Employment Law Update

Bring it Back to the Basics

Presented by:
Oyvind Wistrom & Laurie A. Petersen
Lindner & Marsack, S.C.

Presentation Objectives

- Learn how to identify some of the most common mistakes made by HR professionals.
- Provide practical guidance on how to ensure HR professionals are treating applicants and employees lawfully during both the recruitment and onboarding process.
- Provide HR professionals with a toolkit to minimize the risk of employee litigation.

Topic 1: The Interview Process

What you cannot ask … no matter how much you want to know.

Legal Obligations During the Interview

- **Civil Rights Act of 1964 ("Title VII"):** "Prohibits employment discrimination based on race, color, religion, sex, and national origin." The threshold for coverage under Title VII is 15 employees.
- **Americans With Disabilities Act ("ADA"):** "It is illegal for an employer to discriminate against an applicant or employee with a disability." The ADA covers employers with 15 or more employees.
- **Age Discrimination in Employment Act ("ADEA"):** forbids age discrimination against people who are age 40 or older. The ADEA covers employers with 20 or more employees.
- **Wisconsin Fair Employment Act ("WFEA"):** Prohibits employment discrimination on the basis of age, race, creed, religious observance or practice, color, handicap, marital status, and sex. The WFEA applies to all employers with one or more employee.
- **General Rule:** Information obtained and requested through the pre-employment process should be limited to those essential for determining if a person is qualified for the job.

Interview Questions Do's and Don'ts

DO'S:

- U.S. EEOC guidelines suggest to employ "behavioral based" interview questions during the hiring process.
- Ask questions that provide insight about the candidate's experience, skills, and personality traits that are needed to perform the job.
- Strive to ask the uniform or similar interview questions to all job applicants.

DON'TS:

- Employers should not request information that discloses or tends to disclose an applicant's race, unless it has a legitimate business need for such information (i.e., affirmative action).
- Employers should not ask whether or not an applicant is a United States citizen before making an offer of employment.
- Employers should refrain from asking questions regarding marital status, number/ages of children, child care arrangements, etc.
- Employers *generally* cannot ask disability-related questions or require medical examination, until after an applicant has been given a conditional job offer.
- Employers should not ask questions regarding an applicant's religious affiliation or beliefs.
  - Note: Religious corporations, associations, educational institutions, or societies are exempt from the federal laws that the EEOC enforces when it comes to the employment of individuals based on their particular religion.

Examples of Appropriate Interview Questions

Work/Visa Status and Citizenship:

- *Don't ask: Are you a U.S. citizen? You sound like you have an accent; where are you from? Where were your parents born? What is your native language?*
- *Ask: Are you authorized to work in the U.S.? What languages do you speak (if relevant to the position)?*

Martial/Family Status:

- *Don't ask: Are you married? Do you have children? If so, what do you do for child care? Are you planning to have children soon?*
- *Ask: Are you willing and able to put in the amount of overtime and/or travel the position requires? Are you willing to relocate?*

Age:

- *Don't ask: How old are you? When were you born? How long have you been working?*
- *Ask: Are you at least 18 years of age? Do you have any concerns about handling the long hours and extensive travel that this job entails?*

Examples of Appropriate Interview Questions

Disability Status:

- *Don't ask: Do you have any disabilities or medical conditions? How is your health? Do you take any prescription drugs? Have you been diagnosed with a mental illness? Have you ever been an alcoholic? Have you ever been in rehab?*
- *Ask: Are you able to perform this job with or without a reasonable accommodation?*

Religion:

- *Don't ask: What is your religion?*
  - Note: An employer whose purpose and character is primarily religious is permitted to lean towards hiring persons of the same religion.
- Ask: Can you work on weekends? (Should only be asked if the position requires working on weekends, etc.)

Criminal Record:

- *Don't ask: Have you ever been arrested?*
  - Note: In Wisconsin, employers are not allowed to ask about arrests other than pending charges.
- *Ask: Have you ever been convicted of any crime other than a traffic violation?*
  - Note: Employer may ask about pending charges or convictions, as long as the employer makes it clear that these will only be given consideration if the offenses are "substantially related" to the particular job.

