

YCHRA
YAMHILL COUNTY
HUMAN RESOURCE ASSOCIATION

YAMHILL COUNTY HUMAN RESOURCE ASSOCIATION
CERTIFICATE OF COMPLETION AND ATTENDANCE

*HR Basics II - What Managers and Supervisors
Must Know in the #METOO Era and Much More!*

PRESENTED BY

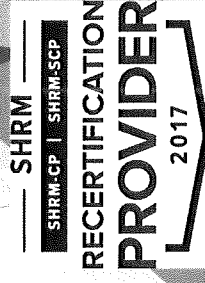
Barran Liebman

Linfield College



YCHRA Representative

YCHRA is recognized by SHRM to offer Professional Development Credits (PDCs) for the SHRM-CpsSM or SHRM-SCPsSM
Enter Activity ID: 18-TIPS9 6.25 credits

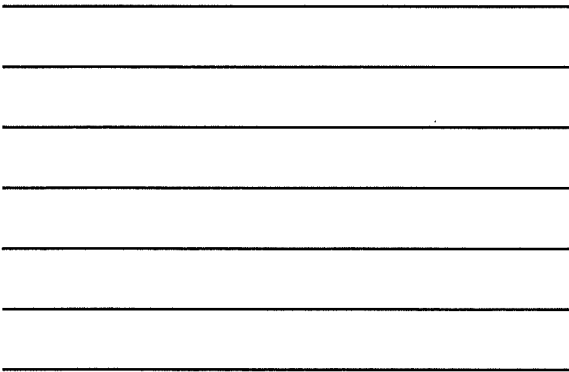
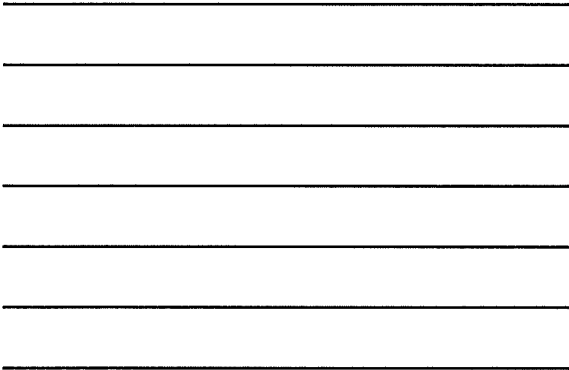
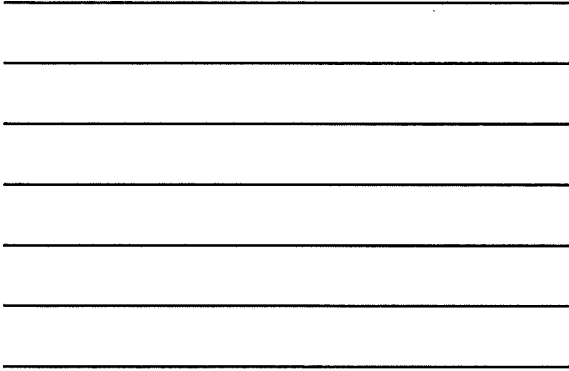


- Hard work is ahead of us



NYK 111 NY221M

-



Where Do We Go from Here?

What the rules are... but more important, why you should care!

- Words matter
- Why workplace dating policies exist
- How to be the best kind of co-worker
- Karma catches up to jerks
- Freedom isn't free



Business Opportunity

- Why do people leave jobs?
- Unemployment at historic low
- The best businesses recruit and retain the best talent

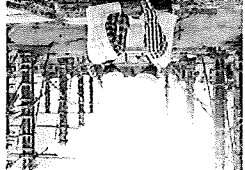


Mistake #2

Nobody has reported harassment in years = we are awesome!

Fear of reporting is itself a problem.

WEDNESDAY, NOVEMBER 11, 2009



• Company that promoted anonymous reporting

Great Story

WEDNESDAY, NOVEMBER 11, 2009

• Best way to avoid lawsuits: trust of internal systems

• ... Even when it doesn't go their way

• Pop quiz. What's your reporting/investigation protocol?

What Did We Learn?

WEDNESDAY, NOVEMBER 11, 2009

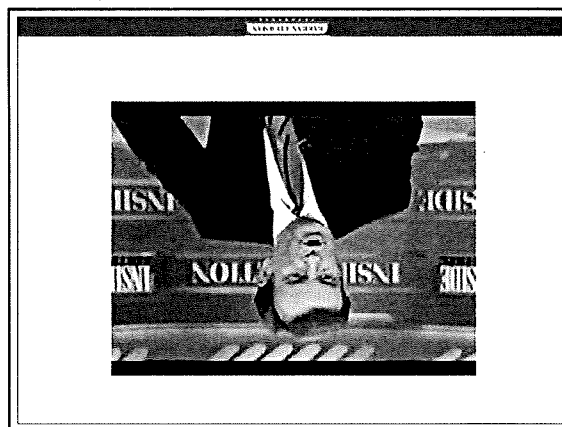


Company standard must be higher than legal baseline.

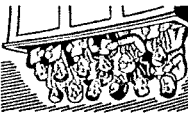
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Change is easy

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Don't Aim for the Baseline



- Employees certainly don't know
- HR doesn't know
- Lawyers don't know

Nobody Knows What Sexual Harassment Is

ATTORNEY AT LAW

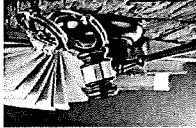
- Make expectations clear with established processes
- Be vigilant about potential issues
- Known or should have known standard
- Confirm people know their reporting outlets
- Seize opportunities to establish values



Solution

ATTORNEY AT LAW

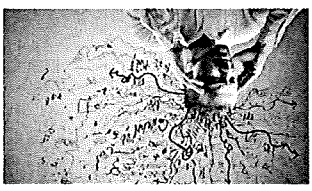
- Person experiences negative event at work
- Believes treated unfairly
- Doesn't think anyone listening
- Feels powerless
- Goes to attorney





Majority of Claims We Defend

ATTORNEY AT LAW





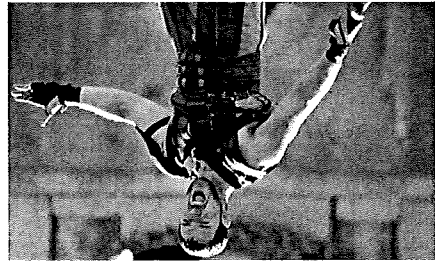
Confusion over Standards = Lawsuits

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- Not interactive or interesting
- Included a lot of jargon they don't need to know
- Almost encouraged people to zone out

Old Presentations

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People will listen and retain better if they are entertained.

Presentations must be boring

Mistake #5

BARRETT

BARRETT

Presentation by Anthony Kuchulis of Barran Liebman LLP

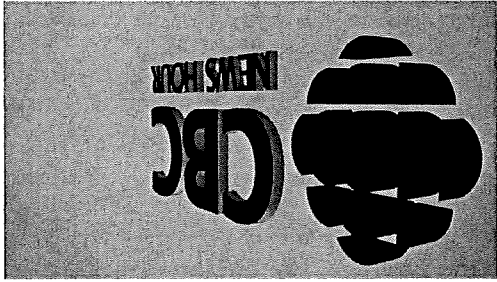
BARRETT

BARRETT

Everything You Say is Sexual Harassment & 9 Other -WHIS-

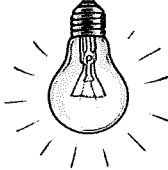
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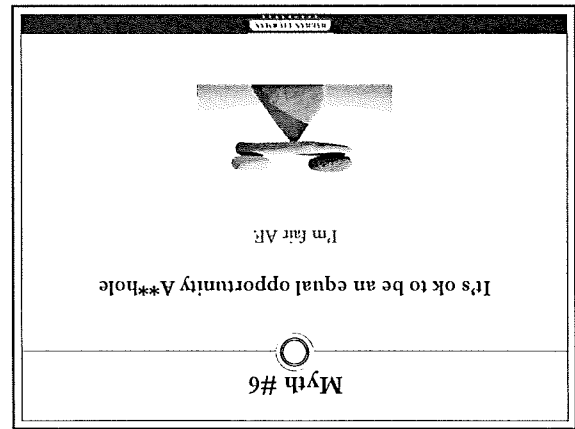
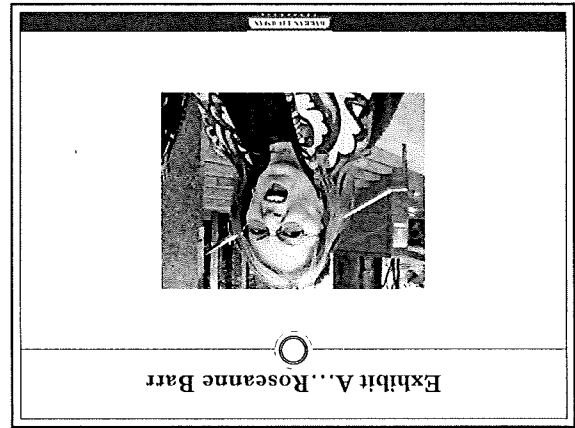
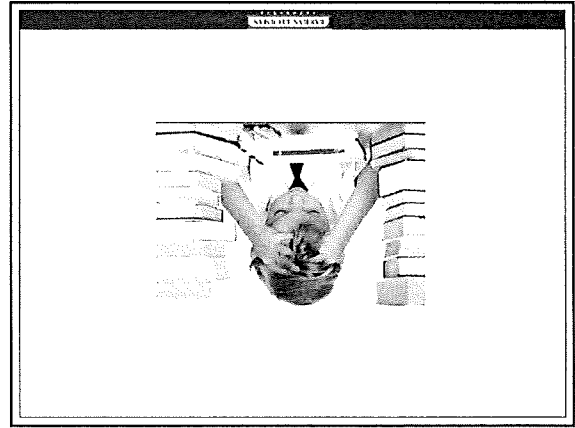


- Fun (yes, actually)
- Not afraid to use humor
- Workshops, people in groups
- Mixed media
- Change of pace and tone

BARRETT

BARRETT

New Presentations






Presented by Kyle Abraham

Yamhill County HR Association | June 14, 2018

Workplace Investigations: Beyond the Basics



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~ Thank You ~

In Closing

- This is a process
- Must be more than one training
- Workshops are key
- Hold your leaders to higher standards
- Make your employees engaged bystanders

Why Conduct an Investigation?

