



# PAYCHEX<sup>®</sup> HR SOLUTIONS – ASO CLIENT SEMINAR

Information for Managers and Supervisors

## *Top 10 HR Issues*

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**Note:** The Top 10 HR Issues provided in this training are not necessarily in the order of importance.



## Overview

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Today's workshop is entitled Top 10 HR Issues. The topics we will highlight in today's session are not necessarily in the order of their importance; rather we followed the typical employment life cycle, from hiring to termination, and cover major HR issues that many employers face during those phases of employment. We have selected 10 of the most frequently asked client questions. If you have additional HR issues or other areas where you have questions or concerns, please feel free to speak with me after the session.

The material presented will be an overview of common problem areas for most employers. We offer additional training sessions that cover many of these topics in more details.

Suggested additional seminars:

- Avoiding Employment Discrimination
- Effective Employee Discipline and Termination
- Fair Labor Standards Act (FLSA)
- Family and Medical Leave Act (FMLA)
- Hiring Practices
- Non-Harassment for Managers and Supervisors and Employees

# Hiring Practices: 1 - Failure to Prepare and Update Job Descriptions

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An up-to-date job description clearly identifying the position's essential functions, as well as the required knowledge, skills, and abilities needed to perform the job should be the starting point of the hiring process.

Developing or updating a job description before hiring may be beneficial in several ways:

- Assist in complying with the Americans with Disabilities Act (ADA) by identifying the essential work-related duties of the position.
- Aid in exempt and non-exempt classification under the Fair Labor Standards Act (FLSA).
- Provide an accurate picture of the job to applicants.
- Assist the hiring manager and supervisor with interviewing by identifying the key skills and abilities the candidate must possess.
- Aid in setting goals for performance.
- Support supervisors in measuring and tracking performance.

## Essential Functions

Job descriptions are not mandated by state or federal law, but do provide an excellent opportunity for employers to determine the essential functions of each position. When determining the essential functions of a position, several factors must be considered:

- Are employees in this job actually performing this function?
- Would removing this function fundamentally change the job?
- Does the job exist to perform this function?
- Are there a limited number of employees available to perform the function, or only a few workers among whom the function can be distributed?
- Is the function highly specialized? Is the person in the position hired for special expertise or ability to perform the function?

# Hiring Practices: 1 - Failure to Prepare and Update Job Descriptions

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The Equal Employment Opportunity Commission (EEOC) lists types of evidence which may be considered when determining whether a job function is essential. Such evidence includes, but is not limited to:

- the employer's judgment
- a written job description prepared before advertising or interviewing applicants for a position
- the amount of time spent performing the function
- the consequences of not performing the function

## Common Pitfalls to Avoid

- **Using out-dated job descriptions**

Job descriptions should be created each time a new position is formed. Once created, the job description should become a working document that is reviewed and updated as necessary (for example, when job duties change, prior to hiring for the position, at the time of a performance review, annually, etc.).

Job descriptions are an excellent tool to aid in the exempt and non-exempt classification of employees.

- **Basing the skills and experience on the person currently holding the position**

Determine the minimum level of education, experience, skill, etc. necessary to perform the job, rather than basing the qualifications on the person who currently holds the position.

## **Hiring Practices: 2 - Failure to Complete and Retain Forms I-9**

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Employers are required to verify that each employee is eligible to work in the United States.

Every new employee must complete the Form I-9 on the first day of employment. Within three business days, the employee must provide proper documentation of identity and authorization to work in the United States. If documentation is unavailable, the employee must produce a receipt showing that he applied for such documentation within three business days (some exceptions apply to this requirement). Actual documentation must then be provided within 90 days. You may terminate an employee who fails to produce the required document or documents, or a receipt for a document, within three business days of the date employment begins. However, you must apply these practices uniformly to all employees.

The Form I-9 must be retained for three years after the date employment begins or one year after the date the person's employment is terminated, whichever is later.

Electronic storage of Form I-9 is permitted where the employer complies with the Department of Homeland Security regulations at 8 CFR § 274a.2.

