2020 EMPLOYMENT LAW WEBINARS FOR CONSERVATION DISTRICTS

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I. Hiring – Making the Most Informed Decisions While Avoiding Legal Claims

The hiring process can be very frustrating for employers, given the many legal restrictions on pre-employment inquiries. These restrictions make it difficult to obtain information to evaluate the qualifications of prospective employees and have set traps for unwary employers.

Specifically, federal and state employment discrimination laws have a significant impact upon the hiring process. Employers face the challenge of making informed hiring decisions while avoiding liability for employment discrimination. As restrictive as these laws may be, they do not require employers to abandon their common sense. Employers can make many lawful inquiries during the hiring process that will enable them to elicit vital information to make informed decisions.

The primary methods used to obtain the most qualified employees include advertising, employment applications, pre-employment interviews, and background checks. It is critically important that Districts comply with applicable laws during each step in the hiring process. All requests for information during the hiring process must be directed toward a specific purpose and hiring decisions must be made based on information received as part of this process. Inquiries that do not lead to information enabling an employer to choose qualified personnel should be avoided. In addition, inquiries and hiring practices that disproportionately screen out members of a protected class leave employers susceptible to claims under one or more anti-discrimination laws. The Americans with Disabilities Act also greatly restrains an employer's ability to make certain pre-employment inquiries. It is within this legal landscape that a District must endeavor to hire the most qualified employees.

A. Avoiding Liability Through the Use of Proper Hiring Procedures

1. Advertisements

Responsibility for job advertising should be centralized with one individual or group of staff to ensure consistency and the use of legally compliant language. Advertisements must be carefully worded to avoid creating even a suggestion of a contractual or other commitment on behalf of the employer. Employers should include an equal employment opportunity statement in their advertisements. All employers should be mindful of the media in which they seek job applicants and should endeavor to obtain the most qualified applicants regardless of race, sex, age, religion, national origin, veteran status, or disability.

2. Job Applications

Application forms are often an employer's primary source of information about an applicant and are excellent tools for avoiding lawsuits. The application form can be used to inform applicants of various employer rules or policies and require applicants to acknowledge and agree to numerous points. Important items that should appear on an employment application include:

- a statement regarding at-will employment status;
- an authorization to conduct background checks;
- a release of the employer and others contacted by the employer during background and reference checks;
- an acknowledgment that pre-employment drug alcohol testing and/or medical examinations will be given (if applicable); and
- the applicant's certification of the accuracy and completeness of the information provided on the application, with notice that falsification of any information on the application form is grounds to reject the applicant or terminate employment if the falsification is found after the applicant is hired.

All such statements should be in plain English and should be placed over the applicant's signature/dateline for appropriate acknowledgment and execution by the applicant.

Both the U.S. Equal Employment Opportunity Commission ("EEOC") and the Pennsylvania Human Relations Commission have developed guidelines with respect to questions that an employer may legally ask on a job application. The following are the most common illegal or otherwise improper questions asked on pre-employment applications and at pre-employment interviews:

- marital status and number of dependents (including Mrs./Miss/Ms. and/or maiden name)
- childcare arrangements
- height and weight
- color of eyes/hair
- date of birth
- dates of school attendance
- health history or any other disability related inquiry

Employers also must take care when inquiring about the following matters:

United States Citizenship – Employers may not ask applicants to state whether they are a citizen of the United States or to provide their national origin. Federal law, however, requires employers to verify the legal status and right to work of all new hires. Employers may ask whether an applicant has the legal right to work in the United States. If an employer asks any applicants this question, all applicants should be asked. Employers should explain that verification of the right to work must be submitted after the decision to hire has been made. To satisfy the verification requirements,

employers must ask all new hires for documents establishing both identity and work authorization.

English Language Skill – While some English skill is probably required for most jobs, fluency or absence of an accent is most likely not relevant. If English language skill is not a requirement of the work to be performed, using it as a criterion may have an effect of unfairly eliminating certain minority groups. Employers must be careful about the consideration which they give to an applicant's English language skill.

Availability for Work on Weekends or Holidays – If the employer needs a workforce on weekends or holidays and desires to ask questions relating to the availability for such work during the application process, the employer should indicate that a reasonable effort is made to accommodate the religious needs of employees. The employer should also be careful not to ask the question in such a way as to elicit a response which indicates the applicant's religion. To the extent that employers do not make accommodations of the employees' work schedules due to religion, they must be able to demonstrate that they are unable to reasonably accommodate a prospective employee's religious observance or practice without actual undue hardship on the conduct of the business. "Undue hardship" is more than a minor financial cost or minor disruption of the employer's work policies or manner of doing business.

Educational Requirements – An applicant's educational background is frequently relied upon by employers when making hiring decisions. This is especially so for management and other high-level positions. Where a certain level of education is related to successful job performance, an employer is justified in considering an applicant's educational background. However, an employer's requirement of a specific

level of education may be discriminatory where that requirement serves to disqualify certain minorities and there exists no evidence that the requirement is job-related. Moreover, employers must not discount education obtained at predominantly minority institutions as inferior to that of other schools. Where educational achievements are significantly related to successful job performance, employers may request copies of an applicant's transcripts.

Military Service – Questions relevant to experience or training received while in the military, or to determine eligibility for any veteran's preference required by law, are acceptable. Moreover, employers may consider the type of discharge an applicant received from the military. A dishonorable discharge should not, however, be an absolute bar to employment. If such questions are asked, the applicant should be told that the dishonorable discharge or general discharge is not an absolute bar to employment and that other factors will affect the final decision of whether to hire the individual.

Criminal Convictions – Employers in Pennsylvania may consider the relationship between a felony or misdemeanor conviction and the applicant's fitness for a particular job. An employer may not consider an applicant's conviction of a summary offense or any arrest that did not result in a conviction. 18 Pa. C.S. § 9125. Conviction records should be cause for rejection only where the number, nature, and recentness would cause the applicant to be unsuitable for the position.

Even if the employer will not conduct pre-employment criminal background checks, it should include on the job application a question asking whether the applicant has ever been convicted of or pled guilty or nolo contendere to a felony or misdemeanor

offense. The application should make clear that a criminal record does not constitute an automatic bar to employment and is considered only as it relates to the job in question.

3. The Interview Process

An employer should not ask any questions at an interview that cannot be asked on the job application. Employers must be sensitive as to their own conduct during the interview process. All representatives involved in the interview process should be aware of their obligations under the anti-discrimination laws. Any statements indicative of bias may be strong evidence in a subsequent discrimination lawsuit. Comments about an individual's appearance or any jokes or innuendoes of a sexual, racial, or religious nature are entirely improper.

Interviews should be conducted in a consistent and relatively standard manner. It is also imperative that employers keep a record of each interview as it takes place. Each interviewer should be given a standard form to complete during, or immediately after, the interview. Even the most unbiased interviewing techniques can result in legal difficulties if an employer does not document the process.

Open-ended background questions with proper follow-up are very useful. Here are some good examples of effective interview questions:

- Tell me a little about yourself.
- Who was your favorite professor in college/boss? Why?
- What are some of your work successes that you are most proud of?
- For supervisor candidates – Tell me your favorite "success story" involving someone you supervised or mentored.
- What do you like to do in your free time?

- For applicants who live outside of the area – What contact have you had with the area? Have you spent any time here? Why are you interested in working and living in this area?

B. <u>Pre-Employment Inquiries under the American with Disabilities Act</u>

An employer may not conduct a medical examination or make any disability-related inquiries of job applicants until after a conditional offer of employment has been made. 42 U.S.C. § 12112(d)(ii)(a). Before making a conditional offer, an employer may inquire as to the ability of the applicants to perform the essential functions of the job with or without a reasonable accommodation. 42 U.S.C. § 12112(d)(ii)(b). If an employer asks whether an applicant can perform an essential function of the job with or without a reasonable accommodation, the question must be phrased as a "yes or no" question. (Because of the nature of this inquiry, it should be asked in writing on the application form, not during an interview.) An employer cannot ask whether a reasonable accommodation is needed to perform the essential functions of the job unless the applicant has a known disability.

Set forth below are specific prohibited pre-offer disability-related inquiries according to the EEOC's guidance:

- How many days were you sick last year?
- What prescription drugs are you currently taking?
- Have you ever collected workers' compensation benefits?
- Have you every attended drug rehabilitation or AA?

Employers must also refrain from pre-offer inquiries regarding psychological disabilities and may not ask questions concerning an applicant's history of treatment of mental illness, hospitalization, or the existence of mental or emotional illness or

psychiatric disability. Employers also cannot conduct any pre-offer psychological evaluations of applicants. Although an employer may not make disability-related inquiries prior to giving a conditional offer of employment, an employer may ask an applicant about current use of illegal drugs, since current illegal drug use is not considered a disability under the Act.

Passed in 2016, the Pennsylvania Medical Marijuana Act ("PMMA") presents some unique challenges for employers. Marijuana (medical or otherwise) remains illegal under federal law. However, the PMMA provides that "no employer may discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee regarding an employee's compensation, terms, conditions, location or privileges solely on the basis of such employee's status as an individual who is certified to use medical marijuana." PMMA, § 2103(b)(1). Thus, individuals who are certified to use medical marijuana are a protected class in Pennsylvania. Any such individual who believes he/she was not hired, discharged, threatened, etc., because of his/her certification to use medical marijuana will be able to file a lawsuit, straight in state court, alleging discrimination. As a result, Pennsylvania employers should not ask applicants about their use of medical marijuana and whether they are certified to use medical marijuana.

Once a conditional offer of employment has been made, an employer may conduct medical examinations and inquiries. 42 U.S.C. § 12112(d)(3). If the employer does so, all conditional employees in the same job class must be given the same medical examination and/or inquiry. 42 U.S.C. § 12112(d)(3)(A). If the initial inquiry discloses that the individual may not be able to perform the essential functions of the job

with or without a reasonable accommodation, the employer can require him/her to submit to further examination by a physician. If an employer uses the results of these inquiries or examinations to screen out an individual because of disability, the employer must prove that the exclusionary criteria are job-related and consistent with business necessity and cannot be met with reasonable accommodation.

Additionally, the ADA requires the employer to keep all medical information concerning an employee confidential. An employer should keep medical information in a separate, locked filing cabinet apart from the location of the personnel files. Access to these files should be restricted, and they should never be used in making personnel decisions unless a reasonable accommodation is needed.

C. References and Background Checks

One of the most important ways for an employer to ensure that it hires quality people is to conduct background checks and to contact an applicant's former employers. Applicants should be asked to provide a list of references and a complete employment history, including the name of their supervisors and/or a contact with each employer. An employer must keep any information obtained during the background request in strict confidence. Most employers know, however, that it has been difficult to obtain meaningful information from former employers because of the risk associated with defamation lawsuits.

Pennsylvania law provides a statutory immunity from liability for disclosures of information regarding former or current employees. Where an employer provides job-related information in response to a request by a prospective employer or a current or former employee, there is a presumption that the employer's response is made in good faith. With this presumption, such communications will be deemed immune from any

civil liability, unless a complaining employee or former employee can prove a lack of good faith. The immunity is limited to responsive information about the current or former employee's job performance. There is no protection for disclosures of information pertaining to an employee's off-duty conduct, family life, marital or familial status, or character traits unrelated to job performance.

Additionally, employers often conduct a background check into an applicant's criminal history. This is advisable where the position is one of trust or public safety. In Pennsylvania, an employer's background check of an applicant's criminal history should be limited to avoid information regarding the arrest record of the applicant or any charge not resulting in conviction. In addition, an employer may only consider information concerning a prospective employee's conviction of a felony or misdemeanor which relates to the applicant's suitability for employment in the position for which he has applied. Summary offenses and convictions not related to the ability to perform the job must not be considered.

Some employers are compelled by law to complete criminal background checks as part of their hiring process. For example, the Pennsylvania Child Protective Services Law ("CPSL") requires any employee hired into a position with a "significant likelihood of regular contact with children, in the form of care, guidance, supervision or training" to obtain a Pennsylvania Criminal History Check, a fingerprint-based national criminal history record check processed by the FBI, and a Pennsylvania Child Abuse History Record Check prior to hire. If these checks reveal a conviction of one of the criminal offenses listed in the law or that the application has been named as the perpetrator of a

founded report of child abuse committed within the prior five-year period, the applicant may not be hired for the position.[1]

As more employers are conducting pre-employment criminal background checks, the use of criminal history in hiring decisions is attracting more scrutiny from the EEOC. The EEOC has issued enforcement guidance emphasizing its belief that employer policies restricting hiring based on prior criminal convictions may unlawfully deprive members of certain minority groups equal employment opportunities. In light of the EEOC's position on this issue, employers who conduct pre-employment criminal background checks should not adopt blanket rules prohibiting the hiring of anyone with a prior conviction. Instead, employers should develop a "targeted screen" that is "narrowly tailored" and that considers multiple criteria when determining whether a prior conviction renders an applicant unsuitable for a position – these include: the nature, severity and age of the offense, the nature of the job, the number of offenses, subsequent employment and rehabilitation efforts. The analysis of an applicant's criminal history should be done on a case-by-case basis considering all relevant information.

If an employer considers an applicant's criminal history in the decision not to hire the applicant, it must notify the applicant in writing that it has done so. 18 Pa. C.S. § 1925(c). A wrongful discharge cause of action may exist if an employer refuses to hire

[1] The CPSL mandates that the required clearances be obtained every 36 months based upon the date of each individual clearance. The CPSL contains similar background check requirements for volunteers who have a "significant likelihood of regular contact with children, in the form of care, guidance, supervision or training."

an applicant based upon an arrest, a summary offense conviction, or a conviction not related to the applicant's suitability for the position.

Additionally, when an employer uses a third-party consumer reporting agency to obtain a consumer report (e.g., criminal history information or credit information), it must comply with the Fair Credit Reporting Act ("FCRA"). Specifically, the employer must provide a written disclosure to the applicant and receive a written authorization prior to obtaining such a report. Further, if the employer intends to take any adverse action based, in whole or in part, upon information in a consumer report, it must give the individual a pre-adverse action disclosure that includes a copy of the consumer report and a copy of a summary of rights under the FCRA. Pre-adverse action disclosures must be provided whenever consumer report information is a factor in any adverse action decision. After any adverse action is taken, the employer must also provide the individual with an adverse action notice.

The EEOC closely scrutinizes the use of credit checks in hiring decisions. The EEOC's position is that certain minority groups tend to have less favorable credit histories on average, such that the use of this information in hiring can have a disparate and discriminatory impact on them. Employers should use pre-employment credit checks only if the employer can establish that the employee's credit history is directly relevant to the job in question.

II. Furloughs, Layoffs, and Reductions-in-Force

With the disruptions brought on by the COVID-19 pandemic, many employers have needed to furlough or lay off employees, some for the first time. The terms furlough, layoff, and reduction-in-force ("RIF") all refer to situations where multiple employees are separated from employment, either temporarily or non-temporarily, for reasons and due to circumstances typically beyond simply the employee's job performance or conduct.

From a legal perspective, furloughs and layoffs mean essentially the same thing. The term furlough is used more often in white-collar settings, while the term layoff is used most often in blue-collar and/or union environments. While the terms furlough and layoff often are used in connection with temporary separations from employment, the term RIF usually is used in the context of a non-temporary group termination. However, furloughs and layoffs are types of RIFs, and for the purposes of simplicity, we will refer generally to RIFs to include furloughs and layoffs in the remainder of this section.

Planning for and executing a RIF can give rise to legal liability, and that liability is increased by the potential of class-based claims. In the context of the COVID-19 pandemic, many employers who have had to furlough employees because of the circumstances have sought to use the pandemic to temporarily or non-temporarily eliminate the employees they deem the least productive or valuable, without regard to protected traits and other possible legal protections. This mindset may lead to unanticipated legal claims and liability. While COVID-19 undoubtedly has giving employers a very legitimate reason to reduce headcount through RIFs, the selection of

those who will lose their jobs and those who will not requires the same level of planning and legal care as an individual termination in any other context.

The keys to minimizing legal risk when conducting a RIF is understanding the legal requirements and risk areas, engaging in advance planning, and (like almost everything in the employment law world) documenting the process. Most importantly, employers should go through this planning process before identifying specific employees for separation.