Topic 2: Rules for New Hires

I-9s, Tax Documents, Notifications, Reporting, etc.

Form I-9, Employment Eligibility Verification

- The Immigration Reform and Control Act ("IRCA") of 1986 requires *all* U.S. employers, regardless of size, to complete a Form I-9 upon hiring a new employee to work in the United States. (8 USCA § 1324a)
- Form I-9 is used to verify the identity and employment authorization of individuals hired for employment in the United States.
  - Employee must attest to his or her employment authorization AND present the employer with acceptable documents evidencing identity and employment authorization.
    - A list of acceptable documents is found on the last page of the form.
  - Employer must examine the employment eligibility and identity documents presented to determine whether the documents reasonably appear to be genuine and to relate to the employee and record the document information on the Form I-9.

Form I-9, Employment Eligibility Verification: Key Considerations

Accuracy and Precision:

- Errors on the I-9 can result in heavy fines and penalties.

Timeliness: It is the employer's responsibility to ensure that the I-9 is timely and properly completed.

- Section 1 of the I-9 MUST be completed no later than the first day of employment;
- Section 2 of the I-9 MUST be completed within three days of the first date of employment.
- Section 3 of the I-9 is only completed when employers are updating and/or reverifying for I-9.
  - Employers must reverify employment authorization of their employees on or before the work authorization expiration date recorded in Section 1 (if any).
    - NOTE: For reverification purposes, employers have the option of completing a new Form I-9 instead of completing Section 3.

Form I-9 Retention:

- Completed Form I-9s MUST be retained by the employer for 3 years after the date of hire or 1 year after the date employment ends, whichever is later. (8 CFR § 274a.2(b)(2)(i)-(ii))

Form I-9, Employment Eligibility Verification: Penalties

Civil Penalties can be issued for:

- Failure to complete Form I-9 in a timely manner (8 CFR § 274a.2(b)(1)(ii)),
- Failure to correctly complete all sections of Form I-9, (8 CFR § 274a.2(f)(2)), and
- Knowingly hired or to have knowingly recruited or referred for a fee, an unauthorized noncitizen for employment in the United States or to have knowingly continued to employ an unauthorized noncitizen in the United States (8 USCA § 1324(a)(1)(A)-(B)).

Maximum and Minimum Penalties for Form I-9 Violations (8 CFR § 274a.10(b)(2) as amended by 86 FR 57532): *Effective for penalties assessed after October 18, 2021, for associated violations that occurred after November 02, 2015*

- Minimum Penalty: $237
- Maximum Penalty: $2,360

ICE interprets its regulations to allow a fine for each error on an I-9 form and also fine a company based upon a percentage of I-9s that have substantive or uncorrected technical errors.

Employer Form I-9 Compliance Toolkit

- Ensure the employee completes Section 1 of Form I-9 at the time of hire.
  - They may do so before the time of hire, but *only* after the employee accepts the job offer.
- An authorized representative of the employer must physically examine the employee's documents and fully complete Section 2 of Form I-9 within three business days of hire.
  - At this time, ensure that Section 1 of Form I-9 was completed properly by the employee.
    - If any errors are found, have the employee correct any confirmed errors and add the employee's initials and the date the employee made the correction. Only employees can correct errors or omissions in Section 1.
  - Note: You must allow the employee to chose which documents they will present from the Form I-9 Lists of Acceptable Documents. You cannot specify which documents to present.
- Keep completed Form I-9 on file for each employee on your payroll who was hired after November 6, 1968.
- Once an employee stops working for the employer, then you can calculate the I-9 retention period:
  - If employee worked for less than two years, retain their form for three years after the date you entered the First Date of Employment field.
  - If they worked for more than two years, retain their form for one year after the termination date.