## Hiring Practices: 2 - Failure to Complete and Retain Forms I-9

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### Common Pitfalls to Avoid

- **Having the applicant complete the Form I-9 prior to hiring**

You may complete the form earlier than the first day of employment, as long as the person has been offered and has accepted the job. You may not use the I-9 process to screen job applicants.
- **Specifying what documentation the employee must use to complete the Form I-9**

Employees can choose any one document from List A (verifying both identity and work authorization), or one document from List B (verifying identity) and one document from List C (verifying work authorization) listed on the back of the Form I-9. Employers cannot specify which of these documents the employee must provide.
- **Neglecting to complete all sections of the Form I-9**

Once the employee has completed Section 1 of the Form I-9, the employer must be diligent in completing Section 2. Section 2, verification of documentation proving identity and work authorization must be completed within three business days of hire (the first day of employment).
- **Failing to reverify expired documentation**

Employers are responsible for notifying employees when their documentation is about to expire and completing the Section 3 of the Form I-9 (or completing a new Form I-9 and attaching it to the original) prior to the expiration of the original documentation. Only List A and List C documents need to be re-verified; List B documents do not need to be re-verified when they expire.
- **Inconsistently Photocopying Documentation**

Employers are not required to photocopy documents used to establish work authorization and identity. However, if photocopies are made, it should be done for **all** employees. Copies of documentation must be maintained with the Forms I-9 and should not be used for any other purpose.
- **Placing completed Forms I-9 in the employee's personnel file**

All Forms I-9 should be maintained in a centralized file. This will help expedite an audit and prevent auditor's access to other records in the employee's personnel files.

## Fair Labor Standards Act: 3 - Misclassification of Employees Exempt vs. Non-Exempt

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The Fair Labor Standards Act (FLSA) is a federal law originally enacted to protect workers against unfair employment practices and promote full employment. The FLSA regulates minimum wage, overtime, child labor, recordkeeping, and equal pay. Under the FLSA, employees are classified as either exempt or non-exempt.

### Non-exempt Employees

- Must receive at least minimum wage for the first 40 hours of work.
- Must receive time and one-half their regular rate of pay for all hours worked over 40 in a workweek, except where state law requires more.
- Non-exempt employees typically perform work that is routine with set rules and standards.
- Generally, manual laborers and blue collars workers are considered non-exempt employees.

**Note:** State law may be more stringent.

### Exempt Employees

Some employees are exempt from overtime pay and minimum wage requirements. Employers should always closely check the exact terms and conditions of an exemption in light of the employee's actual duties before assuming that the exemption applies to the position. The employer is ultimately responsible for supporting the actual application of an exemption.

FLSA section 13(a)(1) exempts bona fide executive, administrative, and professional employees from both minimum wage and overtime pay protections, provided they meet the minimum salary level of not less than \$455 each week, are paid on a salary basis, and perform the job duties as identified in the regulations. Outside sales employees may be exempt based on their job duties; there are no salary level or salary basis requirements for the outside sales exemption. Certain computer employees may also be exempt under either section 13(a)(1) or section 13(a)(17), provided they meet the job duty and wage requirements as prescribed in the Act. In addition to these white collar exemptions, there is an exemption for highly compensated employees.

**Note:** State law may be more stringent. An employee must be exempt under both state and federal law to avoid overtime payment requirements.

## Fair Labor Standards Act: 3 - Misclassification of Employees Exempt vs. Non-Exempt

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Deductions from an exempt employee's salary are limited without jeopardizing the exempt status.

To be classified as exempt, the position must meet the criteria of the **White Collar Exemptions** as described in the regulations.

- Executive Exemption
- Administrative Exemption
- Professional Exemption
  - Learned Professional Exemption
  - Creative Professional Exemption
- Computer Employee Exemption
- Outside Sales Employee Exemption
- Highly Compensated Employee Exemption

## Fair Labor Standards Act: 3 - Misclassification of Employees Exempt vs. Non-Exempt

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### Executive Exemption (all of the following must be met)

- must be paid on a salary basis (at least \$455 each week)
- primary duty is management of the enterprise or of a customarily recognized department or subdivision
- customarily and regularly directs the work of at least two full-time employees (or the equivalent)
- has the authority to hire or fire other employees or whose suggestions and recommendations concerning hiring, firing, advancement, promotion, or other change of status of other employees are given particular weight

**Note:** The executive exemption also applies to employees who own at least 20 percent equity interest in the enterprise and who are actively engaged in the management of the enterprise. The salary level and salary basis requirements do not apply to 20 percent equity owners.

