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ACTIVITY CREATION

All activities must have a parent Course. A course may have many instances of an activity, however all activities will have the same parent details and the same number of PDCs.

Please refer to the Recertification Provider Guide for more information on this process.

Example 1 - Single Instance activity - Activity details will be the same as the parent course.

Example 2 - Single Course with unique offerings - Activity details will vary based on dates, locations and times of the activity, but all activities will be based on the same parent course.

COURSES

New Course

COURSE NAME

HR Basics - A Crash Course in Employment Law

INTENDED AUDIENCE

Early Career

PDC

6.0

DESCRIPTION [OPTIONAL]

This one-day seminar is for HR staff, business owners, managers and supervisors. This seminar focuses on the issues that are most likely to get an employer into trouble. Designed to give a big picture review in a short amount of time, this seminar will help participants avoid the many traps, potholes and landmines of employment law. Topics will include: Legal Hiring Practices, Handling Problem Employees, Legal & Legislative Update, Problem Solving Exercises, Wage and Hour Fundamentals, Leave & Disability Crash Course, Harassment, Discrimination & Retaliation, interactive sessions & practical tips.

ACTIVITY INFORMATION

ACTIVITY FORMAT

Seminar/Workshop

ACTIVITY NAME

HR Basics Seminar

BEGIN DATE

08/10/2017

END DATE

08/10/2017

START TIME

8:30 AM

END TIME

4:00 PM

SPEAKER'S/PRESENTER'S NAME [OPTIONAL]

Randall Sutton, JD; David Briggs, JD; Jennifer Paul, JD; Abby Fitts, JD all of the law firm Saalfeld Griggs PC

REGISTRATION URL OR ORGANIZATION URL

http://cm.mcminnville.org/events/details/a-crash-course-in-employment-law-14871?utm_source=EVENTS+REMINDER+july+17%2C+2017&u

LEARNING OBJECTIVES [OPTIONAL]

x

	ACTIVITY DESCRIPTION [OPTIONAL]	ACTIVITY LOCATION
Enhance understanding of employment law concepts for entry to mid level supervisory and HR staff.	Full day seminar HR Basics - A Crash Course in Employment Law. This one-day seminar is for HR staff, business owners, managers and supervisors. This seminar focuses on the issues that are most likely to get an employer into trouble. Designed to give a big picture review in a short amount of time, this seminar will help participants avoid the many traps, potholes and landmines of employment law. Topics include: Legal Hiring Practices, Handling Problem Employees, Legal & Legislative Update, Problem Solving Exercises, Wage and Hour Fundamentals, Leave & Disability Crash Course, Harassment, Discrimination & Retaliation, Interactive sessions & practical tips.	
	ADDRESS LINE 1 Chemeketa Community College - Yamhill Campus	STATE/PROVINCE Oregon v
	ADDRESS LINE 2 [OPTIONAL] 288 NE Norton Lane	CITY McMinnville
	ADDRESS LINE 3 [OPTIONAL] 	COUNTRY United States v
	ZIP/POSTAL CODE 97128	
	SHRM BOCK REPRESENTATION/ALIGNMENT (CHOOSE AT LEAST ONE)	
	PEOPLE [OPTIONAL] Talent Acquisition & Retention Employee Engagement Learning & Development Total Rewards	
	ORGANIZATION [OPTIONAL] Structure of the HR Function Org. Effectiveness & Development Workforce Management Employee Relations Technology & Data	
	WHAT FUNCTIONAL AREA(S) WILL BE REPRESENTED/ACQUIRED BY PARTICIPATION IN THIS PROGRAM?	
	WORKPLACE [OPTIONAL] HR in the Global Context Diversity & Inclusion Risk Management Corporate Social Responsibility U.S. Employment Law & Regulations	
	STRATEGY [OPTIONAL] Business & HR Strategy	
	Save	

HR BASICS

YCHRA - Yamhill County Human Resource Management Association presents...

A CRASH COURSE IN EMPLOYMENT LAW

Employment laws are complicated. A manager or supervisor's mistake can result in costly employee lawsuits and liability for the company. This seminar focuses on the issues that are most likely to get an employer into trouble. Designed to give a big picture review in a short amount of time, this seminar will help you avoid the many traps, potholes and landmines of employment law.

This one-day seminar is for . . . Business owners, managers and supervisors . . .

Management employees are usually at the center of an employment lawsuit. The employment laws have little to do with common sense. When you "don't know what you don't know," it is difficult to avoid liability. This seminar will help you spot red flags and provide solutions for common employee relations challenges.

Anyone who Deals with HR Issues . . .

Both novice and experienced HR professionals and support staff will benefit from the comprehensive overview and targeted practical solutions that they can take back to the workplace. In addition to building understanding of the fundamentals, we will discuss cutting edge hot topics arising from new statutes, regulations and case law.

THURSDAY, AUGUST 10, 2017 8:30AM – 4:00PM (registration starts at 8:00AM)
Chemeketa Community College – 288 NE Norton Lane McMinnville, Oregon 97128

Presented by the management employment law team at SAALFELD GRIGGS:

Randall Sutton, JD Partner	David Briggs, JD Partner	Jennifer Paul, JD Associate	Abby Fitts, JD Associate
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TOPICS WILL INCLUDE

- Legal Hiring Practices – Best Practices, Documentation & New Regulatory Hurdles in Hiring
- Handling Problem Employees – Strategies to Recognize Risk & Minimize Potential Liability
- Legal & Legislative Update - Latest legal, statutory and regulatory developments
- Problem Solving Exercises
- Wage & Hour Fundamentals – Exempt/Non-Exempt, Overtime, Travel, Final Paychecks & More . . .
- Leave & Disability Crash Course – Sick Leave, ADA, Family Leave & the Bermuda Triangle
- Harassment, Discrimination & Retaliation – Avoiding, Investigating and Managing Complaints
- Interactive Sessions & Practical Tips

Cost: \$125.00 per person. Seating is limited. Includes boxed lunches sponsored by Hagan Hamilton.

Info: To register, please visit <http://cm.mcminnville.org/events/details/a-crash-course-in-employment-law-14871> on the website. Questions? Contact Jill Faughender at (503) 435-3216. Pending for 6.0 hours of Professional Development Credits (PDCs) for SHRM-CP or SHRM-SCP.

Lunch Sponsored by:



HAGAN HAMILTON
Insurance Services

Sound counsel.
Smart business.

Saalfeld
Griggs
PC





The McMinnville Chamber of Commerce

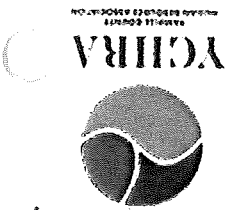
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Yamhill County Human Resource Association

Presented by:

A CRASH COURSE IN EMPLOYMENT LAW

HR BASICS



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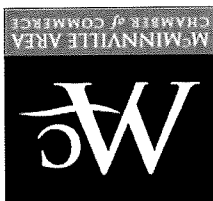
HR BASICS

A CRASH COURSE IN EMPLOYMENT LAW

Presented in partnership with



Sound counsel.
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Yamhill County Human Resource

Management Association presents...

THURSDAY AUGUST 10, 2017
Chemeketa Community College – 288 NE Norton Lane McMinnville, Oregon 97128

PRESENTERS

Randall Sutton, JD
Shareholder – Management Employment Law
Saalfeld Griggs

David Briggs, JD
Shareholder – Management Employment Law
Saalfeld Griggs



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HR BASICS 2017 PROGRAM SCHEDULE

TIME	TOPIC	SPEAKER
8:30 am	2017 Legislative Update	David Briggs
9:00 am	Harassment, Discrimination & Retaliation	David Briggs
10:30 am	BREAK	
10:45 am	Handling Problem Employees How to Avoid Getting Sued Effective Documentation Spotting Red Flags Terminating Employment Case Examples & Problem-Solving	David Briggs
Noon	LUNCH	
1:00 pm	Legal Hiring Practices	Randall Sutton
1:30 pm	Wage & Hour Fundamentals	Randall Sutton
2:45 pm	BREAK	
3:00 pm	Leave & Disability Crash Course ADA, Family Leave & the Bermuda Triangle	Randall Sutton
4:00 pm	CLOSE	



This program, **17-JUZ5X**, has been approved for 6 (General) hours of Professional Development Credits (PDCs) for the SHRM-CP or SHRM-SCP.

RANDALL SUTTON is a partner with the SAALFELD GRIGGS law firm in Salem Oregon. Randall leads the law firm's Business & Employment Litigation Practice Group.

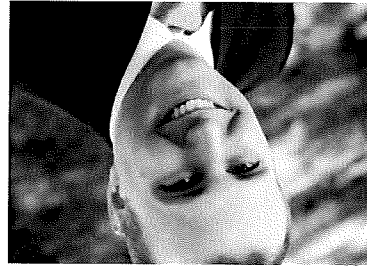


Randall advises and handles employment and business litigation matters for large and small businesses. With well over 20 years of law practice, he is an experienced litigator who is highly regarded for his employment law expertise. He is rated *AV Preeminent* by his peers in the *Martindale-Hubbell* directory. Randall is also listed in *Best Lawyers in America* for the practice area of Employment Law – Management, and has been recognized by *Chambers USA* as a

Leader in the field of Employment Law.

A frequent public speaker on employment legal issues, Randall began his career as a human resources professional. He has served for many years as the Oregon Legislative Director for the Society for Human Resource Management ("SHRM"), and was the 2012 Director of the SHRM Oregon State Council. He also serves on the statewide Associated Oregon Industries (AOI) Employment Practices Steering Committee and is the Past Board President of the Job Growers tri-county workforce investment board.

DAVID BRIGGS is a partner with the SAALFELD GRIGGS law firm. David advises management with regard to difficult employee relations issues and assists employers with employment law compliance and the development of personnel manuals, employment agreements, and best practices. He also assists in the defense of employers against claims by current and former employees as well as in the enforcement of noncompetition and nonsolicitation agreements. David has served as the Oregon State Legislative Affairs Director on the SHRM Oregon State Council and the SHRM Salem Chapter. He received his law degree from the University of Oregon and began his career as a representative for employers on workforce development issues in Washington, D.C.



LEGAL UPDATE

Presented by

DAVID BRIGGS

EMPLOYMENT LAW & LITIGATION PRACTICE GROUP

HR BASICS – AUGUST 10, 2017



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This seminar is intended to identify issues and provide general information and should not be considered legal advice. Employment issues are highly complex. Liability and solutions will vary depending on the facts of the particular situation.

LEGAL UPDATE

AUGUST 2017 POST-LEGISLATIVE SESSION

DAVID BRIGGS, J.D.

AUGUST 2017



The Oregon Legislature adjourned on Friday, July 7th following a busy, contentious session that saw the passage of a major transportation infrastructure package, a balanced 2017-2019 budget, and many other laws. On the employment side, the session began much like it had in previous sessions: with a heaping pile of proposed legislation which promised increased regulation for employers if enacted. By the end of the session, there remain four significant pieces of legislation that have been signed, or are expected to soon be signed, by Governor Brown.¹

DESCRIPTION	COMMENT
Pay Equity: Oregon is one of only a few states to have passed a pay equity bill of this breadth. The law prohibits pay discrimination on the basis of race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability or age for employees performing work that requires substantially similar knowledge, skill, effort, responsibility and working conditions. The new law will also prohibit employers from seeking salary history beginning on October 6, 2017.	Oregon already prohibited an employer from paying an employee a lower wage on the basis of sex for comparable work. This law expands that protection to all the protected classes, although it does offer a limited safe harbor for employers who conduct a pay analysis and justify a pay differential on the basis of 'bona fide' factors, including seniority, merit, education, training, and/or experience, among other factors. Oregon employers are now prohibited from asking about an applicant's current or prior salary history prior to an offer of employment. Employees can file BOLI complaints on January 1, 2019, but do not have a private right of action in court until January 1, 2024.
Amendments to Sick Leave Law: These amendments to Oregon Sick Leave clarify previously unclear pieces of the 2015 Oregon Sick Leave bill. Specifically, these clarifications affect employers offering substantially equivalent policies, employers who pay employees piece rate or commission, small family businesses whose employee count comes close to the paid sick leave threshold, and employers who operate temporary structures in the Portland Metro Area.	As previously written, the Oregon Sick Leave law did not specify how many hours of a substantially equivalent sick leave/PTO policy is protected time. This new amendment clarifies that the first 40 hours of such a policy is protected under the Oregon Sick Leave law, and it also clarifies that an employer may cap accrual at 40 hours a year. The bill also excludes from employee count certain individuals with significant ownership in the business, and clarifies that temporary farm stands/trailers do not fall under the Portland sick leave law. Finally, this bill

¹ The information contained in this report is current as of 8/1/2017. This summary focuses on significant legislation affecting private sector employers and is not intended to cover every employment-related bill. This information is considered accurate but is not guaranteed. Additional information is available at www.leg.state.or.us. The above comments are not legal advice. The purpose of this report is to provide information and analysis and is not intended to lobby one position over another. Follow these updates on Twitter @sgEmploymentLaw.

also clarifies the method for employers to calculate accrual rate for employees paid on commission or piece-rate pay schemes. Governor Brown signed this bill on June 29, 2017. It goes into effect on January 1, 2018.	Beginning July 1, 2018, employers will be required to provide workers with an estimated schedule seven days before the first day of that week's work. Two years later, on July 1, 2020, employers will be required to provide workers with an estimated schedule fourteen days in advance. Employers who do not provide employees with sufficient notice are charged penalty wages, with certain exceptions. Employers will also be required to pay premium wages to employees who rest fewer than 10 hours between shifts, and must allow employees to turn down extra shifts. Employers may maintain a list of employees who are willing to work shift coverage in certain circumstances. This bill is awaiting Governor Brown's signature. Enforcement begins January 1, 2019.	Predictive Scheduling: This bill makes Oregon the first state in the nation to regulate employee work schedules, although there are a few cities in the country that currently have workplace scheduling ordinances. Requires employers in the hospitality, food service, and retail industries, who employ 500+ employees worldwide, to provide good faith estimates of average hours per week and expectations for on-call shifts, advance notice of schedules, predictability pay for schedule changes, employee rights to request preferential scheduling, compensation for less than 10 hours between shifts, and right to rest between shifts.	Oregon requires employers to pay overtime to employees who work over 40 hours in a week. For manufacturers, Oregon also requires overtime payment to employees working 10+ hours a day. For years, BOLI advised manufacturers to pay the greater of either daily or weekly overtime. BOLI recently began advising employers in manufacturing establishments to pay both daily and weekly overtime in response to a lawsuit filed in Multnomah County. Despite a recent finding for the employer in that case (http://www.sglaw.com/daily-overtime-for-manufacturing-ees/), there was still confusion as to whether BOLI would continue to enforce its current interpretation of the two overtime statutes. This bill resolves the confusion by requiring manufacturers to pay the greater of either daily or weekly overtime in certain industries. The bill also imposes strict weekly caps on the maximum number of hours an employee can work. Employees may not work more than 13 hours a day, and no more than 55 hours a week. However, there are two exceptions to the weekly cap: employees may agree to work 60 hours a week, or manufacturers of perishable goods may offer between 80 - 84 hours a week if requested for a limited undue hardship period. All employers must ensure employees have 10 hours rest between 8+ hour shifts. This bill is awaiting Governor Brown's signature. Enforcement begins January 1, 2018.
Overtime Calculations for Employees in Certain Industries: Requires manufacturers to pay employees the greater of either daily or weekly overtime. Sets weekly hourly limits, and provides an undue hardship exception for employers in certain industries.			

HARASSMENT, DISCRIMINATION & RETALIATION

Presented by

DAVID M. BRIGGS

EMPLOYMENT LAW & LITIGATION PRACTICE GROUP

HR BASICS – AUGUST 10, 2017



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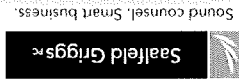
This seminar is intended to identify issues and provide general information and should not be considered legal advice. Employment issues are highly complex. Liability and solutions will vary depending on the facts of the particular situation.

- ## Avoiding Discrimination, Harassment & Retaliation Claims
- Can the employee blame the termination or discipline on:
 - Protected Status
 - Age, race, gender, religion, disability . . . or ??
 - Protected Activity
 - Complained about harassment
 - Complained about wage & hour violations
 - Filed a workers' compensation claim
 - Complained about safety or compliance issues

Avoiding Harassment and Discrimination Claims

And what to do if you get a complaint...

David Briggs, J.D.



Employer Responsibilities

Supervisors

Who is a "Supervisor" now?

- Tangible employment decisions (hire, fire, discipline, etc.)
- Make decisions which cause a significant change in benefits

Employers are responsible for acts of supervisors:

- Even if the specific acts complained of were forbidden; and,
- Whether or not the Employer knew or should have known of such acts.
- The circumstances of the particular employment relationship and the job functions performed considered in determining whether a "supervisory" relationship exists.

Avoiding Discrimination, Harassment & Retaliation Claims

Can the employee allege that she was subjected to workplace harassment?

You are liable for anything you do or should have known about:

"Harassment" is:

- "Quid Pro Quo": Employment actions based on consent or refusal to engage in relationship or sexual favors.
- "Hostile Environment": Severe and pervasive offensive work environment.

Example

- ⑥ While at work, Nina frequently makes personal phone calls to her friends. Her conversations are loud and generously sprinkled with foul language and lurid stories of bar hopping and romantic encounters.
- ⑥ Her coworkers cannot help but overhear her conversations.
- ⑥ Laura, a coworker, recently announced that she has found another job and is quitting at the end of the week.
- ⑥ **Questions:**
 - Can Nina's behavior be interpreted as sexually harassing?
 - How could this have been prevented?
 - What should be done now?
 - What about Laura?

Employer Responsibilities

- ① Fellow Employees and Nonemployees
 - ⑥ Employers are responsible for acts of employees (e.g., agents, supervisory or management employees) and other nonemployees (e.g., customers, vendors) if the Employer:
 - Knew or should have known of the conduct; unless,
 - The Employer takes immediate and appropriate corrective action.