- Fairness to employees
- Aid in decision making
- Affirmative defense against discrimination claims
- Expectations of judges and third parties



3 Characteristics of an Effective Investigation

1. Prompt
2. Impartial
3. Thorough

- Follow established protocols
- EEOC guidance
- AWT guiding principles

Developing an Effective Game Plan

Convening The Investigation

1. Complaint intake
2. Assess the complaint
3. Take appropriate interim actions
4. Determine the posture of investigation
5. Select the investigator
6. Set scope & procedures (INVESTIGATION)
7. Take appropriate action

Conducting The Investigation

6. Set scope & procedures
7. Collect documents
8. Refine the complaint
9. Interview witness
10. Prepare the investigation report

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[illegible]

1. Complaint Intake



- Critical step for the convening official
 - Allows complaint to remain in-house
- This is not part of the investigation – focus on empathy
 - Be careful to avoid:
 - Making promises
 - Challenging the Complainant's version of the facts
 - Blaming the Complainant



**KEEP
CALM
AND
Listen
Carefully**

Convening the Investigation

[illegible]

2. Assess: Need to Investigate

Ask, if everything in the complaint is true, would:

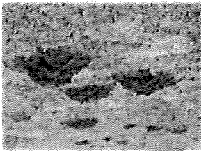
- It be a violation of law/policy?
- We take disciplinary action?

Absolutely:

- Complaint of harassment
- Violation of a serious rule

Maybe:

- Just blowing off steam
- Minor complaints



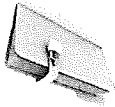
3. Interim Protective Measures?

At the beginning of the investigation, employer should seek to:

- Protect people
- Preserve evidence (involve IT)
- Prevent any new problems

Factors

- Workplace disruptions
- Physical safety concerns
- Chill investigation
- (Reported) concerns of retaliation
- Take the least severe option



4. Posture of Investigation: Defense if Complaint of Harassment

Employer may avoid liability from complaints of harassment by:

- Responding promptly to complaints
- Conducting an appropriate and reliable investigation
- Taking reasonable action based on the results of the investigation



Start Before the Complaint is Filed

- Review policies:
 - o Statement of commitment
 - o Reporting procedures
- Conduct training
- Assess practices:
 - o Atmosphere of safe reporting



4. Posture of Investigation: Offense if Employee Misconduct

- Effective method to establish evidence of wrongdoing
- Avoid the employee's "pre-emptive strike"
- Potential for admissions by the wrongdoer
- Employee was aware of the rule
- Violation is a serious offense
- "Lock in" employee's side of the story



5. Selecting the Investigator

- Characteristics
 - o Neutral
 - o Respectful
 - o Well-trained
 - o Available
- Selection scrutinized
 - o Employer's commitment
 - o Really impartial
- Gender??
 - o Really impartial
 - o Licensed private investigator
 - o Practicing attorney (CORS 703.405.411; OAR 259-061-0018)
- Internal Investigators
 - o Human Resources
 - o Risk Management
- External investigator
 - o Be aware of HR consultants
 - o Licensed private investigator

- Fact-finding
 - Include legal conclusions, or recommendations?
- New allegations that surface during investigation

ANALYSIS SYSTEM

Manager	Simple, involving 1 partner and 1 incident	Non-supervisory	Mid-level supervisor	Extremely experienced	Internal
Chairman	Moderately complex, involving more than 2 partners or multiple incidents	Supervisory	High-level supervisor	Experienced, but uncertain on methodology	External
Partner	Highly complex, involving several parties and incidents, or allegations of discrimination	Advisory	Senior management	Extensive knowledge, best-practices	Responsible or subordinate to

1-4 points: Manageable for an internal investigator
5-8 points: Consider external investigator
9-12 points: Recommend external investigator

5. Internal vs. External Investigator

7. Documents to Collect

Possible list includes:

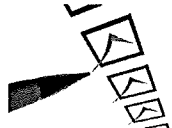
- Employee Handbook
- Procedure Manual
- Collective Bargaining Agreement
- Organizational chart -- supervisory chain
- Personnel file?
- Performance evaluations
- Prior discipline
- Prior complaints on the individuals involved
- Incident reports
- Emails and social media pages -- be careful here
- Maps/diagrams of relevant locations

6. Investigation Outline



- Create while reviewing documents
- Timeline of events
- Cite sources
- Update as you learn more facts
- Involved persons
- Include name, role and contact information

6. Set Procedures



- Audio record interviews
- Facilities for interviews
- Investigation Report format
- Timeline

8. Refine the Complaint

- Critical step for the investigator
- Develop “investigation questions”
- What will need to be answered in order for the investigation to be completed
- Defensive investigation, elements of claim
- Offensive investigation, elements of just cause
- May need to consult with legal counsel
- Organize allegations and supporting factual claims
- Watch for missing factual claims

Witness Interviews

9. Interview Logistics

- Scheduling notices
- Neutral location
- Configuration of the interview room
- Extra attendees?
 - Spouse/friend
 - Union representative
 - Lawyer
- Follow-up as necessary
 - Failure to do so could undermine the entire investigation
 - Respondent
 - Other relevant witnesses
 - Complaining witness
 - Order of witnesses

9. Interviewing the Respondent

- Determine any procedural requirements
 - o Allow time to update interview outline
- Assure no conclusion reached
 - o Give the Respondent the last word
- Law Enforcement
 - o *Brady* issues
 - o Procedural safeguards
 - CRS 236.350-370
- Defensive Investigation
 - o Solicit responses to each allegation against him/her
 - Offensive Investigation
 - o Confirm awareness of rule and how he/she was made aware
 - o If denied, get admission as to the seriousness of offense

9. Interviewing the Complainant

- Confirm the factual claims
 - o Get "buy in" on the allegations of the complainant
- Drill down on facts underlying each allegation
 - o Reporters' questions
 - o "Help me understand..."
- Ask about timing of the complaint
 - o "Why did you come forward now?"
- Ask for corroborating witnesses and documents

9. Prepare an Interview Outline

- Interview questions
 - o Prepare open-ended questions related to allegations
 - o EEOC provides a list of sample questions for various claims (retaliation, discrimination, etc...)
- My four concluding questions
 1. Anyone else I should talk with?
 2. Anything else I should collect, like emails, videos, paperwork, documents, etc...?
 3. What question did I not ask, that I should have asked?
 4. Is there anything else you would like to share?





- Witnesses are people, with different initial perceptions and different recall of the same events
- First, attempt to reconcile the inconsistencies
- Second, make credibility determinations
- Credibility factors:
 - Corroboration with other evidence
 - Bias/Motivation as judged by interest in outcome
 - Inherent plausibility
 - Inconsistencies in statement
 - Opportunity to observe facts
 - Memory of facts reported

10. Inconsistent Statements



- Investigation is done to create a record for the decision makers
- Assume the report will eventually be disclosed to everyone
- Explain your analysis and write to the "losing party."

10. Report Writing Guiding Principles



- Information to record
 - Date, time, location, persons present
 - Observations about body language
 - Do not include impressions or speculative conclusions
- Audio recording
 - Mutual consent on the recording
 - "Time stamp" key testimony
- Team interviews: note taker and a questioner

9. Documenting the Interviews

- ## Take Appropriate Action

- **Executive Summary**
 - Introduction
 - Nature of complaint
 - Summary of findings
 - Quick reference
 - Roadmap for report
- **Investigation background**
 - How investigation was initiated
 - Last of evidence reviewed
 - Other relevant procedural details
 - State any limitations of the investigation
- **Conclusion**
 - **Reach a finding!**
 - Address credibility
 - Consider both sides of the issue
 - Analysis
 - Respondent
 - Third party witnesses
 - Complaining witnesses
 - Facts gathered by allegation
 - Evidence
 - Other relevant substantive details
 - Information about departments and individuals involved
- **Factual background**




Presented by Kyle Abraham

Yamhill County HR Association | June 14, 2018

Traditional Labor Law: New Developments Under a Trump Board

Setting the Stage

- The last 10 years has been a Democratic Board, and the last 7 years has been a Democratic General Counsel
- Lots of pro-labor decisions and changes, and vigorous dissents by former NLRB Chair, Miscimarra
- January 2017, Republican President takes office, and ... nothing ... until December 2017!
- *This presentation is a statement of the law and is not legal advice nor does it create an attorney-client privilege*

The Winds of Change Blow Through the NLRB

- The Composition of the Board and the General Counsel
- December's Big Decisions
 - o The new standard for workplace rules
 - o Back to the traditional joint-Employer standard
 - o Ending of micro units in union organizing
 - o Changes to working conditions after contract expiration
- General Counsel's Memorandum, 18-02

The New Standard on Work Rules

General Counsel of the NLRB

- The GC position is responsible for setting enforcement priorities, overseeing investigation/prosecution of ULP cases, and supervising the NLRB field offices
- o Appointed by the President, confirmed by the Senate
- o 4 year term
- Peter Robb (10/31/21) - R
- o Primary method of signaling change is through GC Memorandums (e.g. 18-02, 18-04)

Composition of the Board

- The National Labor Relations Board includes 5 members appointed by the President, confirmed by the Senate
- Terms of 5 years
- Current members
 - OJohn Ring - Chairman (12/16/22) - R
 - OWilliam Emanuel (8/27/21) - R
 - OMarvin Kaplan (8/27/20) - R
 - OLauren McFerran (12/16/19) - D
 - OMark G. Pearce (8/27/18) - D

A Refresher on "Concerted Activity"

- Unlawful for employer to interfere with, restrain, or coerce employees in the exercise of concerted activity; or
- Maintain policies that would reasonably be construed to chill the exercise of the same.
- Concerted activity means two or more employees act to improve wages, hours, or working conditions
- "Facially neutral" workplace rules/employee handbooks are often the source of violations