### Administrative Exemption (all of the following must be met)

- must be paid on a salary basis (at least \$455 each week)
- primary duty is the performance of office or non-manual work directly related to management or general business operations of the employer or the employer's customers
- primary duty includes the exercise of independent judgment and discretion with respect to matters of significance

## Fair Labor Standards Act: 3 - Misclassification of Employees Exempt vs. Non-Exempt

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### Professional Exemption

a. **Learned Professional (all of the following must be met)**

- must be paid on a salary basis (at least \$455 each week)
- primary duty involves the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction (for example, lawyers, accountants, pharmacists)

**Note:** Salary level and salary basis tests do not apply to doctors, lawyers, and teachers. In some cases learned professionals who have attained the advanced knowledge through a combination of work experience and intellectual instruction are also exempt.

b. **Creative Professional (all of the following must be met)**

- must be paid on a salary basis (at least \$455 each week)
- primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor (for example, musician, novelist, actor, or photographer)

## **Fair Labor Standards Act: 3 - Misclassification of Employees Exempt vs. Non-Exempt**

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### **Computer Employees Exemption (all of the following must be met)**

- may be paid salary (at least \$455 each week) or hourly (at least \$27.63 an hour)
- duties include the application of systems analysis techniques and procedures including consulting with end users, design, development, documentation, analysis, creation, the modification of computer systems or programs, or a combination of such duties

### **Outside Sales Employee Exemption (all of the following must be met)**

- customarily works away from the employer's place of business making sales or obtaining contracts or orders for service
- may be paid commission only; no salary required

### **Highly Compensated Employee Exemption (all of the following must be met)**

- total annual compensation of at least \$100,000
- must be paid on a salary basis (at least \$455 each week)
- performs office or non-manual work
- customarily and regularly performs any one or more of the exempt duties identified in the standard tests for the executive, administrative, or professional exemptions

#### **Note:**

- Employees must be exempt under both state and federal law to avoid minimum wage and overtime requirements.
- In addition to the white collar exemptions, there may be industry specific minimum wage and/or overtime exemptions that apply to certain employees.

### **Common Pitfalls to Avoid**

- Classifying all salaried employees as exempt.
- Basing the exemption on job title, rather than job duties and method of payment.

## Fair Labor Standards Act: 4 – Hours Worked

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Non-exempt employees must receive at least minimum wage for all hours worked and must receive time and one-half their regular rate of pay for all hours worked over 40 in a workweek. Any work suffered or permitted by the employer is compensable time under the Act, even if the work is not requested by the employer. The Act defines “hours worked” as compensable time. Other time that may be compensable includes:

- **Waiting Time**

Generally, employees who are “engaged to wait” must be compensated for the time. Time spent by employees who are “waiting to be engaged” is typically not considered work time and does not have to be compensated.

- **On-call Time**

When an employee is required to remain on-call on the employer’s premises, the time must be compensated. Where employees are on-call from home or able to leave a telephone number where they can be reached, the time may not be compensable. The more restrictions on the employee’s freedom, the greater the likelihood the time will be considered hours worked and compensable.

- **Breaks and Meal Periods**

Short periods of rest, usually 20 minutes or less are, typically compensable and count as hours worked. Bona fide meal periods of 30 minutes or more generally need not be paid or counted as hours worked as long as the employee is fully relieved from his duties and performs no work during that time.

- **Sleeping Time**

Employees required to be on duty for less than 24 hours are working, even if they are permitted to sleep or engage in personal activities when not busy. Where employees are on duty for 24 hours or more, bona fide sleeping periods (of not more than eight hours) can be excluded from hours worked, provided the employer provides adequate sleeping facilities and the employee is usually permitted to sleep uninterrupted for at least five hours.