A. Overview of Potential Liability Resulting from the RIF Process

Loss of employment (either temporarily or non-temporarily) in the context of a RIF is an adverse employment action for purposes of the employment laws, just like the firing of an individual employee. Legal liability in this context of a RIF may range from claims of discrimination based on age, race, sex, national origin, religion, disability, or other protected traits, to claims of retaliation for engaging in protected activity. In addition, it is important to consider whether the RIF will affect employees on FMLA leave or receiving workers' compensation. Failure to consider such circumstances could result in claims of retaliation under the FMLA or Workers' Compensation Act.

The types of discrimination claims identified above can be based on a legal theory of disparate impact. With a disparate impact claim, an employee can challenge the RIF decision by showing, through statistics, that the RIF had a significant adverse impact upon a protected class. If a statistical adverse impact is proven, then the employer must defend the claim by proving that the criteria used to select employees for layoff is job-related and consistent with the business necessity that led to the RIF. For this reason alone, it is important that the employer's decisions during the RIF process

are carefully considered and based upon consistent criteria. This will insure that such decisions are fair, defensible, and done in the employer's best interest.

Employers with union-represented workforces also must ensure that any RIF complies with the terms of the applicable collective bargaining agreement. Many collective bargaining agreements contain provisions that address layoffs and the selection and recall process.

It is also important to ensure compliance with respect to the Worker Adjustment and Retraining Notification Act ("WARN Act")[2] and the Older Workers Benefit Protection Act ("OWBPA"). These laws have strict compliance criteria and contain severe penalties for failure to comply.

B. Overview of the RIF Process

The RIF planning and implementation process will typically involve the following steps: (1) identifying the business case; (2) defining the scope; (3) identifying affected positions; and (4) establishing selection criteria. Each of these steps are discussed in greater detail below.

1. The Business Case for the RIF

It is important to establish business-related and objective reasons for deciding to implement a RIF. The business need for the RIF often is readily apparent at the outset of the planning process. For example, in the COVID-19 pandemic context, restrictions on an employer's ability to conduct in-person operations has created an obvious business case to justify a RIF. However, the business case for the RIF should be

[2] The WARN Act applies only to mass layoffs or facility closings that result in employment losses for 50 or more employees. As such, the WARN Act is unlikely to be implicated in any RIF conducted by a District.

documented at the outset of the planning process. This document may take the form of an internal memo that addresses several questions related to the RIF. Some of the questions that may be addressed in the memo include:

- Why the employer finds itself in this position;
- What are the employer's goals and future plans that created the need for the RIF;
- What alternatives (other than a RIF) has the employer considered;
- Why are the alternatives insufficient or impractical; and
- How does the RIF help the employer in achieving the identified goals.

Documenting the business case for the RIF in advance of the implementation provides proof that the employer considered alternatives and made its decision based solely on business reasons, as opposed to discriminatory reasons.

2. Defining the Scope of the RIF

In defining the scope of the RIF, the employer needs to determine which area and/or positions will be affected. Identifying the areas and/or positions affected by the RIF will be critical in assessing compliance with the OWBPA (discussed in detail below).

3. Identifying the Affected Positions

Once the scope of the RIF is determined, the employer must then identify the positions to be included in the RIF. These decisions should be based on the previously identified business needs and goals. This process usually involves determining the positions and skills within each work unit that must be retained to achieve the articulated business needs/goals. To avoid claims that individual employees or specific classes were selected, this assessment should be done prior to a review of the skills of the individual incumbents. This can be accomplished by establishing criteria for

determining which specific positions the employer will eliminate within the specific work unit to achieve the articulated business needs/goals.

4. Establishing the Selection Criteria

a. Voluntary RIF Program

Before discussing the establishment of involuntary RIF selection criteria, it may be worth considering the offer of a voluntary RIF prior to carrying out the involuntary RIF plan. Voluntary RIFs, also known as voluntary separation programs or early retirement incentive plans, occur when one or more employees opt to leave employment based on the employer's offer of a severance package. Voluntary RIFs are often used as a first step in the RIF plan. Voluntary RIFs mitigate risk of subsequent legal action because employees that voluntarily leave are less likely to consider legal challenges and typically will have signed a general release of claims as part of the severance package.

However, voluntary RIFs are not without complexity and risk. For example, there is the risk that not enough employees will participate, requiring the employer to implement a subsequent involuntary RIF. Furthermore, a voluntary RIF program requires that the employer provide employees with a window period to decide whether to participate. The amount of time employees must be given is not defined by law, but employees must have sufficient time to make a knowing and voluntary decision. Likewise, the OWBPA requires the employer to give employees age 40 or older at least 45 days to decide whether to sign a release in exchange for voluntary separation severance as well as 7 days to revoke the release after signing. Consequently, the use of a voluntary RIF program may be impractical for timing reasons.

b. Involuntary RIF

If a voluntary RIF program is not used or does not adequately address the business case triggering the need for a RIF, then the next step is to establish selection criteria for an involuntary RIF. This step is one of the more critical and difficult aspects of the RIF process.

Once the affected positions have been identified, the employer should establish and standardize the methodology and criteria to be used in selecting individual employees for inclusion in the RIF to ensure uniformity throughout the decision-making process. This must be done before the specific employees to be selected are identified. In defending against discrimination claims associated with a RIF, the employer will need to establish that the selection decisions were made based on legitimate, non-discriminatory reasons. The ability to support the legitimacy of the selection criteria is weakened significantly if the criteria is not established and documented in advance of the selection process.

Before the selection process begins, the employer should establish a RIF plan that documents the business case, the decisional unit, the positions to be affected (or not affected), and the selection criteria to be utilized. Obviously, protected traits such as age, disability status, FMLA-covered leave usage or requests, workers' compensation claims, or other protected traits, can never be considered as part of the selection criteria. Otherwise, absent contractual restrictions, the employer has significant discretion in establishing the selection criteria to be applied.

The employer should use objective selection criteria to the extent possible. There is a broad range of objective, nondiscriminatory criteria that may be utilized, such

as seniority, work-related classifications, or prior disciplinary history. It is important to keep in mind that, whatever criteria the employer chooses, it must be applied consistently. Furthermore, the more subjective the criteria, the more difficult it may be to defend discrimination claims arising from the RIF decisions and the more time-consuming the selection process might be.

In addition to the selection criteria, it is important to identify a methodology or approach to be used in applying the selection criteria. Some examples of RIF selection approaches include the following:

- Multiple-Factor approach – involves a multiple-factor matrix of selecting criteria that is used to core the competing employees on that criteria, resulting in an overall score that will distinguish employees.
- Multilevel approach – uses multilevel criteria similar to the multiple-factor approach, but instead uses the multiple factors in a successive series. The first factor narrows the overall field and then at the next level another factor narrows that remaining field and so forth.
- Skills-based criteria – focuses on what the employees can do by identifying specific skills that are tailored to the needs of the business and used to score or rank employees based on the possession of the identified skills.
- Performance-based criteria – is similar to the skills-based approach but uses past performance evaluations as the system to rank employees in reference to certain specified criteria.

Many employers are drawn to the use of a performance-based criteria to keep the most “valuable” employees. While the performance-based criteria may have value, this relying on performance alone presents additional risks for consideration. This method relies on the subjective judgment of supervisors over time. Some of these supervisors could be alleged to have had a long-standing bias against certain employees based on protected traits.

Courts have recognized that subjective evaluations are more susceptible of abuse and more likely to mask pretext. If subjective criteria are to be considered, it is often advisable to combine it with objective criteria. For example, the employer could first select employees with significant recent disciplinary history and then consider performance evaluations. In addition, employers could consider a weighted average of performance evaluation scores and seniority. Whatever the criteria, the employer should establish the ground rules in advance and then apply them consistently.

If relying on subjective methods like performance evaluations for RIF selection, the employer should deliberately and thoughtfully focus on well-defined, job-related criteria that can be pulled from job descriptions and actual performance evaluations (to the extent they exist) and document that it did so. Furthermore, where performance evaluations will be utilized, consideration must be given to whether recent performance reviews have been conducted. If reliable recent reviews so exist, the RIF criteria should typically rely on the actual performance reviews. If performance reviews have not been completed recently, or are otherwise not a reliable indicator of potential for future contributions to the business, the employer can utilize an evaluation system created for the RIF.

C. Other Considerations When Conducting a RIF

After employees have been selected for the RIF, there are other aspects of a RIF that should be considered before taking action.

1. Release of Claims and OWBPA Requirements

If the RIF is not intended to be temporary, employers often consider offering severance payments and/or other benefits to separated employees in exchange for a release of claims. There exist specific legal requirements in the group termination

context that require additional provisions in a separation agreement and general release.

The OWBPA amended the ADEA to impose specific requirements in cases in which an employer seeks to obtain a waiver of an age discrimination claim under the ADEA. Employees under the age of 40 do not have rights under the ADEA and need not be provided with an OWBPA compliant release. The OWBPA also contains certain additional requirements when an ADEA release is obtained in connection with an employment "termination program," which includes both voluntary and involuntary RIF programs.

If the intent is to offer severance in exchange for a release of claims as part of the RIF process, then the employer will need to comply with the OWBPA requirements in relation to those employees over the age of 40 who are being asked to release claims under the ADEA. To be effective, a waiver executed in connection with a termination program must:

1. Be part of a written agreement calculated to be understood by the average person receiving the agreement;
2. Specifically refer to rights arising under the ADEA;
3. Not purport to waive claims arising after the date the waiver is executed;
4. Be accompanied by consideration in addition to anything the individual is already entitled to receive;
5. Advise the recipient to consult with an attorney before signing the agreement;
6. Provide at least **45 days** for the recipient to consider the agreement;
7. Provide that for at least **7 days** after execution, the recipient may revoke the agreement and that the agreement will not become effective or enforceable until the revocation period has expired;

8. Identify any class, unit or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

9. Provide the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

2. Temporary Furloughs and Layoffs

Temporary furloughs and layoffs, such as those triggered by the COVID-19 pandemic, present additional issues for employers to consider and address.

- Health insurance coverage. During a temporary RIF, the employer must determine how it will handle health insurance coverage. Specifically, will it continue the furloughed employees' health insurance, or will it terminate coverage and issue COBRA notices? If an employer wishes to continue health insurance coverage for employees on a furlough or layoff, it first should confirm with its insurance provider or broker that it can continue coverage for employees on inactive status due to a RIF and, if so, for how long it can continue coverage consistent with the terms of the insurance policy. The employer also should determine how it will handle the employee share of the health insurance premium (e.g., require employees to remit payment for their share to continue coverage or allow employees to pay in arrears through payroll deductions after they return to work) and communicate how these payments will be addressed in a written communication to affected employees at the time of the RIF.

- Access to the employer's e-mail account and network resources. Employees off work on a temporary furlough should not perform any work for the employer, regardless of whether they were directed by the employer to perform the work. This includes accessing their employer's e-mail or other network resources. By doing so, they potentially are engaging in work for which they are not being paid, creating possible wage and hour liability. Employers should consider turning off access to e-mail for employees on furlough and determine who will monitor these e-mail accounts during this time.

- Determine whether employees can use or be paid for accrued paid leave. A common question in a temporary furlough situation is whether employees can or must be allowed to use any accrued paid leave (e.g., vacation, PTO) during the furlough/layoff period. This issue is controlled by the employer's policies (and perhaps by the collective bargaining agreement for union-represented employees). If the employer's policies do not give employees the express right to use accrued paid leave at the time of a furlough/layoff, then the employer likely has the discretion to determine whether and to what

extent furloughed employees may be able to use such leave. The employer should decide how it wishes to handle this issue before announcing the RIF.

- Communicate expectations regarding the furlough but make no promises. Employee communication is particularly important during stressful times such as temporary furloughs. Employers should share with affected employees the reasons for the temporary furlough, how it will impact their benefits, and the expected duration (if the return date can be estimated at that time). Employers should not, however, make any statements that could be construed as guarantees or promises with respect to reinstatement. Because the circumstances that necessitate temporary RIFs are often beyond the employer's control, employers should be honest but cautious with their statements to affected employees in this context.

III. Effective Employment Policies

Good and complete employment policies and procedures provide the framework for consistency, ensure legal compliance, set appropriate employee expectations and standards, and serve as a good resource for supervisors and managers. They are of great importance and require due care in drafting and diligence in application. Having strong policies and procedures that are published and followed can eliminate a fair share of unnecessary employment crises.

It is essential that Districts develop and consistently apply appropriate workplace policies and procedures. Districts should issue an employee handbook or manual informing employees of the applicable policies. It is generally advisable to obtain a signed acknowledgement from each employee, indicating that the handbook has been read and understood. It also is important that the handbook contain an appropriate "at-will" disclaimer, which indicates that the handbook is intended as information concerning the employer's policies and procedures and that nothing contained in the handbook creates an enforceable contract of employment for any specified period of time. Where appropriate, the handbook should state that all employees are employed at-will and may

be terminated at any time and for any reason. Of course, different rules will apply for those Districts with a union-represented workforce.

Most policies and procedures relating to employment matters will differ depending upon the culture of the specific employer. It is important that each District recognize the unique nature of its workforce, its culture, and the history of its relationship with its employees when developing or modifying employment policies. Quite simply, one size does not fit all for most employment policies!

There are, of course, certain provisions that must be included, and others that must be avoided. These materials will cover a few of the most significant policies which typically should be included in an employee handbook or manual and a few which should be considered.

A. At-Will Employment Acknowledgment

The first thing that an employee handbook or manual should contain is not a policy, but rather a disclaimer to protect the employer against possible mischief caused by the handbook itself. As a general rule, all employment in Pennsylvania is presumed to be "at-will," meaning that either party can terminate the relationship at any time for any reason or even for no reason, with or without any advance notice. A handbook certainly should be drafted to ensure that an employee's "at-will" status is not altered. Thankfully, Pennsylvania does not require much effort to ensure that the handbook does not affect the at-will status.

The best synopsis of Pennsylvania case law addressing employee claims that a handbook limits an employer's ability to terminate the employment relationship is this: If you have a good "disclaimer statement" in your handbook, you should be just fine.

Disclaimer language should expressly state that the terms of the handbook are not intended to be a contract for employment, but rather that the handbook is a general statement of District policy. The disclaimer also should indicate that unless the employee has an express contract for employment stating otherwise, all employees are employed at-will, meaning that either the District or the employee may terminate the employment relationship at any time, for any reason, with or without notice. Finally, the disclaimer should also mention that the District may change the terms of the handbook from time to time.

That said, a handbook that clearly disclaims any intent to modify the at-will employment relationship can still create a legal entitlement to a particular benefit. Even when an employee handbook specifically states that the employment relationship is at-will, the employer's communication in the handbook of certain rights may constitute an offer of a contract for employment on those terms, which the employee may accept by continuing to perform the duties of his/her job. For example, if a handbook states that employees working at least 36 hours per week for a period of at least 90 days will be treated as full-time employees for purposes of certain benefits, an employee classified a part-time but who meets this definition may have a legal claim for the full-time benefits outlined in the handbook.

Courts are likely to hold an employer to a promise or statement made in a handbook, even if the handbook clearly states that it is not a contract. Although this conclusion may trouble some employers, the solution is simple: <u>do not make a promise or statement in the handbook that you cannot live with</u>. A well-drafted handbook should not create the type of unforeseen consequences outlined in the example above. To

avoid this problem, an employer simply needs a well-drafted, regularly utilized handbook that accurately states the employer's intentions.

B. Equal Employment Opportunity Policies

After the at-will employment/"not a contract" disclaimer, the first policy in the handbook should be the employer's Equal Employment Opportunity ("EEO") Policy. By stating at the start of the handbook that the employer does not discriminate with respect to any employment decision on the basis of any protected trait, the employer demonstrates that compliance with federal, state, and local employment discrimination laws is a high priority for the organization. We suggest an EEO Policy for Pennsylvania employers modeled on the following:

> _____ is an Equal Employment Opportunity employer that does not discriminate on the basis of race, color, religion/creed, sex, sexual orientation, gender identity, disability, marital status, age, pregnancy, national origin, ancestry, genetic information, possession of a General Education Development Certificate as compared to a high school diploma, veteran status, or any other characteristic protected by the applicable federal, state, or local laws. This commitment applies, but is not limited, to decisions made with respect to hiring, placement, compensation, benefits, promotions, demotions, transfers, terminations, layoffs, return from layoffs, administration of benefits, and all other terms and conditions of employment. Likewise, employees are responsible for respecting the rights of their co-workers, as we must all work together to ensure continued success.

