Form I-9

#### I-9 Forms

Under the Immigration Reform and Control Act of 1986 (IRCA), employers must retain an employee's completed Form I-9 for as long as the individual works for the employer. Once the individual's employment has been terminated, the employer must determine how long after termination the Form I-9 must be retained, which is either three years after the date of hire, or one year after the date employment is terminated, whichever is later.

1. Enter date employee started work: \_\_\_\_\_

Add 3 years to line 1

**A.** \_\_\_\_\_

2. Termination date: \_\_\_\_\_

Add 1 year to line 2

**B.** \_\_\_\_\_

Which date is later: **A** or **B**?

Enter later date here »

**C.** \_\_\_\_\_

***Store Form I-9 until this date***