Form W-4, Employee's Withholding Certificate

- Every employer making payment of wages shall deduct and withhold upon such wages a tax determined in accordance with tables or computational procedures by the Secretary. (26 USCA § 3402(a)(1))
  - Form W-4 is an IRS document that employees must complete to inform employers of how much money to withhold from their paycheck for federal taxes.
- When Should Employees Complete Form W-4?
  - Employees should complete a Form W-4 when they are hired by the employer and when an employee's personal or financial situation changes (i.e., marriage or children). (26 USCA § 3402(f)(2)(A)-(B))
  - If employees claim exemption from income tax withholding, then they must give you a new Form W-4 each year.
  - No limit to the number of times an employee can fill out a new W-4.
- Form W-4 on file remains in effect until the employee provides a new one. (26 USCA § 3402(f)(4))

Form W-4: Employee and Employer Obligations

- When new employee is hired, you must have the employee complete a Form W-4.
  - Distribution of a Form W-4 can be either hard copy or via electronic system for receiving Forms W-4 from employees, as long as it complies with IRS regulations.
- Once an employee has the form, the employee is responsible for the completion and accuracy of the document.
- Employer then must enter the name, address, and Employer Identification Number on the bottom of the Form W-4, as well as the first date of the worker's employment.
- Employer should be sure to have new employees complete the form on or before the first date of employment, but *at least* before the first paycheck is issued. (26 USCA § 3402(f)(2)(A))
  - If employee fails to return the form in time, the employer will withhold taxes as if the employee is single with no withholding allowances.
- Nonresident alien employees, who are not residents of Canada or Mexico and who are not residents of Puerto Rico during the entire taxable year, are only allowed one withholding exemption. (26 CFR § 31.3402(f)(6)-1(a))

Form W-4: Invalid Form W-4

- What makes a Form W-4 invalid?
  - Any unauthorized change or addition to Form W-4
    - Including taking out any language by which the employee certifies that the form is correct, material defacing the form, or any writing on the form other than the entries requested.
  - If by the date the employee gives it to the employer, they indicate in any way that the information contained is false.
- If you get an invalid Form W-4:
  - Do not use it to determine federal income tax withholding.
  - Tell the employee that it is invalid and ask for another one.
  - If the employee does not give you a valid Form W-4, withhold taxes as if the employee is single or married filing separately with no entries in steps 2, 3, and 4.
    - However, if you have an earlier Form W-4 on file for the employee that is valid, withhold as you did before.

Form W-4: Recordkeeping Requirements

- Completed Form W-4s do not need to be submitted to the IRS
- After an employee completes and signs the Form W-4, employers must retain completed Form W-4s for four years. (see Publication 15, (Circular E), Employer's Tax Guide (2022))
  - This form serves as verification that the employer is withholding federal income tax, according to the employee's instructions and needs to be available for inspection, should the IRS ever request it.

Reporting Newly Hired Employees

- Federal Law: Requires employers to report basic information on new and rehired employees within 20 days of hire to the state where the new employees work. (42 USCA § 653(b)(2))

  NOTE: Some states require reporting newly hired employees sooner than what is required under federal law.

  - Federal law requires employers to collect and report seven data elements: (42 USCA § 653(b)(1)(A))
    - Employee's Name; Employee's Address; Social Security Number; Date of Hire; Employer's Name; Employer's Address; Federal Employer Identification Number.
- Wisconsin Law: Requires all Wisconsin employers and labor organizations with a Federal Employer Identification Number to report to the State Directory of New Hires within 20 days each newly hired employee and employees who are rehired after a separation of 60 days or more, including individuals who remain on the payroll during the separation. (Wis. Stat. § 103.05)
  - Form WT-4: Intended for new hire reporting
  - Form W-4: CAN be used for new hire reporting, if it includes the employee's date of birth and date of hire

Reporting Newly Hired Employees: Penalties

- In Wisconsin:
  - An employer that violates the provisions of Wis. Stat. § 103.05 may be required to forfeit up to $25 for each employee concerning whom a violation has occurred. (Wis. Stat. § 103.05(5)(a))
  - An employer may be required to forfeit up to $500 for a failure to supply the information required under sub. (2)(a) about an employee or for supplying false or incomplete information under sub. (2)(a) about an employee, *as a result of conspiracy between the employer and the employee to not supply the information or to supply false or incomplete information*. (Wis. Stat. § 103.05(6))

Topic 3: Family and Medical Leave Act of 1993 ("FMLA")

What qualifies for coverage under FMLA and what companies need to offer it.

FMLA: Overview

- Purpose of FMLA: (29 CFR § 825.101)
  - To provide workers the ability to balance the demands of work and family.
  - Entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave.
  - Employee is entitled to reinstatement to the same or equivalent position at conclusion of leave that they held when FMLA leave started.