C. Discriminatory Harassment Policies and Training

To facilitate a workplace free from discriminatory harassment and to minimize legal liability under federal and state anti-discrimination laws, Districts must develop and communicate policies against discriminatory harassment in the workplace. These policies serve to minimize the frequency of discriminatory harassment. Just as

importantly, they also may provide a defense against an employer's legal liability if such harassment does occur.

Under applicable agency principles, an employer will be held liable for co-worker or third-party (i.e., non-supervisor) harassment only if the employer knew or should have known that the harassment was taking place and failed to take prompt remedial measures to bring it to an end. However, employers are automatically liable for discriminatory harassment committed by supervisors unless the employer can establish an affirmative defense that requires the employer to prove (1) that it exercised reasonable care to prevent and correct promptly any harassing behavior, and (2) that the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. Under this standard, employers must have an appropriate anti-discrimination policy in place that provides an adequate reporting and investigation procedure. In addition, anti-harassment training must be provided to at least supervisors, and employers should consider whether to provide such training to all employees.

Discriminatory Harassment policies should:

- Specifically prohibit sexual harassment.
- Also prohibit all other forms of discriminatory harassment.
- Describe the types of conduct that are prohibited.
- Provide an appropriate harassment reporting procedure that allows an employee to choose from a few specific alternate reporting avenues. Only allow reports to be made to those individuals whom you trust are responsible to take appropriate action upon receiving a complaint.
- Indicate that an appropriate investigation will be conducted, and that confidentiality will be maintained to the extent possible, but that certain information may need to be disclosed in the course of conducting an adequate investigation.

- Indicate that if a violation is found to have occurred, prompt and appropriate remedial measures will be taken to bring the harassment to an end.

- Indicate that the employer will not tolerate any form of retaliation against any individual for making a report of harassment or participating in an investigation.

- Indicate that if the harassment persists after remedial measures have been taken, the victim must inform management so that appropriate measures can be taken.

The policy should *not*:

- Fail to mention and prohibit discrimination based on race, religion, national origin, age, disability, and/or any other protected trait.

- Allow reports to be made to any "supervisor" or specific individuals who cannot be relied upon to act upon the information appropriately.

- Indicate that an investigation will be conducted, and action will be taken only if the victim requests.

- Require that a formal and/or written complaint be made in order for the employer to take any investigative and remedial measures.

- Facilitate unnecessary communication of the allegations or the results of the investigation to individuals not involved.

Employers should consider:

- Training all employees, not just supervisors (and update training periodically).

- Distributing the policy to each employee separately on a yearly basis, and having each employee separately acknowledge receipt of the anti-harassment policy.

- Developing a tracking system for repeated complaints against any one individual.

- Limiting those management individuals responsible for receiving complaints to higher level management and human resources staff and excluding front line supervisors from the responsibility (front line supervisors must, however, report any harassment which they personally witness).

D. General Guidelines for Conduct

Effective and uniform guidelines for conduct are important because they establish clear standards for employees and guidelines for supervisors or managers with respect to workplace conduct. An employer's guidelines for conduct may be reviewed by administrative agencies in response to employee complaints challenging adverse employment decisions. Also, the unemployment compensation system is very interested in such written conduct expectations if an employer contends that it discharged an employee for willful misconduct. Thus, they should be carefully drafted and uniformly enforced.

In drafting such a policy, employers should be careful to avoid using the terms "for cause" or "just cause" in discussing discharge. These terms imply that an employee cannot be discharged unless there is some reason. The discharge policy should confirm that employees remain employed at-will at all times and can be discharged at any time for any or no reason, with or without notice.

Employers also should maintain flexibility in their discipline policies and procedures. If the policy sets forth a list of conduct that will result in discipline, it should be clear that the list is not exhaustive, and that the employer retains the right to discipline an employee for conduct not specifically enumerated. If the employer has a progressive discipline policy, it should state that the employer retains the right to move to any step in the discipline policy, including termination, at any time, with or without notice or prior disciplinary action.

E. Attendance Policies

Employee attendance issues are one of the most common sources of potential liability under the employment laws. While employers generally have the right to insist upon regular and punctual attendance from employees, attendance policies must be properly drafted and applied to avoid violations of the FMLA and ADA. Moreover, consistent enforcement of attendance policies (like any disciplinary action) is necessary to avoid discrimination claims.

Appropriate attendance policies should:

- Clearly and simply define the rules. Employers can have either a more general policy that simply prohibits unsatisfactory attendance and tardiness or a more specific occurrence/points-based progressive discipline attendance policy. Employers who elect to have a "no-fault" points-based attendance policy must ensure that absences protected by the FMLA or ADA do not count as occurrences, both in the policy and in practice.
- Clearly define a procedure for reporting any absences and the ramifications for not following the reporting procedure.
- Provide a method of appropriate documentation of absences.
- Provide a method of providing management with necessary information to determine whether an absence is protected under the FMLA or whether an accommodation might be needed under the ADA.
- Exclude FMLA-protected absences from disciplinary action (this may include single-day absences for a chronic condition or partial-day absences for intermittent leave).
- Always be consistently applied.

Attendance policies must *not*:

- Count all absences, including absences protected by the FMLA or ADA.
- Be drafted in a way that allows employee manipulation or abuse (e.g., a rigid progressive discipline system).

Employers should consider:

- Developing an appropriate method for documenting absences and determining application of the FMLA and ADA.

- Requiring all absences to be reported to the appropriate management official responsible for administering FMLA and ADA issues. Employees should be told that they must speak personally to this individual. Information should be obtained from the employee and documented concerning the reason for the leave, the duration of the condition, any medical treatment administered, any anticipated future medical treatment, whether the employee has suffered similar symptoms in the past, etc.

- Implementing an attendance bonus to discourage excessive absenteeism.

F. Electronic Resources and Cell Phone Policies

Employee Internet, voicemail, computer network, and e-mail use raises significant legal and human resources issues. The use of these electronic resources and methods of communication by employees creates significant additional risk of legal liability and may also involve productivity concerns. For these reasons, employers should consider developing an appropriate electronic resources policy. However, employers must be aware that any monitoring or interception of electronic communications must be done in an appropriate manner to avoid violation of federal and state wiretap laws or potential liability for invasion of privacy.

An electronic resources policy should:

- Explain that use of the employer's electronic resources and communications systems (e-mail, Internet, etc.) are intended for business use and that the employer provides employee access to these systems to enable employees to perform their jobs.

- Define whether and to what extent employees are permitted to use these systems for non-work-related reasons. (Sample language – Limited personal use is permitted so long as it does not interfere with the performance of your job, consume significant resources, give rise to more than nominal additional costs, or interfere with the activities of other employees. Under no circumstances shall such facilities be used for

personal financial gain or to solicit others for activities unrelated to the District's business.)

- Prohibit inappropriate use of the systems, such as
    - harassing messages;
    - downloading inappropriate materials;
    - use that overburdens the system or affects the employee's performance; or
    - dissemination of confidential information.
- Make specific reference to the employer's policy against discriminatory harassment.
- Make clear that employees should treat communications over these systems just like other formal correspondence.

Employers should *not*:

- Monitor or intercept electronic communications without informing employees that this may be done or obtaining their consent to such activities (certain exceptions may apply).

Employers should consider:

- Monitoring electronic communications after informing employees that this will be done and obtaining their consent to such monitoring.
- Developing a clear retention/destruction policy with respect to e-mail messages – in the event of litigation the burden and expense of producing stored e-mail messages can be staggering.

Another potential policy to consider is a policy that addresses cell phones and other portable electronic devices. Possible policy provisions to consider include:

- Make clear that the policy covers all portable electronic devices, including cell phones, tablets, laptop computers, and smart watches.
- Set forth the rules for personal device use while in the office or otherwise while working.
- Prohibit the use of any portable electronic device while operating a vehicle during working time or otherwise while conducting the District's business.

This prohibition should include making phone calls, texting, e-mailing or other messaging, and Internet browsing. An employer may want to permit employees to use a "hands free" device while on the road for District business, but only if such use otherwise complies with applicable law. Otherwise, employees should direct any calls or messages to voicemail while they are on the road for the District. All employees must ensure that their use of portable electronic devices does not pose a safety hazard and complies with all applicable federal, state, and local laws governing the use of cell phones and other portable electronic devices.

G. Internet Postings and Social Media Policies

Employees use "social media" as a fun and rewarding way to share experiences and opinions with family, friends, and co-workers. Social media also can provide an effective tool for exchanging information and raising the visibility of an employer's services. However, the use of social media also presents certain risks. To assist employees in making responsible decisions about their use of social media, employers should establish guidelines in an employee handbook for appropriate use of social media.

An Internet postings and social media policy should:

- Remind employees that the same principles and guidelines found in the District's other policies apply to their activities online. Ultimately, employees are solely responsible for what they post online. Before creating online content, employees should consider some of the risks and rewards that are involved. Any conduct that adversely affects an employee's job performance, the performance of fellow employees, or otherwise adversely affects the District's employees or legitimate interests may result in disciplinary action, up to and including termination of employment.

- Tell employees to refrain from using social media while on working time or on equipment the District provides unless it is work-related and authorized by a supervisor and consistent with the District's other employment policies. Also, employees should not use District e-mail addresses to register on social networks, blogs, or other online tools utilized for personal use unless authorized by management to do so.

- Instruct employees that their use of social media should respect and conform to copyright, privacy, fair use, financial disclosure, and other

applicable laws. Employees should recognize that they may be legally liable for the content of their postings. Employees also may be liable if they make postings that include confidential or copyrighted information belonging to third parties.

- Prohibit employees from retaliating against other employees for reporting violations of the policy.

Employers should *not*:

- Include broad prohibitions on speaking "negatively" about the District, manager, supervisors, or other employees. Employees have the protected right to engage each other and third parties in discussions regarding wages, hours, and conditions of employment, and these rights apply equally to social media use.

H. Drug and Alcohol Policies

Employers are aware of the obvious dangers to employees and others, both inside and outside the workplace, and to the employer in general from employee use or abuse of drugs and alcohol. Employers, therefore, often are committed to establishing and maintaining an alcohol-free and drug-free workplace. To attain this goal, Districts may wish to consider implementing and maintaining drug and alcohol policies.

At a minimum, a drug and alcohol policy should expressly prohibit the sale, use, or possession of illegal drugs and alcohol while on duty, on the employer's premises, or in the employer's vehicles. Likewise, the policy also should prohibit an employee from reporting for duty while under the influence of alcohol or illegal drugs and define "under the influence." The policy should also set forth the procedure for employees to follow if they are using prescription or over-the-counter drugs that may adversely affect the employee's physical or mental ability to perform work in a safe and productive manner. Finally, the policy should make clear the consequences of a policy violation (i.e., possible disciplinary action, up to and including termination).

If the employer desires to implement drug testing of applicants and/or employees, the drug and alcohol policy should set forth the particulars of its testing program, including at a minimum the types of tests conducted, the triggering reasons for a test, and the drugs for which the employer tests.

The drug and alcohol policy also should address medical marijuana. Specifically, the policy should make clear that, with respect to medical marijuana, an employee is under the influence if there is an observation of impairment of physical or mental ability coupled with a scientifically valid test deemed positive or where professional opinion establishes that the employee is under the influence based on the level of marijuana metabolites present on a positive test. (A mere positive test result for marijuana is not sufficient to take disciplinary action if the employee has a valid certification to use medical marijuana.) In addition, the policy should state that, if a prescribing physician or dispensing medical provider suggests work restrictions, those restrictions must immediately be made known to the employer.

I. Improper Pay Deduction Policies

The Fair Labor Standards Act ("FLSA") regulations create a "safe harbor" for employers that make an improper deduction from the salary of an employee otherwise exempt from the FLSA's minimum wage and overtime requirements. Under these rules, if the employer has a clearly communicated policy that (1) prohibits improper pay deductions, (2) includes a complaint mechanism, (3) reimburses employees for any improper deductions, and (4) makes a good faith commitment to comply in the future, the employer will not lose the exemption (unless the employer continues to make improper deductions after receiving employee complaints).

The regulations create a significant incentive for employers to take advantage of these safe harbor provisions by developing and disseminating to employees a written policy regarding improper docking of pay. This is an opportunity to reduce potential liability in the event of an error in overtime administration. The written policy should be distributed to employees at time of hire, published in the employee handbook, or made available on the employer's intranet website.

J. Leave Policies

Most employers provide some type of time off for employees, whether such time off is required by law or simply the employer's policy. Types of time off include:

- Sick leave, vacation leave, and other types of paid time off;
- Family and medical leave provided pursuant to the FMLA;
- Military leave;
- Jury duty leave;
- Bereavement leave; and
- "Other" extended leave.

For leaves of absence required by law, such as military leave and FMLA leave,[3] employers should ensure that their leave policies comply and are consistent with all requirements of the law. In addition, employers should ensure that they update these leave policies as the laws themselves change.

For types of leave not required by law, such as paid vacation, sick, or other type of PTO, the written policies are just as important. Employers have broad discretion to

[3] During July's webinar, we will cover managing employee absences. This presentation will include a detailed discussion of the FMLA, including which employers and employees are covered by the Act and the Act's requirements.

establish the terms and conditions for these types of leave, but they should memorialize these terms and conditions in written policies. Absent clearly defined written policies, ambiguities and confusion can exist, which can give rise to disputes and even legal claims. At a minimum, these leave policies should address the following:

- Eligibility. Which categories of employees are eligible for this type of leave? Only full-time employees or all employees? How is full-time employment defined under your policies?

- Amount and accrual. How much leave is provided to eligible employees, and how do they accrue the leave? For example, is the full annual leave balance awarded at the start of the calendar or fiscal year, or do employees accrue leave as they work throughout the year?

- Terms and conditions of use. For what reasons may an employee use a type of leave? Are there any prior request and approval or notice requirements?

- Payment upon separation. Are employees entitled to a payout of any accrued but unused leave upon separation? If so, are there any conditions to be eligible for payment?

Employers that provide paid childbirth or parental leave should ensure that their leave policies do not discriminate on the basis of sex or gender. Specifically, providing a period of paid (or unpaid) leave for mothers, but not fathers, after childbirth may give rise to sex discrimination claims if the leave is not conditioned on physical incapacity due to childbirth itself. In other words, a policy providing for "maternity leave" should be reviewed and likely renamed "childbirth" and provided equally to new parents.

K. Remote Work/Work from Home Policies

One likely long-term effect of the COVID-19 pandemic is the increase in the number of employees who request to work or actually work remotely from home or elsewhere. Telework has long been a potential accommodation under the ADA for

employees with medical conditions that made coming to the office difficult or impossible. Now, employers can anticipate many employees will request teleworking arrangements.

Employers may wish to consider having a telework policy that addresses the following items:

- The process to follow to request a telework arrangement.
- Eligibility terms for telework. Any discussion of eligibility should mention the nature of the employee's position and the employer's needs, as those typically will be the controlling factors when determining whether and to what extent an employee can telework effectively.
- Confirmation that employees teleworking are expected to comply with all of the employer's same employment policies as if the employee was working at the employer's facility.
- A statement that any approved teleworking arrangement is approved on a temporary basis, subject to periodic review by the employer, and may be revoked by the employer at any time.
- An explanation that, although a teleworking arrangement is intended to be flexible, the focus of the arrangement must be job performance and meeting the employer's needs. Accordingly, employees who are approved to telework should not have primary responsibility for childcare, dependent adult care, or other duties that are not ordinarily part of the employee's normal job responsibilities during working hours.
- If the employer permits any non-exempt employees (i.e., employees who are legally entitled to overtime pay for any hours worked in excess of 40 in any work week) to telework, an explanation of the time recording and reporting process and an emphasis on the need to accurately record all hours worked while teleworking.
- A discussion of whether and to what extent any of the employer's equipment will be provided for teleworking and the terms of use for such equipment.
- An employee acknowledgment that employer-provided e-mail, electronic data communication systems, voice message systems, electronic storage systems, and computer systems are not private and may be monitored, reviewed, or searched by the employer in connection with any use while teleworking.

- An explanation that the employee must designate a workspace within the remote work location for placement of equipment to be used while teleworking. The employee should maintain this workspace in a safe condition, free from hazards and other dangers to the employee and equipment.