Example

- Gwyneth is a successful unmarried business woman.
- Last month, she hired Chris to work as the Office Manager for the company. Chris is also single.
- After a short time, the two realize that they have great chemistry together. Other staff in the office know of the relationship, and despite frequent public displays of affections, have not said much about it.

Questions:

- Is Chris the victim of sexual harassment?
- Are the staff victims of sexual harassment?



Example (continued)

- A few months pass. Gwyneth starts wondering if Chris has feelings for a cute young sales associate that he just hired. The sales associate seems to laugh just a little too hard at Chris's jokes. Gwyneth has commented more than once that Chris needs to behave himself.
- As it turns out, Chris is also a lousy office manager. Bills are not getting sent out and vendors are complaining about not getting paid. Gwyneth decides that she really needs a new office manager. She fired another office manager in the past for similar misconduct, so she doesn't even think twice about firing Chris.
- The next week, Gwyneth receives a letter from Chris's lawyer.

What does the letter say?

Conducting Workplace Investigations



Preventative Steps and Limiting Liability

- ▶ Policy – published and enforced
- ▶ Training – employees and supervisors
- ▶ Investigate – promptly, every complaint
- ▶ Respond – appropriate remedial action/discipline

Beginning The Investigation

Empower Supervisors: TAKEAWAY #1

- Supervisors should feel empowered to ask questions when employees first approach them
- They need to then turn it over to HR or senior management when the issues relate to protected class or status!!!

Picking The Investigator(s)

Credibility Issues

- Subordinate investigating a superior?
- Can anyone within the organization be perceived as neutral?
- Does the investigator have a "dog in the fight?"

Expertise

- Ability to get witness to open up
- Ability to ask probing questions & follow-up on leads
- Trust not to say the wrong thing

Team Approach

- Benefit of a 2nd witness to interview
- Rapport among each other and witness
- Consistency concerns among interviewers

Investigation Must Do's

React promptly

- Bad things happen while you wait
 - Further harassment or retaliation
 - Problems may become too big to cure
 - Case law requires prompt response
- ### Consider Short-Term Efforts to Mitigate
- Offering paid time off
 - Short or long-term transfers
 - Ask complainant what he/she wants

NLRB - Confidentiality of Workplace Investigations

- › In confidential workplace investigations, witnesses often asked not to discuss the investigation & their interview with fellow employees.
- › *Banner Health Systems case*
- *This is a confidential interview and I will keep our discussion confidential except as required by law, or Banner policy or as necessary to conduct this investigation. I ask you not to discuss this with your coworkers while the investigation is going on, for this reason, when people are talking it is difficult to do a fair investigation and separate facts from rumors.*
- › Policy asked for (not demanded) confidentiality
- › NLRB considered the instruction to be a "blanket prohibition"
- › NLRB held that prohibition would tend to coerce employees and restrain exercise of their right to engage in concerted activities

Confidentiality of Workplace Investigations

Now What?

- Decision did not prohibit instruction to maintain confidentiality
- Employer must evaluate:
 - Whether a witness needs protection
 - Whether evidence is in danger of being destroyed or testimony fabricated if instruction not given
 - Whether there is a need to prevent a cover up
- Instruction may be appropriate where:
 - Conduct is serious or sensitive. Sexual harassment or workplace violence. Risk of retaliation.
 - Instruction is specific and limited rather than "blanket"

Interview Basics

Who is Interviewed

- Complainant - *Always*
- Accused - *Always*
- Third party witnesses - *Maybe*
- Corroborating witnesses - *Sometimes*

When to Stop

- Severity of allegations affect the scope of investigation
- Once you are able to make informed & reliable decision
- If requested to talk to a witness, you usually should

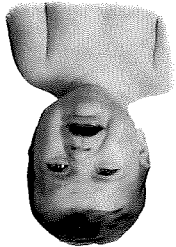
Location of Interview

- Be discrete as to where the investigation occurs.
- Neutral locations are better
- Don't let the interviewee feel "trapped"

Interviewing



The Complainant



**Using the Terms Harassment/
Discrimination: TAKEAWAY #2**

Do not use the phrases or acknowledge that a situation was harassment, discrimination or that particular conduct created a hostile work environment

The Complainant

► What to Explain

- The process & timeline for investigation
- When/how you expect to report back
- How to reach the investigator

► What to Ask:

- Who, what, when, where, why, how?
- What was said / done?
- Who else was there?
- What documents support this?
- Has this happened to others?
- What would you like to see happen?

The Complainant

Your Reaction

- Be open to Complainant's story
- Don't make your mind up yet. You haven't heard the whole story
- Don't make promises about what will happen
- Don't promise confidentiality

► Explain that No Retaliation Allowed

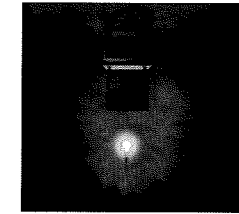
- Explain it is against company policy
- Ask Complainant to come forward if retaliated against

► Are Temporary Measures Needed?

- Can parties work together?
- Concerns about safety? Need for law enforcement?
- Refer to Employee Assistance Program?
- Don't make changes that punish the complainant!

The Accused

- What to Explain
 - The process & timeline for investigation
 - When/how you expect to report back
 - How to reach the investigator
 - Don't make promises about what will happen
 - Don't promise confidentiality
- How much to disclose?
 - Accused needs to be able to explain or rebut
 - Accused does not need all of the details
 - Needs to know enough to respond
 - Evaluate risk of retaliation against complainant
- Non-Retaliation

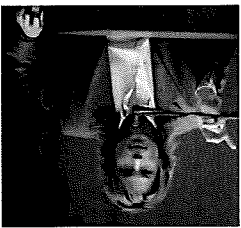


The Accused

The Witnesses

- » Evaluate whether witness is important
 - Add information on a fact in dispute or just cumulative?
 - More witness interviews = more disruption.
- » What to Ask
 - Open ended questions.
 - Don't tell the witness what you already know.
 - Who, what, when, where, why how?
 - Has anyone else been treated this way?
 - Ask for names of other witnesses.
- » Consider obtaining signed statements
- » Discuss Confidentiality
- » Explain non-retaliation

The Witnesses



What To Do Now

- ### Evaluation & Decision-making
- Evaluate the Evidence
 - Consistency of statements
 - External corroboration or inconsistency
 - Credibility
 - Who was more believable?
 - What story makes more sense?
 - What story is backed by other documents or testimony?
 - Evaluate motives

Reports

- ▶ Notes / Findings & Conclusions
 - Provide to attorney for review
 - Attorney will advise re: follow-up and handling of corrective action
- ▶ Summary of Findings
 - Complainant may be provided with summary at 30,000' level re: findings
- ▶ Disciplinary Notice
 - If the investigation results in discipline, then prepare appropriation disciplinary notices

Recordkeeping

- ▶ Notes
 - Date notes. Identify who is present.
 - Write clearly.
 - Make them at the same time as the interview.
 - Transcribe or summarize them quickly.
 - Keep the originals (or the summaries) intact.
- ▶ Tape Recording
 - Can only record with consent (put on the record).
 - May chill witness from speaking candidly.
 - If you make a mistake, it is on the record too.

Wrapping up the Investigation

- Before you complete the investigation
 - Summarize your process with complainant and accused
 - If there are going to be complaints about the process, get them out in the open NOW
- Arrange for a debriefing after the investigation
 - May be handled by the decision-maker, but make sure it gets done

Keep Written Conclusion in Separate File: TAKEAWAY #3

- Have a written conclusion/findings to the investigation.
- All notes and the conclusion should be kept in a separate confidential investigation file.
- If there is discipline to an employee, the conclusion should be in that employee's file.

Is your Investigation Defensible?

- Do you feel you followed all necessary leads to come to a decision?
- Is your decision fair and informed?
- Is the action you are taking justified by your findings?
- Is the action you are taking consistent with how similar instances have been handled?
- Could anyone later question bias or motives?
- What will the complainant / accused do once they learn of your findings & decision?



Questions?

David Briggs, J.D.
dbriggs@sqlaw.com
(503) 399-1070

HANDLING PROBLEM EMPLOYEES

Presented by

DAVID BRIGGS

EMPLOYMENT LAW & LITIGATION PRACTICE GROUP

HR BASICS – AUGUST 10, 2017



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PERFORMANCE CORRECTION NOTICE

Employee:	_____
Date:	_____
Action Taken:	
_____	Coaching and Counseling
_____	Written Warning
_____	Performance Improvement Plan
_____	Suspension
_____	Termination
_____	Other (describe): _____

Issues: The following areas of performance/behavior are not acceptable.

Expectations: The following actions must be taken to correct this performance issue.

Consequences: If these issues are not corrected, the following actions may/will be taken.

Employee Response: (attach additional pages if necessary)

This notice is issued for purposes of progressive discipline. We hope that this notice will assist you in identifying and promptly correcting these issues. Employment continues to be at-will as set forth in the Employee Handbook, and may be terminated at any time.

Employee: _____
Date: _____
Your signature only indicates that you have reviewed and received a copy of this document.

Supervisor: _____
Date: _____

I believe that I can be successful in this at-will position and I agree to take the steps listed above. I understand that I will be expected to show immediate and ongoing improvement, and maintain satisfactory performance at all times.

Employee: _____
Date: _____

SAMPLE TERMINATION CHECKLIST

INTERNAL COMPANY PROCEDURES • Personnel Manual followed? • Informal / unwritten policies followed? • Same treatment as other employees in similar situation? • Does Employee have any rights under an employment contract? • "Just Cause" or "At-Will" employment relationship?	EMPLOYEE PERFORMANCE ISSUES & DOCUMENTATION • Has the employee received prior warnings? • Was employee notified of performance standards? • Was employee told what improvements would be needed? • Was the employee notified of consequences of no improvement • Was employee given a fair opportunity to correct/improve performance? • How long has employee worked for the company?	PUNISHMENT APPROPRIATE UNDER CIRCUMSTANCES? • Were intermediate sanctions considered? ○ Suspension ○ Reassignment ○ Reduction in pay or grade • How have similar employees been treated?	DOES DOCUMENTATION SUPPORT DECISION? • Are performance evaluations consistent • Has employee received disciplinary notices • Has employee received recent positive comments, raises or promotions
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ADEQUACY OF INVESTIGATION • Was a fair and honest investigation of company's allegations and employee's explanations conduct? • Have statements been taken of witnesses? • Are witnesses credible? • Who has recently left the company that might testify against the company?	DOES DISCHARGE OFFEND PUBLIC POLICY? • Employee exercised political belief (jury duty)? • Employee engaged in civic duty (voting)? • Employee exercised a right related to role as employee (resisting sexual harassment)? • Employee refused to participate in illegal conduct? • Whistle blowing? (OSHA, DEQ, EPA, EEOC, Workers Comp) • Does discharge prevent vesting/award of benefits within immediate foreseeable future?	** PROTECTED CLASS STATUS (most likely area of liability) • Can Employee argue that termination decision was based on a legally protected status? • Can Employee argue that termination decision was in retaliation for asserting employment rights? • Has employee with protected status been treated differently than other employees? • Race / National Origin • Sex/Sexual Harassment • Disability or Injury • Religion • Age • Concerted Activity • Family Leave Usage • Union Organizer • Military Service • Legislative Testimony • Marital or Family Status • Whistleblower
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INDEPENDENT REVIEW & CONSIDERATION

- Why now???
- Has decision been reviewed by impartial person?
- Do we need legal review?
- Based on known traits/history, what is the employee likely to do?
- Who will handle the exit interview?
- Should we give the employee another chance?
- Is it time to do a last chance agreement instead?
- Would a severance agreement and release of claims be appropriate?

EVALUATING THE EVIDENCE – EXAMPLE CASES

TYPE OF CASE	THE EVIDENCE	GOOD OR BAD FACT?
<u>Workers Comp Discrimination</u> Joe hurt his back bending over to pick up a pallet. He files a workers' comp claim and is out two weeks. A month after he returns, he is fired for insubordination. He sues, alleging he was fired because he sought workers compensation benefits.	1) While Joe was gone, the company hired a guy who is stronger and works twice as hard 2) Before his injury, Joe had been written up for arguing with his supervisor 3) Just before he is fired, a co-worker overhears the supervisor say that he is worried about Joe injuring himself again.	
<u>Retaliation</u> Steve always thinks that he knows the best way to do something. He isn't happy unless it is done his way. Last Saturday night, he called his supervisor, drunk, and told him that he didn't know how to run the place and he could get paid twice as much somewhere else. The supervisor told him: "If that's how you feel, go get that job. You're fired!"	1) Steve's wife was listening in on the call and heard every word. 2) In the same call, Steve told the supervisor that he was going to call OSHA and tell them what shoddy work the company does. 3) The company can prove it actually does very good work 4) Steve was upset because he received a very poor evaluation and was denied a pay raise the prior day. 5) Steve also called the company's customer and said that his bosses are "bunch of idiots" and "they owe him a ton of overtime."	

TYPE OF CASE	THE EVIDENCE	GOOD OR BAD FACT?
<u>Absenteeism</u> Tina has a real attendance problem. She is late a lot and frequently misses work. Her supervisor finally decides that he has had enough and fires her. She sues the company.	1) She is late a lot due to car trouble or missing the bus. 2) Her mom is undergoing cancer treatments and she takes time off to drive mom to and from the doctor visits. 3) She got tagged for jury duty and decided to serve as a juror even though her supervisor told her not to. 4) Tina often no-calls / no-shows in violation of company policy. 5) Her attendance started getting worse after she filed a sexual harassment complaint about her supervisor. 6) A friend of Tina's tells the company that Tina was unhappy for a long time and had been busy looking for a job. 7) Tina didn't get any warnings about her attendance problems before she was fired.	
<u>Racial / National Origin Discrimination</u> Osama works as a foreman. He is of Middle Eastern descent. He and his supervisor get along well, despite some good natured teasing. His supervisor will call him "Osama bin Lazy" or warns the crews that they "better listen to Osama or he'll go "Al-Qaeda" on you." The crew has jumped on the bandwagon and last Friday, they wired up Osama's lunchbox to look like a bomb.	1) When Osama saw the lunchbox, he laughed out loud and took a photo of it. 2) A couple weeks after the lunchbox incident, Osama announced that he has decided to look for another job that is closer to his home. Osama lives over 20 miles from work. 3) A few months ago, Osama approached the General Manager and told him that the supervisor's teasing made him feel uncomfortable, "but I don't want you to do anything about it." 4) On his last day of work, Osama mentions to the receptionist on the way out the door that his job was really stressing him out and he is glad to be leaving.	

At-Will Employment

Which of the following best describes what "at-will" employment means?

1. The employee can quit at any time so long as he or she provides 2 weeks notice.
2. The employee can be terminated for any reason that is not unlawful.
3. The employee can be terminated without documenting the reason.
4. The employee may be terminated for any reason, and the employee does not need to be told what the reason is.

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**Bulletproof Your Documentation and
Discharge Procedures**

David Briggs, J.D.
Employment Law & Litigation Practice Group

Saalfeld Griggs PC

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Why do some terminations go wrong?



How is an Employee Protected?

- By who they are (protected class)
 - Sex, age, race, religion, gender, national origin, sexual orientation, gender identity, marital status, military status, disability
- By what they do (protected status)
 - Filing a workers' comp claim
 - Making a good faith complaint about legal issue in the workplace (safety, wage and hour, unionization, harassment, discrimination, etc.)
 - Taking protected leave



Employees Most Likely to Sue You:

Protected Class Absences

- ▶ Any days covered by family leave laws?
- ▶ Any days off due to W/C injury?
- ▶ Any days off caused by a disability that you need to accommodate?
- ▶ No fault attendance policy?
- Are you certain about every absence?
- ▶ How have you treated other employees?



- ▶ Why now?
- ▶ Why not before?
- ▶ Same performance. New decision makers?
- ▶ Implied contract issues
- Promises made about continued employment
- Actions taken in reliance on continued job



Employees Most Likely to Sue You

Long Term Employees

Employees Most Likely to Sue You

Potential Wage & Hour Claimants

- ▶ Employee paid on a salary
- Did the employee work overtime?
- Are you certain the employee is exempt?
- ▶ Employee paid on commission basis
- Are you certain the employee is exempt?
- Are you commission policies clear, or might the employee be able to show errors in calculating commissions?
- ▶ Hours Worked but not paid
- Will employee be able to show that you don't pay for all working time or give appropriate breaks?
- ▶ Final paycheck on time?

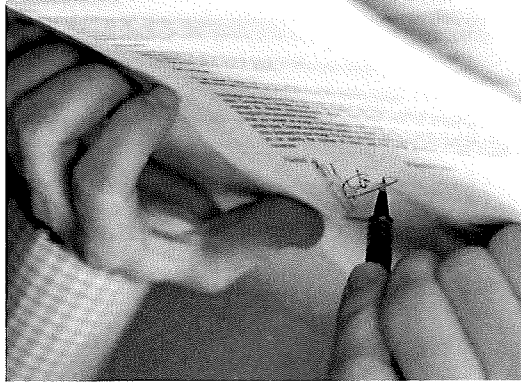
Employees Most Likely to Sue You

Protected Status Retaliation



- ▶ Complained to OSHA or about safety
- ▶ Complained about perceived harassment/discrimination
- ▶ Filed a workers' comp claim
- ▶ Complained about Wages
- ▶ Has called BOLI/DOL/EEOC
- ▶ Speaks out on behalf of other workers; trying to organize a union

Effective Documentation



Documentation Tools

- 1 Use forms provided
- 1 Emailing yourself can effective documentation
- 1 Don't backdate. But, you can document after the fact
- 1 Example: In the last 3 months, we have given Becky verbal warnings about needing to treat her coworkers with respect. [Provide details]. Yesterday, Becky [details of new incident]. I warned Becky about her behavior this morning [describe details]. I told Becky that any further incidents would lead to additional disciplinary action, up to and including termination. She said that she understood and agreed to change her behavior.

Progressive Discipline

[illegible]

Progressive Discipline

What is it?