The Old Standard: *Lutheran Heritage*, 343 NLRB No. 75 (2004)

- No evidence an employee was actually discriminated against for engaging in concerted activity necessary for a violation
- Board may find a violation if:
 - o Employees would reasonably construe the language to prohibit the exercise of concerted activity;
 - o Rule was promulgated in response to union activity; or
 - o Rule has been applied to restrict exercise of concerted activity.
- The Board admitted the "vast majority of violations are found under the first prong of the *Lutheran Heritage* test"

Application of the Old Standard: *Whole Foods Market*, 363 NLRB No. 87 (2015)

- Whole Foods' policy prohibited recording conversations, images or company meetings unless prior approval from leadership and all parties give consent = facially neutral policy
- Stated justification for the policy was to eliminate a chilling effect on employee expression of views if a conversation is recorded
- No evidence anyone felt chilled in the exercise of concerted activity
- NLRB applied the *Lutheran Heritage* standard
 - o Employees have the right to photograph or make recordings in the workplace
 - o Employees would reasonably read rules chilling the exercise of concerted activity
 - o No consideration of employer's justification for the rule

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MEMORANDUM
BARRAN LIEBMAN

Setting the Scene for Joint-Employer Liability

- When two employers have control over working conditions of a single employee
- Often from the service agreement between a "User Employer" and a "Supplier Employer"
- The service agreement allows the User Employer to set:
 - o Qualifications of employees from the Supplier Employer
 - o Reject any employee of the Supplier Employer
 - o Timing of when operations will be conducted
 - o Maintenance schedule for equipment
 - o Contract is a "cost-plus" (wages plus a markup)

MEMORANDUM
BARRAN LIEBMAN

The Joint-Employer Standard

How Many of you have "1099 employees?"

MEMORANDUM
BARRAN LIEBMAN

Memorandum GC 18-04

- On June 6, 2018, Robb provided guidance for Regions regarding the placement of rules into the 3 categories set in *Boring*
- Specific Category 1 include:
 - o civility rules;
 - o no-photography/recording rules;
 - o rules on disruptive behavior;
 - o rules protecting confidentiality, proprietary, and customer information;
 - o rules against defamation; and
 - o more...
- Link to the full Memorandum: <https://www.nlrb.gov/reports-guidance/general-counsel-memos>

NO MORE MICRO UNITS, THE REVERSAL
OF SPECIALTY HEALTHCARE

The New Standard:
Hy-Brand Industrial, 365 NLRB No. 156 (2017)

• The Board returned to the principles governing joint-employer prior to the *BFI* decision (*Albion Express*, 338 NLRB 597 (2002); *TLL, Inc.*, 271 NLRB 798 (1984))

• Accordingly, proof of indirect control, contractually-reserved control that has never been exercised, or control that is limited and routine will *not be sufficient* to establish a joint-employer relationship

• Vacated on February 26, 2018

The Old Standard:
Browning-Ferris Industries, 362 NLRB No. 186 (2015)

Pre-BFI standard

- joint-employer liability:
 - off actually exercised "direct and immediate control" over working conditions of employees
 - Not enough to possess authority to control working conditions
- joint-employer liability:
 - Post-BFI Standard
 - Reserving right to exercise control sufficient working conditions to allow for meaningful bargaining
 - Passive or hypothetical control is enough for liability

[illegible]

Making Sense of Micro Units

- *Pre-Specialty Healthcare* rule: Petitioned-for unit must include all employees who share a community of interest, and there is no undue fragmentation of units
- *Post-Specialty Healthcare* rule: Employees beyond the petitioned-for unit must share an “overwhelming” community of interest
- Strategic point: smaller units are easier to organize

Specialty Healthcare, 364 NLRB No. 106 (2016)

- Regional Director on CNAs at a nursing home
 - o The smallest appropriate unit included CNAs, nonprofessional service and maintenance employees
 - o Petitioned-for unit for election among group of employees, they shared community of interest among themselves
- Employer took position that smallest appropriate unit had to include employees excluded from proposed unit
- Board would not find unit inappropriate unless employer proved that excluded employees shared an “overwhelming” community of interest with petitioned-for group

PCC Structural, 364 NLRB No. 106 (2016)

- Regional Director found that unit of approximately 100 welders was appropriate for collective bargaining
 - o Rejected employer’s contention that smallest appropriate unit was wall-to-wall unit of 2,363 employees
 - o Expressing no opinion as to whether unit was appropriate, Board remanded case to Regional Director
- Reinstated the traditional community-of-interest standard for determining an appropriate bargaining unit
 - o “there are sound policy reasons for returning to traditional community-of-interest standard that Board applied throughout most of its history, which permits Board to evaluate interests of all employees—both those within and those outside petitioned-for unit—without regard to whether these groups share an overwhelming community of interests.”

**Management's Rights Continue
After Contract Expiration**

WEEK 10
WIRP 10/1/10

Setting the Scene:
Changes During Post-Expiration Contract Negotiations

- After a contract expires, some provisions expire with the contract, and the employer is required to continue the practice of some provisions
- *Counter-Journal*, 342 NLRB 1093, 342 NLRB 1148 (2004)

- Scope: during hiatus period - post expiration and before new agreement
- In *E.L. DuPont* the Board ruled: unilateral, post-expiration discretionary changes are unlawful if the change is based on expired management rights clause
 - Employers do not retain absolute discretion to make changes after the contract expires
 - Overruled the *Country-Journal* cases, 342 NLRB 1093, 342 NLRB 1148 (2004)
- Exception: Employer may still make changes when there is an established past practice or changes according to fixed criterion

This image shows a full page of white paper with horizontal black lines, resembling notebook paper. The lines are evenly spaced and run across the width of the page. There is no handwriting or other markings on the paper.

- Robb's memorandum on what cases must be submitted for his review
- "I have developed the following guidelines which will serve as my mandatory advice submission list"
- The list includes:
 - Cases over the last eight years that overruled precedent and involved dissents(s)
 - Cases involving significant legal issues
 - Concentrated activity for minimal aid & protection
 - Common employer handbook rules found unlawful
 - Use of company email for union organizing activity
 - Off-duty employee access to property
 - Conflicts with other statutory requirements
 - Conduct of union stewards (e.g., *Wingate* cases)
 - Disparate treatment of represented employees during negotiations

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- Board reversed *E.L. DuPont de Nemours*
- Employee actions do not constitute change if they are similar in kind & degree with established past practice.
- Actions consistent with established practice ≠ change requiring bargaining merely because they may involve some degree of discretion
- Facts of this case:
 - Employee changes to employee healthcare benefits in 2013 = continuation of Replacements part practice involving similar unilateral changes made at same time every year from 2001-12
 - Company did not violate the NLRA by failing to give union advance notice & opportunity for bargaining before making the 2013 changes.

BARRAN LIEBMAN

Concluding Thoughts

~ Thank You ~



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BARRAN LIEBMAN

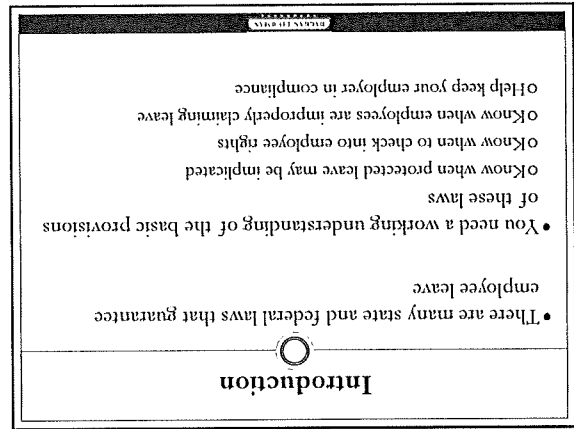
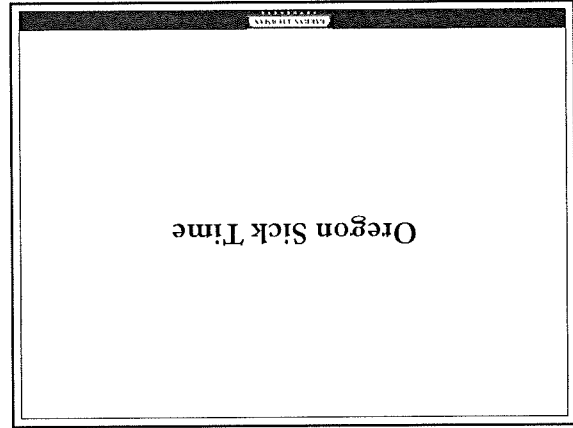
YCHRA

SRM

Leave Compliance in the Workplace:
OFLA, FMLA, ADA & Other Leave

Yamhill County HR Association | June 14, 2018

Presented by Amy Angel



Oregon Statewide Sick Time

- Effective January 1, 2016, employers must provide employees up to 40 hours of sick time per year
- Sick Time Definition:
 - O Time during which an employee is permitted to be absent from work for a qualifying reason without a reduction in benefits including, but not limited to, health care benefits that the employee earns from the employer

Oregon Statewide Sick Time

- Accrual: Minimum accrual rate of 1 hour for every 30 hours worked capped at 40 hours in a year
 - O Frontloading available in lieu of accrual
- Carryover: Required of up to 40 hours
 - O Unless frontloading
- Use: After 90 days of employment; one hour increments; can be limited to 40 hours in a year

To Pay or Not to Pay?