- A directive that no work-related visitors are permitted at the employee's home or remote worksite and that any meetings and must be held at the employer's office or at a mutually agreed to offsite location.

- A reminder that, in the event of a job-related injury while teleworking, the employee must report the incident as soon as possible pursuant to the employer's workers' compensation policy.

- An explanation that the employee must determine any tax or legal implications under federal, state, or local laws related to telework, as well as any restrictions on working out of a home-based office, such as zoning restrictions or condominium/HOA rules and regulations. The policy also should advise the employee to seek independent tax and legal advice, if necessary, regarding these issues.

IV. Discriminatory Harassment Training

In response to the #MeToo/Time's Up movement, discriminatory harassment (and particularly sexual harassment) has become a major issue and concern for many employers. Despite all of the media attention paid to the issue of sexual harassment in the workplace over the last few years, the federal and state laws prohibiting employment discrimination, which includes sexual harassment and other forms of discriminatory harassment, have not changed. Employers have long had the obligation to prevent and remedy all forms of unlawful discriminatory harassment in their workplace. This means that, when employers are on notice of harassing conduct, they must take prompt, appropriate action that is reasonably calculated to ensure that the conduct stops and does not recur.

Typically, employers satisfy this obligation by maintaining a workplace harassment prevention program that includes:

- a comprehensive policy, inclusive of a multiple-contact reporting structure, that allows employees to raise concerns of harassment without fear of reprisal;
- periodic anti-harassment training for employees; and
- procedures that provide for investigation and resolution of any complaints of harassment raised under the employer's policy.

Sound familiar? It should. Preventive measures such as anti-harassment employment policies and training allow employers to raise an affirmative defense to claims of unlawful hostile work environment harassment. This affirmative defense was created by the United States Supreme Court in 1998 and provides a strong legal incentive for employers to maintain such policies and training.

While the #MeToo movement may not have resulted in significant changes to the underlying harassment laws, the movement has increased significantly the importance of effective policies and training. We have seen the number of harassment claims rise in the last few years, and that number likely will continue to increase as time passes. The best defenses an employer can have to a discriminatory harassment claim are legally up-to-date and comprehensive EEO and discriminatory harassment policies and periodic harassment training for all employees.

Long gone are the days when simply having a policy tucked into your employee handbook is sufficient. Employers today must take proactive measures to educate employees on their policy and on conduct that is and is not acceptable in the workplace.

This includes targeted training for supervisors and management, who play a critical role in preventing and addressing concerns of harassment in the workplace. Do not underestimate the value of manager training on these issues and their responsibilities under the law and your policy. Managers who are not trained to recognize potential harassment concerns, or who fail to recognize them and address them appropriately, can subject their employer (and, under Pennsylvania law, themselves, individually) to liability.

Training should be tailored to an employer's culture and workforce, incorporating examples that are meaningful to the employer's business and workplace. It is important to educate employees not only on the conduct that is prohibited under the policy, but also on the ways that they can respond if they experience or observe potentially harassing conduct in the workplace. Training should also explain the employer's commitment to investigating concerns raised under the anti-harassment policy and the general procedures that apply to investigations.

Training also should ensure that key personnel, such as managers, understand what constitutes notice of a harassment concern sufficient to trigger an investigation. Notice can take many forms – from formal complaints, internal or external, to informal complaints (e.g., "I just thought you should know…"), to observed conduct. They also should be trained on the importance of conducting a prompt and thorough investigation. Remember: employees' perception of the employer's commitment to a workplace free from harassment will be formed by how promptly and thoroughly the employer responds to those issues when they arise. Similarly, the employer's potential for liability also can

be impacted by how the employer responds. Thus, it is critical that key personnel know when to start the process and how to do it right.

It is now more important than ever that an employer's anti-harassment policies and procedures are embraced and championed at all levels of the organization. The best way to foster change in a workplace culture is to visibly demonstrate a commitment to the principles promoted in the employer's policy and training – from the top (Board members and senior leadership) down.

Employers need to look no further than recent headlines to recognize the importance of taking workplace harassment issues seriously and the value of addressing preventive and remedial measures head-on. Don't let your District be the next headline. Take the time now to ensure that your District has the right components in place to effectively educate your workforce, to prevent conduct that can contribute to a hostile work environment, and to promptly and appropriately address issues of harassment if and when they do arise.

Below are sample PowerPoint slides for a discriminatory harassment training session for employees and managers. For the remainder of this portion of the presentation, we will walk through these slides and discuss the key elements of an effective discriminatory harassment training session:

Why Are We Here?

- **The District is committed to diversity and promoting an inclusive and respectful workplace**
- **We all are expected to know and comply with the District's anti-harassment policy**
- **Training helps to eliminate discrimination and harassment**
  - Promotes positive work environment
  - Clarifies expectations of behavior
  - Encourages prompt reporting
  - Legal compliance

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Diversity And Inclusion

- **Workforce diversity is the variety of differences in people in our organization (backgrounds, experiences)**
  - Creativity and innovation require collaboration
  - A range of different perspectives
  - Promote productivity and associate morale
- **The District benefits from and values a diverse workforce**

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Discrimination & Harassment

- **Federal and state laws protect against unlawful discrimination**
- **Discrimination = Protected characteristic motivating adverse treatment with respect to "terms and conditions of employment"**
  - "Terms and conditions" can include significant employment decisions and hostile work environment/harassment
- **Laws also prohibit retaliation against an individual who has opposed/reported any discrimination or unlawful harassment**

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Anti-Discrimination Laws

- **Primary sources of protection**
  - Title VII of the Civil Rights Act of 1964
  - Americans with Disabilities Act
  - Age Discrimination in Employment Act
  - Genetic Information Nondiscrimination Act
  - Pennsylvania Human Relations Act
- **The laws prohibit**
  - Discrimination
  - Discriminatory harassment
  - Retaliation

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Protected Traits/Characteristics

- Race
- Religion/Creed
- National Origin
- Ancestry
- Age—40 And Over
- Sex—Gender And Pregnancy
- Veteran Status
- Disability—Physical And Mental
- Genetic Information
- Possession Of A GED
- Sexual Preference/ Orientation

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Understanding Discriminatory Harassment: What Is It?

- **Verbal or physical conduct based on a protected trait that has the purpose or effect of:**
  - Creating an intimidating, hostile, or offensive working environment; or
  - Unreasonably interfering with an individual's work performance; or
  - Adversely affecting an individual's employment opportunities
- **There are two kinds of harassment claims: quid pro quo sexual harassment, and hostile work environment harassment**

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Quid Pro Quo Sexual Harassment

- **Submission to or rejection of unwelcome sexual conduct or advances is used as a basis for employment decisions**
  - Demanding or requesting sexual favors in exchange for a promotion or a raise
  - Disciplining or firing a subordinate who ends a romantic relationship
  - Changing performance expectations after a subordinate refuses repeated requests for a date

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Hostile Work Environment Harassment

- **Unwelcome conduct based upon a protected trait that unreasonably interferes with job performance or creates an intimidating, hostile, or offensive work environment**

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Hostile Work Environment Harassment

1. **Unwelcome Conduct**
2. **On the Basis of a Protected Trait**
3. **Severe or Pervasive**
4. **Basis for Employer Liability**

***REMEMBER*: Conduct may violate District policy even if it does not constitute unlawful discriminatory harassment.**

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1.) Unwelcome Conduct

- **Victim-focused analysis**
  - Conduct/comments must be uninvited by and offensive to the victim
  - Intent of the harasser does not matter
- **Considerations**
  - Did victim initiate/participate in conduct?
  - Did victim protest or indicate disapproval?
- **Practical Advice**
  - Because it is difficult to know individual sensitivities, err on the side of caution

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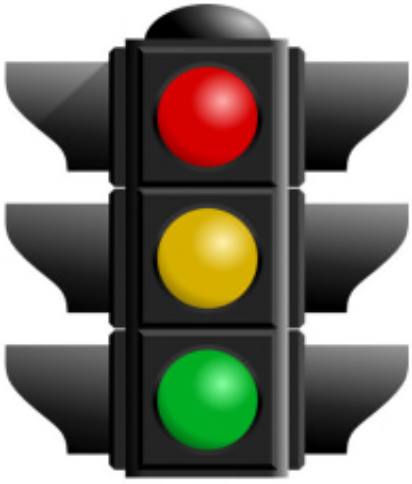
Policy Concern?



Sam has been with the District for 20 years. Sam is known by nearly everyone in the District. Sam is well-liked and friendly and frequently greets co-workers with hugs.

You recently joined the District, and you find Sam's interactions with co-workers to be concerning, but when you mention it to colleagues, they say, "Oh, that's just Sam! Sam's harmless, and no one minds."

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2.) Based On A Protected Trait

- Offensive to members of a protected group
- Sexual advances are always considered based upon a protected trait: sex
- Victim does not need to be a different class than the harasser

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Illegal Harassment Or Bullying?

- **Only conduct based on a protected trait is discriminatory harassment under the law**
  - But would abusive or threatening language towards co-workers violate District policy even if it is not based on a protected trait? (Hint: YES.)
- **Workplace bullying or abusive treatment**
  - Repeated mistreatment using humiliation, intimidation, threats, or vulgar language
  - Not tolerated in our workplaces – regardless of basis – because such conduct is inconsistent with the District's values and commitment to maintaining a positive work environment
- **Treat each other with respect!**

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Policy Concern?

You and a friend are having lunch in the break room. You are discussing recent headlines about the administration's plan to build a border wall between the U.S. and Mexico. Your friend cracks a joke about Mexicans, which you both find hilarious. You often share similar jokes outside the workplace. Another employee overhears and is offended.

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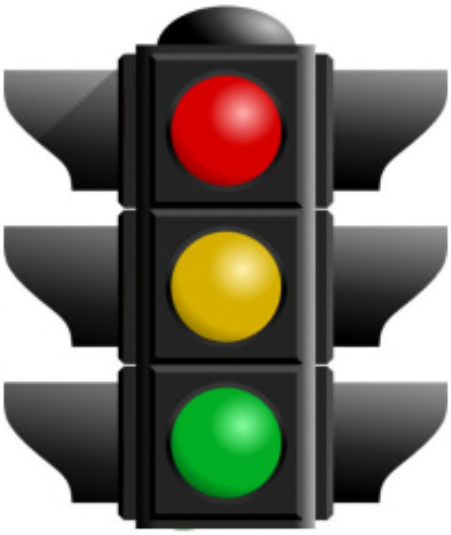
Policy Concern?



Dave reports that Jess made harassing remarks to him during a training event. Specifically, Jess told Dave that he was "lookin' good" and asked if he wanted to go out with her sometime. Dave said no. Later, he said, Jess emailed him a link to her Instagram account, which mostly has pictures of her in her bathing suit. Dave accessed the email at home and the pictures made him uncomfortable.

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3.) Severe or Pervasive

- **The conduct must be sufficiently severe or pervasive to alter the individual's working conditions**
- **<u>Subjective</u> and <u>Objective</u> Standards:**
  - Subjective = Is this person actually offended? Recognizes different social norms
  - Objective = Would a reasonable person in the same situation feel the conduct was so offensive as to alter "terms and conditions" of employment?

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4.) Employer Liability

- **Co-workers/customers/vendors**
  - Knew or should have known standard
- **Supervisor Harassment**
  - Tangible employment action – strict liability
  - No tangible employment action – affirmative defense of reasonableness available

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Conduct That Can Contribute To A Hostile Work Environment

- Sending offensive e-mails, texts or other communications
- Derogatory, profane, or degrading language
- Intimidation, hostile acts, threats, pranks based on protected traits
- Leering, staring and suggestive gestures
- Unwanted sexual advances and propositions, requests for sexual favors
- Physical touching or assault

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Conduct That Can Contribute To A Hostile Work Environment

- Epithets, slurs, negative stereotyping, offensive jokes or comments based upon protected traits
- Display or circulation of derogatory or offensive materials, or images based upon protected traits, including offensive graphics or cartoons
- Offensive or disadvantageous treatment based upon protected traits
- **Remember:** This conduct is prohibited under the District's policy, even if it is not so severe or pervasive to establish a legal claim for discriminatory harassment

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Permissible Behavior

- ✓ Business-like and professional interactions
- ✓ Ordinary socializing
- ✓ Welcome compliments
- ✓ Key – good judgment and common sense (use your filter!)

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Retaliation Is Prohibited

- **Discrimination laws prohibit any form of retaliation against any individual who has engaged in any "protected activity"**
  - In other words, you cannot take adverse action against an employee <u>because</u> he/she has engaged in protected activity

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Retaliation Is Prohibited

- **Protected Activity**
  - Opposing conduct employee reasonably believes is discrimination or harassment
  - Making an internal complaint of discriminatory harassment
  - Filing a charge with the EEOC or state agency
  - Participating in an internal or external investigation
  - Requesting an accommodation (disability, religion)

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The District's EEO Policy

We are committed to providing equal opportunity in all of our employment practices, including selection, hiring, promotion, transfer, and compensation, to all qualified applicants and employees without regard to race, color, religion, sex/gender, national origin, citizenship status, age disability, and any other status protected by law.

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The District's Harassment Policy

- We do not tolerate harassment of or discrimination against any of our employees or applicants
- Because of the nature of harassment, things that may be offensive to one employee may not be offensive to another
- We must depend on each of our employees to speak up when they see something that they feel is out of line – even if others may not – so that we can take whatever steps are necessary to address and correct the problem

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Reporting Discriminatory Harassment

- The District provides a reporting system that offers all employees a choice in the contact for making such a report
- Complaints of discriminatory harassment should be reported to:
  - [INSERT OFFICIALS]

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Investigations of Complaints

- **Complaints of harassment will be investigated**
- **Confidentiality**
  - Cannot be strictly guaranteed due to need to investigate allegations
  - No unnecessary disclosure
- **No retaliation**
- **Appropriate responsive measures if policy violation is found**

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Disciplinary Action for Harassing Behavior

- Employees who engage in harassing behavior may be disciplined, up to and including discharge
- Any retaliation against any employee who reports discriminatory harassment or participates in an investigation of harassment is also strictly prohibited

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Our Commitments

- To maintain a strong harassment policy with an effective reporting procedure, and to train employees on our policy
- To investigate harassment complaints and take prompt remedial measures to eliminate harassment
- To ensure no retaliation against those who make a good faith report of harassment
- To treat employees with respect and expect respectful treatment

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What We Expect of Employees

- **Remember that the District supports diversity and inclusion, and employees are expected to do the same at work**
  - Work is not the place to express personal feelings about race, religion, gender, etc.
- **We all must be aware of our surroundings (*we are not at home*) – and conduct ourselves in a professional manner**
- **Promptly report any concerns of discrimination or harassment**

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Managers Are Agents of the District When Making Employment Decisions

- **As an agent, it is critical that you …**
  - Make decisions based upon legitimate business reasons
  - Set the expectations and boundaries for employees by example
- **Understand your role and responsibilities in both the organization and under federal and state laws**
- **Recognize your duty to intervene and step in before situations require complaints to Human Resources**

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Your Responsibilities

- **<u>You</u> are the District's eyes and ears**
  - If you see inappropriate conduct, stop it
  - Report complaints of discrimination/harassment (*remember, an internal complaint is better than a lawsuit*)
  - Know when and where to get help
- **Supervisors and managers can be subject to personal liability under PA law for "aiding or abetting" discrimination**
  - This means that participation OR failure to take action can trigger liability not just to the District, but to you personally

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What the District Expects of Supervisors and Managers

- **Make employment decisions based on merit**
  - Do not base on discriminatory reasons
  - Document appropriately to support your decisions
- **If you receive a complaint:**
  - Encourage employee to report
  - Report it yourself
  - Do not retaliate
- **When in doubt, ask for help – and know who to contact**

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V. Managing Employee Absences

Perhaps no aspect of employee management can be more frustrating than employees with unsatisfactory attendance. Regular attendance is a necessary function of almost every job, and unpredictable and/or frequent absences and tardiness can severely disrupt the workplace and employee morale.

As with most employee management situations, employers should provide clear communication to employees of the employer's expectations regarding attendance, timely reporting to work, and timely reporting of absences and address employees who fail to meet those expectations with progressive discipline. However, some absences are protected under federal and state law, and taking an adverse action on the basis of a protected absence can give rise to legal liability and claims.

