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Employment & Labor Law Solutions Worldwide

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H.R. & Employment Laws

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Employment Law Basics



Employment at Will

- *Employment At Will*: originally meant that either the employee or the employer could terminate the employment relationship at any time for a good reason, a bad reason, or no reason at all.
- Today, *Employment At Will* exists only when employee is NOT hired for a term, and means that the employee or the employer may terminate the employment relationship at any time for any reason except an unlawful reason.
- Exceptions include violation of law or public policy, and lack of “good faith” or “fair dealing”.

Good Faith & Fair Dealing

The defendant violated the implied promise of good faith and fair dealing if you find that it is more likely true than not true that the defendant deprived the plaintiff of a benefit of the contract:

- 1. intentionally; or
- 2. by acting in a manner that a reasonable person would regard as unfair.

Sources of Employer Obligations

Common Law

Contracts

Implied Contracts

Employee Handbooks & Policies

Local Ordinances & Regulations

State Statutes & Regulations

Federal Statutes, Regulations
& Executive Orders

FAIR CREDIT REPORTING ACT

When using a consumer report for an employment purpose, employers must:

- Obtain consent.
- Notify employee/applicant when an adverse action is taken on the basis of such reports, and
- Identify the source of the report, so that the accuracy and completeness of the report may be verified or contested.

An Employer's Duty Under Common Law

Negligent hiring, retention, and supervision:

- **Employers may be liable when an employee harms others, if the employer knew or should have known of the employee's propensity to cause such harm.**



Federal Anti-Discrimination Laws



A Primer for HR/Employee Relations



The Equal Pay Act (1963)



- Prohibits discrimination on the basis of sex with respect to wages paid for equal work (if the jobs require equal skill, effort and responsibility, and are performed under similar working conditions)
- Permits differences in pay between men and women for equal work if linked to a seniority system, a merit system, a quantity/quality of production system, or a differential based on any factor other than sex.

Title VII of the Civil Rights Act of 1964

- Title VII prohibits discrimination because of race, color, creed, national origin, ethnicity, sex and religion.



The Age Discrimination in Employment Act (1967)



- The ADEA prohibits discrimination against individuals age 40 and older because of age
- Includes prohibitions against age-based preferences between employees who are both age 40+

Arises frequently in the context of hiring, promotions and layoffs



The Pregnancy Discrimination Act (1978)

- The PDA prohibits discrimination because of pregnancy, childbirth or related medical conditions
- Amended Title VII to bring these characteristics under the umbrella of sex discrimination

Be cautious of hiring/firing decisions, transfers and work assignments, physical restrictions

The Americans with Disabilities Act (1990)



- The ADA prohibits discrimination because of a disability (a physical or mental impairment that substantially limits a major life activity)
- The ADA prohibits discrimination because of a history of a disability
- The ADA prohibits discrimination because someone is perceived as having a disability)

Employers must reasonably accommodate qualified individuals with disabilities unless it poses an undue hardship

Requires an interactive process with the employee and possibly his/her healthcare provider



The Genetic Information Nondiscrimination Act (2008)

- GINA prohibits discrimination against employees or applicants because of “genetic information”
- Genetic information is defined broadly to include genetic information about the applicant/employee, as well as general family health history (that is not just genetic)

Cannot seek it, receive it or disclose it

State Law Expands Protected Status

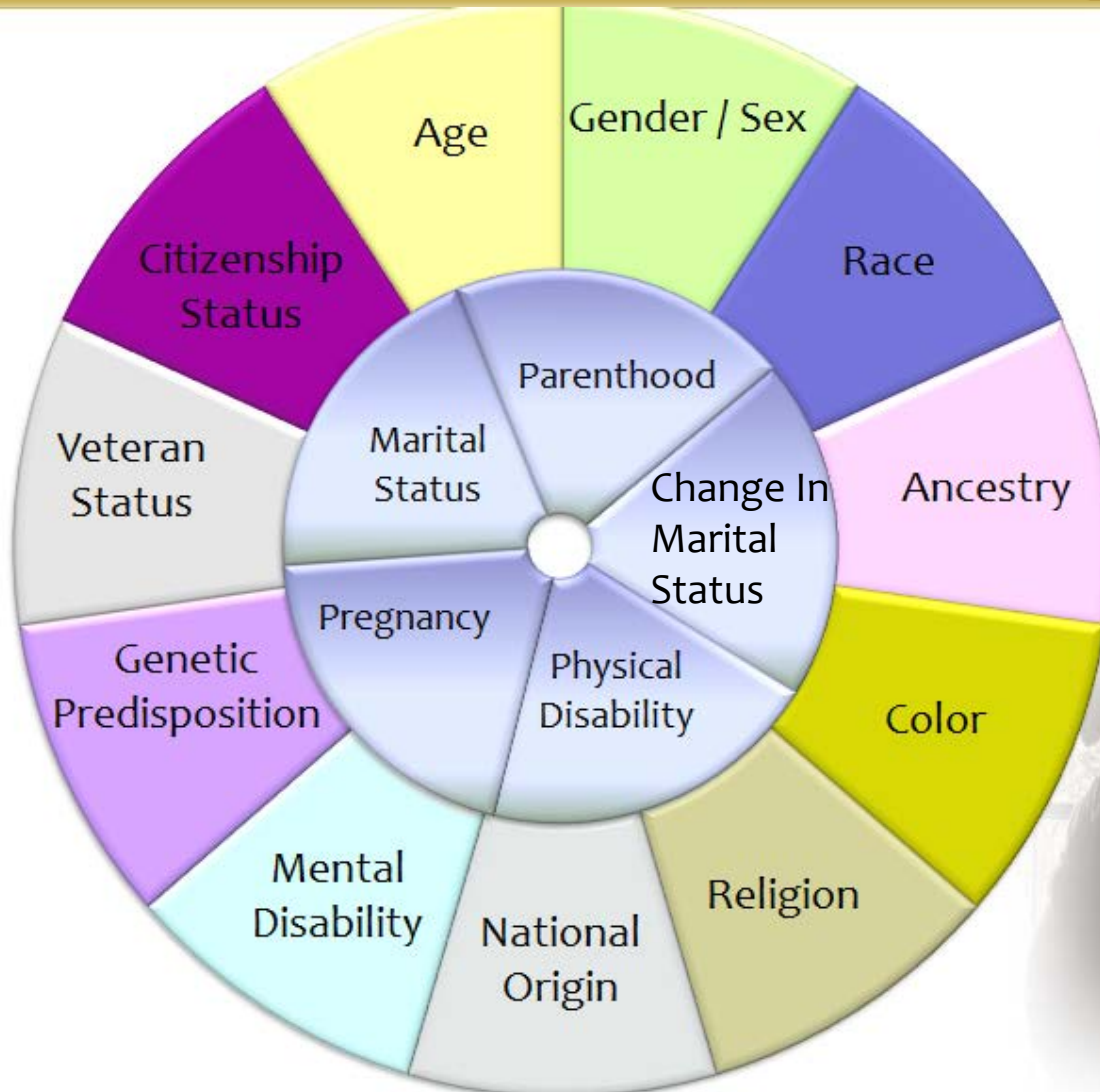
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Alaska