- Notice & Opportunity to Improve
- Expectations/ Consequences Spelled Out
- Increasing Severity of Discipline
- Example:
 - Written Warning
 - Suspension without pay
 - Termination

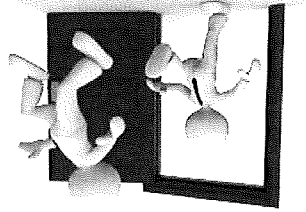
Progressive Discipline

What to Do

- Follow the steps in practice, but don't tie your hands.
 - Each step is in employer's discretion
 - *Except follow CBA if a unionized employer.*
- Treat similar employees the same
- Be able to prove you have treated similar employees the same
- Remind employees that employment is still "at-will"

Insubordination

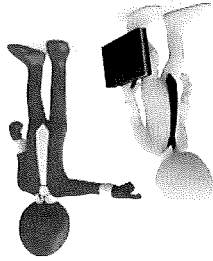
- You are unhappy with Sharron. She has been highly insubordinate and you have had just about enough.
- Last week, Sharron complained that the company is violating OSHA rules on employee safety
- Today, Sharron came in two hours late. When you asked why she was late, Sharron said that he "just felt like sleeping in."
- There were no witnesses to the conversation other than the two of you.
- You tell the employee, "That's it, you're fired"
- Can Sharron safely be terminated?
- What are some of the concerns that you have?
- What should you do (or should have already done)?



Terminating Problem Employees

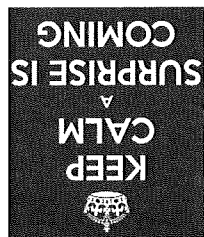
Termination Procedures

- Termination is a big decision.
- If done badly, the damage can be hard / expensive to fix.
- Get legal advice when in doubt
- Suspension pending investigation
- Review documentation. Get advice.
- Gives time for final paycheck to be prepared
- Avoids rash decisions in heat of the moment.
- No Deductions from Paycheck!
- Exit Interviews
- Reasons for termination – *Be Honest / Big Picture only*
- Security Issues – keys, passwords ... etc.
- Remind about Noncompete agreements....etc.
- Confirm your "no references" policy
- Hand employee the final paycheck
- Keep a log of terminations
- Include in a spreadsheet names, dates of employment and reason for termination

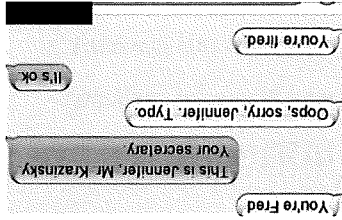


Pre-Termination Review

- Why are we acting now? Why didn't we act then?
- How will you succinctly answer the question:
"Why did you fire _____?"
- What documents will prove our story?
- Former employees are entitled to review their file
- Tell someone else the reason for the termination. Get legal review of the personnel file. Does the file support the decision?
- What will the employee say was the cause for termination?
- Is the timing bad? Will it get worse?
- If this goes to court or a complaint is filed, am I ready?



Delivering the Message



- ▶ "It's a layoff"
- ▶ "I'm asking you to quit"
- ▶ "You're at-will, so I won't say why"
- ▶ "It's not you, it's me"
- ▶ "It's you, not me."
- ▶ "Go home and decide, 'Should I stay or should I go?'"

Let's Make a Deal

- ▶ If the employee is not up for the challenge of improving performance, sometimes a severance agreement is a good "Door #2"

▶ Only use lawyer-prepared agreements!

▶ Employer Gives:

◦ Severance pay?

◦ Continue health insurance?

◦ A positive letter of reference?

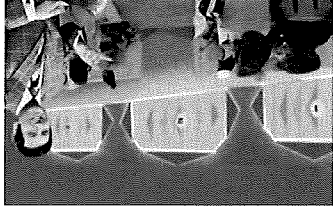
▶ Employer Gets:

◦ Release of Claims

◦ Finality

◦ Employee no longer a daily hassle

◦ The ability to sleep soundly



Does the Employee Have a Claim?

- Tom, a welder, has been on leave related to a workplace shoulder injury. Shortly after returning, Tom accidentally starts an oil fire next to the shop. In a panic, he races to get a power washer to try to douse the flames before cooler (and wiser) heads step in. You fire Tom for poor judgment.
- Rick asks a subordinate out on a date and asks her to send him revealing pictures of herself. She sends the pictures. Employee is still working at the company.
- Ben, a Caucasian manager makes racial jokes with Hispanic subordinates. Some of employees jokingly call Ben "gringo" and "white devil". Ben makes jokes in return. For example, one day when Ben notices that the shop is messy, he tells Juan: "Clean this place up, it's starting to look like Mexico."
- Juan later quits.
- Joe drives as part of his job. He has several seizures at work and an MD suspends his driving privileges. You fire Joe for not being able to drive.

Severance Agreements

Insurance Policy when in Doubt

- What is it?
- When do you offer it?
- How much do you offer?
- Who prepares the agreement?

Do's

Other Documents

- Employee's email, IMs, Internet use
- But . . . make sure you have an electronic monitoring policy
- . . . and make sure your own email traffic is presentable
- Examples of poor work
- Customer or employee complaints
- Investigative findings

Do's

Other Steps

- Train supervisors
- aka "The Source of and Answer to All of Your Problems"
- Ask yourself - Could anyone see this as retaliation?
- Document details
- Document while it is fresh in your mind
- Present documentation to employee
- Get feedback of employee, and follow-up on it
- HR review before any adverse action taken
- Get legal advice if you have any doubts

SHRM Program Certification

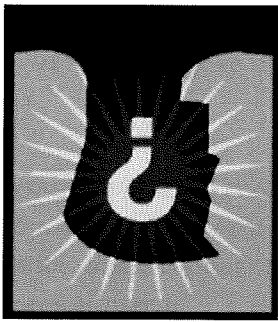
*HR Basics is recognized by SHRM for 6.0
hours of Professional Development Credits (PDCs) for
SHRM-CP or SHRM-SCP.*

The SHRM program number is 17-JUZ5X

Dont's

- Communications
 - Send emails about the situation
 - Gossip or make inappropriate comments
 - Discuss decisions outside management group
- Documentation
 - Expect that your working notes are confidential
 - Sugar-Coat reviews
 - Procrastinate until you just can't take it anymore
 - Say things you would regret showing to a jury
 - Fail to do company-wide tracking

Questions?



LEGAL HIRING PRACTICES

Presented by

RANDALL SUTTON

EMPLOYMENT LAW & LITIGATION PRACTICE GROUP

HR BASICS – AUGUST 10, 2017



Sound counsel.
Smart business.

This seminar is intended to identify issues and provide general information and should not be considered legal advice. Employment issues are highly complex. Liability and solutions will vary depending on the facts of the particular situation.

Legal Hiring Practices

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1. HOW EMPLOYERS GET IN TROUBLE

a. Unlawful Discrimination on Basis of Protected Class

Disparate Treatment "Disparate treatment" exists when an employer intentionally treats some individuals differently or less favorably than others AND the different treatment occurs because of the individual's "protected status" (e.g. race, sex, religion, disability, etc.). Disparate treatment alleges intentional discrimination, i.e. that the decision-maker's actions were motivated or influenced by bias because of race, sex, disability, etc.

Examples: Only hire high school students for minimum wage job

Only hire female receptionists

Won't interview anyone with a Middle Eastern name

Disparate Impact results from facially neutral employment policies and practices that are applied evenly to all employees, but that negatively impact a particular protected class. It is "unintentional discrimination" based upon how the neutral policy affects a protected class.

Examples: Blanket prohibition on hiring anyone with a criminal record

Requiring a physical agility test

"Bona Fide Occupational Qualification" ("BFOQ"): In very rare cases, an employer can take into account a person's status in a protected class when making a hiring decision. The BFOQ exception is rare, difficult to prove, and the burden of proof is always on the employer.

Examples: Child actor needed to play part of a child in a movie

Male locker room attendant in a men's locker room

b. *Negligent Hiring*

Legally, you have a duty to protect your customers, clients, visitors and members of the general public from injury caused by employees you know or should know pose a risk of harm to others. You may also have a duty to protect other employees from an employee whom you know or should know is dangerous. If someone gets hurt or has property stolen or damaged by an employee whose background you didn't check carefully, you can be sued for negligent hiring.

Examples: Failing to perform driving record check on employee hired to drive truck that has a history of DUI

Failing to perform criminal background check on employee hired to care for children who has a record of child abuse

2. THE HIRING PROCESS – KEEPING IT LEGAL

State and federal laws generally prohibit the consideration of any factor related to an individual's protected status (e.g. race, religion, gender, national origin, age, disability...etc.) when making a hiring decision. To avoid the myriad of legal troubles that can arise when it even appears that a protected status was considered, the only appropriate inquiry in the hiring process should be whether the employee has the skills, knowledge, abilities and attitude to become a high-performing employee.

a. *Job Analysis & Job Descriptions*

The first step in filling any position is to perform a job analysis. You need to know the particular knowledge, skills, and abilities that are required to effectively perform the job. In doing a formal or informal job analysis, you should consider the qualities that an applicant must possess to effectively perform the job.

Think about what the essential functions of the job are. Be sure to review the written job description, too. In identifying the essential job functions, consider:

- Whether the position exists to perform the function;
- Whether there are a limited number of employees who are able to perform the function;
- Whether the function is highly specialized;
- How much time the employee will spend performing the function; and
- The consequences if the function is not performed by that position.

If the function does not fit one or more of these categories, it may not be an essential function of the job. If so, the ability to perform that function should not be a part of the decision-making process in hiring.

The most important consideration when evaluating the importance of different job functions is to determine whether the employee actually performs the function. Thus, it is insufficient to say that an employee must be able to perform the function if no employee in that position has ever done so in the past.

Because job descriptions can be strong indicators of essential functions, supervisors should closely monitor the actual work performed by employees in their department and discuss revising job descriptions on a regular basis to ensure that the job descriptions accurately reflect the work being performed.

KEY ISSUES:

- Know what skills are needed to perform the job

- If the job has physical demands, these need to be quantified to avoid disability discrimination claims
- Is the job exempt or non-exempt from the wage & hour laws? Only particular jobs will qualify for "exempt" status

b. *Publicizing the Job*

A job announcement should seek applicants who possess the skills and abilities required to perform the essential functions of the job. You may wish to include in your announcement a description of the knowledge, skills, and abilities required to do the job. Be sure that the skills, education and experience you specify in your announcement are consistent with your job analysis and your job descriptions.

KEY ISSUES:

- Make sure your skills and experience really are needed to do the job
- Indicate in ad that you are an "Equal Opportunity Employer"
- Restricting job to in-house applicants may show disparate impact
- Avoid gender or age based stereotypes in your advertising

EXAMPLES:

Not Salesman. Use "Salesperson"
 Not College Student. Use "Part-Time Worker"
 Not Handyman. Use "General Repair Person"
 Not Married Couple. Use "Two-Person Job"
 Not Waitress. Use "Server"
 Not Young. Use "Energetic"

c. *Job Applications & Resumes*

Use the application to gather only job related information. The application is also important to communicate the conditions upon which you will hire the applicant.

KEY ISSUES:

- A resume will sometimes reveal information that you would prefer not to have. If the resume discloses religious affiliations or other protected class status, be sure the hiring decision is not based on that information.

- Don't spy. If the information is public, that's one thing. But don't pretend to be a "friend" of the candidate or use other means of accessing information that might appear to be fraudulent or deceptive.
 - Are you going to find out information that you wish you didn't know? Once you learn that a candidate is a member of a protected class, you can't unring the bell. For example, you might find out about an applicant's age, race, marital status, kids, religion or other facts by searching online. Once you have that information, if you don't hire the candidate, you may need to explain why this information had nothing to do with your decision not to hire the candidate.
 - Is your inquiry job related? In other words, are you looking for information about the candidate that relates to the person's ability to do the job? Or . . . are you just looking for dirt or satisfying your curiosity? If you are looking for job related information about the candidate, will you be able to explain why you believe that information may be found on a social networking site?
 - Are you going to find out information that you wish you didn't know? Once you learn that a candidate is a member of a protected class, you can't unring the bell. For example, you might find out about an applicant's age, race, marital status, kids, religion or other facts by searching online. Once you have that information, if you don't hire the candidate, you may need to explain why this information had nothing to do with your decision not to hire the candidate.
 - Don't spy. If the information is public, that's one thing. But don't pretend to be a "friend" of the candidate or use other means of accessing information that might appear to be fraudulent or deceptive.
- It can be very tempting to research a candidate using various online tools. But is it legal? In most cases, the answer is "Yes." But be careful . . . the same rules apply to online research as apply to other forms of inquiry:

- e. ***Social Media - Researching using Google, Facebook, LinkedIn, . . .***
 - Screening an applicant based on his/her current or past salary;
 - Asking a job applicant about his/her salary history, or asking a former employer; and
 - Basing compensation for a position on the salary history of a prospective employee.
- d. ***Salary History – Keep it out of your inquiries***

This 2017 Session, the Oregon Legislature passed a new law designed to address systemic wage disparities between male and female employees. The law prohibits an employer from:

 - The application should state that an employee will be terminated immediately if it is later determined that the employee falsified the application.
 - If drug testing will be performed, disclose this in the application.
 - If the employee will be required to sign a noncompete, mention it in the application and make the noncompete agreement available for review.
 - If a marginal former employee seeks rehiring, be careful with how the application is reviewed. The decision not to rehire should be viewed with the same scrutiny that you would have reviewed a decision to terminate. For former drug addicts, a blanket no-rehire policy can be trouble.

So what might be some job-related reasons for researching a candidate online? It depends on the job. If you are hiring a person to dig ditches, it would be difficult to justify why researching the candidate on a social networking site is job related. In many cases, a candidate's off-duty conduct may not be at all relevant in evaluating his or her ability to perform your particular job. However, if you are hiring someone with access to money, financial or other sensitive information, or someone who regularly deals with your customers, Google or social networking research may be easier to justify because the character, experience, personality and social skills of the candidate are more important.

When is an Online/Social Media Search Job Related? Here are some reasons why, for some jobs, using Google or social networking sites to research a candidate might be justified as "job-related":

- Is the information reported on the candidate's resume accurate?
- Can the candidate communicate effectively?
- Does the candidate act in a professional manner in social settings?
- Is the candidate well-rounded?
- Is the candidate creative?
- Does the candidate use appropriate discretion and have good judgment?
- Has the candidate shared sensitive or confidential information of a prior employer?
- Does the candidate engage in or promote drug use or excessive off-duty drinking?
- Has the candidate bad mouthed prior employers or others online?
- Does the candidate's personality fit the needs of the job?

Safeguards when Recruiting Using Online/Social Media Searches: Because of the danger that the social media or internet search will reveal information about the candidate that the company would just as soon not have, some precautions are in order:

- Consider writing a policy that lays out the reasons why you are using internet and social media to conduct searches. Having a policy will force you to think about the lawful reasons why you are conducting searches and what you hope to find. The policy should describe the type of information the company considers relevant to the hiring process.
- Assign the job of conducting research to a person who is not involved in the hiring process. It is much more difficult to prove that inappropriate information

was not part of the hiring decision when the decisionmaker has unlimited access to the information.

- Give the person doing the research guidelines as to what are appropriate resources for inquiry. For example, the researcher might be instructed to limit searches to LinkedIn, which tends to be more business-focused.
- Give the person doing the research guidelines as to what are appropriate topics for inquiry and what information the person should avoid looking for.
- Give the person doing the research instructions as to what information should be shared with hiring decisionmakers and what information should be withheld. Consider developing a form for this purpose, so that only job related information is provided.
- Decide what should be done with the information obtained. What should be kept? What should be destroyed?
- With regard to Facebook and other social media, don't require that applicants provide you with their Facebook passwords so that you can review everything they have ever posted. Don't "friend" applicants in an effort to obtain better access their backgrounds either. This is especially true for "dummy" friend requests using fictitious names or identities.
- As of January 1, 2014, it is unlawful in Oregon for Employers to require an applicant to disclose or provide access to personal social media accounts.

f. *Performance, Aptitude & Other Tests*

Aptitude Tests: In some cases, requiring that the applicant demonstrate a skill is helpful. Just be sure that the applicant does not perform any useful work for you. Working time that benefits the employer must be paid for.

Written Tests: In administering written tests, be careful as to how the test is written and what exactly is being tested. For example, a person may be able to do a physical job very well, but have language or other difficulties that will prevent them from successfully completing a written test.

Personality Tests: Take care when using personality tests. If the questions inquire into personal issues, such as religious beliefs or sexual practices, then you could face an invasion of privacy claim. Ask the testing provider whether they have evaluated stereotypes and other factors that might make the test less valid for particular race or ethnic groups.

Honesty Tests: Polygraph tests of job applicants are illegal. Although other forms of honesty tests may be lawful, take care when considering whether to use such a test.

- Arrange interviews to be held where interruptions will not occur so full attention can be given to the candidate.
- Allow adequate time for each interview.
- Allow time in the interview for the candidate to review the current position description. While the applicant is reviewing the job description, you can use this time to review the applicant's training, experience and job history.
- Record each candidate's responses in writing on the interview questionnaire.
- Allow the candidate to ask questions about the job.
- Use active listening techniques.

The following are suggestions for preparing and conducting the interview.

Consider using the dual interviewing method. Two interviewers can alternate asking questions and taking notes. The method also provides a witness should anything that happened in the interview ever be questioned.

Structuring the Interview

To make sure that the interview is objective and you have not let any discriminatory influences affect your decision, it is helpful to prepare written interview questions and use an interview rating sheet that clearly identifies appropriate responses. A scoring system can be helpful for measuring whether the applicant's response met, fell below or exceeded the anticipated response. Using written questions will also make it less common for interviewers to find themselves in areas of discussion that are inappropriate grounds on which to make for a hiring decision.