Circumstances That Qualify for FMLA Leave

- Eligible employees may take up to 12 workweeks of FMLA leave in a 12-month period for the following qualifying reasons: (29 CFR § 825.112(a))
  - The birth of a child and to bond with the newborn child within one year of birth,
  - The placement with the employee of a child for adoption or foster care and to bond with the newly placed child within one year of placement,
  - A serious health condition that makes the employee unable to perform the functions of his or her job, including incapacity due to pregnancy and for prenatal medical care, or
  - To care for the employee's spouse, son, daughter, or parent who has a serious health condition, including incapacity due to pregnancy and for prenatal medical care.
- Eligible employees may take up to 26 workweeks of leave in a single 12-month period to care for a covered servicemember with a serious injury or illness, if the employee is a spouse, son, daughter, parent, or next of kin of the servicemember (referred to as military caregiver leave). (29 CFR § 825.100(a))

Wisconsin FMLA

- State FMLA (Wis. Stat. § 103.10). Covered employers must allow:
  - Up to six (6) weeks of family leave in a 12-month period for:
    - The birth of an employee's natural child, if the leave begins within 16 weeks of the child's birth.
    - Either the placement of a child with the employee for adoption or as a precondition to adoption (but not both) if the leave begins within 16 weeks of the child's placement.
  - Up to two (2) weeks leave in a calendar year to care for the employee's child, spouse, domestic partner, or parent, if the child, spouse, domestic partner, or parent has a serious health condition.
  - Up to two (2) weeks of leave in a calendar year for the employee's own serious health condition.

FMLA: Private-Sector "Covered Employers"

- "Covered Employers": (29 CFR § 825.104(a))
  - Covered by the FMLA if it employs 50 or more employees in 20 or more workweeks in the current or previous year.
    - An employee is considered to be employed each working day of the calendar week if the employee works any part of the week. The workweeks need not be consecutive.
- Employees who must be counted include: (29 CFR § 825.105)
  - Any employee who works in the U.S., or any territory or possession of the U.S.,
  - Any employee whose name appears on payroll records, whether or not any compensation is received for the workweek,
  - Any employee on paid or unpaid leave, as long as there is a reasonable expectation that the employee will return to active employment,
  - Employees of foreign firms operating in the U.S., and
  - Part-time, temporary, seasonal, and full-time employees.

FMLA: Integrated Employers

- A corporation is a single "covered" employer under the FMLA rather than its separate establishments or divisions. (29 CFR § 825.104(c))
  - —All employees of a corporation, at all locations, are counted for coverage purposes.
- Separate businesses may be part of a single "covered" employer for FMLA purposes, if they are an integrated employer. (29 CFR § 825.104(c)(2))
  - —Factors to be considered in determining if separate businesses are an integrated employer include:
    - Common management, interrelation between operations, centralized control of labor relations, and degree of common ownership or financial control. (29 CFR § 825,104(c)(2)(i)-(iv))
- For purposes of determining coverage under the FMLA, the employees of all entities making up the integrated employer must be counted.

FMLA: Joint Employers

- Joint Employers: Where two or more businesses exercise some control over the work or working conditions of the employee (such as with a temporary employment agency), the businesses may be joint employers under the FMLA. (29 CFR § 825.106(a))

- For purposes of determining employer coverage under the FMLA:

  - Employees jointly employed by two employers must be counted by both employers, even if the employees are maintained on only one of the employer's payrolls. (29 CFR § 825.106(d))

  - In joint employment relationships, only the primary employer is responsible for giving required notices to its employees, providing FMLA leave, and maintenance of health benefits. (29 CFR § 825.106(c))

FMLA: The "Eligible Employee"