- Non-Portland Employers
 - O Paid: 10 or more employees
 - O Unpaid: Fewer than 10 employees
- Portland employers*
 - O Paid: 6 or more employees
 - O Unpaid: Fewer than 6 employees

*Employer located in a city (in Oregon) with a population exceeding 500,000 includes but is not limited to an employer that maintains any office, store, restaurant or establishment in that city.
Location not determined solely by a seasonal farm stand or temporary trailer on a construction site for office purposes only

Employee Count: Owners & Family Members

- Employee count does not include an individual or the parent, spouse or child of an individual who is:
 - A director of a corporation who has a substantial ownership interest in the corporation
 - A member of a limited liability company who has
 - A right to vote on or consent to any matter submitted to a vote or requiring the consent of the members of the LLC, and
 - A substantial ownership interest in the LLC
- A partner of a limited liability partnership who has a substantial ownership interest in the LLC, or
- A sole proprietor of a business

- Substantial ownership interest = a percentage of ownership of equal to or greater than the average percentage of ownership of all owners, but not less than 15%

What to Pay

- Employee's regular rate of pay
- Employees paid on a commission or piece-rate basis must be paid sick time at a rate equal to at least minimum wage
- Employees paid a base rate plus piece-rate or commissions must be paid for sick time at a rate equivalent to the base rate or minimum wage, whichever is greater

Qualifying Absences

- Diagnosis, care or treatment of mental or physical illness, injury or health condition, including preventive medical care of employee or family member
- Reasons related to domestic violence, harassment, sexual assault or stalking
- Any OFLA qualifying reason as defined by ORS 659A.159
- Public health emergency
- Closure of business or school due to public health emergency
- Care for self or family member if presence in community jeopardizes health of others
- Any law that requires employer to exclude the employee from the workplace for health reasons

- When notice not provided, may require documentation by calendar days of the employer's request for verification

- CHOTOSCADIC LEAVE

- Of the employee is engaged under the applicable law
- Of the absence is a qualifying reason under the applicable law

Employer Obligations

- **No Discrimination:** denial, interference with or restraining employee's ability to take or failing to pay for sick leave; retaliation for taking sick time
- **Employer Notices:** provide written notice of the requirements of SB 454 in accordance with BOLI rules; written quarterly notice re accrual
- **Confidentiality:** information about health care, domestic violence, sexual assault and stalking
- **Record Keeping:** no statutory requirements

Paid Time Off Policies

- Employer may use vacation, personal time off or other paid time off to satisfy the sick leave statute
- Any time off policy that is substantially equivalent to or more generous than the minimum statutory requirements:
 - o Must, at minimum, comply with the requirements of the sick leave statute for the first 40 hours of PTO that the employer's policy provides per year, AND
 - o Need not comply with the requirement of the sick leave statute beyond the first 40 hours per year

No Pay, No Play: Linn County v. Brown

- Nine counties sought declaratory relief, arguing that the sick leave law imposed a fiscal "program" obligation on them without funding
- Holding: The law mandates an employer to increase compensation in exchange for nothing, so it effectively raises the price of labor, and is a "program" under the Oregon Constitution that benefits employees
- Result: Because the law was enacted with no funding to the counties, the law amounted to an unfunded mandate and the counties involved in the suit do not have to comply with the statute
- Subsequent discovery whether the .01% financial threshold satisfied
- Applies to Linn, Yamhill, and Douglas Counties

Family Medical Leave

OFLA/FMLA Eligibility

- Covered Employer
 - o OFLA: 25 or more employees in Oregon
 - o FMLA: 50 or more employees w/in 75 miles
- Eligible Employee
 - o OFLA: Worked 180 days immediately prior to request at least 25+ hours/week
 - Parental leave has no per week hourly requirement
 - OAFILA: Works an average of at least 20 hours per week
 - o FMLA: Worked 12 months for employer and at least 1250 hours during 12 months prior to request and works at a location where the employer has at least 50 employees within 75 miles
 - o Time employed through a temporary staffing agency counts

**Oregon Family Leave Act
Key Distinctions From FMLA**

- OFLA Length of Leave = 12 weeks in a calendar year
 - o A female who takes pregnancy-related disability leave may take up to an additional 12 weeks for any OFLA-qualifying purpose
 - o An employee who uses full 12 weeks of parental leave may use up to 12 additional weeks in the same leave year for sick child leave
- Example
 - o 12 weeks pregnancy disability OFLA leave
 - o 12 weeks FMLA serious health condition leave
 - o 12 weeks OFLA parental leave
 - o 12 weeks OFLA sick child leave

1. Requires inpatient care,
 2. Is terminal,
 3. Requires constant or continuing care
- Home care administered by a HCP
- Involves a period of incapacity of more than 3 consecutive calendar days and any subsequent, required treatment or recovery period
 - Inability to perform essential job function +
 - Two or more treatments by a HCP or
 - One treatment + regimen of continuing care

- Both parents are entitled to parental leave to bond with new child
- Available for the first 12 months of newborn's life
- Available for the 12 months following adoption or fostering
- Husband and wife employed by the same employer are limited to a total of 12 weeks
- Leave is available to satisfy legal requirements related to adoption or fostering
- Intermittent or reduced schedule parental leave permitted per employer policy or practice. Must provide intermittent leave:
 - To effectuate adoption or foster placement
 - To attend the birth of or give birth to the employee's child

- FMLA & FMLIA
 1. Parental Leave
 2. Employee's Serious Health Condition
 3. Family Members' Serious Health Condition
- OFLA only
 1. Sick Child Leave
 2. Bereavement Leave
 3. Family Military Leave
- FMLIA only

MEMBER'S SERIOUS HEALTH CONDITION
• Illness, injury, impairment, or condition that 5. Involves a period of incapacity or treatment for a chronic SHC that requires periodic visits 6. Asthma, diabetes, epilepsy 7. Involves permanent or long-term incapacity 8. Alzheimer's, stroke, terminal stages of a disease 9. Involves multiple treatments for restorative surgery or treatment 10. Chemotherapy, physical therapy for arthritis, dialysis 11. Involves any period of disability of a female due to pregnancy or childbirth or period of absence for prenatal care

MEMBER'S SERIOUS HEALTH CONDITION
• Disabilties related to pregnancy or childbirth • Incapacity due to pregnancy • Even if no visit to health care provider • Even if short term (like morning sickness) • Prenatal care • Incapacity following childbirth

MEMBER'S SERIOUS HEALTH CONDITION
• Family Member • OFLA/FMLA: Spouse, parent (bio, adoptive, step, foster or in loco parentis), or child (bio, adoptive, step, foster or in loco parentis) • OFLA only: Also parent-in-law, grandparent, grandchild, same-gender domestic partner, and parent or child of same-gender domestic partner

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- Child must be under the age of 18 or over 18 and incapable of self care due to physical or mental incapacity
- Non-serious health condition which requires homecare (e.g., cold, flu, fever, etc.)
- Employer may request medical verification (doctor's note) after the third occurrence

OFLA Bereavement Leave

- Required Notice
 - Leave may be commenced without prior notice
 - Oral notice within 24 hours
 - May be given by someone other than the employee
- Written notice within 3 days of the employees return to work
- No certification regarding the death is permitted, except to receive paid leave under company policy

Oregon Military Family Leave

- General Rule: 14 days of leave per military deployment
- Eligible employee:
 - Employee who is spouse or domestic partner of a member of the Armed Forces, National Guard or military reserve who has been notified of an impending call or order to active duty or who has been deployed
 - Employee must work at least 20 hours/week (no min days required)
- Notice:
 - Within 5 business days of receiving official notice of an impending call or order to active duty or of a leave from deployment
- Timing of leave:
 - After call or order to active duty and before deployment
 - When military partner is on leave from deployment

Oregon Military Family Leave

- Updated Regulations:
 - Employee need not be eligible for OFLA leave to take OMFLA leave
 - OMFLA leave may be counted against an employee's OFLA entitlement, if any
- Relationship with FMLA
 - If employee FMLA eligible, leave runs concurrently with "qualifying exigency" leave entitlement

• OFLA/FMLA leave can be utilized in blocks, intermittently, or on a reduced schedule, based on medical need
 • Amount of time available is determined from regular schedule
 • Intermittent leave can be used in hourly increments
 • Not available for a parental leave, unless permitted by your policy or as required by regulation
 • To effectuate adoption or foster placement
 • To attend the birth or give birth to the employee's child

Intermittent Leave

• Up to 26 weeks in a single leave year
 • For spouse, child, parent, or next of kin
 • To provide care for a "covered service member" who
 • Is undergoing medical treatment, recuperation or therapy;
 • Is otherwise in outpatient status, or
 • Is otherwise on the temporary disability retired list, for a "serious illness or injury"
 • "Serious illness or injury" includes pre-existing injuries/illnesses aggravated in the line of duty
 • Covered service member includes:
 • Current member of the Armed Forces (including a member of the National Guard or Reserve), or
 • Veteran discharged under conditions other than dishonorable during the 5 years preceding treatment

FMLA Military Caregiver Leave

• Qualifying Exigency Leave
 • Federal active duty or call to active duty in support of a contingency operation
 • For spouse, child or parent
 • Short notice deployment (less than 7 calendar days notice)
 • Military events and activities
 • School and childcare activities
 • Financial and legal arrangements
 • Counseling
 • Rest & recuperation—up to 15 calendar days
 • Post deployment activities
 • Parental care

FMLA Qualifying Exigency Leave

Calculating Intermittent Leave

- Convert 12 weeks to hours:
 0 40 hour work week = 480 hours
 0 30 hour work week = 360 hours
 0 50 hour work week = 600 hours
- For varying schedules, use a weekly average over the 12 months worked prior to the leave period
- Holidays count only if the employee would have been scheduled to work

Exempt Employee on Intermittent Leave

- FMLA: may reduce an exempt employee's salary for a part-day FMLA absence without loss of exempt status
- OPLA-only: reducing an exempt employee's salary for a part-day OPLA absence jeopardizes an employee's exempt status

Employer Notice

Employers must provide employees with:

1. General Notice
2. Eligibility Notice
3. Rights and Responsibilities Notice
4. Designation Notice

- Poster
- Employee Handbook
- Within 5 business days of request
- Once in a 12-month period for that reason for leave
- Also within 5 business days of request
- May be accompanied by any required certification form
- Employers must responsibly answer employee questions
- Within 5 business days of knowing absence is FMLA protected
- Must state if fitness-for-duty will be required to return to work

Recognizing A Request For Leave

- No magic words needed
 - o Employees aren't usually required to identify the law providing leave
 - o "I'm at the ER with my mother who just arrived here by ambulance"
 - o But saying FMLA doesn't make it FMLA
 - o "Notice" can come over time through multiple communications
- Proper Notice
 - o Statement by employee that he was undergoing tests, had a prostate biopsy and that he was worried about cancer were sufficient to put employer on notice
- Improper Notice
 - o Statement that "I had a nervous breakdown" without anything more
 - o Doctor's note stating that employee needed follow up appointment and medication
 - o "I'm sick"

Medical Certifications

Employers may request medical certifications for serious health condition leaves of an employee or family member.