Interviews are one of the most common methods for selecting among persons who have applied for a position. The interview, as with every other step in this process, should directly relate to the job analysis and job description. Your questions should be focused on the knowledge, skills, and abilities required to perform the job. Your job analysis should provide you with plenty of areas of questioning. To the extent that you wish to evaluate whether the candidate works well with others, can handle deadlines, and properly perform other job related duties, be sure that these abilities are included in the job description.

Interviewing

Interviews are one of the most common methods for selecting among persons who have applied for a position. The interview, as with every other step in this process, should directly relate to the job analysis and job description. Your questions should be focused on the knowledge, skills, and abilities required to perform the job. Your job analysis should provide you with plenty of areas of questioning. To the extent that you wish to evaluate whether the candidate works well with others, can handle deadlines, and properly perform other job related duties, be sure that these abilities are included in the job description.

Under the recently enacted Genetic Information Nondisclosure Act ("GINA"), it is likewise unlawful to use genetic information in the hiring process.

Genetic Information

It is unlawful under Oregon law to use genetic tests to evaluate whether to hire a candidate.

- Do not allow the interview to digress from job-related issues. If it does, quickly steer it back to a job-related topics.
- Allow, and be comfortable with, periods of silence.
- Ask clarifying work related questions regarding applicants' responses.
- Let each candidate know when you expect to make a decision, and promptly notify all candidates when the position is filled.

ii. *Examples of Lawful Interview Questions*

Questions must be designed to elicit responses that are job related. Do not ask a question that is likely to elicit a non-job related response. Samples of questions that may be used in an interview are listed below. These are only suggestions and are not all-inclusive. Be sure that all interview questions obtain HR approval before you begin interviewing.

Previous Experience

- Please explain your training and experience related to this position.
- What experience have you had in performing a particular task?
- How did you feel about the workload in your last job?
- May I call your past or present supervisor(s) for a reference?

Career Interests

- What are your short-term and long-term career objectives?
- How will this job enable you to reach your career goals?
- What is it about this position that interests you?

Job Requirements

- This position is scheduled to work from 8:00 a.m. to 5:00 p.m. Would you be available to work during these hours?
- Now that you've reviewed the job description, what special skills do you have that might enhance your ability to do this work? What skills would you need to acquire?
- How do you think you would spend your first week on this job if you were hired?
- Are you able to perform the essential functions of this job, with or without a reasonable accommodation?

Attitudes & Skills

- What did you like most about your most recent job? Least?
- Give me two examples of what you have done in previous jobs that "demonstrated your willingness to work hard" or "demonstrated a high level of initiative."
- Tell me about three areas that you have excelled in and how that knowledge or experience makes you more qualified for this position.
- How do you feel about how your last organization was managed?
- What was the most disappointing aspect of your last job?

Work Standards

- What were some of the more important things you accomplished in your last job?

- Avoid questions which imply bias. Properly phrased questions can eliminate implications of bias. Questions that could touch on personal matters should be phrased by stating the job requirement and asking whether or not the candidate can meet the requirement.
 - Avoid assumptions/stereotyping. Do not make assumptions, ask about, or comment on the candidate's age or date of birth, sex, ethnic/cultural background, religious beliefs, marital status, or family circumstances.
 - All candidates must be treated equally. Develop a standard set of written questions to ask during the interview. This does not preclude asking a candidate to clarify information from an application or résumé, or to elaborate on answers elicited by the standard question.
 - Be careful about questions regarding a candidate's private life. All questions must be based strictly on the duties and requirements of the job and what it takes to be successful on the position.
 - Do not ask an applicant about his/her salary history. Oregon just recently passed a bill prohibiting employers from asking an applicant about salary history.
- An interview is a time to determine the applicant's ability to perform the job. Hiring decisions are based upon the applicant's skills, abilities, and attitude. Decisions are not made on the basis of stereotypes, prejudice or bias.

!!! Questions to Avoid

- What kinds of work related decisions are the most difficult for you to make and why?
 - Give me two examples of decisions you had to make on your last job.
 - What do you do when work priorities change quickly? Give me one example when this has happened to you.
 - Tell me about a time when you had to make an unpopular decision at work.
- Leadership**
- How would the people who work for you describe you?
 - What single skill or ability is your greatest asset? How did you develop this expertise?
 - What do you enjoy most about being a leader? Least?
 - What has your staff criticized you for?
 - Tell me about your worst hiring decision.
 - Tell me about a time when you had to take disciplinary action with someone you supervised.
- Problem Solving & Decision Making**
- What were some of the factors that would account for the accomplishments you just mentioned?
 - What responsibilities or results did not come up to your expectations on this job?

iv. Examples of Right and Wrong Questions

WRONG: Asking if a candidate has family, religious obligations or a disability which would interfere with the travel requirements of the job.

RIGHT: Stating that the incumbent of the position will be required to travel twice a month, averaging three days per trip; then asking if the candidate would have a problem with this work schedule.

WRONG: Asking if a candidate will have problems working late because of parenting obligations.

RIGHT: Stating that the required working hours are generally 8:00 to 5:00, but that it is very common to stay late; then asking if the candidate can commit to working that schedule.

WRONG: Asking if a candidate smokes.

RIGHT: Stating that this is a nonsmoking office and that employees are allowed two 15-minute work breaks each day; then asking if these restrictions would pose a problem for the candidate.

WRONG: Asking if the candidate has any health issues or physical limitations.

RIGHT: Informing the applicant about the physical and attendance requirements of the job and asking whether the applicant will be able to satisfy those requirements with or without a reasonable accommodation.

v. What to Do If You Receive Unwanted Information

Sometimes an applicant will disclose information that was not elicited and that should play no role in the hiring decision. If you feel an applicant has disclosed information pertaining to a legally protected class or that may lead to information about a legally protected class:

- Stop the applicant from elaborating and take control of the conversation.
- Tell the candidate that the company does not base its hiring practices and decisions on that particular subject area.
- Make sure that the information that came up stays with you, the interviewer, and is not mentioned to others in your office or in subsequent decision-making about the applicant.
- Rather than pretending the subject did not come up, document exactly what happened and how you handled it. This will be your best evidence if the interview is ever called into question.

i. Checking References with Prior Employers

Prior employers should be contacted whenever possible for employment references. Thorough reference checks can make the difference between a successful and unsuccessful new hire. An

interview of an applicant's references should be treated like any other formal interview in terms of the types of questions that are asked.

If information about the applicant suggests that employment of the applicant in the position may pose a risk or hazard to the potential employee, other employers, or customers, further evaluation is likely in order before making a decision.

Considerations when checking references

- Ask only for job related information.
- Verify any questionable information provided by the applicant.
- Write down in advance the questions or areas you will want to ask about.
- Cover the same areas for each applicant's references.
- Contact only former supervisors or persons who have direct knowledge of the applicant's qualifications to perform the job.
- Ask for factual information that can be verified. Focus on behavior and actions. Stay away from subjective impressions of character, attitude, or personality.
- You may NOT ask a previous employer or personal reference about an applicant's disability, sick leave usage, illnesses or worker's compensation claims. However, you MAY ask about the employee's ability to perform essential functions, including the ability to meet performance and attendance standards.

Examples of acceptable reference questions

- When did the candidate begin working in your company?
- What was their job title?
- How long did they work for your company?
- What were the responsibilities in order of importance?
- How would you rate the quality of the candidate's work?
- How would you rate the volume of the candidate's work?
- How did the candidate handle work-related pressures?
- How would you describe the candidate's attitude?
- How would you characterize the working relationship between the candidate and coworkers?
- How would you describe the candidate's ability to interact with the general public?
- Can you cite two or three of the candidate's strengths?
- Can you cite two or three of the candidate's weaknesses?
- Does the candidate work well with little or no supervision?
- What level of supervision was required?
- How did the candidate handle several different types of tasks?
- How accurate was the work performed?
- How were work related details attended to?
- Would you rehire the candidate for the same position?

- When hiring into a managerial position which involves setting the direction or control of the business;
 - A position that involves access to personal or financial information of customers, employees or the employer, and that information would not customarily be provided in a retail transaction; or
 - A position that involves a fiduciary responsibility to the employer, including, but not limited to, the authority to issue payments, transfer money or enter into contracts.
- When is a credit check "Substantially Job Related"? The determination of whether an investigation into an applicant's credit history is "substantially job-related" is evaluated on a position-by-position basis. BOLI has given some guidance on when a hiring decision can be made based on an applicant's credit history:
- The credit history of the applicant is substantially job related to the position.
 - The employer is required by state or federal law to use credit checks as part of the hiring process; or
 - The job is with a bank, credit union, or law enforcement organization;
- Under the new law, unless an exception applies, it is an unlawful employment practice for an employer to obtain or use a credit history to make a decision to hire a candidate. Therefore, an employer can't obtain a credit report, or use the credit report to make a hiring decision, unless one of the following *exceptions* applies:
- In the past, employers have sometimes used credit checks to evaluate a candidate's suitability. However, a new 2010 Oregon law places strict limits on an employer's ability to perform credit checks.

k. **Checking Credit History**

- Evaluate how recent the applicant was convicted or released from incarceration.
 - Consider the nature of the crime in light of the job to be performed; and
 - Decisions are made based on convictions, not arrests;
- The EEOC has determined that discrimination on the basis of conviction records have a disparate impact on racial minorities. Thus, a criminal conviction cannot be the sole reason to disqualify a person from employment. If you wish to take criminal convictions into account, you should develop a flexible "case-by-case" policy that includes the following:

j. **Criminal Background Checks**

I. Background Checks (other than credit checks)

Background checks are a powerful tool for reviewing an applicant's history, and are a necessity when hiring for a position that poses significant liability risks. They can also help identify inflated or false statements on résumés and applications. Where you are hiring an outside agency to conduct the background check, even if you are checking other information than just an applicant's "credit history," the Fair Credit Reporting Act imposes several procedural requirements:

KEY ISSUES:

- FCRA requires that a separate, standalone authorization form be used. *An authorization on an application is not sufficient.*

- If an employer uses information for an adverse action (denying a job applicant, rescinding a job offer, etc.), the employer must give the applicant a "pre-adverse action disclosure." This includes a copy of the report and an explanation of the consumer's rights under the FCRA.

- After an adverse action is taken, the individual must be given an "adverse action notice." This document must contain the name, address, and phone number of the employer, screening company, a statement that this company did not make the adverse decision, rather than the employer did, and a notice that the individual has the right to dispute the accuracy or completeness of any of the information in the report.

m. Pre-Employment Drug Testing

Employers may test for the illegal use of drugs on a pre-employment basis. Testing and inquiries about drug use should not occur even before a conditional job offer is made. Pre-employment drug testing and inquiries about illegal drug use must be uniformly applied. Don't pick and choose which candidates will be subjected to these inquiries.

Under the ADA, even though pre-offer medical exams are not allowed, the ADA does allow testing for the illegal use of drugs, and inquiries about illegal drug use.

When it comes to asking about drug use, here are some rules to keep in mind:

- Applicants can be asked at any time during the hiring process about whether they currently use illegal drugs.
- Pre-offer, applicants can't be asked whether they use legal drugs, as this question is likely to elicit information about a disability. Although such a question can sometimes be job related, especially for hazardous occupations, the question needs to wait until after a conditional job offer is made.
- Although casual drug use is not a disability, a prior drug addiction is. Questions that target casual drug use are lawful, such as: "When is the last time you used illegal drugs?" or "Have you used illegal drugs in the last six months?" However,

pre-offer questions that target whether the candidate has been addicted to drugs would not be lawful.

n. *Physical Agility/Skills Tests*

Particularly in physically demanding jobs, employers may be interested in seeing if the applicant is physically able to perform the job. Does the applicant struggle to do the work? Does the applicant have the requisite coordination and motor skills? Highly technical jobs, such as a hygienist in a dental office, might also be tested to determine the level of the applicant's practical skills. Some issues to think about when conducting a physical agility or skill test:

- The applicant is not employed yet, so workers' compensation protections and benefits may not apply. Consider having the applicant sign a waiver of liability.
- The applicant cannot perform any productive or meaningful work. If the work is of any value to the employer, then the applicant needs to be paid for the work and will be considered an employee.
- Make sure your examination process is validated. Can you prove, if challenged, that the test accurately predicts future success on the job?

o. *Post-Offer Medical Inquiries & Examinations*

Once an employer offers the applicant a job, it then may require that the applicant undergo a medical examination as a condition of hire. The offer must be conditioned on the applicant satisfactorily passing the medical inquiry. Although the ADA does not require that the medical inquiry be job related, every applicant in the same job category must be required to submit to the inquiry.

In evaluating the mental and physical ability of the applicant to perform the job, the employer must factor in whether there is any reasonable accommodation that would enable the applicant to perform the job's essential functions.

KEY ISSUES:

- Medical inquiries can only be made post-offer. Pre-offer, the ADA prohibits any inquiries that might reveal that the applicant has a disability.
- The employer must require all persons in the same job category to take the same exams and answer the same inquiries.
- The employer also must keep any medical information confidential and separate from the candidate's personnel file.
- The decision not to hire must be made very carefully. The ADA requires an individualized assessment by a qualified individual. In other words, if the examination finds that the employee should not be hired because the job may pose a direct threat to the safety or health of the applicant or others, the following additional conditions apply:

Although it may never be necessary, supervisors should always be prepared to provide the specific job-related reason(s) why a particular applicant was or was not selected for a follow-up interview or for hire. Taking detailed notes about job-related matters will also help the interviewer remember important aspects of the selection process. When using interviews as a method of consideration, supervisors must be careful to ensure that the interview process does not introduce bias based on factors unrelated to the duties and responsibilities of the position being filled.

q. *Justifying the Hiring Decision*

- Preparation of the job analysis;
- Preparation of job announcements & selection of advertisers;
- Decision about selection methods;
- Selection of particular applicants for interview;
- Preparation of interview questions and rating sheets;
- Selection of applicants for follow-up interviews and screening;
- Review of the results of screening processes and reference checking;
- Hiring decision;
- Orientation of the new employee; and
- Notifying other applicants that the position has been filled.

Supervisors should keep the HR Department involved throughout the hiring process. Supervisors should consider consulting the HR Department for each step in the hiring process, as appropriate. This includes:

p. *Human Resources Review*

- The decision must be made based on an individualized assessment. In other words, a blanket policy or prohibition is not lawful. (e.g. no person with epilepsy can be hired for this position).
- The assessment must determine whether the applicant is presently able to perform this particular job.
- The health care professional making the assessment should have expertise in the applicant's specific condition and be able to provide medical information that allows the employer to determine the effects of the condition on the applicant's ability to perform his/her job. So for example, a cardiologist rather than a general practitioner should evaluate an applicant's heart condition.
- Assuming that the assessment is properly made and employment of the applicant would pose a direct threat, the conditional offer of employment can be withdrawn.

3. CLOSING THE HIRING PROCESS

a. *Job Offer Letters*

Once you have selected a candidate for hire, one common practice is to send an offer letter. The offer letter should include a statement that employment is "at will." It should also include a description of the wages to paid, the manner in which they will be paid, and possible benefits for which the employee may become eligible.

Additionally, the letter should clearly state if the position is dependent upon completion of any tests or background checks. If the position will expose the employee to confidential information, including customer lists, a confidentiality agreement may be in order. Similarly, if you wish to limit the ability of the employee to compete with you after termination of employment, particularly when the employee will be building relationships with clients that could be taken advantage of later, a noncompetition or nonsolicitation agreement may be in order. Such agreements should be provided to employees as early as possible, and are best included with an offer letter.

If you are going to have an exempt employee sign a noncompetition agreement, then you need to disclose that an agreement will be required in the job offer letter. The same is true if you plan to require that the new employee sign an arbitration agreement.

The offer letter should also reference that the employee will be subject to the company's general personnel policies.

b. *Rejection Letters*

Once a position has been filled, all applicants should generally be notified as a matter of professional courtesy. These letters should be neutral in tone and avoid unnecessary praise of an applicant.

EMPLOYMENT APPLICATION

ON THE EDGE CORPORATION

a division of Love to Hire Lawyers, Inc.



Name: _____ Sex: _____ Race: _____ Age: _____ SSN: _____
Country of Birth: _____ Are you a U.S. citizen? ☐ Yes ☐ No
Current Marital Status: ☐ Married ☐ Living together ☐ Divorced ☐ Separated ☐ Available?

Height: _____ Weight: _____ Hair Color: _____ Eye Color: _____ Do you smoke? ☐ Yes ☐ No

Religion: _____

Sexual Orientation: _____

Significant Other Information			
Name	Age	Occupation	Race
Health Problems (attach additional pages if needed)			

Dependent Information			
Name	Age	Health Problems (attach additional pages if needed)	Days of School Missed Last Year

Does an immediate family member already work for the company? ☐ Yes ☐ No	
Note: The company has a strict policy against hiring an employee's spouse or immediate family member	
Are you pregnant now? ☐ Yes ☐ No Are you planning to have more children? ☐ Yes ☐ No	
If "Yes," when? _____ How many? _____ (estimate if necessary) Do you plan to continue working? ☐ Yes ☐ No	

Have you ever ...	Been arrested?	☐ Yes ☐ No
	Filed a harassment claim?	☐ Yes ☐ No
	Reported safety violation to OSHA?	☐ Yes ☐ No
	Suffered an on-the-job injury?	☐ Yes ☐ No
	Filed a workers comp claim?	☐ Yes ☐ No
	Taken family leave?	☐ Yes ☐ No
	Worked as a union organizer?	☐ Yes ☐ No
	Been addicted to drugs?	☐ Yes ☐ No

Health History		
Do you currently have a disability?	Have you had a disability in the past?	Any diseases or injuries?
☐ Yes ☐ No	☐ Yes ☐ No	☐ Yes ☐ No
Attach doctors notes regarding prescriptions & work restrictions		
If you have a disability, can you perform this job ☐ with ☐ without a reasonable accommodation? List accommodation(s) needed: _____		

APPLICATION PROCEDURES

Once you have completed this application, please: 1) Report to the company nurse for a fitness evaluation (health history review, lie detector test, genetic test for uninsurable conditions, and drug test). Please make your check for the health evaluation fee (\$15.00) payable to "On the Edge Corp."; and 2) Report to the testing center for the job Readiness Exam. If you pass the fitness evaluation and readiness exam, we will submit your application for further consideration by the Human Resources Department. If you are hired, you will need to purchase uniforms from the company store. The \$150 per uniform charge will be deducted from your first paycheck. I hereby authorize On the Edge to obtain a credit and criminal background check.