- Eligibility requirements are the same for all employees, regardless of the reason for the leave request.
- Four Requirements of Eligible Employee: (29 CFR § 825.110(a))
  - —Works for a covered employer;
  - —Has worked for the employer for at least 12 months as of the date the FMLA leave is to start;
    - 12 months need not be consecutive – any combination of 52 weeks equals 12 months.
      - If the employee has a break of employment lasting seven or more years, the employer is not required to count the time worked prior to the break, unless:
        - Break in employment is due to service covered by the Uniformed Services Employment and Reemployment Rights Act, or there is a written agreement outlining the employer's intention to rehire the employee after the break in employment. (29 CFR § 825.110(b)(2))
  - —Has at least 1,250 hours of service for the employer during the 12-month period immediately before the date of the FMLA leave is to start; and
    - Only time actually worked, including overtime hours worked, is counted.
  - —Works at a location where the employer employs at least 50 employees within 75 miles of that worksite as of the date when the employee gives notice of the need for leave. (29 CFR § 825.111)

Circumstances That Qualify for FMLA Leave

- "Serious Health Condition": (29 CFR § 825.113(a))
  - An illness, injury, impairment, or physical or mental condition that involves *inpatient care* or *continuing treatment* by a health care provider.
    - FMLA does not apply to routine medical examinations, unless complications develop.
- "Incapacity": (29 CFR § 825.113(b))
  - Inability to work, including being unable to perform any one of the essential functions of the employee's position, or inability to attend school, or perform other regular daily activities due to the serious health condition, treatment of the serious health condition, or recovery from the serious health condition.
- "Treatment": (29 CFR § 825.113(c))
  - Includes but is not limited to examinations to determine if a serious health condition exists and evaluations of the condition.

Comparing Wisconsin's FMLA and Federal Law: Who Is Covered? Who Is Eligible?

	FEDERAL FMLA	WISCONSIN FMLA
EMPLOYERS COVERED	Employers of 50 or more employees in at least 20 weeks of current or preceding year (29 CFR § 825.104(a))	Employers of at least 50 permanent employees during at least 6 of the preceding 12 calendar month (Wis. Stat. § 103.10(1)(c))
EMPLOYEES ELIGIBLE	Have worked for employer at least 1,250 hours in preceding 12 months and employed for at least 12 months and employed at worksite by employer with 50 or more employees within 75 miles of that worksite (29 CFR § 825.110(a))	Have worked for employer at least 1,000 hours in the preceding 52 weeks and for at least 52 consecutive weeks (Wis. Stat.§ 103.10(2)(c))

Comparing Wisconsin's FMLA and Federal Law: Amount and Type of Leave

	FEDERAL FMLA	WISCONSIN FMLA
AMOUNT OF LEAVE	• 12 weeks during a 12 month period (29 CFR § 825.101); or – Note: Leave for birth, adoption, or to care for sick parent or child must be shared by spouses working for same employer. • 26 workweeks of leave during a 12 month period to care for a covered servicemember. (29 CFR § 825.100(a))	During a 12 month period: • 6 weeks for birth or adoption (Wis. Stat. § 103.10(3)(a)(1)) • 2 weeks for serious health condition of parent, child, or spouse (Wis. Stat. § 103.10(3)(a)(2)) • 2 weeks for employee's own serious health condition (Wis. Stat. § 103.10(4)(a))
TYPE OF LEAVE	Birth, placement of child for adoption or foster care within one year to care for parent, child, or spouse with serious health condition or employee's own serious health condition; qualifying exigency where employee's spouse, child, or parent is a covered military member on "covered active duty" (29 CFR § 825.112(a))	Birth, placement of child for adoption or foster care to provide for parent, child, spouse, domestic partner, or parent of domestic partner with serious health condition or employee's own serious health condition (Wis. Stat. § 103.10(3)(b)

Comparing Wisconsin's FMLA and Federal Law: "Serious Health Condition"

	FEDERAL FMLA	WISCONSIN FMLA
SERIOUS HEALTH CONDITION	• Illness, injury, impairment or physical or mental condition involving incapacity or treatment connected with inpatient care in hospital or hospice • Residential medical care in hospital, hospice, or residential medical care facility • Continuing treatment by a health care provider involving: — Incapacity or absence of more than 3 days from work, school, or other activities — Chronic or long-term condition incurable, or so serious if not treated would result in incapacity of more than 3 days — Prenatal care (29 CFR § 825.113)	A disabling physical or mental illness, injury, impairment, or condition involving inpatient care in a hospital, nursing home, hospice, or out patient care that requires continuing treatment or supervision by a health care provider. (Wis. Stat. § 103.10(g))