- **Time Spent in Meetings, Lectures, or Training Programs**

Time spent in meetings, lectures, or training programs must be paid and count as hours worked unless all of the following conditions are met: attendance is voluntary, the training, meeting, lecture is outside normal working hours, it is not job related, and no other work is concurrently performed.

- **Travel Time**

Whether or not travel time is compensable depends on the type of travel. Ordinary home to work travel (beginning and end of workday) is not work time. Time spent traveling to and returning from a special one day assignment in another city is compensable work time (except the employer need not count the time the employee would normally spend commuting to their regular worksite). Time spent traveling as the regular part of an employee’s job (that is, from one job site to another) is compensable work time. Travel time that takes an employee away from home overnight is work time when it cuts across an employee’s regular workday (including corresponding hours on nonworking days). Travel time as a passenger outside of regular working hours is not considered work time and need not be compensated.

## Fair Labor Standards Act: 4 – Hours Worked

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### **Overtime**

Non-exempt employees who work more than 40 hours in a workweek must receive overtime pay at a rate of at least one and one-half times the employee's regular rate of pay.

The regular rate must be at least minimum wage and includes all remuneration for employment with the exception of certain payments excluded by the Act. Under the FLSA, the rate does not include payments for:

- pay for expenses incurred on the employer's behalf
- premium pay for hours worked on Saturdays, Sundays, and holidays
- discretionary bonuses
- gifts/payments in the nature of gifts on special occasions  
**and**
- holiday, vacation, or sick pay.

### **Common Pitfalls to Avoid**

- Averaging the hours worked between two workweeks to avoid overtime pay.
- Not including non-discretionary bonuses, such as production bonuses, in the regular rate for determining overtime.
- Providing "comp time" to non-exempt employees in lieu of overtime pay.
- Failure to use a weighted average to calculate the regular rate of pay for overtime purposes for employees who receive two or more different rates of pay.

## **Fair Labor Standards Act: 4 – Hours Worked**

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### **Recordkeeping**

The FLSA requires certain records to be retained for a period of at least three years. There is no specified format for retaining such records.

**Note:** State law may be more stringent.

### **Records to Be Retained for Non-Exempt Employees**

- Employee name, social security number, or other identifying symbol or number (if such is used in place of name), address, occupation, sex, and date of birth (if under 19 years of age).
- Hour and day when workweek begins.
- Total hours worked each workday and workweek.
- Basis on which employees are paid (hourly, salary, piece rate, or commission).
- Total daily or weekly straight-time earnings.
- Regular hourly pay rate.
- Total overtime pay for the workweek.
- Deductions from or additions to wages.
- Total wages paid each pay period.
- Date of payment and pay period covered by payment.

### **Records to Be Retained for Exempt Employees**

- Employee's name, social security number, or other identifying symbol or number (if such is used in place of name), address, occupation, sex, and date of birth (if under 19 years of age).
- Hour and day when workweek begins.
- Basis on which wages are paid in sufficient detail to permit calculations for each pay period of the employee's total remuneration for employment.
- Total wages paid each pay period.
- Date of payment and the pay period covered by payment.

## Employee Handbooks: 5 – Handbook Policy Development

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Employee handbooks provide a means of communicating company policies and other key information to employees. They also may help:

- establish basic ground rules for employee conduct
- set the tone for employer-employee relations
- **and**
- assist employers in consistent implementation of policies and practices.

Poorly written employee handbooks can be legal landmines for employers. Ensure employee handbook policies:

- avoid statements that may imply a contract or guarantee of employment
- avoid language that may result in claims of favoritism, discrimination, or unfair labor practices
- **and**
- mirror actual company practices.

Employee handbooks should be written or reviewed by legal counsel to ensure the document does not create an implied contract of employment or create exposure to litigation for the employer. However, rarely is an employer sued over an employment **policy**; rather, lawsuits are generally founded on the actual employment **practice**. Therefore, how handbook policies are implemented is critical. When it comes to employee relations, what you do for one employee may set the precedent for treating other similarly situated employees.