Applicant Signature _____

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OREGON WAGE & HOUR FUNDAMENTALS

Presented by

RANDALL P. SUTTON

EMPLOYMENT LAW & LITIGATION PRACTICE GROUP

HR BASICS – AUGUST 10, 2017



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EXEMPT VS NONEXEMPT

A. Basic Rule

1. Unless "exempt" under federal *and* state laws, all employees are entitled to at least minimum wage and overtime each workweek.

a) Employer must track hours worked unless exempt

b) Employer must ensure appropriate breaks unless exempt

B. Common Myths and Misconceptions

1. Salary automatically makes an employee exempt—it is usually only one of several required elements.

2. Commission automatically makes an employee exempt—it often destroys exempt status.

3. Job titles determine exempt status—possibly helpful, but the reality of the job controls.

C. Primary Categories of "exempt" employees:

1. "White Collar"

a) Professional Exemption

b) Executive Exemption

c) Administrative Exemption

2. Outside Sales

3. Retail Sales

4. Certain Computer Employees

5. Others

- a) Certain Agricultural employees
- b) Domestic service on a casual basis in or about a family home
- c) Student workers for schools
- d) Volunteer firefighters
- e) Golf caddies
- f) Certain campground hosts
- g) ...etc.

D. Dual Coverage Rule

1. When there is a conflict between federal and state laws, employers must apply the standard that is most beneficial to the employee.
2. So what? Federal and Oregon wage and hour laws are not the same.

E. "White Collar" Exemptions

1. Basic Requirements for Each

a) Salary Basis Test:

- (1) A predetermined amount that is not varied based on the quantity or quality of work performed.
- (2) No deductions. With very few exceptions, exempt employees must be paid a full salary for any week in which work is performed without regard to the number of hours or days worked.

b) Salary Level Test: At least a guaranteed \$455 gross pay per workweek.

- c) Primary Duty Test: Employee must perform legally specified duties the majority of the time (sometimes more).

2. Professional Exemption

a) Salary Basis & Salary Level

b) Duties:

- (1) Primary duty is the performance of work requiring knowledge of an advanced type; and
- (2) The work is in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study; and
- (3) Exercise discretion and independent judgment.

- c) Examples: Doctors, lawyers, CPAs; certain "creative professionals; teachers.

3. Executive Exemption

a) Salary Basis & Salary Level

b) Duties:

- (1) Primary duty consists of the management of the establishment or a

division thereof, and

- (2) Supervise two or more full-time employees (or the equivalent); and
- (3) Hiring or firing authority (or at least can make recommendations that are given particular weight); and
- (4) Independent judgment and discretion (new federal rules omit this requirement, but Oregon has not changed)

4. Administrative Exemption

a) Salary Basis & Salary Level

b) Duties:

- (1) Primary duty is the performance of office or non-manual work directly related to management policies or general business operations (new federal rule omits the word "policies"); and
- (2) Exercise discretion and independent judgment (new federal rules add "with respect to matters of significance").

c) Categories of generally exempt work: Tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations...

d) Other common candidates for the exemption: Insurance claims adjusters, project managers, executive assistants to senior executives, and purchasing agent, depending on specific job duties.

F. Other Exempt Categories

1. Outside Sales Exemption

- a) Primary duty of making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- b) Customarily and regularly engaged away from the employer's place of business in performing this primary duty.

(1) Under revised federal law, employee must generally spend 50% of time performing exempt work; but

(2) Under Oregon law, employee must spend at least 70% of time in

outside sales duties to qualify as exempt.

2. Retail Sales Exemption

a) Employer is a "retail or service" establishment

(1) A business that generates at least 75% of its annual dollar volume from the sales of goods or services that are not for resale and that are recognized as retail sales or services in the particular industry.

b) Employee's regular rate of pay is more than one and one-half times the minimum wage; and

c) More than half of the employee's compensation represents commissions on the sales of goods and services.

d) Update: As of May, 2005, finance and insurance ("F&I") managers of auto dealers now generally qualify under this exemption.

G. Exemption Examples

Example 1

Al is the manager at Bob's Diner. Al earns a weekly salary of \$420 and oversees the work of 8 part-time employees. The owner of the Diner, Bob, makes the ultimate decisions on hiring and firing for the restaurant, but Al assists in the hiring process and makes recommendations on discipline and terminations that are generally followed.

Al also has authority to make day-to-day decisions on how to run the restaurant. He spends the majority of his time on duties including orientation and training of employees, monitoring employees' work, scheduling employee shifts and ordering supplies, although he also spends some of his time each day cooking hamburgers and taking customer orders.

Bob classified Al as an exempt supervisor. Bob hasn't kept track of Al's hours, paid him overtime during the many weeks he worked over 40 hours, or made sure that he takes any breaks.

Question: Has Bob properly classified Al as exempt?

Answer:

Answer:

Question: Can Acme classify Bob, a six-figure earning employee, as exempt under the administrative exemption?

Bob is an extremely successful salesman of widgets for Acme, Inc. He conducts sales over the phone from the Acme office and is paid commissions based on his sales. Without fail, Bob has earned over \$100,000 per year every year he has worked for Acme. Bob attributes his success to his intensive researching, which often keeps him at the office until late at night, as well as his willingness to call his east coast clients early in the morning, which requires him to be at the office even earlier. Bob also travels a lot, and is probably out of the office at least 30% of the time. Acme classifies Bob as exempt, and has never tracked Bob's long hours.

Example 3

Answer:

Question: Is Ken properly classified as exempt?

Ken is the Human Resources Manager for Brian's Bakery, a chain of artisan bread making stores. Ken is classified as an exempt employee and receives a salary of \$5,000 per month. He supervises only one other employee (a personnel clerk). Ken develops the company's internal HR policies and has a say in which policies are adopted. Ken works 60-70 hours per week, but receives no overtime.

Example 2

COMPENSABLE TIME

A. General Rules

1. Suffer or permit to work: Employees must be paid for all time they are "suffered or permitted to work." This means that an employer must pay each employee for all hours that the employee works, whether or not the employee was authorized to work the hours. For example, if a supervisor says: "Don't work past 5:00 pm," but the employee does anyway, the employee must still be paid.
2. Employer Duty to Track Hours Worked: Despite the use of timecards, time clocks, timesheets...etc., the burden to track an employee's hours worked *always* rests with the employer.

B. Preparatory and Concluding Activity

1. General Rule: Employees must be paid for any time that they spend in preparation for, or in conclusion of, doing their jobs, if the preparation or concluding activities are an integral part of the principal work activity. The key question is whether the preparatory or concluding activity is one that the employee cannot forego if he/she is to perform the principal activities of the job. The following are some examples of preparatory and concluding activities that the employee must be paid for:

- a) Employee must perform certain activities to enable them to be ready to begin work at that time (e.g., restaurant server setting up workstation, machinist cleaning and oiling machinery in a plant prior to beginning a shift, or a bank teller counting a till before the business opens to the public).
- b) Donning and Doffing: If an employee is required to wear a uniform or protective gear and the nature of the business is such that the uniform can only be put on at work, the time spent changing is compensable. However, if the protective gear required is basic and takes very little time to put on (e.g. safety goggles, gloves, glasses), the time is not compensable. Conversely, if an employee could change into the uniform at home, but chooses to do so at work for his or her own convenience, the employer is not required to compensate for the time spent changing.

C. On-Call/Waiting Time

1. General Rule: All time that is spent waiting to perform work for the benefit of, and at the request of, the employer must be paid.
2. Engaged to be Waiting = Compensable: If an employer's business requires the employer to ask a certain number of employees to report to work, but the number of employees required to actually perform work will depend on business that day, the employees must be paid for time spent waiting on the premises.

3. Waiting to be Engaged = Non-compensable: If an employee is required to carry a beeper or cell phone, or to leave a number where he can be reached, the employer does not need to pay for time spent carrying the equipment or waiting for a call if the employee can use the time effectively for his own benefit.

4. Show Up Pay

- a) No legal mandate (*usually*): The Oregon rule requiring "show-up pay" or "adequate work" for adult workers was rescinded in 1990. This rule formerly required employers to guarantee work and/or payment of at least half the scheduled shift. Under current wage and hour laws, when an adult employee reports for a scheduled shift but is sent home early for lack of work, the employer need only pay for the actual time worked. If the employee performs no work and is not required to wait on the employer's premises for any period of time, no wages are due. For example, if an employee arrives at work for his scheduled shift, is asked to wait in the break room, and is sent home after fifteen minutes because the employer is overstuffed, the employer only needs to pay for the fifteen minutes of waiting time.

- b) Exception: There is an "adequate work" rule which remains in effect for minors (employees younger than 18). OAR 839-021-0087(5) states that a minor who is required to report to work must be provided sufficient work to earn at least one-half of the amount earned during the minor's regularly scheduled shift or be paid reasonable compensation if the work is not provided. Reasonable compensation means the greater of: (a) the amount the minor receives for one hour of work at his regular rate of pay; or (b) the amount determined by multiplying the minor's regular rate of pay by one-half of the hours the minor was scheduled to work. For example, if a fifteen year old employee is scheduled to work from 10:00 a.m. to 2:00 p.m. but is sent home immediately after showing up for work, the employer must pay him for two hours at his regular hourly rate.

D. Volunteering

Hours worked must generally be paid unless:

1. The work is at the employee's initiative; *and*
2. The work is outside normal or regular work hours; *and*
3. The employee is performing religious, charitable or community service; *and*
4. The employee works without contemplation of payment; *and*
5. The employee is performing a task outside of the regular job functions performed for the same employer.

E. Travel Time

1. Portal-to-Portal General Rule: Not compensable under federal or Oregon law unless employer policy mandates pay or has contracted to pay. This includes travel time from home to different work sites, regardless of how far away the work site is, if the employee is expected to report to different work sites as a *normal, contemplated and indeed mandated incident of their employment.*
2. Travel Between Worksites Within Single Day General Rule: Generally compensable under federal and Oregon law if travel is required to accomplish the day's work.
3. Special Single-Day Assignments

- a) Rule: Employer must pay employees home to work travel time if the employee is given a special one-day assignment at another location.

b) When Applicable:

- (1) Employee has a fixed official work location; and
- (2) Employer requires employee to report for one day (not overnight) to an alternate worksite; and
- (3) Alternate location is over 30 miles from primary worksite (e.g. Portland to Salem).

4. Overnight Travel

a) General Rules

- (1) On overnight trips, all time spent traveling during normal work hours, *even if traveling on a day not normally worked (e.g., weekends),* must be compensated;
- (2) On overnight trips, travel time outside of an employee's normal working hours is not legally compensable, *except where the employee is required to drive during these hours.*

5. Travel time is considered hours worked for purposes of overtime

6. Travel time can be expensive. Consider options:

- a) Schedule passive travel during non-working hours
- b) Pay for travel time at a lower rate
- c) Require completion of work when employee is a passenger

7. Examples

Example 1: Eric regularly works for Dr. Tom's Rhinoplasty from 8 am to 5 pm, Monday through Friday. Dr. Tom requires Eric to attend a two-day seminar in Bend. Eric travels by bus from 9 am to noon on Thursday. Dr. Tom must pay for these three hours of travel time because they cut across Eric's normal working hours. Eric returns home by bus on Saturday, traveling from 4 pm to 7 pm. Dr. Tom must pay Eric for 1 hour of this travel (4-5), as the remaining 2 hours fall outside of his normal work schedule. The one hour of travel is compensable even though it occurs on a Saturday because Eric would typically work from 4 to 5 on the days he does work.

Example 2: Same facts as above, except that there is no bus route and Eric is required to drive during the same hours. In this case, all travel time is compensable, regardless of the time or day during which it occurs.

Example 3: Kyle also works for Dr. Tom, and has the same schedule as Eric. Dr. Tom requires Kyle to attend the same two-day Bend seminar as Eric. Kyle rides to Bend in Eric's car on Thursday from 9 am to noon. Because Kyle regularly works during these hours, Dr. Tom needs to pay Kyle for 3 hours of travel time on the way to Bend. Kyle rides back with Eric on Saturday from 4 pm to 7 pm. While Dr. Tom must pay Eric for all 3 hours because Eric is driving, Dr. Tom must only pay Kyle for the 1 hour (4:00 pm–5:00 pm) that cut across his regular working hours. The remaining two hours as a passenger do not need to be compensated.

Example 4: Stan also works for Dr. Tom from 8 am to 5 pm, Monday through Friday. Dr. Tom requires Stan to attend a weekend convention in New York City. Dr. Tom books Stan on a redeye flight, leaving PDX at 8 pm on Friday and arriving at JFK on 5 am on Saturday. Dr. Tom also books an airport shuttle to drive Stan. Since Stan is traveling as a passenger outside of his normal working hours, Dr. Tom does not need to pay Stan for any of this travel time.

Dr. Tom provided Stan with a bus ticket from JFK to the convention. However, terrified of NYC public transportation, Stan rents a car and drives to Manhattan. Because of slow traffic, it takes Stan 2 hours and he arrives at 7 am. Dr. Tom does not need to pay Stan for any of this time, as all of it fell outside of his normal work hours. This is true even though Stan drove, since Dr. Tom offered him public transportation.

BASIC FRINGE BENEFIT ISSUES

- A. Most fringe benefits are up to the employer.
- Employer's Choice, usually but once promised by the employer, they need to be delivered. Policies should not be ambiguous about how benefits accrue, are used, and what happens at termination.
- B. "Introductory Period" / "Trial Service" / "Probationary Period"
1. Review to ensure no interference with "at will" nature of employment
2. Tie to benefits issues
- C. Paid Forms of Leave
1. What must be offered?
2. Accrual vs. Lump Sum
3. Do you have to pay for unused leave at end of year or at termination?
- D. Bonuses—Discretionary v. Nondiscretionary
1. Holiday bonus not tied to performance (not need to be repeated) v. contractual bonus tied to production levels.
2. Policy should specify how and when bonuses are earned, and whether an employee who terminates prior to the bonus award date will receive any or a prorated portion of the bonus.
- E. Jury Duty
1. Pay is discretionary.
2. Time off is not.
- F. Severance Pay
1. Required?
2. Think of as an insurance policy

REST & MEAL BREAKS

A. Meal Period

1. Who: All but "exempt" employees.
2. What: At least a 30-minute unpaid meal period when the employee works six hours or more. Meal period must be uninterrupted, and employee must be relieved of all duties.
3. When: If the work period is at least six hours but less than seven hours, the meal must be taken between the second and fifth hour worked. If the work period is more than seven hours, the meal period must be taken between the third and sixth hour worked.

B. Rest Breaks

1. Who: All but "exempt" employees.
2. What: A paid, uninterrupted 10-minute rest break for every "four-hour segment or major portion thereof" (i.e., any segment over 2 hours) in the work period.
3. When: In the middle of each four-hour segment, whenever possible.

C. Exceptions

1. **NONE of these exceptions apply to employees under the age of 18** (i.e. you **must** provide all minor employees with a meal break)
2. "Unanticipated Circumstances": If unforeseeable equipment failures, acts of nature, or other exceptional and unanticipated circumstances, make it so an employee cannot take a meal break, the employer is excused from providing the meal break and must consider the time schedule for the meal period as hours worked and pay the employee for the period. This exception is intended to apply to "unanticipated circumstances" **that occur rarely and infrequently**
3. "Industry Custom": If it is industry practice or custom that employees receive a **paid** meal period of less than 30 minutes (**but no less than 20 minutes**), the employer can give the employee a shorter meal period and treat the time as hours worked. .
4. "Undue Hardship": If providing an employee an unpaid 30-minute meal period would create an "undue hardship" on the employer's business, the employer is excused from providing the meal break and must consider the time scheduled for the meal period as hours worked and pay the employee for the period. An employer who does not give an employee a meal break under this exception must (1) still provide the employee adequate time to consume a meal, to rest, and to use the restroom and must treat that time as hours worked and (2) must first give the

employee a prescribed BOLL notice and maintain a record of that notice. A copy of this notice is included at the back of this handout and can be found at <http://www.oregon.gov/BOLI/WHD/docs/WH-161.pdf>

5. Factors to be considered with regard to "undue hardship" include:

a) The employer's cost of complying with the requirement to provide a meal period;

b) The overall financial resources of the employer;

c) The number of persons employed at the particular worksite and their qualifications to relieve the employee; the total number of persons employed by the employer; and the number, type and geographic separateness of the employer's work sites; and

d) The effect providing the meal period would have on: the start-up or shutdown of machinery in continuous operation industrial processes; intermittent and unpredictable workflow not in the control of the employer or employee; the perishable nature of the materials used; and the safety and health of the employees, patients, clients, and the general public.

D. Meal & Rest Break Chart

REST BREAKS AND MEAL PERIODS REQUIRED BASED ON LENGTH OF WORK PERIOD

Length of work Period	Number of rest breaks required	Number of meal periods required
2 hrs or less	0	0
2 hrs, 1 min-5 hrs, 59 mins	1	0
6 hrs	1	1
6 hrs, 1 min-10 hrs	2	1
10 hrs, 1 min-13 hrs 59 mins	3	1
14 hrs	3	2
14 hrs-1 min to 18 hrs	4	2
18 hrs, 1 min-21 hrs, 59 mins	5	2
22 hrs	5	3
22 hrs, 1 min-24 hrs	6	3

E. Breaks to Express Breast Milk

1. Prior to March 23, 2010, only Oregon employers with 25 or more employees had to

provide breaks to mothers of infants that wanted to express breast milk.

2. Under the Healthcare Reform Act, all employers are now required to provide rest breaks to nursing mothers, however, what an employer is obligated to do for its employees depends on the employer's size.