- Request must be in writing and explain consequences for failure to comply
- Employees have 15 days from receipt of written request to return certification, or for planned leave before leave begins
- o Must allow more time if, despite employee's diligent, good faith efforts certification is late
- Employer must pay out of pocket cost of all certifications per Oregon law
- Employer may request medical certification per OFLA/FMLA even if not permitted by the Oregon Sick Leave statute

Incomplete or Insufficient Certifications

- Incomplete vs. Insufficient
 - o Incomplete: certification received but one or more of the applicable entities have not been completed
 - o Insufficient: certification is complete but information provided is vague, ambiguous, or non-responsive
- Next steps
 - o Advise employee in writing what additional information is needed to make the certification complete and sufficient
 - o Provide seven days to cure (more if good faith efforts are made by employee)

- No more than every 30 days and only in connection with an absence
- More than 30 days if minimum duration of the condition is more than 30 days
- Every 6 months, even if intermittent or reduced schedule leave needed for a period in excess of 6 months

- Employer may not communicate directly with health care provider
- FMLA: Must have employee's permission and contact must be made by designee—health care provider, human resources professional, leave administrator, management official—not supervisor) to clarify or authenticate certification
- OFLA: Health care provider representing employer may contact employee's health care provider to clarify or authenticate certification

- If complete and sufficient, may not request additional information but may authenticate or clarify

Using Paid Leave

- Company policy requires employees to "substitute" paid leave for otherwise unpaid CFLA/FMLA leave
- Employer using paid leave must follow the employer's paid leave policies with respect to use of that leave
- Employer must provide information about substitution of paid leave in the "rights and responsibilities" notice and in "designation" notice

Retroactive Designations

Rule: May retroactively designate leave with appropriate notice to the employee if the failure to designate leave timely does not cause harm or injury to the employee.

Employer and employee may mutually agree that leave be retroactively designated.

Examples:

- Employee is off work due to doctor-ordered bed rest for pregnancy complications
- Employee is off work for knee surgery
- Employee is off work to help parent move into an assisted living facility

Recertification

- Less than 30 days only if:
 - o Employee requests an extension
 - o Circumstances have changed significantly
 - o Employer receives information casting doubt on the employee's stated reason for absence

Escrība v. Foster Poultry Farms

- Plaintiff worked at Foster Farms and had previously taken FMLA leave on 15 different occasions
- When she subsequently requested time off to care for her ill father in Guatemala, she was ultimately approved for 2 weeks of vacation
- She remained in Guatemala well past her return date, and didn't contact Foster Farms until 16 days after she was scheduled to return to work
- She was terminated for violating Company's 3-day no-call, no-show policy
- She sued alleging violation for not designating her leave as protected under FMLA
- Can an employee *affirmatively waive* using FMLA leave, even though the underlying reason for leave would have been FMLA protected leave?
- o Ninth Circuit's answer: YES

Denying Future Leave

- When is eligibility determined?
 - o At time request is made?
 - o At time leave will commence?
- An employee's pre-eligibility request is protected
 - o Pregnancy
 - o Other foreseeable leave

Insurance Coverage

- If the employee is provided group health insurance, the coverage must continue during the period of family leave on the same terms as if the employee had continued to work
- Employers must also maintain family member coverage during the period of family leave

Reinstatement

- FMLA: Same or equivalent position
- OFLA: Same position, unless...
- Caution regarding replacement workers and restructuring to accommodate leave
- Transfer to Alternate Position during Intermittent Leave
 - o Okay under FMLA
 - o Under OFLA, need employee's consent

Discrimination/Retaliation

- Unlawful employment practices:
 - o To interfere with or deny leave to an eligible employee
 - Protected absences may not be held against an employee!
 - o To retaliate or in any way discriminate for
 - Submitting a request for leave,
 - Invoking any provision of OFLA/FMLA
 - Opposing or complaining about any unlawful practice under OFLA/FMLA
 - Filing any charge under OFLA/FMLA
 - Giving information in connection with an inquiry or proceeding
 - Testifying in any proceeding relating to OFLA/FMLA
 - o To aid, abet, incite, compel or coerce a violation of OFLA
- This mean individuals may be named as defendants

Disciplinary Action

- Employees who use protected leave can be disciplined if:
 - o The discipline is not because of the use of (or attempted use of) leave AND
 - o A similarly situated employee who did not use leave would be treated the same
- Employees who use protected leave can be disciplined for attendance problems
 - o As long as you do not count any protected leave!
- Areas to watch for:
 - o Adjusting performance standards
 - o Properly tracking intermittent leave
 - o Distinguishing between failing to adhere to the call in policy versus holding a protected absence against the employee

Call In Violations - OFLA

o "Employer may take appropriate action under its internal rules and procedures for failure to follow its usual and customary notification rules, as long as the actions are taken in a manner that does not discriminate against employees taking OFLA or FMLA leave."

o "If an employee fails to give notice as required by ... the employer's policies ... the employee may ... be subject to disciplinary action under an employer's uniformly applied policy or practice. This practice must be consistent with the employer's discipline for similar violations of comparable rules."

o "An employer may not ... take disciplinary action unless the employer has posted the required Bureau of Labor and Industries Family Leave Act notice or the employer can otherwise establish that the employee had actual knowledge of the notice requirement."

Call In Violations - FMLA

o "An employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances."

o "Where an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied."

o "The employer may take appropriate action under its internal rules and procedures for failure to follow its usual and customary notification rules, absent unusual circumstances, as long as the actions are taken in a manner that does not discriminate against employees taking FMLA leave and the rules are not inconsistent with [FMLA's notice requirements]."

When an Employee Fails to Return to Work

- When an authorized period of OFLA leave has ended and an employee does not return to work.
- An employee having reason to believe the continuing absence may qualify as OFLA leave must request additional information, and
- May not treat a continuing absence as unauthorized unless:
 - o requested information is not provided or
 - o does not support OFLA qualification
- Document all follow-up communications!!

Terminating An Employee When Leave Expires

- Intersection between OFLA/FMLA and the ADA
- Possibility of available leave under other state law
- More generous employer leave policies
- Employees heal faster when faced with losing a job
- Investigate thoroughly before terminating
- Severance can be a win-win

Holiday Pay

- FMLA: applies a non-discrimination principle
- OFLA: BOLI takes the position that an employer may not count OFLA leave against an employee in determining eligibility for holiday pay because OFLA covered absences cannot be considered when determining compliance with attendance policies or eligibility for bonuses based on attendance
- OST: BOLI takes the position that an employer may not count sick time against an employee in determining eligibility for holiday pay

Workers' Compensation

STANDARD FORM NO. 100-10

OFLA & On-The-job Injuries

- FMLA runs concurrently with a workers' compensation injury that is also a serious health condition
- OFLA leave may not be used for any period the employee is unable to work because of a disabling compensable workers' compensation injury
- **Exception:** Worker who refuses a bona fide offer of light duty or modified employment which is suitable prior to becoming medically stationary
- Automatically commences OFLA leave
- Worker need not give notice to the employer that OFLA leave is beginning
- Also: If employee works for more than one employer, the employee may be eligible for and qualify to use OFLA leave with the employer where the injury did not occur

STANDARD FORM NO. 100-10

On-The-job Injury & Disability Law

- Employee who actually becomes "disabled" from a work related injury will trigger federal and state disability laws
- Oregon gives injured workers reinstatement or reemployment rights for up to three years from the date of injury or illness

STANDARD FORM NO. 100-10

Leave Related To On-The-job Injuries

- Employees who are injured or become ill on the job are entitled to leave from work and reinstatement or reemployment to work upon release by the treating physician
- Employer cannot require employee to be "100%"
- Employee has job rights even if he/she cannot do original job

OFLA & On-The-Job Injuries

- Designate leave as OFLA pending acceptance of a workers' compensation claim
 - If the claim is accepted, OFLA leave used for the workplace injury must be restored
 - If the claim is denied, OFLA leave will remain deducted from the employee's entitlement
 - If the claim is first denied and then accepted, restore any OFLA leave taken for the condition covered by workers' compensation in the leave year in which the claim is accepted

OFLA & On-The-Job Injuries

- Upon returning to work after leave for a compensable injury, an employee need not requalify for OFLA eligibility
- Look to the 180-day period immediately preceding the leave for the compensable injury to determine eligibility

Interplay with the ADA

SYNOPSIS

- Must provide for the known disability of a qualified applicant or employee unless it would impose undue hardship
- Examples:
 - Physical modifications to work environment
 - Modified work schedule
 - Protected leave
 - Job restructuring / elimination of marginal functions

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- Prohibits discrimination if:
 Qualified individual with a disability
 (or "regarded as" such)
 Able to perform essential functions of the job
 With or without reasonable accommodation

NOTES ON CONTRIBUTORS

- Qualified individual with a disability
(or "regarded as" such)
○ Able to perform essential functions of the job
○ With or without reasonable accommodation

EEOC Guidance: "Employer-Provided Leave & the ADA"

1. Provide access to leave on the same basis as other similarly-situated employees
2. Consider unpaid leave even if not eligible for leave or if leave has been exhausted
3. Treat all leave requests based on a medical condition as an accommodation request
4. Consider modifying maximum leave policies

When Leave is *NOT* a Reasonable Accommodation

- In determining whether granting leave would result in an undue hardship, an employer may consider:
 - o The amount and/or length of leave required
 - o The frequency of leave
 - o Flexibility and the days to be taken
 - o Its request for intermittent leave predictable or unpredictable
 - o The impact of absence on coworkers and the job requirements
 - o The impact to the employer's operation and its ability to serve customers appropriately and timely
 - o Size of the employer

No Fixed Date of Return

- Employee's health care provider may only be able to predict an approximate date of return (e.g., employee can return to work "within 8 to 12 weeks")
- Unforeseen medical circumstances may delay an originally agreed-upon return date
- EEOC: Leave without a fixed date of return may still be a reasonable accommodation

No Fixed Date of Return

From the EEOC:

• In certain circumstances, undue hardship will result from granting leave without a fixed return date because of disruptions to the operation of the employer's business (e.g., employer can neither plan for the employee's return nor fill the position).