# Employee Handbooks: 5 – Handbook Policy Development

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## Common Problem Policies

- **Comp Time**

The practice of granting non-exempt employees time off in lieu of overtime compensation is not allowed in the private sector. Non-exempt employees must be paid time and one-half their regular rate of pay for all hours worked over 40 in a workweek.

- **Religious Holidays**

Providing paid holidays is a fringe benefit. If offering paid holidays, it is generally suggested that employers do not specify time off for specific religious holidays, with the exception of Christmas Eve Day and Christmas which are recognized by most employers, to avoid claims of religious favoritism or discrimination. Rather, employers may consider offering floating holidays or personal days off which may be used to provide employees with paid time off to observe religious holidays.

- **Vacation**

Vacation is a fringe benefit. However, some states require earned but unused time to be paid out upon termination. In the absence of a state law, it is dependent on company policy. Employers who elect not to pay for earned but unused vacation upon termination should state so in their policy to eliminate any confusion and preserve their rights under state law to deny such payment upon termination.

# Employee Handbooks: 5 – Handbook Policy Development

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## Common Problem Policies

- **Sick Days**

If an exempt employee is absent due to injury or illness, a deduction can be made for a full day absence caused by injury or illness if the exempt employee is not yet eligible for the plan or has exhausted their allotted number of days if the employer offers a bona fide sick day plan. If the employer does not have a bona fide sick day plan then a deduction cannot be made unless the exempt employee is absent for the full workweek and completes no work for the company.

- **Doctors' Notes**

Requiring employee's to submit a doctor's note for occasional absences may be problematic. Such practice can result in potential liability for employers including: reasonable accommodation under the ADA; invasion of privacy claims; being held responsible for the cost of obtaining the note; discrimination claims; and religious accommodations.

- **Salary Discussions**

Employers should not encourage or discourage employees from talking about their wages. Such restriction could be a violation of the National Labor Relations Act, which gives employees the right to organize and to discuss working conditions, wages, etc. California, Michigan, and Vermont have state specific restrictions that prohibit employers from requiring employees to refrain from discussing their wages.

- **No Dating**

While not specifically prohibited in most states, this type of policy may be problematic because it is very difficult for employers to control what employees do off company property during non working hours. Additionally, this type of policy would be very difficult to enforce consistently and may lead to invasion of privacy claims in trying to do so. Federal and state laws may restrict an employer's ability to take adverse employment action based on off duty conduct.

## Employee Handbooks: 5 – Handbook Policy Development

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### Strongly Recommended Policies

- **Employment-at-will**

In the absence of an employment contract or collective bargaining agreement, every employee handbook should have a clearly communicated employment-at-will statement. This statement should be highly visible to all employees.

- **Equal Employment Opportunity (EEO)**

This policy affirms the employer's commitment to equal opportunities for each employee. EEO laws ensure equality in all aspects of employment including, but not limited to, recruitment, hiring, on-the-job treatment, promotion, transfers, and termination, thereby removing employment barriers for all members of society.

- **Sexual Harassment and Non-Harassment**

Every employer should have clearly communicated policies prohibiting harassment in the workplace. These policies should define harassment, provide examples, and explain procedures for filing a complaint.

- **Open Door Policy**

An employer who settles grievances promptly will most likely have fewer civil rights claims and disciplinary problems. The lack of a proper grievance procedure has caused many companies to lose a union election. The worst grievance is the bottled-up, silent grievance.

# Employee Handbooks: 5 – Handbook Policy Development

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## Strongly Recommended Policies

- **Overtime**

Most employers are covered under the FLSA which regulates overtime compensation. An overtime policy will inform employees whether or not overtime will be mandated and which hours count as hours worked for overtime purposes. Additionally, an overtime policy should instruct employees to have supervisory approval before working overtime. While unauthorized overtime must still be paid in accordance with applicable state and federal wage and hour laws, employees who violate the policy (by working unauthorized overtime) may be subject to disciplinary action.

- **Workers' Compensation**

This policy is important to inform employees that all on the job injuries, no matter how slight, must be reported. This policy also informs employees that on the job injuries are generally covered by their workers' compensation insurance policy.