3. Employers with fewer than 25 employees are not required to follow the state law, but are:

a) Required to provide nursing mothers with reasonable break time and space to express breast milk "each time" that the employee has a need to do so when the employee has a child 12 months or younger. NOTE: reasonable break time and the frequency of the breaks have yet to be defined.

b) NOT required to pay for the rest break if it lasts at least 30 minutes.

c) Required to pay for the first 10 minutes if the break to express breast milk is taken in conjunction with the employee's standard rest break and the break lasts at least 30 minutes.

d) Probably required to pay for all of the break if it lasts less than 30 minutes. The law is unclear on this issue, so the conservative approach would be to pay for the entire break. While this outcome is probably not the outcome that the legislature or BOLI intended in developing the law and regulations, until it is clarified, it may be safer to pay than risk a lawsuit.

e) Required to provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public."

f) NOT required to provide these breaks "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 of the structure of the employer's business."

4. Employers with 25 or more employees in Oregon are:

a) Required to provide nursing mothers with reasonable break time and space to express breast milk "each time" that the employee has a need to do so when the employee has a child 18 months or younger.

b) Required to provide employees with a 30-minute break for each 4 hours worked or major portion thereof (i.e., 2 hours and 1 minute) in approximately the middle of that work period. For an employee working eight hours per day, the employee would get a break in the morning and another in the afternoon.

c) NOT required to pay for the rest break if it lasts at least 30 minutes and not taken in conjunction with an employee's usual rest break.

d) Required to pay for the first 10 minutes if the break to express breast milk is taken in conjunction with the employee's standard rest break and the break

lasts at least 30 minutes.

e) Probably required to pay for all of the break if it lasts less than 30 minutes. The law is unclear on this issue, so the conservative approach would be to pay for all of the break. While this outcome is probably not the outcome that the legislature or BOLI intended in developing the law and regulations, until it is clarified, it may be safer to pay than risk a lawsuit.

f) Required to provide a private place, other than a bathroom, to express breast milk that is in close proximity to the employee's work station.

g) Required to allow the employee to bring a cooler or other insulated container to store the expressed milk. If the employer allows employees to use a refrigerator for personal use, the employee must be permitted (but may not be required by the employer) to use the available refrigeration to store the milk.

F. Risks

1. Unpaid wages

2. Overtime (if unpaid break time pushed hours worked over 40 in a week)

3. Statutory penalties (Class Actions?)

4. Attorney fees

DEDUCTIONS FROM PAY

A. Generally Prohibited Unless:

1. Required by law (e.g. taxes, garnishments...etc.); or

2. The deduction is (1) authorized in writing by the employee, (2) *for the employee's benefit*, and (3) recorded in the employer's books; or

3. The deduction is (1) authorized in writing by the employee, (2) for an item for which the ultimate recipient of the money withheld is not the employer, and (3) the deduction is recorded in the employer's books (e.g. charitable contribution); or

4. The deduction is authorized by a collective bargaining agreement to which the employer is a party; or

5. The deduction is a \$1 processing fee for handling a garnishment; or

6. The deduction is made from the payment of wages upon termination of employment and is authorized pursuant to a written agreement between the employer and employee for the repayment of a loan made to the employee by the employer, and *all* of the following are met:

a) The employee has voluntarily signed the agreement; and

b) The loan was paid to the employee in cash or other medium permitted by ORS 652.110;

c) The loan was made solely for the employee's benefit and was not used, either directly or indirectly, for any purpose required by the employer or connected with the employee's employment with the employer;

d) The amount of the deduction at termination of employment does not exceed the amount permitted to be garnished under Oregon law; and

e) The deduction is recorded in the employer's books.

B. Penalties

1. \$200 or actual damages, whichever is greater, per violation

2. If not paid by time of termination, then up to 30 days of wages

3. Attorney fees

OVERTIME

A. General Overtime Rule

1. Unless exempt from overtime under federal and state laws, all hours worked in excess of 40 per workweek must be paid at no less than one-and-one-half times the employee's regular rate of pay.

2. Manufacturing Exception to 8 hour rule:

- a) OT after 10 hours per day (and can't work more than 13 hours per day total).

- b) Employers pay *either* daily and weekly OT.

3. Hospital/Residential Care Exceptions: The "8 and 80 Rule"

- a) Daily OT after 8 hours per day

- b) Weekly OT may be assessed using 2 workweeks (i.e. 80 hours)

B. What is the "workweek"?

1. A regularly recurring period of seven consecutive 24-hour periods.

2. Must be determined in advance.

C. What counts as "hours worked" for purposes of calculating entitlement to overtime?

1. Vacation, Sick, PTO...? - No.

2. FMLA/OFLA leave? - No.

3. Travel Time? - If otherwise compensable.

D. "Regular rate"

1. An employee's regular rate of pay is the employee's hourly rate of pay based on all remuneration received each workweek divided by the number of hours worked in the workweek.

E. Calculating Overtime

2. Hourly Employees: For an employee who receives an hourly wage, that wage rate is the "regular rate." The overtime rate is 1.5 times that rate.

3. Salaried Employees: For an employee who is paid a monthly salary intended to cover all hours worked in a week, the regular rate is calculated by: (1) multiplying the monthly salary by 12 to get the annual salary; (2) dividing the annual salary by 52 to get the weekly salary; and (3) dividing the weekly salary by the number of hours worked in that particular week to get the "regular rate." Overtime is 1.5 times that rate.

4. Employees Paid a Fluctuating Wage: For employees who receive varying rates of pay, receive nondiscretionary commission pay, or nondiscretionary performance bonuses, the "regular rate" is calculated by dividing the total pay received during the workweek by the number of hours for which that pay was intended to compensate. For example, an employee who worked 40 hours in the week and received \$250 in salary and \$150 in commissions, would have a regular rate of \$10.00 per hour (\$250 + \$150 = \$400 / 40 = \$10.00). The employee's overtime rate would be 1.5 times \$10.00 per hour, or \$15.00 per hour had they worked any overtime.

5. Bonus Payments: *Nondiscretionary* bonuses must be included in calculating the regular rate. Only bonuses that are 100% discretionary, both in terms of whether they are paid and how much is paid, may be excluded from the regular rate. The bonus must be applied to the workweeks for which it was meant to compensate.

TERMINATION WAGES

- A. Employee quits with less than 48 hours of notice
 1. Final paycheck is due within five (5) days (excluding weekends and holidays *actually observed by the employer*), or on the next regular payday, whichever comes first.
 2. Best Practice: Make payment on following day.
- B. Employee quits with at least 48 hours of notice
 1. Final paycheck is due on the final day worked, unless the last day falls on a weekend or holiday. In that case, the check is due on the next business day.
 2. Best Practice: Make payment on the last day worked.
- C. Employer fires employee
 1. Final paycheck is due not later than the end of the business day after the termination.
 2. Best Practice: Make payment at the time of termination.
- D. Employer and employee mutually agree to end employment
 1. Final paycheck is due not later than the end of the business day after the termination (i.e., treat it like a firing).
 2. Best Practice: Make payment at the time of termination.
- E. How must payment be made to be timely?
 1. Hand delivery/pickup
 2. Direct Deposit
 3. Mail, but only if authorized by employee
- F. Penalty for failing to obey the timing rules
 1. If not timely paid, then as a penalty the employee's wages continue from the date they were due for up to 30 days. The wages accrue at the employee's regular hourly rate for 8 hours per day (even if the employee regularly worked fewer than 8 hours per day)
 2. Prejudgment interest on the amount of the penalty.
 3. Employer is also liable for employee's attorney fees.

RECORD RETENTION

A. General Rule

1. Employers are required to make and keep records containing the name, address and occupation of each of its employees, the actual hours worked each week and each period as well as other information described in OAR 839-020-080. Federal law requires that employers keep these records for **at least three years**.

B. Best Practice

1. The statute of limitations for a breach of contract and certain wage claims is six years. A recent law, the Lily Ledbetter Fair Pay Act, allows courts to look back over an employee's entire tenure with a company to see if any discriminatory pay decisions were ever made against the employee. Accordingly, the best practice is to keep an employee's records available for the employee's tenure with the employer and **at least six years after they leave the company**. However, an even better practice would be to retain records related to pay changes, promotions, and transfers that affect pay indefinitely, as that data may be needed to defend a Lilly Ledbetter claim by another similarly situated employee.

USEFUL WEBSITE REFERENCES

- Department of Labor: www.dol.gov
- Oregon Bureau of Labor & Industries: www.boli.state.or.us
- Washington Department of Labor and Industries: www.lni.wa.gov
- Saalfeld Griggs: www.sglaw.com

MINIMIZING WAGE CLAIM LIABILITY

Tips for Avoiding Wage Claims

- **KEEP ACCURATE RECORDS:** At a minimum, keep the following records for 6 years: pay rate; actual hours worked each day; total hours worked each week; overtime compensation due; deductions from wages; bonuses or other additions to pay; dates wages were paid and pay period covered; date & time employee received final paycheck.
- **USE TIMECARDS OR TIMESHEETS COMPLETED BY THE EMPLOYEE -** Make sure timecards are accurate. If using a time clock, make sure employees punch clock immediately before working and after working. If no time clock is used, employee should fill out time card.
- **EMPLOYEES REVIEW & SIGN TIME CARDS:** Employees should sign timecards before submitting timecards to the payroll department. The employee should review the time card for accuracy, and then sign the card to verify that the timecard is accurate.
- **SUPERVISOR SHOULD REVIEW TIME CARDS FOR ACCURACY:** If an employee is working more hours than are shown on a timecard, the supervisor should make sure that the employee is paid for all hours worked, and disciplined regarding the need for accuracy.
- **ANALYZE EXEMPT STATUS:** Too often, employers categorize nonexempt employees as exempt. This results in a failure to pay minimum wage and overtime each workweek. It also results in a lack of records of the hours actually worked by the employee, which allows the employee to assert that (s)he worked an enormous number of unpaid hours. Because liability for these claims includes unpaid minimum wages and overtime, up to 30 days' additional wages, prejudgment interest, the employer's attorney fees and the employee's attorney fees, employer's should carefully assess whether their "exempt" employees truly are exempt.
- **EXIT INTERVIEW:** At the exit interview, ask the employee if he or she has been paid in full for all hours worked. If the answer is "no," investigate and take action.
- **TAKE WAGE & HOUR ISSUES SERIOUSLY:** Although the laws in this area can be complex and counterintuitive, there is almost no area of employment in which employers can more effectively manage their exposure. Given the disproportionately high penalties, and the ease of filing a wage claim, managing wage and hour practices is one of the most fundamental preventative steps every employer can take.



Strict Liability for Wage & Hour Violations

Wage & Hour Law Basics

Identifying Wage and Hour Pitfalls and Protecting Your Company From Liability

Randall Sutton

Employment Law & Litigation Practice Group

Saalfeld Griggs

Sound counsel. Smart business.

Overview

- Exempt vs. Nonexempt Employees
- Compensable Time
- Basic Fringe Benefit Issues
- Rest & Meal Breaks
- Deductions from Pay
- Overtime
- Termination Wages
- Record Retention
- Minimizing Wage Claim Liability

Exempt vs. Nonexempt

Basic Rule

- "Exempt" means that most of the wage & hour laws don't apply.

Every "Non-Exempt" employee must:

- Be paid at least minimum wage each workweek
- Be paid for overtime after 40 hours each week
- Receive meal & rest breaks
- Cannot have certain deductions from wages etc.

Categories of Exempt Employees

White Collar Exemptions

- Professional

- Executive

- Administrative

Other Exemptions

- Outside Sales Exemption

- Retail Sales Exemption

- Certain Agricultural employees

- Babysitters, student workers, volunteer firefighters, and golf caddies, etc.

Exempt vs. Nonexempt

Myths & Misconceptions

- › Salary = Exempt

- › Sales / Commission = Exempt

- › Job titles = Exempt

Exempt vs. Nonexempt "White Collar" Exemptions—Three Requirements

Requirement #1:

- Paid on a "salary basis" - Guaranteed predetermined minimum salary not subject to reduction because of fluctuations in quality or quantity of work:
- Paid full salary if employee works at all during week
 - Deduction from wages only for unpaid full days off for:
 - Safety-related suspensions
 - Personal reasons or Vacation
 - For sickness, if:
 - a) employer provides paid sick leave; or
 - b) either employee is not eligible for paid sick leave yet or has used up all available paid leave
 - Partial or Full Days if leave is FMLA eligible and employee has no paid leave available

Exempt vs. Nonexempt "White Collar" Exemptions—Three Requirements

Requirement #2: Paid at least \$455 per week

- Recent DOL rule increased the minimum threshold to \$913 per week. However, the implementation of the rule is tied up in court.
- Unknown what DOL will do going forward
- DOL has issued request for information, seeking public input, which is likely first step before DOL issues notice of rulemaking.

Requirement #3: Duties qualify under Exemptions

Exempt vs. Nonexempt "Professional" Exemption

- ▷ Salary Basis & Salary Level
- ▷ Primary Duties:
 - Work requires knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction
 - (Usually an advanced degree)*
 - Work requires exercise of discretion and independent judgment

Exempt vs. Nonexempt "Executive" Exemption

- ▷ Salary Basis & Salary Level
- ▷ Primary Duties:
 - The management of a business or division;
 - Supervise 2 or more full-time employees;
 - Hire/fire authority, or recommendations given significant weight;
 - Discretion and independent judgment

Exempt vs. Nonexempt "Outside Sales" Exemption

- ▶ Not subject to salary tests
- ▶ Primary Duties:
 - Employee's primary duty is making sales;
 - Customarily and regularly engaged away from employer's place of business
 - 50% under federal law; but
 - 70% under Oregon law

Exempt vs. Nonexempt "Administrative" Exemption

- ▶ Salary Basis & Salary Level
- ▶ Primary Duties:
 - Office or nonmanual work;
 - Directly related to management policies or general business operations;
 - Discretion and independent judgment

Exempt vs. Nonexempt

"Retail Sales" Exemption

- Not subject to salary tests
- Requirements:
 - Employer is a "retail or service" establishment;
 - Employee's regular rate of pay is more than 1.5 times the minimum wage; and
 - More than 50% of employee's compensation is from commissions on sales of goods and services

"Hours Worked" / Compensable Time

General Rules

- Must pay for all time an employer "suffers or permits" an employee to work
 - Any time that you knew or *should have known* the employee worked
- Employer ALWAYS has burden of tracking hours worked

Compensable Time On-call / Waiting Time

- General Rule: Any time spent waiting to perform work at the request of an employer is compensable.
- Waiting to be Engaged?
 - Can use time for own purposes
 - Limited restrictions on mobility
 - Limited restrictions on activities
- Engaged to Wait?
 - Can't use time effectively for own purposes
 - Required to provide immediate response
 - Required to stay on-premises
- "Show up" pay: *Not legally required unless dealing with minors*

PAID

UNPAID

Compensable Time

Preparatory & Concluding Work

- Test: Is the work in question an integral part of the principal work activity?
 - "Donning" & "Doffing"
 - Uniforms, safety gear, specialized clothing...etc.
- What is the principal activity?
 - Where and how long does the activity take?

Compensable Time

Volunteering

- When an employee can be a volunteer
 - Work is at employee's initiative;
 - Outside normal working hours;
 - Performing religious, charitable or community service;
 - Not expecting payment;
 - Work performed is not a regular job function performed for the employer.
- Bottom Line: "Volunteers" are rare

Compensable Time:

Internships

When can an intern be unpaid?

- Similar to training given in educational environment
- For the benefit of the intern
- Regular employees not displaced by intern/ intern closely supervised by existing employees
- Employer does not receive any immediate advantage from intern's activities and;
- Both intern and employer understand intern will not receive wages.
- If all of the above do not apply, the intern may be considered an employee and is subject to wage and hour rules

Basic Fringe Benefit Issues

- ▶ Good News – Employer's Discretion
 - *Exception – Oregon Sick Leave*
- ▶ Bad News – Better be well documented
 - Paid Vacation Leave or Personal Days
 - Holidays
 - Bonuses
 - Severance Pay

Compensable Time

- ▶ Portal-to-Portal: To/from work is not compensable
- ▶ Between Worksites: Compensable
 - In the course of a days work if required to accomplish the days work
- ▶ Special One Day Assignment:
 - More than 30 mi. from fixed worksite
- ▶ Overnight Travel Time:
 - Time during normal work hours

Rest & Meal Breaks

Basics

- Who: All nonexempt employees.
- What:
 - Meal period: *Unpaid, uninterrupted* meal period of at least 30 minutes when the employee works at least 6 hours
 - Rest breaks: *Paid, uninterrupted* 10-minute break for every 4 hours worked or major portion thereof
- When: In the middle of shift

Rest & Meal Breaks

Exception

- "Unanticipated Circumstances" Exception
 - Occur rarely or infrequently
 - Pay employee for time worked
- "Undue Hardship"
 - Must still provide employee time to eat
 - Must first provide employee with BOLI notice

Overtime

General Rule

- ▶ Applies only to non-exempt employees
- ▶ Paid at 1.5 x regular rate for hours over 40
- ▶ Many Exceptions:
 - Manufacturing: (*Note: New Rule Effective January 1*)
 - OT after 10 hours/day
 - No more than 13 hours of work/day
 - Agriculture
 - Hospital ("8 and 80")
 - OT after 8 hours/day
- But can calculate weekly OT over 2 weeks

Deductions

- ▶ Recipient Other than Employer
 - "Voluntary" or Required by Law
 - Authorized in writing
 - Recorded in Employer's books
- ▶ Recipient is the Employer
 - Voluntary
 - Authorized in writing
 - Recorded in Employer's books
 - For the *employee's benefit*
 - Not a work-related purpose (tools, uniforms)
 - Not to pay for employee's theft, negligence...etc.