Indefinite Leave

- Indefinite leave: When the employee can provide no indication of when, or if, he or she will ever be able to return to work
- o Courts have held requests for "indefinite leave" are unreasonable
- o EEOC would apply an "undue hardship" analysis, but similarly concludes where an employee can give no indication that he or she will be able to return to work, leave as a reasonable accommodation need not be granted
- Don't confuse requests for leave without a fixed date of return with requests for "indefinite leave"

Is an OFLA/FMLA Request Also a Request for Accommodation?

- OFLA/FMLA and Workers' Compensation
- o Employee with a "serious health condition" under OFLA/FMLA may have a "disability" under the ADA
- o Employee with an on-the-job injury may have a "disability" under the ADA
- EEOC: Treat all requests for medical leave as a request for an accommodation
- Practical Tip: Are there on-the-job accommodations that can be made that may reduce the need for leave?

QUESTIONS

Other Leave

QUESTIONS

Returning to Work

- Leave as a reasonable accommodation includes the right to reinstatement to the employee's former position
- Possible that an employer may determine that holding a position open is an undue hardship but must offer employee returning from leave an alternate, available position for which the employee is qualified

QUESTIONS

Ask the Doctor

- Letter to health care provider asking:
 - o What accommodations are recommended
 - o If leave is requested as an accommodation:
 - How long is the leave likely to last
 - What is the likelihood of the employee returning at the end of that period
 - Upon return from leave, what accommodations might be needed

Domestic Violence Leave

- Eligible Employee:
 - o Victim of domestic violence, harassment, sexual assault or stalking, or
 - o Parent or guardian of a minor child or dependent who is a victim of domestic violence, harassment, sexual assault or stalking
 - o No longer required to have worked an average of 25 hours per week for at least 180 days immediately before the date leave begins

Veterans Day Leave

- Exception for Compliance
 - o If providing time off would cause the employer to experience significant economic or operational disruption or undue hardship
- Denying Leave:
 - o If employer cannot provide time off to all eligible employees requesting it, the employer must:
 - Deny time off to all who request it, or
 - Deny time off to minimum number needed to avoid significant economic, operational disruption, or undue hardship
 - o Denied employees may choose, with employer's approval, a single day off within the year as a replacement day off

Veterans Day Leave

- Veterans Day Off: Paid or Unpaid
 - o Eligible Employees = Veteran
 - o Active duty in the Armed Forces 6+ months
 - o Discharge under honorable conditions
 - o NOTE: service in Reserve or National Guard unit ≠ "veteran"
- Procedure
 - o Employee otherwise required to work on Veterans Day
 - o Employee must provide 21-day notice of intent to take time off
 - o Employer must notify employee at least 14 days before Veterans Day if time off will be provided and whether it will be paid or unpaid

Domestic Violence

- Eligible Employee:
 - o Worked an average of more than 25 hours per week for the employer for at least 180 days immediately before the employee takes leave to attend a criminal proceeding
 - o Has suffered financial, social, psychological or physical harm as a result of a personal felony
 - o Member of employee's immediate family has suffered financial, social, psychological or physical harm as a result of a personal felony
 - Spouse, domestic partner, parent, sibling, child, stepchild or grandparent

Crime Victims Leave

Domestic Violence

- Pay
 - o Unpaid
 - o Employee may use any vacation or other paid leave offered in lieu of vacation
- Strict Confidentiality Requirements
 - o Fact employee is taking DV leave is confidential
 - o Fact employee inquired about DV leave is confidential

Domestic Violence Leave

Domestic Violence

- Reasonable Leave to:
 - o Seek legal or law enforcement assistance or remedies
 - o Seek medical treatment or to recover from injuries
 - o Obtain counseling from a licensed mental health professional
 - o Obtain services from a victim services provider
 - o Relocate or to secure an existing home
- Employee Notice
 - o Reasonable notice of intent to take leave, unless not feasible
 - o If unanticipated or emergency, must give notice as soon as practicable
 - Notice may be given by any person on behalf of employee
 - o While on leave, employee must follow employer's known, reasonable and customary procedures for periodic reporting

Domestic Violence Leave

Crime Victims Leave

- Notice
 - Reasonable notice of intent to take leave
 - Provide copies of any notices of scheduled criminal proceedings received from a law enforcement agency
- Leave
 - Reasonable leave
 - Employer may limit amount of leave if the leave creates an undue hardship to the business
 - Employer may notify the prosecuting attorney if taking leave would cause an undue hardship to the employer
- Pay
 - Unpaid
 - Employee may use any vacation or other paid leave offered in lieu of vacation

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Juvenile Court Proceedings

- Parents or guardians with physical custody of a youth who must appear in court must appear personally pursuant to the summons
- An employer may not discharge, threaten to discharge, intimidate or coerce any employee because of such attendance at a juvenile court hearing
- Does not alter or affect an employer's policies or agreement with employees concerning wages when an employee attends a juvenile court hearing

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Jury Duty Leave

- May not terminate or discipline an employee because of jury duty
- Cannot cease to provide health, disability, life or other insurance during jury service
- May not require employees serving on jury duty to use accrued vacation, sick leave, or PTO; must allow employees to take jury duty leave as unpaid
- Employer cannot make deductions for absences of an exempt employee due to jury duty (or serving as a witness or military leave)
 - Employer may offset any amount received by an exempt employee as jury fees (or witness fees or temporary military pay)
 - Employee need not be paid for any workweek during which they perform no work

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Bone Marrow Donation Leave

- Unlawful employment practice
 - o Deny a leave of absence to an employee who donates bone marrow
 - o Deny the use of already accrued PTO for an employee who undergoes a medical procedure to donate bone marrow
 - o Reimbursing against an employee for requesting or using accrued paid leave to undergo a medical procedure to donate bone marrow
- Eligible Employee
 - o Works an average of 20 or more hours per week
- Length of leave
 - o Determined by the employee
 - o Employer not required to grant leave that exceeds the amount of already accrued paid leave or 40 work hours, whichever is less

Religious Observance Leave

- May not deny the use of vacation or other leave available to the employee for the purpose of allowing the employee to engage in the religious observance or practices of the employee
 - o Unless the leave would impose an undue hardship on the operation of the business
 - o Applies to leave that is not restricted as to the manner in which the leave may be used
- Sick vs. Vacation

Other Oregon Leave

- Military leave
- Serving in state legislature
- Search & rescue operations
- Participating in Olympic Games

STICKER FOR ORAL

Best Practices

STICKER FOR ORAL

- Keep the following information confidential:
 - o That an employee has asked for protected leave
 - o The reasons for the leave
 - o Any medical information

- Communicating with doctors:
 - o Don't speak directly to an employee's doctor
 - o Let HR handle those communications

STICKER FOR ORAL

Confidentiality

- Disclosure permitted to:
 - o Employees needing the information to carry out his or her job duties
 - o Supervisors and managers who need to know the restrictions or accommodations or the fact that a medical leave has commenced
 - o First aid and safety personnel may be informed if a medical condition might require emergency treatment
 - o Government officials investigating compliance with the ADA
 - o Workers' compensation insurance carriers may be provided medical information pursuant to state law

STICKER FOR ORAL

STICKER FOR ORAL

STICKER FOR ORAL

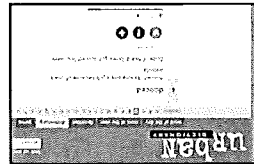
- videos
- photographs
- electronic mail
- instant messages
- or locations
- any form of electronic communication




Ollet me check on that

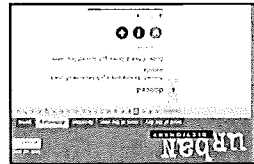
Why Talk About Social Media?

- Social Media is everywhere
 - Used by employees and employers alike, as well as customers/clients
 - Accessible everywhere (phone, home, work, etc...)
 - Facebook has over 2 billion active users
 - Twitter generates 500 million tweets daily
 - LinkedIn claims 500 million registered users
- We access Social Media all the time
 - Recent study found nearly 90% of employees access Social Networking sites during work hours



Why is Training Necessary?

- Increasing number of ill-advised posts
 - Posts can cause significant damage to employees and employers
 - Harassment/bullying
 - Business reputation
- Real consequences to employee online posts



The Taco Bell Genius

- Taco Bell photo contest: submit photos of employees enjoying their first bite of the product
- Co-worker took the photo and posted it on Taco Bell's Facebook wall
- Both employees terminated



[illegible]

- Saloon owner required bartenders to split tips with "back of the house employees" and gave wait staff raises (none to bartenders)
- Bartender complained on Facebook about the owner and having to serve "technick" customers all day
- Owner sent bartender message on Facebook: "you're fired"
- The Court said it was a lawful discharge
- *J.T's Porch Saloon*, 13-CA-46889



QUESTIONS

- Unlawful employment practice for an employer to:
 - o Request disclosure of personal social media account
 - o Require acceptance of a "friend" request
 - o Compel employee to access page in presence of the employer
 - o Authorize the employer to "advertise" on a personal account
 - o Take or threaten disciplinary action for refusing to maintain/disclose/access a personal account or add employer as friend
- ORS 659A.330 allows for a private cause of action

ANSWERS



QUESTIONS

- "Personal social media account"
 - o A social media account used by an employee or prospective employer exclusively for personal purposes unrelated to any business purpose of the employer or prospective employer
 - o Not provided by or paid for by the employer or prospective employer
 - o State law prohibition on access by employer applies only to employees "personal social media account"
 - o If the social media account is used for any business purpose of the employer or prospective employer, then it is not covered by the prohibition (purely personal Facebook account vs. LinkedIn)

ANSWERS

QUESTIONS

Oregon Law on Social Media

Definitions & Limitations

ANSWERS

Oregon State Law – What Employers Can Do

Employers may:

- Require disclosure of password for account used on behalf of employer
- Direct employee to share content of social media pursuant to an investigation
- Access publicly available social media accounts
- Avoid liability for inadvertent receipt of information

NLRB on Social Media

Protected Activities & Upcoming Changes

Overarching Principles

- Employer policies may not be overly broad and prohibit activity protected by the NLRRA, e.g., discussion of wages or working conditions
- Employee comments on social media not protected if they are mere gripes not made in relation to group activity among employees

The Obama-Era NLRB Standard

- If employees would "reasonably construe" the rule to prohibit activities under the NLRBA, then the rule must be struck down
- Examples of overly broad social media policies:
 - o "No defamatory, libelous, slanderous or discriminatory comments about the company, its customers... its employees or management"
 - o "Don't pick fights" online
 - o "Employees may not engage in any action that is not in the best interest of the employer"

Overly Broad Policy Example

- Employee transferred to less lucrative position. Using explicitives, employee updated Facebook status, stating employer messed up and I'm done being a good employee.
- When the employee next reported to work, at the end of the day, she was told that she was being terminated due to her comments on Facebook.
- The Employer had a "non-disparagement rule" which prohibited "making disparaging comments about the company through any media, including online blogs, other electronic media or through the media."
- The rule contained no limiting language that would clarify to employees that the rule does not restrict Section 7 rights.