- **E-mail and Internet Usage**

If e-mail and Internet usage is provided to employees at work, it is important to have a policy explaining that these are for business purposes only. Employees must be aware that the company reserves the right to monitor e-mail and Internet usage. The purpose is to put the employee on notice that these communications and uses are not private.

- **Workplace Violence**

Every employee handbook should include a policy that informs employees that workplace violence will not be tolerated. This policy can help minimize the potential risk of violence in the workplace and provide employees with guidance on handling a situation that is or may potentially become dangerous.

**Note:** Policies need to be implemented consistently to help avoid discrimination claims.

Despite what is written in your employee handbook, your **actual practice** becomes your policy!

## **Harassment: 6 – Harassment in the Workplace**

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Harassment, based on a protected class, is prohibited by federal, state, and in some instances, local law.

Unlawful harassment may be based on sex, race, color, religion, age, national origin, disability, or any other protected class at the federal, state, or local level. The most prevalent form of harassment is sexual harassment.

There are two types of sexual harassment: quid pro quo and hostile work environment.

### **Quid Pro Quo (this for that)**

Sexual favors are demanded in return for a promotion or job benefit. The employee may be threatened with discharge, demotion, or punishment for failing to meet sexual requests.

Quid pro quo harassment generally involves a person in authority but can also involve a coworker.

### **Hostile Work Environment**

An intimidating, hostile, or offensive working environment which occurs when an employee is subjected to unwelcome sexual conduct based on gender that is pervasive or severe enough to alter the terms or conditions of the person's employment.

## Harassment: 6 – Harassment in the Workplace

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### Preventative Measures

To help avoid liability in harassment claims, employers should consider the following:

- **Company Policy**

Have effective, strongly worded policies prohibiting all types of workplace harassment (including sexual harassment and harassment based on any other protected class at the federal, state, or local level). Policies should also include a complaint mechanism and prohibit retaliation against employees for filing a complaint or participating in the investigation of a complaint of harassment.

- **Communication to Employees**

Distribute copies of the company's sexual harassment and non-harassment policies to all employees on an annual basis (and obtain signed receipt pages from employees).

- **Employee Training**

Provide non-harassment training for all employees on an annual basis.

- **Supervisory Training**

Provide additional training for managers and supervisors on recognizing harassment and steps to take if harassment occurs.

- **Enforcement**

Ensure the company's sexual harassment and non-harassment policies are enforced consistently and that any questionable behavior is addressed and discouraged. All complaints of harassment should be taken seriously and a designated company official should be responsible for conducting prompt, thorough and objective investigations of harassment complaints.

## Family and Medical Leave Act: 7

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The FMLA provides eligible employees with the following leave:

- up to 12 workweeks of unpaid, job protected leave in a 12-month period for qualifying family and medical reasons, including “because of any qualifying exigency” under the qualifying exigency leave.
- Eligible employees are also entitled to up to 26 workweeks of unpaid, job protected Military Caregiver Leave in a 12-month period under the FMLA.
- Employers are required to continue the employee’s preexisting health insurance coverage while on leave as if they were actively employed. Once FMLA leave has concluded, the employee must be reinstated to the same or an equivalent job with equivalent benefits, pay, and other terms and conditions.
- The FMLA applies to all private employers who employ 50 or more employees for each working day during each 20 or more calendar workweeks (not necessarily consecutive workweeks) in the current or preceding calendar year. Public agencies (including state, local, and federal employers), as well as, public and private elementary and secondary schools are covered under the Act regardless of the number of employees.

Employees are eligible for FMLA benefits provided the employee:

- has worked for a covered employer for at least 12 months (not necessarily consecutive)
  - has worked at least 1,250 hours during the previous 12 months
- and**
- at the time leave is requests either: a) worked at a worksite with 50 or more employees, or b) worked at a worksite with less than 50 employees if 50 or more employees are employed within 75 miles of that worksite.