Thus, it is vital that employers understand the legal requirements associated with employee absences before addressing absences. Improperly managing absences is an example of how unwary employers can create significant liability in discipline and discharge situations. Not only are employers required to consistently apply their internal attendance policies and collective bargaining agreements, but they have to understand their obligations under applicable laws, including the Family and Medical Leave Act ("FMLA") and the Americans with Disabilities Act ("ADA").

Applying internal policies without giving consideration to whether there are any legal obligations could change a routine termination for violation of an attendance policy into a termination in violation of the law. Nevertheless, being armed with the necessary knowledge to effectively manage employee absences will go a long way in preventing employer liability. This discussion is designed to give you the practical information you

need to recognize when a potential issue under the FMLA and/or ADA may arise, and arm you with the right tools to take appropriate action in specific situations.

A. FMLA Eligibility and Basic Rights

The FMLA requires that covered employers provide eligible employees up to 12 weeks of unpaid leave for a qualifying reason. With very limited exceptions, an employee on FMLA leave must be returned to work in an equivalent position upon expiration of the leave, and health insurance benefits must be maintained while the employee is on FMLA leave on the same terms that existed while the employee was actively employed. Essentially, the FMLA provides unpaid job protection with health insurance for eligible employees who must take a leave of absence from work for a qualifying reason.

Employers must be aware of when and how the FMLA applies. In order for an employee to be entitled to FMLA leave, the following conditions must be met:

- The FMLA must apply to the employer;
- The individual requesting leave must be an "eligible employee;" and
- The leave of absence must be needed for a qualifying reason.

Covered Employers. The FMLA applies to employers who employ 50 or more employees in each working day during each of 20 or more calendar work weeks in the current or preceding calendar year. 29 U.S.C. § 2611(4). All employees on the employer's payroll will be considered employed each working day of the calendar week, including part-time and temporary employees and any employees on paid or unpaid leave. 29 C.F.R. § 825.105.

With respect to Districts, all public agencies are considered covered employers under the FMLA, regardless of the number of employees. For smaller Districts not part of the county government system, however, they likely will be "covered employers" without any "covered employees," because even if the District is a covered employer, any employee must work at a work site that employs 50 or more employees within a 75-mile radius to be eligible for FMLA rights. 29 C.F.R. § 825.108(d).

Eligible Employees. In order to be considered an eligible employee under the FMLA, an individual must have been employed for at least 12 months by the employer and must have worked at least 1,250 hours during the 12-month period immediately prior to the date on which the leave is to begin. The employee also must be employed at a work site at which the employer has at least 50 employees within a 75-mile radius. Accordingly, an employer may be covered by the FMLA, but its employees at remote sites may not be eligible to take leave.

Qualifying Reasons for FMLA Leave. If an employee meets the coverage requirements set forth above, he/she is eligible for a total of 12 weeks of unpaid leave in any 12-month period for:

(1) the birth or placement for adoption of a child with the employee;

(2) to care for an immediate family member (i.e., husband, wife, father, mother, minor or disabled child) with a serious health condition; or

(3) for the employee's own "serious health condition," which renders the employee unable to perform one or more of the essential functions of the job.

The definition of "serious health condition" raises the most significant coverage issues under the FMLA. If the employee, or the immediate family member, does not

have a condition that constitutes a “serious health condition,” then the employee is not entitled to FMLA leave as a result of that condition.

“Serious health condition” is a physical or mental illness, injury, impairment, or condition involving either in-patient care (i.e., an overnight hospital stay) or continuing treatment by a health care provider.

“Continuing treatment by a health care provider” is defined as follows:

(1) A period of “incapacity” (i.e., inability to work, attend school, or perform regular daily activities) of more than three calendar days that also involves either two or more treatments by a health care provider or one treatment by a health care provider that will result in a regimen of continuing treatment; or

(2) Any period of incapacity due to pregnancy or prenatal care; or

(3) Any period of incapacity for a chronic serious health condition; or

(4) Any period of permanent or long-term incapacity from a condition for which treatment may not be effective (e.g., Alzheimer’s, stroke, terminal stages of a disease); or

(5) Any period of absence in order to receive multiple treatments for a condition that likely would result in a period of incapacity of more than three calendar days in the absence of medical intervention (e.g., chemotherapy, radiation, physical therapy, dialysis).

If the employer determines that the employee is an “eligible employee” and that the absence may be for a qualifying reason, the employer should immediately (i.e., within two business days) designate (or preliminarily designate) the time off from work as FMLA leave and send the employee a written notice of rights and responsibilities under the FMLA.

The FMLA also provides coverage for eligible employees with a spouse, son, daughter or parent who is (1) a member of the regular component of the Armed Forces

and deployed to a foreign country, or (2) a member of the National Guard or Reserves on active duty or called to active duty status and deployed to a foreign country, may use their 12-week leave entitlement to address certain qualifying exigencies. Qualifying exigencies may include attending certain military events, arranging for alternative child care, parental care, the military member's Rest and Recuperation leave (subject to a 15 day maximum), addressing certain financial and legal arrangements, attending certain counseling sessions and attending post-deployment reintegration briefings. FMLA now also includes a special leave entitlement that permits eligible employees to take up to twenty-six (26) weeks of leave to care for a covered servicemember during a single 12-month period.

B. ADA Eligibility and Basic Rights

The ADA prohibits discrimination against any qualified individual with a disability. In addition, the ADA imposes an affirmative obligation upon employers to provide a reasonable accommodation in order to allow a qualified individual with a disability to perform the essential functions of the job. Once again, the ADA compliance process begins with the determination as to the scope of coverage under the statute.

Employer Coverage. The ADA applies to all employers with 15 or more employees.[4]

Employee Coverage. All "qualified individuals with a disability" who work for a covered employer are entitled to protection under the ADA. "Disability" is defined by the ADA as (1) a physical or mental impairment that substantially limits one or more major

[4] The Pennsylvania Human Relations Act, which imposes obligations similar to the ADA, applies to all employers in Pennsylvania with four or more employees.

life activities, (2) having a record of such impairment, or (3) being regarded as having such impairment.

Major life activities include both general life activities and major bodily functions. General activities that are classified as “major” include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working. Major bodily functions that are classified as “major life activities,” include, but are not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. This list is not exhaustive and is clearly aimed at a broad construction of life activities that could lead an individual to be covered under the ADA.

The determination of whether an impairment substantially limits a major life activity must be made without regard to the ameliorative effects of mitigating measures. In other words, when determining whether someone is substantially limited, an employer cannot consider simply whether the individual is substantially limited currently. Instead, the employer must consider whether the person would be substantially limited if the individual ceased taking any maintenance medication or discontinued any other ongoing mitigating measures. This greatly broadens the scope of coverage for the ADA and further demonstrates why employers rarely can deny a reasonable accommodation on the basis that the employee does not have a disability.

Basic Rights. The leave entitlement under the FMLA is straightforward: An eligible employee is entitled to up to 12 weeks of unpaid leave in any 12-month period.[5] However, the leave of absence issue becomes complicated under the ADA. If the employee suffers from a disability under the ADA, a leave of absence, in excess of 12 weeks or for FMLA-eligible employees or in general for non-FMLA-eligible employees, may be required as a reasonable accommodation. In fact, the EEOC has taken the position that an indefinite or extended leave of absence may be a required reasonable accommodation under many circumstances, unless the employer can establish an undue hardship. The EEOC takes the following position in its *Guidance on Reasonable Accommodation and Undue Hardship*:

> Under the ADA, an employee who needs leave related to his/her disability is entitled to such leave if there is no other effective accommodation and the leave will not cause undue hardship. An employer must allow the individual to use any accrued paid leave first, but if that is insufficient to cover the entire period, then the employer should grant unpaid leave. An employer must continue an employee's health insurance benefits during his/her leave period only if it does so for other employees in similar leave status. As for the employee's position, the ADA requires that the employer hold it open while the employee is on leave unless it can show that doing so causes undue hardship. When the employee is ready to return to work, the employer must allow the individual to return to the same position (assuming that there was no undue hardship in holding it open) if the employee is still qualified (i.e., if the employee can perform the essential functions of the position with or without reasonable accommodation).
>
> If it is an undue hardship under the ADA to hold open an employee's position during a period of leave, or an employee is no longer qualified to return to his/her original position, then the employer must reassign the employee (absent undue hardship) to a vacant position for which he/she is qualified.

[5] If feasible, employers should use a rolling 12-month period. Regardless of the period selected, an employer must communicate this method to employees in its FMLA Policy.

EEOC Guidance on Reasonable Accommodation and Undue Hardship, Question 21. The Guidance specifically requires employers to modify their no-fault attendance policies to accommodate individuals with a disability, and it disapproves of any *per se* limitations on the amount of extended leave to which an employee might be entitled, even if the employee is unable to provide a fixed date of return.

The EEOC's position that an extended or even indefinite leave of absence must be offered as a reasonable accommodation (absent undue hardship) is in conflict with many judicial decisions on the issue. Many courts have held that attendance is an essential function of nearly every job. Not surprisingly, showing up for work is an important part of actually working. However, the lack of clarity under the law and disagreement between the EEOC and some courts on this issue creates risk for employers faced with employees who need extended time off due to a personal medical issue.

C. Applying the ADA and the FMLA to Common Scenarios Involving Absent Employees

After the 12 Weeks Have Expired

> Roxanne requested and received approval for FMLA leave due to a diagnosis of "anxiety." Just prior to the expiration of her 12-week FMLA leave, Roxanne submits a doctor's note requesting an additional leave of absence for up to three months due to her condition. The doctor's note states that he is hopeful that Roxanne will be able to return to work within the three-month period. During her time off, other employees in her department have been able to pick up most of her workload.
>
> At the end of Roxanne's 12-week FMLA leave, the District immediately terminates her position. Roxanne's request for accommodation in the form of additional leave is denied. Roxanne has no other accrued paid leave that she could use for her additional time off.

This scenario highlights the interplay between the ADA and the FMLA. An employee's medical condition may qualify as "serious" for purposes of granting FMLA leave, but also may constitute a "disability" under the ADA requiring the employer to engage in the interactive process of accommodating the employee. As the EEOC Guidance points out, an extended leave may be a reasonable accommodation under certain circumstances. In considering whether the District acted correctly in terminating Roxanne, consider the following factors:

1. Was the request for additional leave of a definite duration?
2. Was there an undue hardship for the District in providing additional leave?
3. Is it reasonably likely that Roxanne would have been able to return to work at some point?

Extended leave of absence situations thus should be handled on a case-by-case basis. An employer cannot simply apply a blanket rule that employees will be terminated if unable to return to work after the expiration of the 12-week FMLA leave entitlement; some consideration of the ADA's applicability is required. Employers should request information from the employee on leave as to when the employee will be able to return and what restrictions will apply upon his/her return to work. If an extended leave is requested for a fairly definite period of time, the request should be granted unless the employer can prove undue hardship. On the other hand, if an employee (or the employee's treating health care provider) is unable to indicate when, or if, the employee will be able to return to work, then the employer can be more comfortable in terminating

employment. Under such circumstances, the employer may wish to express a willingness to rehire the employee if he/she is able to return to work in the future.

The Never-Ending Leave Of Absence

> James has been with the District for about three years. He began suffering from a neurological condition, which caused him to miss lengthy periods of work and prevented him from accomplishing a substantial portion of his duties. The District initially allowed FMLA leave and then granted an additional three months of extended leave. When he returned to work, the District created another position to accommodate him. Then, after about a week of work, he advised that he needed another leave of absence. This went on for a few months. James would work a few weeks and then request another leave of absence. The District needs someone to perform his new duties – that is why he was assigned there.

A prior accommodation (e.g., leave of absence or creation of a new position) does not make that accommodation automatically reasonable. Even after FMLA leave has expired, an employer may have additional ADA obligations. Often an additional unpaid leave of absence for a reasonable duration will constitute a reasonable accommodation under the ADA, unless the employer can show undue hardship. However, this requirement has its limits, and courts are reluctant to require open-ended extended leave.

Most courts have held that in most jobs the inability to report regularly to work means the employee is not otherwise qualified to perform the essential functions of the job, because attendance is an essential function of most jobs. The employer should, nevertheless, document support for the undue hardship determination before terminating the employee.

D. Enforcement Of Attendance Standards And Management Of Intermittent Leave

The FMLA is clear that an employer may not count FMLA-protected absences against an employee under an attendance policy or even as a disqualifying factor under an attendance bonus program. In situations where employees are disciplined for poor attendance, the employer must be comfortable that none of the infractions were due to FMLA qualifying reasons. In order to do so, employers should review the absences and the information it possesses to determine whether the employee has a condition that might qualify as a chronic serious health condition. There also should be some centralized review of attendance-related disciplinary actions.

By far, the greatest challenge for employers wishing to apply uniformly their attendance policies is the intermittent FMLA leave situation. The FMLA permits employees to take leave on an intermittent basis or on a reduced leave schedule under certain circumstances. Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason. A reduced leave schedule is a leave schedule that reduces an employee's usual number of working hours per work week, or hours per work day. 29 C.F.R. § 825.203. Intermittent leave issues often arise in dealing with chronic conditions (e.g., migraine headaches, gastrointestinal disease, mental illness, asthma), because such conditions may cause episodic periods of incapacity for only a few days at a time. Some employers operate under the mistaken assumption that unless the absence exceeds three days, a serious health condition is not involved. This method of analysis is a recipe for disaster when dealing with intermittent leave issues for chronic conditions.

Employees are entitled to take intermittent or reduced leave for a serious health condition or to care for an immediate family member with a serious health condition. Absent the employer's consent, employees are not permitted to take intermittent leave or a reduced leave schedule for the birth or care of a healthy newborn child or for the placement of a child with the employee for adoption or foster care. Only a serious health condition (of the employee or an immediate family member) gives rise to the intermittent leave obligation.

In connection with intermittent leave situations, employers may be able to request periodic recertification from an employee's health care provider. For example, recertification is appropriate when serious health conditions involve pregnancy, chronic conditions, and permanent/long term conditions and no minimum duration of incapacity is specified on the medical certification. 29 C.F.R. § 825.308(a)(2). An employer may request recertification in those situations every thirty days in connection with an employee's absence. However, the employer may request recertification more frequently if the circumstances have changed significantly or information is received that casts doubt upon the validity of the certification.

When an employee's absences are following a consistent Friday/Monday pattern, the employer would be justified in requesting a recertification if the original certification did not specifically call for Friday/Monday absences. Moreover, the employer is permitted to submit the employee's record of attendance (e.g., Friday/Monday absences) along with the medical certification form in an attempt to get clarification.

Recertification can be useful for employers in monitoring the use of intermittent leave and ensuring that employees are not taking advantage of the protections provided

under the FMLA. In addition, employers should explain clearly in their FMLA policies that fraudulent use of FMLA leave (or providing any other false or misleading information to the company) will be grounds for disciplinary action, up to and including termination of employment. Courts consistently have recognized that an employer's good faith belief that an employee has fraudulently obtained FMLA leave is grounds for dismissal.

E. Takeaways for Managing Employee Absences

Employee absences present the perfect storm for employers by combining frustrating and often crippling operation and morale impacts caused by absenteeism with a legal minefield of potential liability for the unwary employer. To navigate through these difficult situations, employers should keep in mind the following points:

- Communicate clearly in your attendance policy and through your culture that regular attendance is expected and an essential function of each position.
- Require employees to report to work on time and address employees who fail to maintain satisfactory performance in this area.
- If an employee begins to miss work on a regular basis, review the situation to determine whether the absences may be FMLA or ADA-covered. If so, initiate the process to determine whether the absences indeed are so covered.
- If an employee is missing work more frequently than you deem satisfactory and you do not have any information indicating that the absences may be FMLA or ADA-covered, meet with the employee to reinforce your attendance expectations and make clear that the employee currently is not meeting them.

Ask the employee whether there is anything that you can do to assist the employee in meeting those expectations. If the employee says no and there exists no other indication that the absences may be legally protected, explain to the employee that his/her attendance needs to improve and that the employee will face disciplinary action in the future if the attendance does not improve.