Non-Disparagement Rule

- NLRB construed this rule to be unlawful because it contained no limiting language that would clarify that the rule does not restrict Section 7 rights
- NLRB also found termination pursuant to non-disparagement rule was unlawful

MEMORANDUM

• NLRB found the Employer's discharge was lawful

o Facebook posts were merely an expression of an individual gripe

o No attempt to initiate group action

o No evidence she was seeking to solicit group support for her individual complaint

• NLRB found the Social Media policy was unlawful

o No explanation of "appropriate" vs. "inappropriate"

o Savings clause insufficient because employee could not know it reached discussions the Employer deems "inappropriate"

MEMORANDUM

• Rule prohibited employees from identifying themselves as the Employer's employees, unless there was a legitimate business need to do so or when discussing terms and conditions in an appropriate manner

• Savings clause: the policy would not be interpreted or applied so as to interfere with employee rights to self-organize, form, join, or assist labor organizations, to bargain collectively through representatives of their choosing, or to engage in other bargaining or other mutual aid or protection, or to refrain from engaging in such activities

MEMORANDUM

• Employee reprimanded for failing to perform a task she was never instructed to perform

• During break, Facebook post: F+K Employer. Coworker likes the status

• Second Facebook post: Employer does not appreciate its Employees

o No coworker responds

Personal Gripe or Concerted Activity?

Protected Concerted Activity?

NLRB v. Per Sixty, LLC, No. 15-1841 (2d Cir. Apr. 21, 2017)

- An employee's Facebook post about management during work hours constituted "protected concerted activity"
- Facebook post was as follows:

o Bob is such a NASTY MOTHER F***ER don't know how to talk to people!!!!!! Fuck his mother and his entire fucking family!!!! What a LOSER!!!!!! Vote YES for the UNION!!!!!!
- The post was publicly accessible for 3 days before deleted by the employee and the employer terminated the employee
- The Court held that while the posting did have profanity, it was common in the employer's workplace and the posting also included statements about union activity

Building the Defensible Policy

- Key components
 - o Warn employees they are responsible for the content of their posts
 - o Warn that posts with adverse impact on job performance or violation of company policy may result in discipline
 - o Prohibit posts that are malicious, obscene, or threatening to co-workers and customers
 - o Require honesty in comments
 - o Restrict use of personal social media using company equipment
 - o Restrict employees' access to personal social media during work hours
 - o Prohibit posts that disclose confidential or proprietary information (include definition)

Social Media Policy Upheld

- Social media policy originally prohibited "discriminatory, defamatory, or harassing web entries about specific employees, work environment, or work-related issues on social media sites"
- Amended policy prohibited "the use of social media to post or display comments about coworkers or supervisors or the Employer that are vulgar, obscene, threatening, intimidating, harassing, or a violation of the Employer's workplace policies against discrimination, harassment, or hostility on account of [a protected class]"

Social Media Policy Upheld

- Employer prohibited employees from using or disclosing confidential and/or proprietary information, including personal health information about customers or patients
- Employer prohibited employees from discussing in any form of social media "embargoed information," such as launch and release dates and pending reorganizations
- Employer required employees, while engaging in social networking activities for personal purposes, to indicate that their views were their own and did not reflect those of their employer
- Employer prohibited employees from referring to the employer by name and from publishing any promotional content

The Upcoming Trump-Era Standard

- The NLRB recently replaced the "reasonably construe" standard with a balancing test :
- o the nature and extent of the potential impact on NLRB rights, versus
- o legitimate justifications associated with the rule
- As of now, there is no case on how the balancing test would apply to social media and employer policies
- Beginning of a pro-employer standard?

Employer Compliance with FTC Endorsement Guidelines

Employer Compliance with FTC

Fair Trade Commission has established rules on endorsements
 Endorsement rules apply to:
 any endorsement/testimonial made by employees/employers
 off related to their employment

Endorsement Example

Bruh, I've won like \$8,000 worth of CS:GO Skins today on @CSGOLolito I cannot even believe it!

75 922
 13 PM 12/19/2018

"Well, Bruh, while we're on the subject of things we cannot even believe, did either of you like consider clearly disclosing that you like owned the company - a material connection requiring disclosure under FTC law?"

(Source: FTC website)

FTC Endorsement Guideline

- The fact that the endorser is an employee of the company whose product is being endorsed is a "material connection" that must be disclosed in any communication that contains the endorsement
- Listing the employer on the employee's profile page is not sufficient → must disclose in the actual post
- Doesn't matter whether employees received or were promised any payment or other consideration in return

WHO OWNS AN EMPLOYEE'S LinkedIn Account?

This image shows a single sheet of white paper with horizontal blue or grey ruling lines, typical of notebook paper. The lines are evenly spaced and run across the width of the page. There is no handwriting or other markings on the paper.

- Bloggers' disclosures could be → "XYZ paid for my trip"
- "Thanks to XYZ for the free trip" (sponsored by XYZ)
- Disclosure requirement applies to "stories" or posts that are time-limited (usually 24 hours)
- All disclosures should be
 - "placed where it easily catches" attention,
 - in a font easy to read, and
 - close to the claims to which they relate

[illegible]

- The Revised Endorsement Guidance provides specific examples and recommendations including:
 - Instagram "tags" to demonstrate "material connection" with the product being endorsed
 - Amazonian Instagram "Tags" to demonstrate "material connection"
 - "consultant" are not adequate disclosures
 - "likes", "retweets", "shares" does not allow you or your audience to potentially be problematic depending on the overall impression on the post

Can Social Media be Trade Secrets?

- ORS 646.461(4): "Trade secret" means information, including ... customer lists
- Denies value from not being generally known
- Efforts to maintain secrecy
- Are social media contacts considered a customer list?

- *PhonDog LLC v. Kravitz*
- Former employee took employer's Twitter followers
- Court held that a Twitter follower list can constitute a trade secret
- *Eagle v. Murgun*
- Provided banking education services
- Former employee took her LinkedIn contacts

Avoiding Ownership Disputes

- *Andis Hall, LLC v. Nankivill*
- Have a Social Media Ownership Agreement or Policy
- Employer should be significantly involved in the creation and maintenance of the account
- Allow employees to access account on company time
- Exception under ORS 659A.330

Social Media in the Hiring Process

To Google or Not to Google?

The Evolution of Reference Checks

- Astronomer—outspoken critic of evolution and believer of intelligent design viewpoint—applied for job as director of observatory
- His religious beliefs were uncovered via Google search and brought to the decision makers as potential issue
- Case settled for \$125,000
- *Gaskell v. Univ. of Kentucky* (2009)

Using Social Media to Research Candidates

- Ask yourself (and your company) three essential questions before you do the search:
 - Is the information I am going to learn a valid predictor of job performance?
 - Which job classifications will be subject to the internet background check (and why)?
 - How much tolerance will we show toward unprofessional behavior?
- Consider researching *after* extending the candidate a conditional job offer
 - If you find something negative, consider approaching the candidate and giving them the opportunity to correct or explain

Harassment & Social Media

Virtual Harassment is On the Rise

Harassment Policy Violations

- Employer prohibits harassment of employees
- Harassment includes conduct that creates a hostile work environment
- Severe or pervasive interference with work performance
- Off work activity can create a hostile work environment



Employer's Obligations

- Maintain a workplace free from harassment
- Investigate reports of harassment
- Take corrective measures to prevent harassment



Discipline & Discharge

- *Espinoza v. County of Orange* (Cal. App. 4 Dist. 2012)
 O juvenile corrections officer born without fingers on his right hand claimed he was subjected to disability harassment creating a hostile work environment by his co-workers on a blog maintained during off-duty hours
- Court affirmed the jury verdict of \$820K against Employer because Employer had an obligation to act to stop the harassment even though it did not control the blog



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~ Thank You ~

Effective Discipline & Discharge

Yamhill County HR Association | June 14, 2018



Presented by Nicole Elgin

Why Discipline is Important

- Helps employees understand rules, requirements and expectations
- Helps employers shape performance
- Helps employers end relationships without conflict
- Complies with legal requirements that protect employees



• Change the way you think about discipline:
Before you think negative, think positive

- o Protects Your Investment
- o Rewarded Behavior Will Be Repeated
- o Silence Is A Poor Management Tool

Positive Discipline

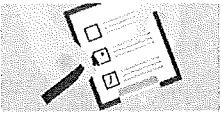
How to Document Poor Performance

Defining the Standard for Performance

• Establish the standard through:

- o Performance feedback
- o Job descriptions
- o Department policies
- o Operating instructions

• True standard is defined by what employees are allowed to get away with on a daily basis





- Look at past performance reviews
- Critically review work performed
- Talk with customers about employee performance
- Go check in with your employees
- You have to get out from behind your desk

How Do You Spot Poor Performance?