### **Minimum Service Requirement (12 months)**

The 12 months of employment do not need to be consecutive months. Employment periods prior to a break in service of seven years or more need not be counted (certain exceptions may apply). If the employee is included on the payroll for any part of a week (including periods of paid or unpaid leave), during which other benefits or compensation are provided, the week is considered as a week of employment.

## Family and Medical Leave Act: 7

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### Minimum Hours Requirement (1,250 hours)

The determination of whether or not an employee has worked the requisite number of hours is based on hours worked as defined by the Fair Labor Standards Act (FLSA). The employee must have worked the minimum number of hours as of the date leave commences.

The FMLA may interact with various other laws and employee benefits including:

- the Americans with Disabilities Act (ADA)
  - workers' compensation insurance
  - short-term disability insurance
  - company paid time off (vacation, sick days, etc.)
- and**
- paid and unpaid leaves (state mandated leaves, disability leave, leave of absence, etc.).

### Reasons for Leave

- the birth of employees child or to care for such child
  - the placement of a child with the employee for adoption or foster care or in order to care for the newly placed son or daughter.
  - to care for a spouse, child, or parent (covered relation) with a serious health condition
  - the employee's own serious health condition that renders them unable to perform an essential function of their position
- or**
- any qualifying exigency arising out of the fact that a spouse, son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation.

The Act also entitles an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember to a total of 26 workweeks of leave during a single 12-month period to care for a covered servicemember with a serious injury or illness.

## **Workers' Compensation Insurance: 8**

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Workers' compensation insurance provides monetary benefits to employees who suffer work-related injuries or illnesses. The workers' compensation statute does not provide for any mandatory leave, however, employees who are injured on the job must be treated consistently with other employees who need time off of work for non work-related injuries or illnesses. Additionally, employers are prohibited from retaliating against employees for filing a workers' compensation claim.

When an employee suffers from an on the job illness or injury and requires time off, the following may need to be considered:

### **Family and Medical Leave Act**

Does the employee qualify for FMLA leave (or a similar state leave law)? Designate the leave as FMLA where applicable. The employee may be on FMLA leave while collecting workers' compensation benefits.

### **Company Disability Leave**

If the company provides a disability leave for non work related injuries or illnesses, the employer must offer the same leave to employees who are absent due to work related injuries or illnesses. This leave may run concurrently with FMLA leave as well.

### **Americans with Disabilities Act**

On the job injuries may result in a disability that is covered under the ADA or similar state laws. Employers may need to make a reasonable accommodation for an otherwise qualified individual with a disability. Additional time off may be a reasonable accommodation under the ADA. To be a qualified individual with a disability, the employee must be able to perform the essential functions of the job, with or without a reasonable accommodation.

### **Key Points to Remember**

- Document and investigate all workplace accidents.
- Report workplace accidents immediately.
- Keep in contact with injured workers while they are out.
- Consider offering light duty or alternate positions to allow injured employees to return to work earlier.

## **Employee Discipline and Termination: 9 - Employment-at-Will**

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Employment-at-will, a common law doctrine, generally enables the employee and employer to terminate the employment relationship at any time, with or without cause or notice, with the exception of any statutory prohibition. For example, an employer may not terminate an employee based on the employee's disability or membership in any other protected class, or to retaliate against the employee for filing claims for under-payment of minimum wage or claims alleging discrimination. The employment-at-will doctrine generally applies only to those employees who are not governed under a collective bargaining agreement or an employment contract.

Many state courts have found judicial exceptions to the employment-at-will doctrine in favor of employee challenges of wrongful discharge. Judicial exceptions to the employment-at-will doctrine may include:

- Breach of implied or express contracts, found to be created through written or oral promises of continued employment, and dismissal for just cause only. An implied contract is a verbal or written statement, often located in an employer's policies or handbook, implying continued employment that may bind an employer.
- Public policy violations, whereby an employee was terminated for exercising his statutory rights, i.e., serving jury duty, filing a workers' compensation claim, or whistle blowing (reporting wrong doing).
- Representation of good faith and fair dealing, which specifies that employers are required to act fairly and in good faith in all dealings with employees.

Contact your state Department of Labor or legal counsel regarding state statutes which may offer additional protection against discharge.