Calculating the "Regular Rate"

- Overtime = 1.5 x "Regular Rate"**
 - Regular Rate: The total remuneration in a workweek divided by the number of hours worked that week
- Complicating the Regular Rate Calculation:**
 - Salaried Employees with Fluctuating Hours
 - Commissions
 - Non-Discretionary Bonuses

Overtime Definitions

- Workweek:** Any regularly recurring 7 day period
 - (Sun – Sat; Mon – Sun...)
 - Pick one in writing and stick with it
- Hours Worked:** For OT purposes, only hours actually worked count towards OT
 - Vacation/Sick/PTO
 - NO
 - FMLA/OFLA/Unpaid Leave
 - NO
 - Travel Time
 - MAYBE

Hourly Employee Regular Rate

(“easy” example)

- Regular Rate = \$12 per hour.
- OT = 1.5 x “regular rate” for all hours over 40 in a week.

Example:

- Andy is paid \$12/hr. He works 45 hours in one workweek. His “regular rate” is \$12/hour & OT premium is an *additional* \$6 per hour. (.5 x \$12)

\$12/hr x 45
\$540

\$6/hr x 5

\$ 30

TOTAL: \$570

Salaried Employee Regular Rate

(“Not so easy” example)

Bob is paid \$1,200 per week. His salary is intended to cover all hours worked. Bob’s job duties make him “non-exempt”.

Week 1 – Bob works 50 hours

- Regular Rate = \$1200 / 50 hrs = \$24
- Additional OT premium = \$24 x .5 = \$12
- Total Pay: \$1200 + (10 OT hrs x \$12) = \$1320

Week 2 – Bob works 60 hours

- Regular Rate = \$1200 / 60 hrs = \$20
- Additional OT premium = \$20 x .5 = \$10
- Total Pay: \$1200 + (20 OT hrs x \$10) = \$1400

Regular Rate

Hourly Employee – Quarterly Bonus

Quarterly Bonus: Because Andy hits his sales numbers for the quarter, he receives a \$1,500 bonus. Regular rate for overtime last quarter must be recalculated to include bonus.

Total hours worked in quarter:	500 hours
Regular Rate Adjustment \$1500/500 hrs	\$3/hr
Overtime hours worked in quarter:	50 hours
Additional OT owed: 50 x \$3 x .5	\$75

Regular Rate

Hourly Employee – Weekly Bonus

Nondiscretionary bonus payments are included in the regular rate.

Weekly Production Bonus:

Andy is paid \$12 per hour & works 50 hours one week. He earns a \$100 bonus for exceeding his sales goals that week. Calculation of the overtime "regular rate" must include the additional bonus compensation.

Total Compensation for the Week:	
\$12 x 50 hours = \$600 + \$100 Bonus = \$700	
Regular Rate = \$700 / 50 hrs = \$14 hour	
Overtime Premium = \$14 x .5 = \$7 hour	
Total Pay that Week:	
50 hours x \$12.00	\$600
10 hours x \$7.00	\$ 70
Sales Bonus	\$100
TOTAL:	\$770

Termination Wages

Timing

- ▶ Best Practice – Always Pay at Termination
- ▶ Quits with less than 48 hours of notice
 - Five (5) days or next regular payday, whichever comes first.
- ▶ Employee quits with at least 48 hours of notice
 - Final day worked
- ▶ Employer fires employee
 - Next business day after the termination.
- ▶ Mutual agreement
 - Next business day after the termination.

Termination Wages

Pitfalls

- ▶ All wages due
 - Include wages from all pay periods, all commissions and bonuses earned...etc.
 - *Missing Timesheets?* Pay estimated wages at termination & any shortage within 5 days of receiving timesheets
- ▶ Vacation/Sick/PTO
 - If policy or practice is to pay at termination, then these amounts are treated as "wages"
- ▶ Mailing
 - Not allowed unless employee authorized

Termination Wages

Penalties for Late Payment are Severe

Employer may owe:

- Unpaid wages
- Daily wage (8 hours) for each day the wages are not paid post-termination (up to 30 days)
- Interest
- Employee's attorney fees
- Written Wage Demand
 - If no demand received from employee, penalty limited to amount of wages owed
 - If written wage demand received, 100% limit only applies if wages and penalty are paid within 12 days

Records & Record Retention

Best Practices

- Maintain all wage and hour records for at least 6 years
- Statute of limitations for unpaid OT is 2 years (3 years if willful)
- Statute of limitations for unpaid minimum wage and wages due per employment contract is 6 years
- Lilly Ledbetter – Fair Pay Act
 - Keep pay records as long as you are able
 - Unequal pay decisions based on gender may be pursued many years later

Minimizing Wage Claims

- Keep accurate records
- Employee completes timecards or timesheets
- Employees Review & Sign Time Cards
- Supervisor Should Review Time Cards for Accuracy
- Analyze Exempt Status
- Analyze Equal Pay Issues
- Exit Interview – *Paid for all hours worked?*
- Take Wage & Hour Issues Seriously
- Little problems can add up to very big problems
- When in doubt, get legal advice about your pay practices

Questions?



LEAVE & DISABILITY CRASH COURSE ADA, FAMILY LEAVE & THE BERMUDA TRIANGLE

Presented by

RANDALL SUTTON

EMPLOYMENT LAW & LITIGATION PRACTICE GROUP

HR BASICS – AUGUST 10, 2017



Sound counsel.
Smart business.

This seminar is intended to identify issues and provide general information and should not be considered legal advice. Employment issues are highly complex. Liability and solutions will vary depending on the facts of the particular situation.

OVERLAP BETWEEN EMPLOYEE LEAVE LAWS

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ADA ONLY Accommodations that Don't involve Leave - Needs orthopedic chair - Needs quieter cubicle Disability that is not a serious health condition Mental disorder causes inappropriate outbursts Disability does not affect job performance - Has AIDS but can perform all job duties Disability requires modification of job - Needs late start time to accommodate sleep disorder "Record of" or "regarded as" Disability - Previously had back problems	ADA & FMLA/OFLA Serious health condition is also a disability. - Has lung cancer - Has chronic back condition - Suffers from chronic depression - Needs fertility treatments Serious Health Condition Treatment for Disability creates - Medicine for back pain causes drowsiness	FMLA/OFLA ONLY Serious health condition not a disability or leave taken for other purpose Parental Leave - Wants time off newly adopted child Pregnancy - Needs time off for prenatal visit Serious health condition of a family member - Mom undergoing cancer treatment Sick child of employee - Child has an ear infection Off-job injury causes short-term impairment - Breaks leg & arm in auto accident - Needs knee surgery
ADA & FMLA/OFLA & WORKERS' COMP Occupational injury is serious health condition and causes or is substantially limiting impairment. - Employee severely injured back on job - Employee is crippled in job accident - Exposed to chemicals on job that require hospital stay & permanently scar lungs		
ADA & WORKERS' COMP On-job injury causes disability but not serious health condition - Accident at work causes partial loss of hearing - Accident at work requires job modification rather than leave of absence	WORKERS' COMP ONLY Short-term on-job injury does not qualify as a serious health condition. - On-job slicing injury treated on outpatient basis - Breaks leg (sedentary job)	FMLA/OFLA & WORKERS' COMP Short-term on-job injury impairment qualifies as a serious health condition. - Strains back in job accident - Job accident causes need for knee surgery - Breaks leg (standing job)



Brad Ayvastian, Commissioner



REQUIREMENTS OF OREGON'S SICK TIME LAW

Effective January 1, 2016, employers that employ employees in the state of Oregon are required to implement sick time policies and provide sick time to employees. Employers are also required to provide employees with a notice of the law's provisions. This notice is intended to summarize the major provisions of the law, but should not be relied upon as a full and complete summary of the law. The full text of the law and administrative rules adopted by the bureau are available at www.oregon.gov/boli.

How much sick time does the law require? Employees begin accruing sick time on the first day of employment and earn one (1) hour of sick time for every 30 hours worked or 1 1/3 hours for every 40 hours worked. Employees may use accrued sick time on the 91st calendar day of employment and may use sick time as it is accrued. Employers may choose to simply give employees ("front load") 40 hours of sick time at the beginning of the year rather than track the number of sick time hours accrued. Employers may also select the 12-month period to be used as the designated "year", e.g., calendar year, fiscal year, employee anniversary date, etc. Employees may carry over up to 40 hours of unused sick time from one year to the next; however, employers may adopt policies that limit employees to accruing no more than 80 hours of sick time or using no more than 40 hours of sick time in a year. Paid time off (PTO) policies that include time off for other purposes (such as vacation and other personal time off) comply with the sick time law as long as the policy is substantially equivalent to or more generous than the requirements of the law. Employees must use accrued sick time in hourly increments unless to do so would pose an undue hardship to the employer, in which case the employer may require sick time to be taken in minimum increments of four hours if the employer allows employees to use at least 56 hours of paid leave per year.

When must sick time be paid? Employers with 10 or more employees (6 or more in Portland) in the state must pay employees for sick time taken at the employee's regular rate of pay. All other employers must provide unpaid sick time. The number of all employees employed by the employer in Oregon must be counted – including full-time, part-time and temporary employees.

Notices and Verification: In addition to providing notice to employees of the requirements of the law, employers are required to provide **quarterly notifications** to employees of the amounts of accrued and unused sick time. Employers may require employees to provide notices, verifications and certifications for using sick time under certain circumstances. For example, if the need for sick time is foreseeable, employers may require employees to provide up to 10-days' notice of the need to use sick time. Refer to the law and rules for more information.

Discrimination/Retaliation Prohibited: It is unlawful for an employer to deny, interfere with, restrain or fail to pay for sick time to which an employee is entitled, or retaliate or in any way discriminate against an employee because the employee has inquired about the provisions of the law, submitted a request for or taken sick time. Complaints may be filed with the Bureau of Labor and Industries.

Collective Bargaining Agreement Exception: The sick time law does not apply to certain employees who are covered by a collective bargaining agreement, employed through a hiring hall and whose benefits are provided by a joint multi-employer-employee trust or benefit plan.

For what purposes may sick time be used? Employees are entitled to use sick time for the following purposes:

- For an employee's or family member's mental or physical illness, injury or health condition or need for medical diagnosis of these conditions or need for preventive medical care.
- To care for an infant or newly adopted child under 18, or for a newly placed foster child under 18, or for a child over 18 if the child is incapable of self-care because of mental or physical disability.
- To care for a family member with a serious health condition.
- To recover from or seek treatment for a serious health condition.
- To perform at least one of the essential functions of the employee's job.
- To care for a child of the employee who is suffering from a non-serious illness, injury or condition.
- To deal with the death of a family member by attending the funeral or alternative, making arrangements necessitated by the death of a family member, or grieving the death of a family member.
- To seek legal or law enforcement assistance or remedies to ensure the health and safety of the employee or the employee's minor child or dependent for proceedings related to domestic violence, harassment, sexual assault, or stalking.
- To seek medical treatment, recover from injuries, or obtain services related to domestic violence, sexual assault, harassment or stalking incidents to the employee or employee's minor child or dependent.
- To donate sick time to another employee for qualifying purposes if the employer has a policy allowing such donations.
- For certain public health emergencies.

Provision of this notice to employees complies with the requirement in the sick time law for employers to provide written notice of the requirements of the law to employees.

For more information, visit our website at www.oregon.gov/boli, or contact us at 971-673-0761 or mail@boli.state.or.us.

CHECKLIST FOR ANALYZING ADA ISSUES

Randall Sutton, Partner

Step 1: Does the employee have a Disability?

- ☐ Has a physical or mental impairment?
- ☐ The impairment limits a major life activity?
- ☐ The major life activity is substantially limited?
- ☐ Is the impairment specifically excluded by the ADA?
- ☐ Even if the impairment does not qualify:
- ☐ Have we "regarded" the employee as disabled?
- ☐ Does the employee previously have a "record of" disability?

Step 2: Is the employee qualified to do the job?

- ☐ Is there an accommodation that will allow the employee to perform all of the essential functions of the job?

Step 3: Is the accommodation needed by the employee "reasonable"?

- ☐ Will the accommodation in Step 2 impose an undue hardship?
- ☐ If the accommodation is offered, does the employee still pose a threat:
 - To the safety of the employee?
 - To the safety of others?

Step 4: Can reassessment be ruled out as an accommodation?

THE INTERACTIVE PROCESS

Discuss. Investigate. Document. Repeat.

For each step of this process, the "interactive process" requires discussions with the employee, review of information provided by the employee's doctor, and other investigative efforts by the employer. If the employee is determined to have a disability, repeat the process as necessary until the employee is accommodated or all potential accommodations are ruled out.



The Americans with Disabilities Act (ADA) and state disability discrimination laws protect certain "disabled" employees. While many employers may think of a disability as a permanent impairment such as blindness or the inability to walk, the law is actually applied far more broadly. Employees with a serious incapacity that lasts for as little as 3-4 months may be considered "disabled." Such "disabilities" could include cancer recovery, back injuries, or chronic depression. In such a case, the law may require that the employer allow the employee to be absent for a period of time as a "reasonable accommodation."

The ADA was amended by the American with Disabilities Amendments Act and changes went into effect January 1, 2009, and subsequent regulations that were published in the spring of 2011. The amendments will require employers to shift their focus from whether an employee is "disabled" to whether the employer can provide a reasonable accommodation for the employee. The ADA Amendment Act will require most employers to adopt new policies and procedures. Employers must also be more diligent in going through the ADA interactive process and documenting their decisions. Without that documentation, a lawsuit likely won't be dismissed short of a jury trial.

To analyze whether an employee is protected by the state of federal disability laws, an employer must ask several questions. Each question includes many terms that have a particular legal definition. Countless court cases have interpreted these definitions and this area of the law is constantly evolving.

1. Overview of the ADA

a. In a Nutshell

The ADA requires that an employer offer *accommodations* that help a disabled employee satisfactorily perform his or her job. The ADA also prohibits an employer from *discriminating* against an applicant or employee because that person is disabled.

b. The Big Things to Remember . . .

- Disabilities can be mental or physical. Think about disabilities whenever performance issues could be connected with a mental or physical condition. Absenteeism is an especially risky area.
- The ADA is not paternalistic. Most of the time, the employer does not need to offer help unless the employee asks for it.
- Employers do not have to settle for substandard performance even if the employee is disabled. Even a disabled employee must satisfactorily perform the *essential functions* of the job.

- b.** Does the impairment have any impact on any major life activity?
- i.** Many major life activities are now defined by statute and can be impairments that impact bodily functions, like the immune system, digestive, bladder, neurological, respiratory, circulatory, or reproductive functions
 - ii.** Examples of Major Life Activities: Walking, speaking, breathing, hearing, seeing, thinking, sitting, standing, reaching, interacting with others,

- (a)** Pregnancy
 - (b)** Common physical characteristics (e.g. left-handedness)
 - (c)** Common personality traits (e.g. irresponsible, lack common sense)
 - (d)** Cultural or economic disadvantages
 - (e)** Being somewhat taller, smaller, bigger or thinner than most people
 - (f)** Homosexuality, bisexuality etc.
- ii.** But Not:
- i.** Physical Disorders (e.g. bones, heart, skin, digestive etc) or mental disorders (e.g. mental illness, learning disorders, retardation)
- a.** Does the employee currently have a physical or mental "impairment"?

DOES THE EMPLOYEE HAVE A "DISABILITY"?

2. Step-by-Step Analysis of Disability Issues

- Disabled employees may be entitled to special treatment. Employers may be required to change work rules and procedures and pay extra costs to reasonably accommodate a disabled employee.
- Employers have a right to verify the person's disability and the need for accommodation. What can be asked depends upon when the employer is asking:
 - Pre-Employment Offer – No questions of any kind.
 - After Contingent Job Offer - Broad inquiry is allowed, including medical exams, so long as everyone in job class is subject to same scrutiny.
 - Post-Hire – Inquiries must be narrow to the specific issue or concern.

- Regarded as Disabled: The employee was never disabled, but employer treats employee as if disabled:
- !!.
- (d) Is the employee entitled to an accommodation that is no longer disabling, but used to be?
- (c) Did Employer discriminate against the employee because of the history of disability (e.g. fail to hire employee with prior job-related injuries etc.); or
- (b) In "record of" cases, the legal issue may be:
- (a) Examples: Employee had chronic back pain that was remedied by surgery; employee had history of cancer, which is now in remission etc.)
- Record of Disability: If employee is not disabled right now, was the employee disabled in the past?
- !.

d. Alternative Test . . . If Employee does not Qualify Under the Above Steps

- iv. If an employee has an episodic or is in remission, evaluate whether the impairment substantially limits the employee when the impairment is active.
- (a) Compare "Short-Term" – Impairment only lasts a few months or less, and employee is eventually as good as new (e.g. properly healed broken bones, temporary depression etc.) .
- !!!. Is this a "long-term" condition? Impairment must last at least several months, probably more. Chronic conditions often qualify (e.g. chronic back injury, cancer).
- !!.
- Is the employee unable to perform a major life activity that the average person would be able to perform, or is it much more difficult for the employee to perform that activity?
- !.
- Do NOT Evaluate employee's abilities in light of any medications or other aids the employee is using.
- c. Does the impairment "substantially limit" any major life activity?

- !!!. But Not: Lifting very heavy loads; running a marathon; bowling; driving; getting along with a particular supervisor etc.
- learning, caring for oneself, concentrating, lifting, sleeping, reproducing, eating, reading, communicating, and working.

IS THE EMPLOYEE "QUALIFIED" TO DO THE JOB?

- a. Does the employee meet the minimum education, experience, skill, and licensing job requirements?

Example: Employee has disability that prevents her from getting a driver's license. Employee not qualified for a driver job.

- b. Can the employee perform the "essential functions" of the job, either with or without a reasonable accommodation?

Essential Functions of Job: A function is "essential" if the job exists to perform that function, it is a major part of the job, it needs to be performed, and it cannot be easily performed by someone else.