FMLA: Employer Notice Requirement

General Notice Requirement:

- Every employer covered by the FMLA is required to post prominently and keep posted on its premises a notice explaining the Act's provisions and providing information concerning procedures for filing complaints of violations of the Act with the Wage and Hour Division. (29 CFR § 825.300(a)(1))
- Employer shall provide general notice to each employee by including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights OR by distributing a copy of the general notice to each new employee upon hiring. (29 CFR § 825.300(a)(1))
  Eligibility Notice Requirement (29 CFR § 825.300(b) and (c)):
- Employer Eligibility Notice: When an employee requests FMLA leave or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason:
  - Employer must notify the employee of the employee's eligibility to take FMLA leave within 5 business days, absent extenuating circumstances.
  - Notice must state whether the employee is eligible for FMLA as defined in 29 CFR § 825.110. If not eligible, the notice must state why.
- Employers shall provide written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these expectations. (29 CFR § 825.300(c))

FMLA: Employee Notice Requirement

Employee Notice Requirement for Foreseeable FMLA Leave:

- Timing of Notice:
  - Employee must provide the employer at least 30 days advance notice before FMLA leave is to begin, if the need for the leave is foreseeable. (29 CFR § 825.302(a))
    - If 30 days notice is not practicable, because of lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable. (29 CFR § 825.302(a))
      - "As Soon as Practicable": As soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. (29 CFR § 825.302(b))
    - In cases where the employee is required to provide at least 40 days notice of foreseeable leave and does not do so, the employee shall explain the reasons why such notice was not practicable, upon a request from the employer for such information. (29 CFR § 825.302(a))
- Content of Notice:
  - Employee shall provide at least verbal notice sufficient, to make employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. (29 CFR § 825.302(c))
    - Employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially FMLA-qualifying.
    - Failure to respond to reasonable employer inquiries may result in denial of FMLA protection if employer cannot determine a FMLA-qualifying reason for leave.

FMLA: Designation of FMLA Leave

- An employee giving notice of the need for FMLA leave need not expressly assert their rights under the Act or even mention the FMLA to meet his or her obligation to provide notice. (29 CFR § 825.301(b))
- Employee giving notice of the need for FMLA leave must explain the reasons for the needed leave to allow employer to determine whether the leave qualifies for FMLA. (29 CFR § 825.301(b))
  - If the employee fails to explain the reasons, leave may be denied.
- The employer's decision to designate leave as FMLA-qualifying must be based only on information received from the employee or the employee's spokesperson (e.g., if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, etc. may provide notice to the employer of need to take FMLA leave). (29 CFR § 825.301(a))
  - In any circumstance where the employer does not have sufficient information about the reason for an employee's use of leave, the employer should inquire further of the employee or spokesperson to ascertain whether leave is potentially FMLA-qualifying.
- Once the employer has acquired knowledge that the leave is being taken for FMLA reason, employer must notify the employee as provided in 29 CFR § 825.300(d).

Topic 4: Harassment

Red flags to follow up on.

Defining Harassment

- Harassment is a form of employment discrimination that violates Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967 ("ADEA"), the Americans With Disabilities Act of 1990 ("ADA"), and /or the WFEA.
- As defined by the EEOC, harassment is unwelcome conduct that is based on race, color, religion, sex (including sexual orientation, gender identity, or pregnancy), national origin, older age, disability, or genetic information.
- Harassment becomes unlawful where:
  - Enduring the offensive conduct becomes a condition of employment, or
  - The conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.
- Anti-discrimination laws also prohibit harassment against individuals in retaliation for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or lawsuit under anti-discrimination laws or opposing employment practices that they reasonably believe discriminate against individuals in violation of anti-discrimination laws. (42 USCA § 2000e-3)

Defining Harassment

- Offensive conduct may include, but is not limited to:
  - Offensive jokes, slurs, epithets, or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance.
- "The Harasser":
  - Can be the victim's supervisor, a supervisor in another area, an agent of the employer, a coworker, or a nonemployee.
- "The Victim":
  - Does not have to be the person harassed but can be anyone affected by the offensive conduct.