Montana has additional exceptions to employment-at-will. Employers in Montana should be particularly aware of state laws that limit employment-at-will.

## Employee Discipline and Termination: 9 - Progressive Discipline

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A series of warning steps is a common method of dealing with employee violations or performance issues. Each warning step results in a consequence that increases in severity the longer the undesirable behavior persists.

- **Set expectations for employees**

The use of progressive discipline gives the employee clear expectations and makes the employee aware of the consequences if poor performance or misconduct continues.

- **Provide documentation**

Following progressive discipline steps and documenting situations and actions creates a “paper trail” which can be useful if the employee files charges against the company with a government agency or a private attorney.

### Common Pitfalls to Avoid

- **Having a set progressive discipline policy published to employees**

While it is important that progressive discipline be applied consistently for similar offenses, it is not recommended that a discipline policy be published to employees. Employers should retain the right to suspend some or all progressive discipline steps and to terminate the employment relationship immediately, depending on the severity of the behavior. A written disciplinary policy, if not carefully worded (including disclaimers), could limit an employer’s flexibility and imply that an employee must be given a certain number of verbal or written warnings before they are subject to termination.

- **Failure to investigate**

Prior to taking adverse employment action against an employee, it is critical that the employer investigate the situation and ensure they understand all facets of the situation. Use caution when taking disciplinary action against an employee who has filed a complaint (either against the employer or a complaint of wrongdoing against another employee, such as sexual harassment). Employers who take adverse action against employees who have filed complaints of wrongdoing may be faced with charges of retaliation.

## Protected Activities and No Retaliation: 10

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There are numerous federal retaliatory discharge and anti-discriminatory laws that make it unlawful for an employer to terminate an employee for asserting rights under those laws.

### Retaliatory Discharge Laws

Some retaliatory discharge laws include:

- **The Fair Labor Standards Act** which sets minimum wage and overtime regulations, prohibits employers from terminating employees for filing a claim under the Act or assisting in any proceeding under the law.
- **The Occupational Safety and Health Act (OSHA)** provides employees with a safe, hazard free workplace. Employees cannot be terminated in retaliation for asserting their rights under OSHA.
- **The Family and Medical Leave Act** provides eligible employees with up to 12 weeks of unpaid leave for qualifying family and medical reasons including because of a qualifying exigency. The act also requires an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember to be entitled to a total of 26 workweeks of leave during a single 12-month period to care for a covered servicemember with a serious injury or illness. Employers are prohibited from discharging employees who exercise their right to take this time off under the FMLA.

Retaliation is an adverse action that an employer takes against an employee because he or she complained about discrimination, harassment or some other violation of an employment law. Employees who participate in an investigation under any of these laws may also be protected.

Adverse action may include, but is not limited to:

- demotion
  - discipline
  - termination
  - changing job duties
  - poor job evaluations
- and**
- a series of small adverse employment actions.

## Protected Activities and No Retaliation: 10

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### Anti-Discrimination Laws

- **Title VII of the Civil Rights Act of 1964** prohibits discrimination against employees on the basis of sex, race, color, national origin, and religion for employers with 15 or more employees.
- **The Age Discrimination in Employment Act** was designed to protect older workers (age 40 and older) against discrimination based upon their age. This law applies to employers with 20 or more employees.
- **The American with Disabilities Act** applies to employers with 15 or more employees. The ADA prohibits discrimination in employment against individuals on the basis of disability and requires covered employers to provide a reasonable accommodation to qualified individuals with disabilities, unless such accommodation causes an undue hardship to the employer.
- **The National Labor Relations Act** prohibits discrimination against employees for engaging in (or refusal to engage in) union activity. Nonunion employees who collectively work to improve or protest working conditions are also protected.
- **The Immigration Reform and Control Act** prevents employers with 4 or more employees from discriminating on the basis of national origin or citizenship status.
- **The Uniformed Services Employment and Reemployment Rights Act** prohibits discrimination on the basis of past, present or future military service and provides job protected leave for voluntary or involuntary service in the military.

**Note:** State anti-discrimination laws may vary.







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