- Generally attempt to avoid discharging an employee for unsatisfactory attendance if you have not previously addressed the unsatisfactory attendance with the employee in the manner outlined in the previous bullet point. Attendance issues are best addressed through progressive discipline.
- Enforce your call-off policy. Even if an employee's absences are medically-based and potentially protected, such protections do not excuse failures to properly and timely report absences (barring extraordinary circumstances that would not permit an employee to report off in a timely manner).
- Apply your attendance and call-off expectations consistently. Inconsistency in the application of these expectations can result in potential liability for discrimination and retaliation claims.
- Understand the risks and legal obligations. Before disciplining or discharging an employee, review the situation thoroughly to ensure that you have no indication that any of the absences that form the basis of the discipline or discharge are not potentially protected by law.

VI. The Wage and Hour Laws and Employee Classifications

The federal and state wage and hours laws, which include the federal Fair Labor Standards Act ("FLSA"), the Pennsylvania Minimum Wage Act ("MWA"), and the Pennsylvania Wage Payment and Collection Law ("WPCL"), remain one of the most active areas in employment law. These laws present special concerns for Districts and employers in general because their requirements are complicated and seemingly nonsensical, with problems often lurking unknown until a dispute with an employee or former employee arises.

In addition to their complicated requirements, other aspects of these laws increase the possibility of legal trouble. The fee shifting provisions in the FLSA obligate an employer to pay the attorneys' fees for the employee or former employee if he/she prevails in the action. This fee shifting provision makes wage and hour claims especially attractive for plaintiffs' attorneys. In addition, the FLSA includes a collective action provision, which works like an opt-in class action mechanism, giving plaintiffs and their attorneys greater leverage to litigate or force lucrative settlements. Indeed, courts now see more collective actions brought under the FLSA than class action claims under federal and state employment discrimination laws. For a District, what may appear to be one disgruntled employee (or former employee) fighting over a few minutes a day of compensation quickly can become an expensive problem, with a potential collective action including numerous employees and former employees and the possibility of paying the employees' attorneys' fees.

With the increase in collective actions and the possibility of significant liability, it is vital that Districts understand the wage and hour rules and how they apply to their

workforce. Although potential liability cannot be completely eliminated, exposure can be greatly reduced through focused compliance efforts. Compliance efforts should begin well before the filing of a claim by an employee or former employee or an audit or investigation by the DOL or Pennsylvanian Department of Labor and Industry. If a District thinks about wage and hour compliance only after a claim, complaint, or investigation, the end result almost certainly will be unfavorable.

These materials provide a general overview of the wage and hour rules, with specific emphasis on recent changes to their requirements and the most often misunderstood and misapplied provisions.

A. Overview of State and Federal Wage and Hour Laws

Conservation Districts must comply with a variety of both federal and state wage and hour laws. Many of the federal and state wage and hour laws overlap and have similar requirements, but the differences between the federal and state laws continue to grow. In this section, we will list and briefly describe the principal federal and state wage and hour laws.

1. Fair Labor Standards Act

Originally passed in 1938, the FLSA and its regulations establish federal standards for minimum wages, overtime pay, recordkeeping, and child labor. In the private sector, the FLSA applies to only those employers that are engaged in interstate commerce and have certain minimum gross volumes of business. Regardless of their dollar volume of business, however, the FLSA automatically covers federal, state, and local government agencies. Thus, the FLSA applies to each Conservation District. The FLSA's requirements will be discussed in detail below.

2. Pennsylvania Minimum Wage Act

The MWA is the state law companion to the FLSA. The MWA also establishes minimum wage, overtime compensation, and recordkeeping requirements. The MWA applies to any individual employed by an employer in the Commonwealth of Pennsylvania.

Both the FLSA and MWA currently contain the same minimum wage rate (i.e., $7.25 per hour). Most, but not all, of the MWA's overtime compensation requirements are identical to the requirements of the FLSA. For example, the MWA has no companion to the FLSA's computer employee exemption. Thus, an employee may be exempt from the FLSA's overtime compensation requirement as an exempt computer employee. Nevertheless, because the MWA does not contain a computer employee exemption, the employer still may be obligated to pay the employee overtime compensation under state law. We will discuss each of the primary areas where federal and state overtime law differs in the sections that follow.

3. Equal Pay Act

The Equal Pay Act of 1963 ("EPA"), an amendment to the FLSA, requires "equal pay for equal work" for men and women. The EPA prohibits employers from discriminating on the basis of sex in paying wages. Where male and female employees for the same employer and at the same establishment perform work requiring equal skill, effort, and responsibility, and under similar working conditions, it is a violation of the EPA to pay female employees lower wages, unless the wage differential is due to (1) a seniority system; (2) a merit system; (3) a production system which measures

earnings by quality or quantity of work; or (4) a differential which is based on a factor other than sex (e.g., shift differential).

4. Pennsylvania Wage Payment and Collection Law

The WPCL is the state statute designed to enforce the payment of agreed upon wages and fringe benefits. The WPCL does not establish an entitlement to wages, but only provides a means to recover wages that are due under the "contract" of employment. In addition, the WPCL (1) establishes deadlines for the payment of wages and fringe benefits that are earned; (2) defines the types of deductions that may be withheld from the wages of employees; (3) requires certain notices to be provided to new hires; (4) regulates payment of wages upon the termination of employment; and (5) contains a comprehensive enforcement scheme. Under the WPCL, "wages" include all earnings, regardless of the method by which they are calculated. Fringe benefits include payments to ERISA plans, severance pay, vacation pay, holiday pay, guaranteed pay, reimbursement for expenses, union dues, and other amounts paid pursuant to an agreement between the employer and employee.

Regular Paydays. Employers in Pennsylvania must pay all non-overtime wages, other than fringe benefits and wage settlements, to employees on "regular" paydays that are designated in advance by the employer. This payday may be established by a written contract, the standards of the industry, or, if neither of these are applicable, within 15 days from the end of the pay period. Once the payday is established, the employer may not deviate from it without advance notice to employees. However, overtime wages may be considered as wages earned in the next succeeding pay period and may be paid at the same time as wages earned in that latter period.

Payment for fringe benefits, wage supplements, or deducted union dues must be made within 10 days after such funds are required to be paid to the trust fund, employee, or union or within 60 days after a proper claim is filed by the employee in situations where no time for payment is specified.

Under the WPCL, employers must notify new hires as to the amount of wages to be paid and the time and place of payment. Notice of these items may be accomplished individually or through posting in a conspicuous place at the job site.

Wage Deductions. The WPCL and its regulations permit deductions from pay as required by law for the convenience of the employee. The following deductions are permitted under the WPCL:

(a) Contributions to and recovery of overpayments under employee welfare and pension plans subject to the Federal Welfare and Pension Plans Disclosure Act;

(b) Contributions authorized in writing by employees or under a collective bargaining agreement to employee welfare and pension plans not subject to the Federal Welfare and Pension Plans Disclosure Act;

(c) Deductions authorized in writing for the recovery of overpayments to employee welfare and pension plans not subject to the Federal Welfare and Pension Plans Disclosure Act;

(d) Deductions authorized in writing by employees or under a collective bargaining agreement for payments into the following:

(i) Employer operated thrift plans; and

(ii) Stock option or stock purchase plans to buy securities of the employing or an affiliated corporation at market price or less provided such securities are listed on a stock exchange or are marketable over the counter;

(e) Deductions authorized in writing for payments into employee personal savings accounts;

(f) Contributions authorized in writing by the employee for charitable purposes;

(g) Contributions authorized in writing by the employee for local area development activities;

(h) Deductions provided by law;

(i) Labor organization dues, assessments, and initiation fees;

(j) Deductions for repayment to the employer of bona fide loans provided the employee authorizes such deductions in writing;

(k) Deductions for purchases or replacements by the employee from the employer of goods, services, rent, or similar items provided such deductions are authorized by the employee in writing or are authorized in a collective bargaining agreement; and

(l) Such other deductions authorized in writing by employees and as deemed proper by the Department of Labor and Industry.

Termination from Employment. In the event that an employee is separated from employment for any reason prior to the regular payday, the employer must pay any outstanding wages to the employee no later than the next regular payday. Moreover, the employer must make the final payment by certified mail if so requested by the employee. An employer may not hold the final paycheck pending return of its property. Likewise, an employer may not deduct from the final paycheck the cost of such property, unless the employee has authorized this deduction in writing and the deduction is for the benefit of the employee.

Non-Waiver Provision. Employees cannot waive their rights under the WPCL in the absence of a bona fide dispute between the employee and the employer over entitlement to wages. The WPCL specifically provides that no provision of the law can be waived by a private agreement.

5. Direct Deposit

The Pennsylvania Electronic Funds Transfer Systems Act permits direct deposit of wages, salaries, and commissions to an employee's account in a bank, credit union, or other financial institution only if an employee has made a written request for this form of wage payment. Any agreement for direct deposit of wages must be reduced to writing, must set forth the terms and conditions under which the fund transfers are to be made, and must explain the method by which the employee may withdraw his/her request for direct deposit. The Act also prohibits the direct transfer of any earnings to an account unless the party authorizing the transfer has received a separate written record of the transfer at or prior to the time it is made.

B. Exemptions under the Fair Labor Standards Act

All employees covered by the FLSA are entitled to one and one-half of their regular hourly rate for all hours worked in excess of 40 in any work week, unless the employer can prove that the employee qualifies for one of the overtime exemptions. Congress established exemptions from the minimum wage and overtime requirements of the FLSA to provide some flexibility for employers when compensating certain types of employees.

When determining whether an employee may properly be classified as exempt from overtime requirements, employers must keep in mind that non-exempt treatment is the "default" status under the FLSA and MWA. To establish an exemption, the employer bears the burden of proving that the employee qualifies for the exemption. Courts and the U.S. Department of Labor interpret the exemptions narrowly, and close calls generally go to the employee in a claim for overtime compensation. An employer may treat an employee as non-exempt and pay him/her overtime compensation, even if

the employee could qualify for exempt status. The reverse is not true; an employer may not treat an employee as exempt if the employee does not meet the requirements of any of the exemptions.

The FLSA minimum wage and overtime exemptions are divided into two general categories: industry-specific exemptions and the "white collar" exemptions that apply to any employer, regardless of industry. Because none of the industry-specific exemptions apply to the employees of Conservation Districts, we will spend the remainder of this section discussing the "white collar" exemptions and their application to District employees.

1. White Collar Exemptions

The FLSA contains exemptions to the Act's overtime and minimum wage requirements for "bona fide" executive, professional, and administrative employees, and for certain computer employees. To meet the requirements of these so called "white collar" exemptions, an employer must prove that the employee (1) is paid on a salary basis and (2) meets the duties test for the exemption at issue.

2. Payment on a Salary Basis

For an employee to be exempt from the FLSA under any of the white collar exemptions, the employee generally must be paid on a "salary basis." This seemingly obvious element of the FLSA has caused substantial confusion. Failure to satisfy the salary basis requirement converts otherwise exempt employees to non-exempt and subjects the employer to potential backpay liability.

Under the FLSA, an employee's receipt of a weekly salary is not necessarily synonymous with payment on a salary basis. Payment on a salary basis requires

employers to pay exempt employees a pre-determined sum of money regardless of the quality of work performed or the actual number of hours worked, subject to a few limited exceptions.

For example, an employer may not reduce the salary of an exempt employee for partial-day absences from work, unless the partial-day absence was covered by the FMLA. Thus, if an otherwise exempt manager takes two hours off for a doctor's appointment or a haircut, his/her salary cannot be reduced to reflect that absence. Such an adjustment violates the "salary basis" requirement and may result in a loss of exemption for that employee.

An employer may make deductions from an exempt employee's salary without violating the salary basis rule only in the following limited circumstances:

- Deductions may be made when the employee is absent from work for a day or more for personal reasons, other than sickness or accident (partial-day absences must not result in a deduction).

- Deductions may be made for absences of one day or more caused by sickness or disability if the deduction is in accordance with a "bona fide sickness or disability plan." For example, if an employer has a bona fide sick leave program, and an exempt employee has exhausted all sick days, deductions can be made for additional full day absences from work due to sickness.[6]

- Employees on approved FMLA leave need not be paid for full or partial-day absences.

[6] Note, however, than an employer can still implement partial-day deductions from an employee's leave allowance without jeopardizing salary status so long as the partial-day deductions are not taken out of an employee's pay. For example, if a salaried employee is given ten days of sick leave per year, the employer will not destroy the exemption status merely by docking the sick leave allotment in 15 minute increments for partial-day absences. In this situation, the employee's actual pay is not affected, just how much sick leave remains after a partial-day absence.

- An employer is not required to pay the full salary in the employee's initial or terminal week of employment. Instead, the employer may pay a proportionate part of an employee's full salary for the time actually worked in said weeks.

- Deductions may be made for unpaid suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules pursuant to a written policy applicable to all employees.

- Deductions may be made for penalties imposed for infractions of "safety rules of major significance."

In addition to these limited permissible deductions, an exempt employee need not be paid for any workweek in which he/she performs no work. To qualify for no pay in a workweek, the employer must ensure that the employee performs no work whatsoever, including work from home such as checking e-mails or calling into the office to check messages. For certain employees, completely prohibiting work in a work week may be practically impossible.

Keep in mind that paying an employee on a salary basis does not, by itself, qualify the employee as exempt. To be exempt, the employee's compensation must meet the salary basis test, and the employee must meet one of the duties tests. Paying an employee on a salary basis only gets an employer half-way to meeting an exemption. The duties test is often the more onerous half of the exemption determination.

3. Recent Changes to the Minimum Salary Requirements

On September 24, 2019, the U.S. Department of Labor released new regulations changing the minimum salary requirements for the FLSA's white collar exemptions. These new regulations, which took effect on January 1, 2020, include the following changes:

- Raising the exemptions' minimum salary requirement from $455 per week ($23,660 annually) to $684 per week ($35,568 annually);
- Raising the total annual compensation requirement for the FLSA's highly compensated employee exemption from $100,000 to $107,432; and
- Allowing employers to use non-discretionary bonuses and incentive payments (including commissions) that are paid annually or more frequently to satisfy up to 10% of the minimum salary requirement.

In response to these changes, Districts should:

- Identify employees who currently are classified as exempt under the FLSA white collar exemptions and earn a weekly salary of less than $684 (taking into account the new ability to credit non-discretionary bonuses and incentive compensation for up to 10% of the minimum salary requirement); and
- For those employees, considering whether to (1) increase their salaries and/or bonuses/incentive compensation to meet the new minimum salary requirement or (2) convert them to non-exempt status for FLSA overtime pay and minimum wage purposes.

In addition, on January 31, 2020, Pennsylvania's Independent Regulatory Review Commission approved regulations promulgated by the Pennsylvania Department of Labor and Industry to increase the minimum salary requirements for the white collar exemptions under the MWA. These regulations have been submitted to the Attorney General for final legal review and approval. If approved, the regulations will be submitted for publication in the Pennsylvania Bulletin and set to take effect.

Under the new MWA regulations, the minimum salary as of the date of publication in the Pennsylvania Bulletin would match the new federal FLSA requirement of $684 per week ($35,568 annually). Under these regulations, the minimum salary requirement in Pennsylvania would increase one year later to $780 per week and to $875 per week two years after the date of publication, with additional "adjustments" (i.e., most likely increases) every three years thereafter. While the new MWA regulations have not yet been formally approved, it is safe to assume that they will be approved and take effect, and the additional minimum salary requirements will begin to impact Pennsylvania employers one year after their publication in the Pennsylvania Bulletin (when the MWA's minimum salary requirements would exceed the requirements of the FLSA).

4. Executive Employees

"Bona fide" executive employees are exempt from the minimum wage and overtime provisions of the FLSA so long as the following requirements are met:

(1) The employee must be paid a salary of at least $684 per week;

(2) The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;

(3) The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and

(4) The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees must be given particular weight.

"Managing" includes duties such as hiring, firing, directing and evaluating employees, setting rates of pay, determining work techniques, and determining

appropriate levels of supplies and merchandise. "Two or more employees" means two or more full-time employees or their equivalent, such as one full-time employee and two part-time employees who all together work 80 hours per week. Employees may not be "shared," however, to meet this requirement (i.e., two supervisors cannot both count the same two employees for the purpose of the exemption). It should also be noted that the executive employee does not actually need to be present at the work site for the entire period of time that the other employees are working in order to supervise them.

Often, the issue of most significance when determining whether the executive exemption will apply, is the employee's "primary duty." For example, a working supervisor may spend a majority of his/her time engaged in non-supervisory work. Nevertheless, the employee is responsible for managing a division of the employer, has the authority to hire and fire, and directs the work of at least two employees. In the majority of such situations, courts have held that the "primary duty" consists of management as opposed to non-supervisory work.