- Failure to perform "essential duties and responsibilities" of the position
- Diminished contribution to employer
- Other employees required to "pick up the slack"
- Complaints from co-workers, members of public, vendors

Bottom line: Employee's performance is a negative deviation from the standard

Red Flags of Poor Performance

- Before you start talking about discipline:
 - o Make sure employees have an understanding of expectations
 - o If there is a problem, make sure your employee understands what it is
 - o If there is a deadline, make sure you communicate it
 - o If you have something to say about performance, don't be ambiguous or wishy-washy about it
- Do not provide excuses for your employee
- o Instead, listen to what the employee has to say
- Important to spot and correct poor performance

Communicate & Enforce the Standard



- Develop a performance improvement plan (PIP)
 - o A reasonable chance to demonstrate acceptable performance
 - o Set smart goals
 - o Set milestones and timelines
- Document interaction
 - o Email employee
 - o Memorandum with employee acknowledgment
 - o Maintain a file

Develop a Plan to Improve



- Have a reason to talk
 - o General concerns?
 - o Touching base?
- Pick a good time and place
 - o Make sure employee is not on deadline
 - o If you expect emotional reaction, try for the end of the day
 - o Pick a non-public location
- Have examples of performance problems
 - o Copies of inaccurate work can focus the discussion
- Make sure to ask: What do you think you need to help you improve?

How to Intervene



- Performance problems do not go away on their own
- o If you have a performance problem do not let it continue to grow

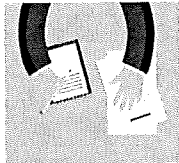
Intervene Early & Often

KEYS TO DOCUMENTATION



- Need to Develop a Paper Trail
 - o Form < Content
- Where To Keep It
 - o Personnel File
 - o Supervisor's File
- o Make sure the formal file is complete

HOW TO DOCUMENT EARLY INTERVENTION



- Casual
 - o Email
 - o Formal
- Memorandum, no signature required
 - o Memorandum requiring signature
- Summarize conversation
 - o Events and concerns
 - o Expectations for job and to correct performance
 - o What do you think you need to help you improve?
- Make sure to put a copy with personnel records

COMMON PITFALLS WITH PIPs



- Subjective milestones
 - o Improve your timeliness for filing reports
- Absolute standards
 - o Ensure 100% of reports are filed in a timely manner
- Vague standards
 - o Do better about turning in reports
- Instead, try:
 - o Ensure 80% of reports are filed in a timely manner

Keys to Documentation

- Assume it will be read
 - o Be professional
 - o Be complete
 - o Be honest
- o Do not be too casual: emails/texts

Keys To Documentation

- Should employees get copies?
 - o Rarely a bad idea
 - o Employees may have a legal right to review file
- Oregon personnel records statute
- ORS 652.750

Keys to Documentation

- When to Document
 - o Repeated Problems You Have Addressed
 - o Repeated Problems Not Yet Addressed
 - o Problems Associated with Other Problems
 - o Serious Performance or Behavior Problems
 - o Workplace Sins That Can Hurt Others: Drug or Alcohol Violations, Violence, Harassment

How to Document

- Date Your Documentation
 - o It may become important to know when an event happened
 - o It may become important to know when a document was created
- Do not backdate documents
 - o There is a difference between "creation date" and effective date
 - o You can always explain any discrepancies

How to Document

- You can document a previously undocumented history
 - o Prepare a complete summary of pertinent events (prior violations, counseling sessions)
 - o Be as thorough as possible
- Use the "history" as a preamble for a current disciplinary event

How to Document

- Gather key documents
 - o Written complaint
 - o Workplace rules implicated by complaint
 - o Evidence of wrongdoing
 - o Personnel file
- Create a file



• Analyze complaint to determine alleged violations of rules

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Discharge: The Ultimate Discipline

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What Is Progressive Discipline?

- Progressive discipline is a process in which the penalty becomes greater for each succeeding infraction
- A Typical Process Could Be:
 - o Verbal warning
 - o Written warning
 - o Suspension
 - o Termination (last resort)
- What does your Handbook say?



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Get Your Facts Straight Before Discipline

- Conduct thorough interviews, if needed
- Provide due process (public employers)
- Do not pre-judge if you are conducting a fact-finding investigation
- Have an upfront retaliation discussion with all participants

At-Will Employment



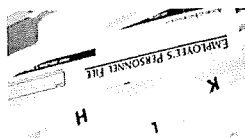
- Employers can terminate
- Employees can quit
- At any time
- With or without notice

What is the Employment Status?



- For non-union private-sector employees:
 - o At-Will
 - o Employment contract
- Public Employees
 - o Due Process property and liberty interests
- For union employees:
 - o Usually "just cause" standard

First, Check the File



- Check the personnel file for
 - o Record of prior discipline
 - o Training
 - o Employee complaints that might be important
 - o Duration of employment
 - o Protected activity / class
 - o Other factors that might matter
- Protected leave
- Workers' compensation
- Request for accommodation

Protected Classes

- Race
- Color
- National origin
- Sex (including pregnancy)
- Disability
- Religion
- Age
- Military service
- Genetic testing
- Use of protected leave (military, family, sick, legislative, jury)
- Sexual orientation

- Garnishment
- Bankruptcy
- Right to testify in criminal or civil proceedings
- Association with a protected class
- Marital status
- Family relationship
- Injured worker
- Opposition of unlawful practices
- Expunged juvenile record
- Good faith report of safety or criminal issue

Union Employees

- Collective Bargaining Agreement (CBA)
- Employer may be limited in disciplinary options by the CBA
- Employee has right to a representative at discipline or termination meetings
- CBA may restrict what can be placed in the personnel file
- Grievance procedure

At-Will Employment

- Does not protect you from liability for unlawful termination
- "At-Will" is an ineffective defense for
o Statutory claims
o Public policy claims
- Justices never believe employers terminate for no reason at all
- At-Will is a legal tool – a good one, but still a legal tool

Retaliation Claims

- Files or Participates in:
 - Internal complaint or report
 - Complaint or filing with government agency
 - Gathering of evidence to support claims
- Opposition
 - The employee need not be right, just reasonable

Follow the Straight Face Rule

- Employment may be at-will, but juries (and employees) expect there to be a reason
 - Be able to articulate and explain the reasons for termination
 - Be careful about generalizations that do not say enough:
 - "bad fit"
 - "not following directions"
 - "bad listener"
 - "personality conflicts"
 - If the excuse sounds or smells funny, think twice

All Employer Actions Are Under a Microscope

- Juries or courts scrutinize employer actions carefully
- The jury gets to decide which side to believe
- Juries care about FAIRNESS and CONSISTENCY
- Juries have the benefit of hindsight

WORKSHEET

• Settlement is not the same thing as losing; you may gain something:
 o A chance to "buy" a resignation from the worst employee you ever had
 o You will not have to pay your lawyer's estimated \$250,000 (just in lawyer fees)
 o Yes, we had a toxic supervisor
 o Our witnesses are current employees and they are terrified, and conflicted because they are friends with the plaintiff

Opportunities Worth Grabbing

WORKSHEET

Negotiating Severance & Separation Pay

WORKSHEET

• Proximity of termination to protected event may be sufficient evidence to let claim go to jury

• When decision is made but termination may be delayed, document the timing of the decision

• Do not ask for trouble (unless you really have to)

- o Terminations during family leave
- o Terminations while on injured worker status
- o Termination while on protected leave such as Oregon Sick Leave
- o During an EEOC claim or threat of filing a claim

Timing the Termination

TERMINATION OF EMPLOYMENT



The Termination Meeting

- Short and to the point
- Professional
- Two people from company
- Written statement for witnesses and employee to sign
- Statements made at time of termination may provide direct evidence of motive
- Avoid ambiguous reasons that might suggest an improper motive
 - o Absences where they may be protected
 - o Protected complaints as compared to the improper manner of complaining

WALKING TO COURT

The Exit Interview

WALKING TO COURT

Severance: Get a Strong Release

- Define the "Employee" broadly when you are getting the release
 - o Employer's spouse, agents, anyone claiming through him/her
- Define the "Employer" broadly when you are getting the release
 - o Officers and directors, agents, insurers, attorneys, employees, subsidiaries, affiliates
- Define the "Released Claims" broadly when you are getting the release

The Termination Meeting

- If termination is for several reasons, be complete
- If each would be sufficient independently, say so
- Be prepared with clear denial if employee suggests motive may be improper
- Be prepared with firm statement of reasons for termination
- Termination should not be a surprise!

Getting Your Property Back

- Prepare a checklist
- Offer to stop by and pick up company computer, etc.
- Do not withhold earned wages pending return of property
- Do not withhold discretionary severance or other discretionary benefits
- Civil lawsuits
- Police

Non-Compete & Trade Secret Reminders

- Provide a copy of policies or agreements
- Remind employee of post-employment restrictions

REASON FOR SEPARATION

Termination
Quit with 48 hours advance notice
Quit without 48 hours notice

FINAL PAYCHECK DEADLINE

End of the next business day
Final work day
Five working days
OR
the next regular payday (whichever comes first)

Oregon:

Final Paychecks

REASON FOR SEPARATION

Whether owed depends on agreement with employee
of Handbook, contract, other policies
"Earned" or "accrued"
Absent clear language, it is part of wages

PAYOUT VACATION/PTO

Your handbook should be clear on whether vacation time will be paid or not at termination.
Once you pay it out to one . . .

REASON FOR SEPARATION

Consider corporate culture
Consider defamation claims
Ask terminated employee what they would like said
Consider whether to explain that no reasons will be provided because of the individual's privacy

Message to Other Employees

REASON FOR SEPARATION

Whether owed depends on agreement with employee
of Handbook, contract, other policies
"Earned" or "accrued"
Absent clear language, it is part of wages

PAYOUT VACATION/PTO

Your handbook should be clear on whether vacation time will be paid or not at termination.
Once you pay it out to one . . .

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~ Thank You ~



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