Employer Liability for Harassment

- Harassment by Supervisor:
  - Under federal law, employers are automatically liable for harassment by a supervisor that result in a negative employment action (i.e., termination, failure to promote or hire, and loss of wages).
    - If the supervisor's harassment results in a hostile work environment, the employer can avoid liability only if it can prove that: 1) it reasonably tried to prevent and promptly correct the harassing behavior; and 2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer.
  - Strict liability under Wisconsin law if the owner or an agent under the principle of respondent superior engages in sexual harassment.
- Harassment by Nonsupervisory Employees or Nonemployees Over Whom It Has Control:
  - Under federal and state law, the employer will be liable for the harassment, if it knew or should have known about the harassment and failed to take prompt and appropriate corrective action.

Best Practices in Responding to Internal Complaints of Harassment

- Once a claim is made, preserve any relevant emails, memos, and other documents.
- If the company has Employment Practices Liability Insurance (EPLI), notify carrier promptly of the claim.
- Choose a qualified, neutral individual to investigate the complaint.
- Treat the complaining party with respect and assure the complaining party, at the outset, that the complaint will be treated seriously and that there will not be any retaliation for raising it.
  - Specify that any concerns regarding retaliation for making the internal complaint should be brought to the investigator's attention immediately.
- Promptly and thoroughly investigate the complaint (including those that may initially appear to be meritless).
  - Failure to treat a complaint seriously can exacerbate the problem and the corresponding employer liability.
  - If the investigation is delayed for whatever reason, document the reason for the delay to establish a record as to why the employer did not begin the investigation immediately.
- Instruct the accused not to contact the complainant, regarding the complaint, and not to engage in conduct that is—or even might be viewed as—retaliatory.
  - If the accused violates these instructions, then take action immediately.

Best Practices in Responding to Internal Complaints of Harassment – Cont.

- Depending on the circumstances, it may be appropriate for the employer to take immediate steps with respect to the employee who raised concerns.
  - For example: placing the alleged wrongdoer on paid or unpaid leave, pending the outcome of the investigation, allowing the complainant paid time off during the investigation, altering work assignments so that an alleged harasser does not work directly with or supervise the complainant, and ensuring that all supervisors understand that retaliation will not be allowed.
- Refrain to coming to a conclusion that incorporates legal concepts such as "his conduct constituted sexual harassment."
  - Such terminology may be inaccurate under applicable legal standards and may also be argued to be an admission of liability, in future litigation even if incorrect.
    - Examples of appropriate conclusions include: "the company's policy was violated" or "based on the evidence, I cannot determine that the company's policies were violated."
- If it is determined that a policy was violated and inappropriate conduct occurred, then it should take appropriate disciplinary action. Appropriate disciplinary action depends on the severity of the situation.
  - Document the discipline carefully, although specifics about the investigation should not go into personnel files.

Topic 5: Document Retention

Which items can be tossed when an employee leaves and which will cost money if not handled correctly.

Document Retention

- All Personnel or Employment Records: EEOC Regulations require that private employers keep all personnel records for 1 year from the date of termination. (29 CFR Part 1602)
- Payroll Records:
  - ADEA also requires that employers keep on file any employee benefit plan (such as pension and insurance plans) and any written seniority or merit system for the full period the plan or system is in effect and for at least 1 year after its termination.
  - FLSA also requires employers to keep for at least 2 years of all records (including wage rates, job evaluations, seniority and merit systems, and collective bargaining agreements) that explain the basis for paying different wages to employees of opposite sexes in the same establishment.
- Form W-4: After an employee completes and signs the Form W-4, employers must keep it in their records for at least 4 years. (See Publication 15, (Circular E), Employer's Tax Guide (2022))
- Form I-9: Employer must retain I-9 for 3 years after the date of hire, or 1 year after the employment ends, whichever is later. (8 CFR § 274a.2(b)(2)(i)-(ii))

Questions?

Oyvind Wistrom & Laurie A. Petersen
Lindner & Marsack, S.C.
411 E. Wisconsin Avenue, Suite 1800
Milwaukee, Wisconsin 53202-4498
Phone: 414.273.3910
owistrom@lindner-marsack.com
lpetersen@lindner-marsack.com
www.lindner-marsack.com