5. Administrative Employees

The administrative exemption generally is used for employees who lack supervisory duties but serve as assistants to those who do possess traditional measures of supervision or otherwise in high-level administrative roles. For example, an executive assistant, although he/she does not have the primary duties of managing a business or regularly directing employees in the performance of their job, nevertheless may be exempt from the provisions of the FLSA as an administrative employee.

In order to meet the administrative employee exemption, an employee must:

(1) be paid a salary of at least $684 per week;

(2) perform office or non-manual work directly related to management operations; and

(3) exercise discretion and independent judgment with respect to matters of significance in the performance of these job duties.

Thus, the administrative exemption only will apply where the primary duty is office or non-manual work directly related to management policies or general business operations and requires the exercise of discretion and independent judgment with respect to matters of significance.

Office or non-manual work directly related to management policies or general business operations. The Department of Labor draws a distinction between work that is directly related to management policies or business operations and mere "production work." Although certain work may require the exercise of frequent discretion and independent judgment and may be extremely important to an employer, the administrative exemption will not apply if the work is not directly related to management policies or business operations, as opposed to providing the "product" offered by the employer.

The exercise of discretion and independent judgment with respect to matters of significance. Nearly every employee exercises some degree of discretion and independent judgment in the performance of his/her daily activities. In order to qualify for the administrative exemption, however, the employee must exercise such discretion and independent judgment with respect to significant management policies or general business operations. An employee performing routine clerical duties is not performing work of substantial importance to the management or operation of the

business even though he/she may exercise some measure of discretion in judgment as to the manner in which the employee performs his/her clerical tasks.

It should also be noted that the discretion and independent judgment exercise must be real and substantial. The courts and Department of Labor will look to what the employee actually does, not what duties are listed on a job description, when determining whether this prong of the duties test is met.

6. Professional Employees

"Learned" professional employees are also exempt from the minimum wage and overtime requirements of the FLSA if they meet the following test:

(1) The employee must be paid a salary of at least $684 per week;

(2) The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;

(3) The advanced knowledge must be in a field of science or learning; and

(4) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

As with all white collar exemptions, whether an individual satisfies the requirements of the professional exemption is dependent upon the facts of the given case. It is a misconception to believe that an individual's title or degree is determinative of his/her professional status under the FLSA. For example, salaried registered nurses traditionally are considered exempt as learned professionals. Of course, if a registered nurse serves primarily in a clerical capacity, his/her work duties would not require the possession of an advanced degree or the exercise of discretion and independent judgment. In such a case, the nursing degree would be irrelevant in determining

exempt status. Likewise, the extent to which a position requires post-high school education can be dispositive with respect to the professional exemption. Keep in mind, however, that, as discussed above, a four-year college degree does not automatically guarantee application of the professional exemption.

7. Computer-Related Employees

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

(1) The employee must be compensated either on a salary or fee basis (as defined in the regulations) at a rate not less than $684 per week or, if compensated on an hourly basis, at a rate not less than $27.63 an hour;

(2) The employee must be employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field performing the duties described below;

(3) The employee's primary duty must consist of:

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

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

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

(d) A combination of the aforementioned duties, the performance of which requires the same level of skills.

As noted above, the Pennsylvania Minimum Wage Act and its regulations contain no companion to the federal computer employee exemption. Thus, an otherwise exempt computer employee still may be entitled to overtime compensation under the state law. If an employer has a computer employee that meets the federal exemption, the employer should examine whether the employee also qualifies for another white

collar exemption, such as the administrative or professional exemption, that is also recognized by state law. If the employee in question would not qualify for any other exemption, the employer may be liable for unpaid overtime compensation under the state MWA.

8. Highly Compensated Employee Exemption

To qualify for the highly compensated employee exemption, the employee must perform office or non-manual work and be paid total annual compensation of $107,432 or more (which must include at least $684 per week paid on a salary or fee basis), so long as the employee customarily and regularly performs at least one of the duties of an exempt executive, administrative, or professional employee identified in the exemptions' standard tests. This exemption may cover any highly compensated employee who does not fit cleanly within any of the traditional white collar exemptions.

Unfortunately, the state MWA contains no companion highly compensated employee exemption. Thus, unless the employee also meets one of the other white collar exemptions, the employer may be required to pay the employee overtime compensation, even though he/she qualifies for the FLSA exemption.

9. Independent Contractors

Coverage under both the FLSA and MWA is afforded only to "employees" of a covered employer. The protections of the FLSA and MWA do not apply to true independent contractors. *Rutherfood Food Corp. v. McComb*, 331 U.S. 722 (1947). When determining FLSA coverage, courts look to the "economic reality" of the situation rather than traditional common law concepts of employee or independent contractor. To establish that an employment relationship exists, the individual must show that,

based upon the totality of the situation, he/she is economically dependent on the alleged employer. Relevant factors in the economic reality analysis include:

- the degree of control exercised by the alleged employer over the work performed;
- the alleged employee's opportunity for profit or loss depending upon his managerial skill;
- the alleged employee's investment in equipment or materials;
- whether the service rendered requires a special skill;
- the degree of permanence of the working relationship;
- whether the service rendered is an integral part of the alleged employer's business.

Donovan v. DialAmerica Mktg., Inc., 757 F.2d 1376 (3d Cir. 1985).

Generally, the FLSA applies a very narrow definition of independent contractor. Again, close calls generally result in a finding that the individual is an employee, not an independent contractor.

C. Wage and Hour Requirements for Non-Exempt Employees

Unfortunately, determining whether an employee qualifies for an overtime exemption is not the only wage and hour issue employers must consider. Even after concluding that an employee is not exempt and entitled to overtime compensation, many pitfalls remain before wage and hour law compliance is achieved. The remainder of this section will address common overtime compensation issues and missteps made by employers.

1. What are "Hours Worked?"

The FLSA and MWA generally require that non-exempt employees receive at least the statutory minimum wage for each hour that the employee is "suffered or permitted to work." "Hours worked" also have great significance in overtime situations, because employees must be paid overtime for all "hours worked" in excess of forty in any given workweek. The mere fact that an employer did not specifically request an employee to work during a particular period (e.g., during lunch break, at home, etc.) does not necessarily mean that the time worked is not compensable. Wage and hour regulations provide as follows:

> Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift. He may be a pieceworker, he may desire to finish an assigned task or he may wish to correct errors, paste work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time.

29 C.F.R. § 785.11. Work performed away from the job site, including work performed at home, also constitutes "hours worked" if it otherwise meets this standard. 29 C.F.R. § 785.12. Many of the recent court decisions under the FLSA involve situations where an employer "knew or should have known" that its employees were working but did not pay them for this time.

The Department of Labor's Wage and Hour Division has promulgated detailed regulations regarding the types of activities for which an employee must be compensated and those which are non-compensable. As a general matter, an employee always must be compensated for all time spent performing the "principal duties" of his/her job if the employer knows or has reason to believe that work is being

performed. It is when employees engage in "incidental" activities, such as travel time, on-call time, and job-related training, that problems most frequently arise.

a. Preliminary and Finishing Activities

The courts have defined hours worked as all the time an employee "is necessarily required to be on the employer's premises, on duty, or at a prescribed workplace" when the time is spent for the benefit of the employer. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). Using this test, courts have established that pre-work and post-work activities are compensable if they are an "integral" and "indispensable" part of the employee's principal activities. If the pre-work and post-work time is "insubstantial and insignificant," it falls within the de minimis exception and need not be included as hours worked. *E.g.*, *Reich v. Monfort, Inc.*, 144 F.3d 1329 (10th Cir. 1998).

> **Example:** A chemical worker who must change into special protective clothing on the employer's premises prior to beginning his/her job normally should be compensated for this time. On the other hand, if the employer merely provides a dressing room for its employees' convenience, changing time at the beginning and end of the work day generally is not considered compensable.

b. Waiting or On-Call Time

The same general test applies to determine whether waiting or "on-call" time is compensable. Many employers realize significant wage savings by placing certain employees on "standby" or "on-call" status. Wage and hour regulations generally do not limit the number of hours that an employer may require an employee to be on call. However, the regulations do specifically limit the restrictions that an employer may place

on an employee who is on call. Failure to observe these restrictions may convert otherwise non-compensable "on-call time" into compensable "hours worked."

With respect to on-call time, the regulations provide:

> An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on call." An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call.

29 C.F.R. § 785.17 (emphasis added).

The majority of cases regarding on-call time address the issue of whether an employee who is "on call" is able to "use his time effectively for his own purposes." Employers who place employees "on call" must therefore be careful not to place such restrictions on the employees that the on-call time would be deemed compensable hours worked. "[W]here the conditions placed on the employee's activities are so restricted that the employee cannot use the time effectively for personal pursuits, such time spent on call is compensable." *Dinges v. Sacred Heart St. Mary's Hosp., Inc.*, 164 F.3d 1056 (7th Cir. 1999). Factors courts consider when determining whether an employee is free to engage in personal pursuits include:

- required response time;
- use of a pager to ease restrictions;
- ability to trade on-call shifts;
- excessive geographic limitations;
- personal activities in which employees can engage despite the restrictions; and

- frequency of calls.

Ingram v. County of Bucks, 144 F.3d 265 (3d Cir. 1998).

c. Travel Time

The FLSA establishes that, absent a contract or custom to the contrary, ordinary home-to-work and work-to-home travel is not considered worktime and is not compensable. 29 U.S.C. § 254; 29 C.F.R. §§ 785.34-785.35. Conversely, an employee's travel time "as part of his principal activity, such as travel from job site to job site during the workday," is treated as compensable hours worked. 29 C.F.R. § 785.38. The FLSA regulations, therefore, make a distinction between normal daily commuting time, which is generally not compensable, and travel "all in the day's work" during the course of a workday, which is typically compensable.

Travel time spent on special one-day assignments away from work, such as trips to another city, is generally compensable when the trip is taken for the employer's benefit. 29 C.F.R. § 785.37. The FLSA regulations treat travel on one-day trips "as an integral part of the 'principal' activity which the employee was hired to perform on the workday in question." *Id*. In most situations, an employer need not compensate non-exempt employees for all travel time spent on a one-day trip. Typically, an employee will leave his/her home and travel to an airport or train station to take the trip. The regulations treat the time spent commuting to the airport and back as part of the non-compensable "home-to-work" category. *Id*. Thus, even on day trips, an employer generally may deduct from the compensable hours worked the time the employee would have spent commuting from home-to-work and work-to-home on a typical day. Of course, the usual meal time would also be deductible. *Id*.

Special rules apply to overnight travel for non-exempt employees. Unlike one-day trips, an employer may not need to compensate employees for all travel time (minus the home-to-work time) on an overnight trip. Instead, employees must be compensated for all hours actually worked on the trip and all travel time that "cuts across the employee's workday." 29 C.F.R. § 785.39. If the employee typically works from 9 a.m. to 5 p.m., the employee must be compensated for travel time that falls within that time period, even if the travel occurs on a weekend or other day the employee typically does not work. *Id*. If the employee travels outside of his/her normal working hours during a multi-day trip, the employer need not compensate the employee for that time spent traveling if the employee is riding as a passenger in a car, bus, airplane, train, etc. during that time. If the employee is actually driving during the travel outside the normal working hours, the employee must be compensated for the travel time. As with one-day trips, regular meal periods need not be counted.

d. Meetings and Training Programs

Attendance at lectures, meetings, and training programs counts as compensable hours worked unless (1) attendance is outside normal working hours, (2) attendance is voluntary, (3) the lecture, meeting, or training is not directly related to the employee's current job assignment, and (4) no work of value to the employer is performed at the lecture, meeting, or training. 29 C.F.R. §§ 785.27-785.31.

e. Meal Periods and Breaks

Rest periods of 5 to 20 minutes are considered compensable hours worked. 29 C.F.R. § 785.18. Meal periods during which an employee is "completely relieved of duty for the purpose of eating regular meals" do not count toward hours worked. *Id.* § 785.19.

Generally, an employee must be given 30 minutes or more and must be completely relieved of his/her duties for a period to qualify as a bona fide meal period. *Id*.

f. Vacation, Holidays, Sick Days, and Other Non-Working Time

If an employer provides employees with time off (paid or unpaid), time spent by an employee on such leave need not be counted as "hours worked" for purposes of determining whether the employee has worked overtime in any given week.

2. Paying Overtime Compensation under Federal and State Law

The FLSA and MWA generally require that non-exempt employees be paid an overtime rate of not less than one and one-half times their "regular rate" for all "hours worked" over 40 hours in any workweek. For payroll purposes, an employer may begin the workweek on any day of the week and any hour of the day but must be consistent. Employers may not change the starting time of a workweek to evade the overtime requirements of the FLSA.

As a general rule, an employer must consider each work week separately when calculating overtime earnings. If the employer establishes a two-week pay period, it generally may not average the number of hours worked by an employee in both weeks to determine the employee's overtime compensation.

> **Example:** A District pays its hourly employees every other Monday. An employee works 41 hours during the first work week of the pay period and only 8 hours during the second work week. In calculating the employee's earnings, the employer must recognize the one hour of overtime worked during the first week and pay the employee time and one-half for this hour. This 41st hour may not be rolled into the second week for purposes of avoiding overtime pay.

Unless an employee's "hours worked" exceeds 40 hours in a given work week, overtime is unnecessary.

a. "Regular Rate of Pay" Defined

Although the FLSA does not require employers to pay non-exempt employees on an hourly basis, overtime earnings must be calculated on the basis of an employee's "regular hourly rate of pay." An employee's "regular rate" is determined by dividing the total remuneration for employment in a work week by the total number of hours worked. This regular rate must include all remuneration for employment, including shift differentials, commission payments, and board and lodging. Thus, an employee's regular rate may differ from his/her stated hourly rate of pay. The regular rate does not include

- payments made by an employer on behalf of an employee to a bona fide profit sharing, thrift, or savings plan;
- irrevocable contributions made by an employer pursuant to a bona fide plan for providing retirement, life, accident, or health insurance;
- pay for time spent on vacation, holiday, illness, layoff, or any other periods when the employee is not at work;
- gifts and holiday or special occasion bonuses;
- bonuses paid at the discretion of the employer and not pursuant to any agreement or promise to the employee;
- reimbursements for expenses incurred by an employee while carrying out his/her job; and
- "premium pay" in excess of time and one-half the employee's hourly rate for work performed on weekends, holidays and other special occasions. However, if the premium rate is less than time and one-half the employee's hourly rate, the premium must be included in determining the employee's regular rate of pay.

29 U.S.C. § 207(e). Payments in these categories must generally meet a variety of strict requirements set forth in the regulations to qualify for exclusion from the regular rate calculation.

Bonuses. An employer must include non-discretionary bonuses and incentive pay when determining an employee's regular rate. Such bonus payments must be included in the regular rate determination, even if the employee will not receive the bonus until later and even if the regular rate must be retroactively adjusted after the amount of the bonus is determined. In order to qualify for exclusion as a discretionary bonus, the employer must retain complete discretion over the fact and amount of payment. If the employer promises or announces in advance that a bonus will be paid, no such discretion exists.

> Bonuses which are announced to employees to induce them to work more steadily or more rapidly or more efficiently or to remain with the firm are regarded as part of the regular rate of pay. Attendance bonuses, individual or group production bonuses, bonuses for quality and accuracy of work, bonuses contingent upon the employee's continuing in employment until the time that payment is to be made and the like are in this category.

29 C.F.R. § 445.211 (c).

> **Example:** (Non-Exempt Hourly Employee/40 Hour Work Week) A District pays its hourly employees at the rate of $10.00 per hour. However, each employee is promised a $5.00 bonus for each week in which he/she has perfect attendance. Because this bonus is not "discretionary," it must be included in the employee's total wage earnings for each week in which it is earned in determining the employee's regular rate of pay. Assuming an employee receives the bonus in a week during which he/she worked 50 hours, his/her "regular rate" would be calculated as follows: $500.00 (straight earnings) + 5.00 (bonus) ÷ 50 hours worked = $10.10. The employee should be paid an overtime premium equaling one-half times his regular rate ($10.10 per

> hour) for each of his ten overtime hours. The employee's total weekly earnings may be calculated as follows: $500 (straight earnings) + (10 overtime hours x ½ x $10.10 = $50.50) + ($5.00 bonus) = $555.50 total weekly earnings.

