

Human Resources Best Practices and Updates Concerning Your Workforce

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Overview

- Main Laws at Issue related to your Best Practices
 - Discrimination and Harassment
- Best Practices
 - Interviewing and Hiring
 - Performance Evaluation, Coaching, Discipline
- Medical Marijuana in Missouri
- COVID-19

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Why Should You Care About Employment Laws and Practices?

- Inappropriate conduct, including discrimination, harassment, and retaliation:
 - Is unfair and interferes with work
 - Affects productivity and morale
 - Causes valuable employees to leave
- Such **practices** look and are unprofessional and make employees and customers uncomfortable
- Such **practices** can be unlawful and lead to administrative charges and/or lawsuits



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Why Should You Care About Employment Laws and Practices?

- Other effects on the business
 - Dissatisfied employees
 - Turnover
 - Internal complaints
- Personal effect on you



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Laws

- Title VII of Civil Rights Act
- Age Discrimination in Employment Act
- Americans with Disabilities Act
- Missouri Human Rights Act
- Missouri Whistleblower Protection Act
- Many others

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Legally Protected Characteristics

- Race
- Color
- Religion
- Age
- Ethnicity
- National origin

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Legally Protected Characteristics

- Pregnancy
- Sexual orientation or gender identity
- Disability/handicap
 - Mental or physical
 - Actual or perceived
- Veteran status
- FMLA leave
- Military leave
- Persons who have engaged in "protected activity" under any employment law (i.e., complained internally or externally about discrimination, harassment or retaliation or assisted someone else in making such a complaint, whistleblowers).

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Discrimination

- Discrimination = basis (legally protected category) + tangible employment action + injury
- Disparate treatment
 - Treating a person less favorably than someone else because of that person's protected status
 - May be proven directly (i.e., because of statements made about the reason for the decision)
 - May be proven through circumstantial evidence (i.e., no legitimate, non-discriminatory reason for decision)
- Disparate impact
 - Neutral policy affects one protected status more than others

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Discrimination

- What Are Tangible Employment Actions?
 - Recruiting
 - Hiring
 - Promotion
 - Scheduling
 - Training
 - Discipline
 - Discharge/Termination

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Harassment

- Most people are familiar with the concept of sexual harassment
- It is also illegal to subject someone to harassment based on other protected characteristics
- Harassment can be committed by supervisor, employee/co-worker, or even a non-employee

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Harassment

- Verbal or physical conduct;
- that denigrates or shows hostility or aversion;
- toward a person because of the protected status of:
 - that person; or
 - his/her relatives, friends, or associates;
- and that:
 - has purpose or effect of creating intimidating, hostile, or offensive working environment; OR
 - has purpose or effect of unreasonably interfering with individual's work performance; OR
 - otherwise adversely affects individual's employment opportunities

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What Constitutes Harassment?

- Verbal
 - Slurs, comments, negative stereotyping, jokes, questions, ridicule, propositions, threats or intimidation, demands for favors
- Non-Verbal
 - Objects, pictures, e-mails, sounds/ noises, whistling, looks/leering, gestures, offensive materials
- Physical
 - Unwanted contact; touching, pinching, brushing up against someone; trapping a person in a room; assault; direct contact; throwing things at a person; sexual activity or intercourse

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Harassment

- Two kinds:
 - Quid pro quo — less common:
 - Submission to or rejection of sexual conduct
 - Used as basis for making employment decisions
 - Hostile work environment — more common

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Harassment and Discrimination

- Most discrimination/harassment cases are based, in part, on inappropriate conduct and language—even if not intended to be discriminatory or harassing.
- Even if you don't use inappropriate language or behavior, could be seen as condoning that conduct when you allow your employees to act that way without consequence.
- **When you hear or see it, do not ignore it.**

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Complaints: When You Get Them

- Take all reports seriously
- Reserve judgment
- Report it to HR
- Do not gossip; maintain confidentiality
- Cooperate in investigations

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Interviewing and Hiring

- Your primary goal in hiring is to identify and select employees with the skills and qualifications that are most likely to make them good employees for your business
- A secondary goal is to do so while minimizing exposure to lawsuits related to the selection process

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Interviewing: Do's

- Only ask job-related questions
- Ask all applicants the same or similar questions
- Keep your questions focused on the candidate's education, work experience, skills and abilities, along with the particulars of the job for which you are interviewing
- Ask whether applicant will be able to perform the essential job functions



TAKE NOTES!