Examples:

- (a) Job as train dispatcher requires that employee be conscious and alert. Employee occasionally passes out, and no accommodation would prevent that. Employee not "qualified."
- (b) Receptionist must be present at work from 8:00am – 5:00pm to answer phones. Disability causes receptionist to be tardy much of the time, and employee often needs to leave work early. Receptionist not "qualified."
- (c) Word processor can work either from home or work. Disability would cause frequent lateness if employee required to report for work. Word processor is "qualified" because reporting for work not an essential function.
- (d) Employee has severe and disabling back pain when sitting in the standard chair every other employee uses. Employee would

- (a)
Employee operates crane at construction site. Disability causes occasional loss of consciousness. Employee poses a direct threat to others and can be excluded from performing job.

(b)
Doctor has short-term memory disability. Disability causes inaccurate chart notes and prescriptions. Employee poses a

c. Even with the accommodation, would the employee pose a "direct threat" to the employee or others?

- (a)
Adjustable computer tray would cost \$50 to install. Accommodation is probably "reasonable" for any employer.

(b)
Wheelchair-bound employee requests installation of elevator to work at upstairs office of a small family-owned grocery store. Accommodation not reasonable, but other accommodations might be.

(c)
Employee wants employer to hire a second employee to do some of the essential functions of the job. Accommodation never reasonable.
- Examples:

b. Does the accommodation cause an "undue hardship" to the Employer?

- (i)
In light of the financial abilities of the employer and the nature of the employer's operations, is the requested accommodation "reasonable"?

(ii)
Examples: new computer tray or chair; a leave of absence; reassignment to a different job; modification of the job; change in work shift; new work area with fewer distractions; ability to take more frequent restroom breaks etc.
- (i)
Employer need only offer one offer one accommodation, so long as it is effective. Employee cannot pick a "favorite" among all possible accommodations.

a. Are there any accommodations that would allow employee to perform essential functions of employee's job?

IS THE EMPLOYEE ENTITLED TO REASONABLE ACCOMMODATION?

have no pain if given a slightly more expensive orthopedic chair. Employee is "qualified" because employee could perform the job with a reasonable accommodation.

clean. A "no-rehire" policy might be discriminatory.
EXAMPLE: Employee terminated for failing drug test. Employee goes through rehab and is
for discrimination based upon the employee's record of being a disabled person.

However, once that disability is resolved, a refusal to rehire the employee could result in a claim
An employee may be terminated for performance issues or misconduct arising from a disability.
• No-Rehire Policies

example, provide fewer distractions, relocate worker etc.
company can do to improve reliability so the employee meets minimum standards? For
focus. Although this could be a disability, mistakes need not be tolerated. Is there anything the
EXAMPLE: Employee is making lots of mistakes due to medical condition that causes loss of
required to provide more frequent breaks.

EXAMPLE: Employee has a condition that requires frequent restroom breaks. Employer may be
• Performance Problems related to a disability

a reasonable accommodation?
a medical condition that may qualify as a disability under the ADA? Would a leave of absence be
EXAMPLE: Employee may be chronically absent. Has the employee blamed the absenteeism on

• Absenteeism Problems

3. Common Disability Issues

(a) Employee operating a saw has disability that may cause muscle
spasms. Employee faces risk of serious injury to himself if
spasm occurs while operating saw. Employee may pose a direct
threat to himself.

/// Direct Threat to Self:

direct threat to others and can be excluded from performing
job.

- Regarding a Person as Disabled when they are Not

An employee can become protected by the ADA even when they are not covered by the law, if the employer treats them as disabled. The most common situation is where the supervisor prohibits an employee with a minor injury from doing certain types of work out of fear of re-injury. That person may be "regarded as" disabled, and entitled to protection under the ADA.

- Drug or Alcohol Use

EXAMPLE: Employee is abusing drugs. Drug addiction is a disability. However, the ADA does not require an employer to tolerate current drug use. The ADA also allows an employer to set rules that all employees are required to follow, including drug testing policies. Terminating an employee who fails a drug test is generally ok. Discriminating against a former drug user who is now recovered is not.

EXAMPLE: Employee is an alcoholic. Employee wants time off to clean up and get back on the wagon. Time off may be a reasonable accommodation. However, if the employee repeatedly falls off the wagon, repeat requests for time off may not be reasonable.

4. The Interactive Process

The "interactive process" is a key step in dealing with disability issues. The employer and employee work together to determine how the employee can be successful in the job. The interactive process is designed to:

- Verify that the employee has a "disability" for purposes of the ADA;
- Identify precisely how the employee is limited; and
- Identify potential reasonable accommodations that will allow the employee to do his or her job.

STEP 1: MEET WITH THE EMPLOYEE

The employer and employee have a duty to work together in good faith to help each other determine what accommodation is necessary. If an employee does not cooperate, this may relieve the employer of further duty to accommodate. Key inquiries:

- Request must be "job related and consistent with business necessity." Request must be limited to documentation necessary to:
 - Substantiate that the employee has an ADA qualifying disability; and
 - Identify accommodations that may allow the employee to perform his or her job.

STEP 3 - OBTAIN INPUT FROM THE EMPLOYEE'S PHYSICIAN

- When the accommodation requires purchase of an expensive item, but everyone will want one.
 - When the request is to eliminate an essential function of the employee's position.
 - When the accommodation will not be effective to bring the employee back to full productivity.
 - When the accommodation will create morale issues or other negative side effects.
 - The courts do not penalize an employer who acts in good faith to accommodate employee requests. Doing so will not create a "regarded as" disability and does not set a precedent that the employer cannot escape in future cases.
 - Let the employee know that you have not decided whether the employee has a disability or not – you are simply providing the requested accommodation at this time in the hope that it will help the employee.
 - Document the accommodation provided in the employee's personnel file and on a running spreadsheet of accommodations offered to all employees in the company.
 - If the need for the accommodation is not obvious, and is not "cheap and easy," you should continue the interactive process. When is an accommodation not "cheap and easy?"
 - When the accommodation requires purchase of an expensive item.
 - When the accommodation requires purchase of an inexpensive item, but everyone will want one.
 - When the request is to eliminate an essential function of the employee's position.
 - When the accommodation will not be effective to bring the employee back to full productivity.
 - When the accommodation will create morale issues or other negative side effects.
- If the need for the requested accommodation is obvious . . . *provide it.*
- If the need for the accommodation is not obvious, but it is cheap and easy . . . *provide it.*

STEP 2: DECIDE WHETHER THERE IS A QUICK AND EASY FIX

- What is your concern?
- What are the barriers to you being successful in this job?
- How can I help you?

Just talking to the employee and the employee's doctor is not enough. Courts will consider the employer's good faith efforts when deciding both liability and damages. To show good faith, it is best to become very knowledgeable about the employee's particular medical condition and the accommodations that could address the employee's issue:

STEP 4 - RESEARCH THE DISABILITY & ACCOMMODATIONS ONLINE & ELSEWHERE

- It is up to the employer to pay all uninsured costs related to providing documentation from the employee's doctor.
 - If the information is still incomplete, or if you think the doctor is not honestly evaluating the situation, you can have the employee submit to an independent medical exam (IME). Make sure that the IME is limited to determining the existence of an ADA disability, the functional limitations that require reasonable accommodation, and what accommodations might be effective.
 - Try to get better information by explaining why the response was insufficient. Submit a follow-up request asking for more complete information.
- If the treating physician provides cryptic, incomplete or questionable information:
 - Provide the employee with a questionnaire specifically designed to get the information you need. The employee will submit the questionnaire to the doctor.
 - Have the employee forward a letter to his or her doctor from you.
- Avoid verbal communications with the treating physician. Communicate with the doctor through the employee:
 - The nature, severity, and duration of the employee's impairment;
 - The activity or activities that the impairment limits;
 - The extent to which the impairment limits the employee's ability to perform these activities;
 - What particular accommodation is needed; and
 - Why the requested reasonable accommodation is needed.
- The employer can request documentation describing:
 - Because the information the employer can obtain is limited, don't ask for the employee's entire medical file or ask questions that go outside the request for an accommodation.

- The Internet has an amazing amount of information available about particular health conditions. Doing a Google search on the name of the condition is a great place to start. As you do research, print copies of the pages you review.

- The Job Accommodation Network (JAN) makes suggestions about how to accommodate a large variety of disabilities. The JAN website is located at: <http://www.jan.wvu.edu>. Select the "JAN by Disability: A to Z" link to review an extensive list of conditions and possible accommodations for each. Document your review of these resources.

- If your company regularly uses its own doctor, ask the doctor for input about the condition and any accommodations that might allow a person with that condition to perform the job. Document your discussions with the doctor.

STEP 5 – TALK TO THE EMPLOYEE SOME MORE

Throughout the interactive process, stay in touch with the employee. You want the employee to understand the considerable efforts you have taken to address this issue.

- Discuss your efforts with the employee. Get the employee's feedback.
- Discuss with the employee whether there are other avenues or options that you should consider? If so, pursue those avenues.

- If the employee has also run out of ideas and cannot come up with an accommodation that would be effective, document this as well.

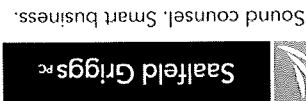
STEP 6 – MAKE A DECISION

- Communicate to the employee in writing what accommodation the company feels is reasonable and effective.
- If the company and the employee cannot come up with a reasonable accommodation, the employee should be notified. In this instance, it is advisable to have legal counsel provide input, as this decision will be subject to considerable second-guessing if the matter is ever litigated.

STEP 6 – ONGOING REVIEW

- Monitor the effectiveness of the accommodation provided.
- Get the employee's input. Is the accommodation effective? If so, document what the employee tells you and hold that employee to the same performance standards as any of your other employees.
- If the accommodation is not effective, go back to the drawing board and see what else can be done. Courts have penalized employers who fail to offer other accommodations when the first accommodation turns out to be ineffective.

Oregon Leave Laws Other than ADA and Family Medical Leave



Sound counsel. Smart business.

*Randy Sutton, Partner
Employment Law & Litigation Practice Group*

Oregon law requires employers accommodate some employees' absences, even if those absences are not related to disability, workers' comp, or family medical leave.

1. Crime Victim Leave

a. In a Nutshell

In 2003, the Oregon legislature passed a bill granting certain crime victims and immediate family members the right to protected leave from work to attend criminal proceedings. The leave granted to employees is unpaid leave unless the employee requests use of accrued, but unused, paid time off.

b. Which Employers does the Law Apply to?

It applies to any organization that has six or more employees in Oregon for 20 or more weeks in the calendar years in which the employees takes the leave or in the immediately preceding year.

c. Which Employees Qualify for Leave

In order for an employee to eligible for leave under this law, the employee must have worked an average of more than 25 hours per week for at least 180 days immediately before the leave begins.

d. What Qualifies as a "Crime Victim?"

The law says the employee must also be a "crime victim," meaning that he or she "has suffered financial, social, psychological or physical harm as a result of a personal felony." The law treats immediate family members of the person as crime victims as well and defines "immediate family" to include a spouse, domestic partner, father, mother, sibling, child, stepchild or grandparent.

e. How Much Leave Can an Employee Take?

The law doesn't set a specific time limit on the amount of leave an employee may take, but does say that an employer may limit the leave if it creates an undue hardship to the business, meaning "a significant difficulty and expense," taking into consideration the size of the business and any critical need for the employee.

If an employer limits the employee's leave due to undue hardship, the law provides that the employee may notify the prosecuting attorney, who is then required to notify the court. The

court must then take the employee's work schedule into consideration when scheduling the criminal proceedings.

f. Do Employees Have to Provide Notice?

The law requires that the employee provide "reasonable notice" of the intention to take leave and copies of any notices of scheduled criminal proceedings that the employee receives from a law enforcement agency. Employers must treat any such documentation as confidential records.

2. Domestic Violence Sexual Assault, and Stalking Leave

a. In a Nutshell

In 2007, the Oregon legislature passed a bill granting certain crime victims and immediate family members the right to protected leave from work. The law requires employers to grant an eligible employee a "reasonable" leave of absence if the employee or the employee's minor child or dependent needs time off to deal with issues of domestic violence, sexual assault, or stalking. These arrangements might include such things as seeking medical treatment, obtaining counseling, relocating, getting legal advice or contacting law enforcement personnel. The leave is unpaid unless the employee has accrued and unused paid time off available (i.e., vacation, sick, or PTO). If the employee has paid time off available, the employer must allow the employee to draw down on his or her leave banks.

b. Which Employers does the Law Apply to?

It applies to any organization that has six or more employees in Oregon for 20 or more weeks in the calendar years in which the employees takes the leave or in the immediately preceding year.

c. Which Employees Qualify for Leave

This rule applies to all employees.

d. How Much Leave Can an Employee Take?

The law doesn't set a specific time limit on the amount of leave an employee may take, but does say that an employer may limit the leave if it creates an undue hardship to the business, meaning "a significant difficulty and expense," taking into consideration the size of the business and any critical need for the employee.

e. Do Employees Have to Provide Notice?

The employer may require the employee to give reasonable notice of the need for leave, unless that is not feasible. The employer can also require that the events leading to the need for leave be documented. This documentation could include police reports, medical and/or counseling documentation, attorney records, etc. All of that information must be kept confidential by the employer.

LEAVE LAW STUDY QUESTIONS

1. Julie, your production supervisor, has been with the company for 10 years. She does great work for you. If you were to lose her, productivity would go down quickly because Julie keeps things running smoothly. What are your obligations and what can you or should you do in the following scenarios:
- a. Julie has begun to frequently miss work, sometimes without calling in. She won't tell you why she's missing work. She only states that it's for "personal reasons."

Is this protected leave? ☐ Yes ☐ No ☐ Call Your Attorney

If so ☐ OFLA ☐ FMLA ☐ ADA ☐ Workers' Comp. ☐ Other protected leave

- b. Julie's husband lost his job, so they are in a tough spot financially. She has been frequently late recently because her car keeps breaking down and she can't get it fixed.

Is Julie's tardiness protected? ☐ Yes ☐ No ☐ Call Your Attorney

If so ☐ OFLA ☐ FMLA ☐ ADA ☐ Workers' Comp. ☐ Other protected leave

- c. Julie has missed a lot of work because due to PTSD. She has issues with an abusive husband.

Is this protected leave? ☐ Yes ☐ No ☐ Call Your Attorney

If so ☐ OFLA ☐ FMLA ☐ ADA ☐ Workers' Comp. ☐ Other protected leave

- d. Julie's mother-in-law is in deteriorating health. Her husband is very upset about this. Julie has been taking time off to provide emotional support to her husband and to visit her mother-in-law in the hospital. Julie also took a couple of days off to help her mother-in-law move into an assisted living facility.

Is this protected leave? ☐ Yes ☐ No ☐ Call Your Attorney

If so ☐ OFLA ☐ FMLA ☐ ADA ☐ Workers' Comp. ☐ Other protected leave

e. Julie requests to leave two hours early every Tuesday in order to attend a Bible study class.

Is this protected leave? ☐ Yes ☐ No ☐ Call Your Attorney

If so ☐ OFLA ☐ FMLA ☐ ADA ☐ Workers' Comp. ☐ Other protected leave

f. Julie requests to leave two hours early every Tuesday in order to attend an Alcoholics Anonymous meeting.

Is this protected leave? ☐ Yes ☐ No ☐ Call Your Attorney

If so ☐ OFLA ☐ FMLA ☐ ADA ☐ Workers' Comp. ☐ Other protected leave

2. Chris operates a sit down forklift. He suffers a back injury riding his motorcycle and has been on family leave for eight weeks. Chris has been released to work six hours a day, but he cannot sit for more than four hours a day. Can he come back to work? If so, for how long?

Is this protected leave? ☐ Yes ☐ No ☐ Call Your Attorney

If so ☐ OFLA ☐ FMLA ☐ ADA ☐ Workers' Comp. ☐ Other protected leave

3. Donald wants to take time off to care for his child with a mild ear ache.

Is this protected leave? ☐ Yes ☐ No ☐ Call Your Attorney

If so ☐ OFLA ☐ FMLA ☐ ADA ☐ Workers' Comp. ☐ Other protected leave

4. Sue wants time off to help her mom around the house. Mom pulled a muscle while lifting a box at work the other day and has been taking Advil to control the pain.

Is this protected leave? ☐ Yes ☐ No ☐ Call Your Attorney

If so ☐ OFLA ☐ FMLA ☐ ADA ☐ Workers' Comp. ☐ Other protected leave



5. Eunice and her brother are in their 60s and have no other family. Her brother has heart trouble. Eunice would like to take him to the doctor.
- Is this protected leave? ☐ Yes ☐ No ☐ Call Your Attorney
- If so ☐ OFLA ☐ FMLA ☐ ADA ☐ Workers' Comp. ☐ Other protected leave
6. Susan was in an auto accident that occurred after she picked up the office's mail on her drive to work. She was admitted to the hospital. The doctor said that due to the very significant injuries she has suffered, she must be off work for 6 weeks.
- Is this protected leave? ☐ Yes ☐ No ☐ Call Your Attorney
- If so ☐ OFLA ☐ FMLA ☐ ADA ☐ Workers' Comp. ☐ Other protected leave
7. Judy's mom suffered a serious back injury at the plant where she works. Judy has asked for time off to take her mom to a physical therapist. The injury has also made Judy very depressed, and she has said that she needs to "take some time off to get my head straight."
- Is this protected leave? ☐ Yes ☐ No ☐ Call Your Attorney
- If so ☐ OFLA ☐ FMLA ☐ ADA ☐ Workers' Comp. ☐ Other protected leave
8. Mike drives everyone crazy. His dumb decisions are questioned by all and fixed by most. You believe that he simply lacks any common sense. When confronted on this, he has no idea what you are talking about.
- Does Joe have any protections? ☐ Yes ☐ No ☐ Call Your Attorney
- If so ☐ OFLA ☐ FMLA ☐ ADA ☐ Workers' Comp. ☐ Other protected leave
9. Tom is taking parental leave to spend time with his new baby. Hunting season has just begun. The employer wants to hire a private investigator to track how much time Tom is really spending with his newborn.
- Is this protected leave? ☐ Yes ☐ No ☐ Call Your Attorney
- If so ☐ OFLA ☐ FMLA ☐ ADA ☐ Workers' Comp. ☐ Other protected leave



NOTES