Only bonuses that are completely discretionary and not paid pursuant to any prior agreement or arrangement, such as a holiday bonus, may be excluded from the regular rate computation. 29 C.F.R. §§ 778.211-778.212. Discretionary bonuses that are given on a regular basis may appear to be part of the employee's regular pay and pose problems in the event of an employee complaint and/or a Wage and Hour Division investigation. Thus, discretionary bonuses should be used with caution and only given if the employer has a written policy clearly stating that the bonuses are not guaranteed and may be discontinued at any time. 29 C.F.R. § 778.211(b).

Despite the general exclusion of expense reimbursement from the regular rate calculation, per diem payments to non-exempt employees, such as travel and temporary living expenses, must be included in the regular rate if the per diem is not reasonably related to expenses incurred by the employee. 29 C.F.R. § 778.217. Thus, employers should ensure that non-exempt employees provide documentation when seeking reimbursement for work-related travel and temporary living expenses.

Different Pay Rates. With respect to employees who receive different pay rates for different types of work, the federal wage and hour regulations provide two permissible methods of calculating the regular rate for overtime purposes. The usual method is to use the weighted average of the two rates to determine the regular rate. 29 C.F.R. § 778.115. The other method is to calculate overtime on the basis of the regular rate for the type of work being performed during the overtime hours. 29 C.F.R.

§ 778.419. Employers may use this second method to calculate the regular rate only by prior agreement with the employee. *Id*.

Premium Pay Credits. The FLSA allows an employer to credit three specific types of extra compensation against any overtime it owes an employee:

- extra compensation at least one and one-half of the employee's regular rate for hours works in excess of daily or weekly standards (for example, premium pay for hours exceeding 8 or 12 in a day or 35 hours in a week); or
- extra compensation at least one and one-half of the employee's regular rate for work on Saturdays, Sundays, holidays, or other "special days"; or
- "clock pattern" premium pay at least one and one-half of the employee's regular rate where extra compensation is paid for work outside the basic workday or work week (for example, premium pay for work performed outside the normal 8 a.m. to 5 p.m. workday).

29 U.S.C. § 207(h)(2); 29 C.F.R. §§ 778.202-778.204.

If an employer provides premium payments in any of the manners described above, these payments need not be included in the "regular rate" for overtime calculation. In addition, the extra compensation can be credited to any overtime owed the employee. Conversely, any premium payment that falls outside the three categories described above must be included in the employee's regular rate of pay and cannot be credited to any overtime obligations. 29 C.F.R. § 778.204. Thus, premium pay for "undesirable hours" cannot be counted to overtime and must be included in an employee's regular rate.

b. Compensatory Time

One of the most frequently misunderstood wage and hour concepts is "compensatory time." If an employer's pay period is longer than one week, it may be possible to control the amount of overtime wages paid by granting employees time off in

lieu of overtime. Under a time-off plan, an employer gives an employee time off in one work week to offset overtime hours worked in a previous work week. However, such plans are only lawful for private employers if three requirements are met: (1) all compensatory time off must be used during the same pay period in which it is accrued; (2) compensatory time off must be granted at a rate of one and one-half times the number of overtime hours worked; and (3) affected employees should be informed of the plan prior to its implementation.

> **Example:** A District pays its non-exempt employees every other week. One employee is paid $10.00 an hour and usually receives $800.00 gross pay at the end of each two week pay period. During the first week of a pay period this employee works 44 hours. In order to avoid additional wage costs due to the four hours of overtime worked, the employer may grant the employee six hours (1 1/2 x 4) compensatory time off with pay during the second work week of the pay period. At the end of the pay period, the employee's earnings are calculated as follows:

First Week Straight Time Earnings:	40 x $10.00 per hour =	$400.00
First Week Overtime Earnings:	4 x $15.00 per hour =	$ 60.00
Second Week Earnings:	34 x $10.00 per hour =	$340.00
	TOTAL	$800.00

Special amendments to the FLSA allow the use of compensatory time off in lieu of overtime compensation for employees of a public agency that is a state, a political subdivision of a state or an interstate governmental agency. Comp time is earned at a rate of at least 1.5 hours for each hour worked for which overtime otherwise would be paid. In order to employ a comp time system, an agreement or understanding (we suggest a written agreement) must be reached with affected employees or their representative before the work is performed.

Employees involved in public safety, emergency response, or seasonal activities may accrue to a maximum of 480 comp time hours (i.e., 320 straight time hours x 1.5). Others may accrue only to a maximum of 240 hours (i.e., 160 straight time hours x 1.5). Once an employee would exceed these maximums, he/she must either use comp time or receive overtime compensation in lieu of further comp time. Accrued, unused comp time also must be paid upon termination.

D. Wage and Hour Self-Audit

Employers are well advised to conduct a careful review of their wage and hour practices, and in many circumstances a full blown "self-audit" will be appropriate. The scope of the project will depend upon the situation. As with most important employment practices, an employer should consider consulting with its attorney during the self-audit process, as numerous legal questions may arise (application of exemptions, "hours worked," "regular rate," etc.). Typically, employers should consider the following issues during a wage and hour self-audit:

- Are all independent contractors properly qualified?
- Are all exempt employees properly classified?
    - Do the job duties and responsibilities qualify for the exemption?
    - Are exempt employees paid on a salary basis and in a manner that meets the applicable minimum salary requirements?
- Do the employer's policies improperly call for deduction of pay based upon quality or quantity of work?
- Are all non-exempt employees properly compensated?
    - Does the employer properly account for all hours worked?
        - Volunteer activities
        - Waiting or on-call time

        - Break periods
        - Meetings and training
        - Travel time
        - Unauthorized work

    - Is overtime pay properly calculated?

    - Is all applicable compensation included in the "regular rate"?

- Are any overtime pay plans properly applied and administered?

VII. Best Practices for Employee Management

With the seemingly countless number of laws that exist to protect employees, managing employees in a manner that maximizes productivity and efficiency without creating the risk of avoidable legal claims can seem daunting. While the legal landscape may be a challenge for employee management and discipline, employers can effectively manage employees and minimize the risk of employment-based claims by keeping in mind a few best practices.

A. Communication

Employee management starts with communication. Every employer should communicate clearly its expectations regarding conduct, performance, and attendance to each employee. On a general basis, this communication can be accomplished through job descriptions, employment policies, and other employee-wide communications. However, when employees are not meeting these expectations, individualized communications should occur. Specifically, an employee not meeting expectations should be informed/reminded of the expectations and where the employee is not meeting those expectations. Such communication need not be in the form of

disciplinary action, but disciplinary action may be appropriate depending on the circumstances or if the initial communication does not rectify the issue.

Regular performance evaluations of employees can serve as an effective communication tool for employers. However, their value is measured by the time and care put into the review and its accuracy. Performance evaluations should be thorough and honest. If an employee is having performance or conduct issues and the performance evaluation fails to note them, taking action later based on such issues can be complicated greatly and encourage and strengthen legal claims challenging such action.

B. Consistency

At the core of most types of employment law claims and many employee relations issues is the perception, if not reality, of inconsistency. Employers should attempt to apply their policies and expectations as consistently as possible. Of course, there will be times that consistency is not possible or appropriate. As a general rule, an employer should act consistently, unless the employer has a good reason not to be consistent. For example, an employer may treat a new hire who misses a number of days of work differently than a 25-year employee with a good attendance record who suddenly starts missing a similar amount of time. In that situation, the employee's tenure would justify arguably "inconsistent" treatment of attendance issues.

C. Documentation

When it comes to employee performance or conduct issues, if an employer does not document the issues and attempts made to address those issues, the efforts made to address the issues (i.e., counseling, even disciplinary action) essentially never

occurred for purposes of the defense of an employment-related lawsuit. Of course, that does not mean that the efforts to address the performance or conduct problems did not actually occur. It means that it will be much harder for the employer to prove that such efforts were made in the event of a legal claim challenging a disciplinary action or discharge taken in response to these issues. Employers should document performance or conduct problems, disciplinary incidents, and any complaints or reports involving discrimination or harassment. Documentation should include only factual information and avoid opinions or comments that are not fact-based. Any documentation should be written with the expectation that a government investigator, judge, or jury may one day see the document. Thus, care should be taken to ensure the document is factual, fair, and professional.

D. Disciplinary Action and Discharge

Employee discipline is an important component of an employer's efforts to maintain a productive and motivated workforce. Appropriate initial discipline often will lead to improved performance or the elimination of unwanted conduct. On other occasions, discharge will be necessary, either in response to egregious misconduct or because prior disciplinary measures did not resolve the problem. In today's legal environment, employers must ensure that the discipline and discharge decisions are supported by legitimate reasons, are implemented fairly and consistently, and can be documented and/or clearly explained.

1. The Legal Risks Associated With Discipline and Discharge

1. Wrongful discharge in violation of public policy.

    a) Retaliation for filing a workers' compensation claim.

b) Retaliation for filing an unemployment compensation claim.

c) Discharge for attending or participating in jury duty.

d) Termination for refusal to take a polygraph or lie detector test.

e) Discharge for filing a complaint under the Wage Payment and Collection Law.

f) Breach of express or implied contract.

(1) Additional consideration for employment.

(2) Handbook provisions creating a reasonable expectation of employment for a specified duration.

2. Unlawful discrimination under the Pennsylvania Human Relations Act.

3. Unlawful discrimination under Title VII of the Civil Rights Act of 1964.

4. Unlawful discrimination under the Age Discrimination in Employment Act.

5. Unlawful discrimination under the Americans with Disabilities Act.

6. Unlawful termination under the Family and Medical Leave Act.

a) Interference with FMLA rights.

b) Retaliation for exercising FMLA rights.

7. Retaliation under the FLSA, OSHA, etc.

8. Unlawful termination under military leave laws.

9. Unlawful termination under volunteer fire personnel statute.

10. Unlawful termination under Pennsylvania Whistleblower Law by an employer receiving public funds.

Regardless of the precise nature of a claim challenging discipline or a discharge, the employer will be called upon to explain and support the reasons for the discipline, and the employee typically will try to prove his/her case by either showing that those

reasons are a “pretext” for discrimination, or by offering other evidence of unlawful motives.

2. The Legal Framework

Over 40 years ago, the United States Supreme Court recognized that employers had evolved to the point that there was rarely an admission or “smoking gun” evidence of unlawful employment discrimination. To enable plaintiffs to prove that an underlying unlawful motive existed in the absence of such direct evidence, the Supreme Court established a “burden-shifting” analysis in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under *McDonnell Douglas*, the Plaintiff must first produce evidence sufficient to establish a *prima facie* case. Typically a *prima facie* case is established by merely showing (1) that the plaintiff is in a protected class, (2) that an adverse employment action was taken, (3) that the plaintiff was qualified for the job, and (4) that others outside of the protected class were not adversely affected. This test is flexible; for example, in age discrimination cases, the fourth prong of the test is satisfied by showing that “substantially younger” employees were not adversely affected.

Once a *prima facie* case is made, the defendant/employer must then articulate (but not specifically prove) a legitimate, non-discriminatory reason for the adverse employment action. After the employer meets this burden, a plaintiff must submit evidence from which a jury could reasonably either (1) disbelieve the employer’s articulated reasons, or (2) believe that an invidious discriminatory reason was more likely than not a determinative cause of the employer’s actions.

> To discredit the employer’s proffered reasons, however, the Plaintiff cannot simply show that the employer’s decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not

> whether the employer is wise, shrewd, prudent, or competent. Rather, the non-moving Plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them 'unworthy of credence,' and hence infer 'that the employer did not act for [the asserted] non-discriminatory reasons. While this standard places a difficult burden on the Plaintiff, it arises from an inherent tension between the goal of all discrimination law and our society's commitment to free decision making by the private sector in economic affairs.

Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994).

3. The Primary Methods of Proving Pretext

1. More favorable treatment of similarly situated employees outside of the protected class under similar circumstances.

   Examples:

   - Evidence that similarly situated employees outside of the protected class committed the same disciplinary infractions in the past, but were not terminated.

   - Evidence that others outside of the protected class had a similar pattern of absences/lateness, but were not terminated.

   - Evidence that similarly situated employees outside of the protected class had similar performance problems, but were not terminated.

   Note, in these cases, the employer proves that the employee actually committed the disciplinary infraction or was not performing acceptably, but the employee wins anyway because the jury is permitted to infer that the employer treated the plaintiff more harshly than others outside of the protected class.

2. Conflicting reasons for the adverse employment action.

   Examples:

   - Providing the employee with a "kinder, gentler" reason for termination at the time of discharge and then, later, during

an investigation or litigation, relying upon the real reasons.

- Any inconsistent statements made during the termination meeting, unemployment compensation hearings, or later agency investigations.

- Different employer officials providing different reasons for the termination.

3. Inconsistent policies or evidence.

   Examples:

   - Terminating an employee for "poor performance" shortly after the employee received a "satisfactory" performance evaluation.

   - Terminating an employee for policy violations where the policy is so unclear that it is questionable whether the employee violated it.

     - In these cases, clarification of the policy through the progressive disciplinary process may be helpful.

   - Other evidence of discrimination.

     Example:

     - Statement made by decision-makers indicating discriminatory animus (e.g., prior comments made about the employee's age).

4. Best Practices in a Discipline or Discharge Situation

Things to Consider: Disciplinary Infractions

1. Has the infraction been clearly established or admitted?

2. If not, has the employer conducted a thorough investigation and concluded that the infraction did indeed occur?

3. If the employee was terminated for a rule violation, is the rule clear and was it known to the employee?

   If not, is the standard of conduct obvious (e.g., no fighting)?

4. Is the investigation well documented?

5. Is the disciplinary action to be taken consistent with the action taken in response to prior incidents of a similar nature?

   If not, is there a clear explanation for the deviation from prior practice?

6. Has the employee had the opportunity to provide an explanation, and can the employer articulate why that explanation is not sufficient?

7. If the offense is not egregious, have prior warnings been given, and was the employee previously aware that additional infractions would result in termination (this is especially important in attendance cases or situations involving repeated minor infractions)?

8. How will the decision be communicated to the employee?

9. If in a union environment: will the employer be able to prove “just cause”? Has the employee been provided “due process”?

10. Is there any other reason to believe that the decision might be motivated by discriminatory reasons, or that the basis for the decision could be challenged?

Things to Consider: Discharge for Poor Performance

1. Were the performance issues made known to the employee?

2. Are the prior performance appraisals consistent with the position now being taken by the employer?

3. Do the prior performance appraisals provide objective examples of poor performance?

4. Was the employee given the opportunity to comment upon or contest the prior adverse performance appraisals?

5. Was the employee placed on a performance improvement plan and given an opportunity to correct the deficiencies after they were made known?

6. Is there objective evidence that the employee has failed to correct the performance deficiencies?

7. Is there corroborating evidence of poor performance, as opposed to the subjective beliefs of a single supervisor?

    a) If the discharge is based upon the subjective beliefs of a single supervisor, is there any reason to believe that that supervisor has discriminatory animus?

8. If the performance deficiencies are capable of objective measurement, are there other employees who have performed worse and are not being terminated?

9. Is termination consistent with the District's handling of prior circumstances involving poor performance of other employees?

10. Has the employee been given the opportunity to explain his/her side of the story before termination?

11. Did the employee ask for assistance that was denied, such as additional training or alternative procedures?

12. Does adequate documentation exist?

Things to Consider: Conducting Termination Meetings

1. Be prepared to communicate the discharge decisions succinctly and accurately.

    a) It is typically advisable to provide some information to the employee in a tactful manner regarding the reasons for the discharge.

2. Typically, two people should conduct the termination meeting, but the meeting should be conducted in a non-threatening way. It may be advisable to allow both management participants to have a role in the termination meeting so that it does not appear as if one of the individuals is simply there for security or to intimidate the employee.

3. Always communicate discharge decisions in a confidential manner. Unnecessary disclosures of the reasons for discharge (or other discipline) could lead to defamation claims.

4. Avoid a debate regarding the merits of the termination.

5. Take care of the logistics:

   a) Try to conduct the termination in a way that requires the employee's contact with other employees immediately following the termination meeting to be minimal.

   b) Ensure that the employee understands what property must be returned to the District upon termination.

   c) Arrange for final payment of wages and how benefits will be handled upon termination.