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Interviewing: Don'ts

- How old / Date of birth
- U.S. Citizen
- Children / Child care arrangements
- Medical conditions
- Arrest record
- Bankruptcy
- Marital status



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Hiring: Selecting A Candidate

- Best practice – prepare a documents that explains your decision-making as to selection and starting pay
- Identify why you believed this applicant was the best qualified and the best fit – provide concrete examples
- Explain why other candidates were not as qualified or as good of a fit
- Do not make any reference to any candidate's protected characteristics

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Hiring: Offer Letter

- Conditions, if any (drug screen; background checks; signing of non-compete / non-disclosure agreement)
- Position
- Start date
- Salary or rate of pay
- Benefits
- At-will nature of employment



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Performance Evaluations and Coaching: What to Avoid

- Generalities
- Sarcasm or humor
- Manufacturing or over-emphasizing positives simply to make the employee feel better
- Direct comparisons to other employees
- Any references to protected characteristics or protected activity

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Discipline



- Verbal counseling or warning
- Written counseling, including final warning
- Suspension
- Demotion
- Discharge, Termination

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Discipline: Best Practices

- Make sure you have the facts straight
- Where appropriate, interview witnesses and get statements
- Pull together and preserve relevant documents
- Identify and review the rule or policy that may have been violated
- In most cases, the employee should be given a change to tell his or her side of the story

DOCUMENT!

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Discipline: Documentation

- *Documentation is incredibly important*
- Document the event and the discipline imposed – **even if it was verbal counseling or warning**



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Discipline: Documentation Do's

- Documentation **should** include:
 - Name of employee
 - Date discipline imposed
 - Date(s) of event(s) giving rise to discipline
 - Applicable rules or policies implicated
 - Summary of facts leading to discipline
 - Identify the discipline imposed (write-up, suspension)
 - Consequences of future misconduct, issues, or violations
 - Signature of manager

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Discipline: Documentation Do's

- You might also consider identifying prior discipline imposed on the employee and dates in the disciplinary documentation.
- **Keep all supporting documentation, including witness statements with a copy of the disciplinary documentation**

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Current Issues For Employers

- Medical Marijuana in Missouri
- COVID-19



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Medical Marijuana in Missouri

- As of November 2018:
- **Federal:**
 - Marijuana classified a Schedule I Narcotic
 - Manufacture, sale, distribution, and possession are illegal under federal law (Controlled Substances Act)
- **State:**
 - 33 states (plus D.C.) permit medical marijuana, including Missouri
 - 10 states (plus D.C.) permit recreational marijuana

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Medical Marijuana in Missouri

- November 2018 Election
 - Missouri voters approved "Amendment 2"
 - Amended Missouri's Constitution
 - Legalized medical use of marijuana for qualifying patients
 - Permits qualified persons to home grow



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Medical Marijuana: Can Employees be High at Work?

- Employees may not bring a cause of action for wrongful discharge or discrimination because the employer:
 - (1) prohibited the employee from being under the influence of marijuana while at work; or
 - (2) disciplined the employee for attempting to work while under the influence of marijuana
- So, employers may:
 - Continue to enforce prohibition of working under the influence
 - Adjust policies to prohibit smoking, ingesting, or otherwise consuming and/or using marijuana in the workplace

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Medical Marijuana: Drug Testing

- Generally, may continue drug testing (and related discipline) so long as consistent and non-discriminatory
- Safety Sensitive Positions (including DOT)
 - Employees subject to DOT testing may not use marijuana
 - Similarly, Missouri law does not permit a person under the influence of marijuana to operate, navigate, or be in physical control of any:
 - "Dangerous Device"
 - Motor vehicle, aircraft, or motorboat

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Medical Marijuana: Drug Testing

- Non-Safety Sensitive Positions
 - No "Breathalyzer" Equivalent
 - Drug Free Workplace v. Permissible Home Use
 - Reasonable accommodation?

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Medical Marijuana: Reasonable Accommodation

- But, do I have to accommodate them?
 - No duty to accommodate illegal drug use under ADA
 - ADA recovering addict provisions apply
 - Employer may have a duty to engage in the interactive process if reason to believe employee is disabled – use your reasonable accommodation forms!
 - Employer may also have to consider whether FMLA or other leave is appropriate for underlying medical condition
 - Absences caused by illegal drug use not protected

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Medical Marijuana: What Other Jurisdictions Are Saying

- “Illegal under federal law” is not a sufficient answer to deny use as an accommodation
- “Undue hardship” remains defense for employers in accommodation claims
- Employers will have strongest arguments with applicants/employees in safety-sensitive positions
- Employers are not required to accommodate intoxication, use, or possession in the workplace

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Medical Marijuana: Key Takeaways

- Review, revise, and brush-up on Drug Free Workplace and Testing policies
- Train supervisors to accurately identify, document, and address impairment/intoxication at work
- Supervisors and HR need to be aware of and have training on the ADA’s interactive process and reasonable accommodation

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COVID-19 in Missouri

- Missouri is currently fully reopened
- Governor Parson announced on June 11 that in Phase 2, there are no statewide public health orders
- Local officials were granted the ability to put further measures or regulations in place (such as mask requirements), but statewide, all restrictions were lifted



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COVID-19: Updated CDC High Risk Guidance

- June 25, 2020 – CDC expanded list of risk factors
- Those at risk of severe COVID-19 illness
 - Age – no longer limited to 65 and older; more of a sliding scale consideration
 - Chronic kidney disease (no longer limited to those undergoing dialysis)



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COVID-19: Updated CDC High Risk Guidance

- Chronic obstructive pulmonary disease (now distinguished from moderate to severe asthma)
- Obesity (BMI of 30 or higher)
- Immunocompromised state (weakened immune system) from solid organ transplant, which is now distinguished from other reasons a person might be immunocompromised

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COVID-19: Updated CDC High Risk Guidance

- Those at risk of severe COVID-19 illness - continued
 - Serious heart conditions, such as heart failure, coronary artery disease, or cardiomyopathies
 - Sickle cell disease, which is new to the list
 - Type 2 diabetes, which the CDC now distinguishes from Type 1 diabetes
 - Neurologic, genetic, metabolic conditions or congenital heart disease in children (in addition to children with medical complexities). This is a new addition to the CDC's list

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COVID-19: Updated CDC High Risk Guidance

- Why are these new categories important?
 - May be entitled to FMLA, or may consider providing other leave
 - "Leave taken by an employee for the purpose of *avoiding exposure* to COVID-19 would not be protected under the FMLA." DOL COVID-19 and the Family and Medical Leave Act Questions and Answers

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COVID-19: Updated CDC High Risk Guidance

- Employee can use FMLA only if the high-risk individual is suffering from COVID-19 complications, making it a serious health condition.
- Workers with underlying health condition that makes them high-risk may be entitled to an accommodation under the ADA
 - Older workers with underlying medical condition
 - Pregnant worker with underlying medical condition
 - Individual with heart disease

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COVID-19: General Guidelines

- Prepare to implement basic infection measures informed by industry best practices, regarding:
 - Protective equipment
 - Temperature checks
 - Testing, isolating, and contact tracing; and
 - Sanitation, including disinfection of common and high-traffic areas

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COVID-19: General Guidelines

- Modify physical workspaces to maximize social distancing
- Develop an infectious disease preparedness plan, including policies and procedures for workforce contact tracing where an employee tests positive for COVID-19

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COVID-19: General Guidelines

- **Monitor workforce for indicative symptoms**
 - **Missouri Guidance:** Do not allow symptomatic people to physically return to work until they are cleared by a medical provider
 - The CDC is not recommending requiring a negative test to return to the workplace in most circumstances. Exposed individuals need to simply follow CDC isolation guidelines before returning to the workplace.

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COVID-19: Revise, Update Policies


- Leave
- Workplace safety (including OSHA considerations)
- Layoff/furlough/recall
- Complaint reporting
- Attendance
- Working from home
- Employment agreements



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COVID-19 Resources

Ogletree.com/coronavirus-covid-19-resource-center/



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Thank you!

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