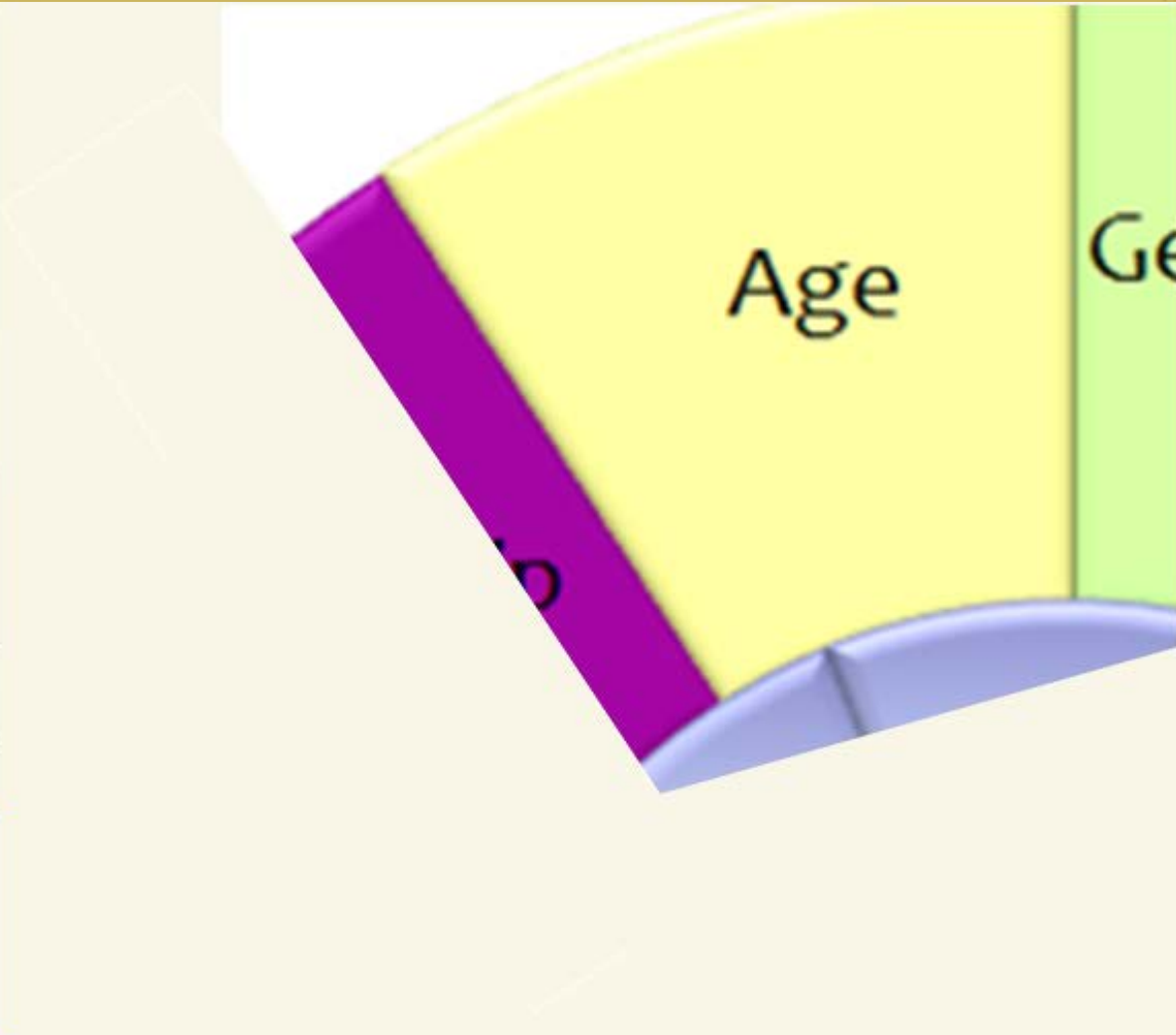
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Anchorage





A Closer Look: *Discrimination, Harassment and Retaliation*



What Does the Law Require?



No Retaliation

Reasonable Accommodation
(Religion and Disabilities)

No Harassment

No Discrimination

Unlawful Discrimination

When employment decisions or other actions are taken based on a “protected category” and these actions interfere with equal employment opportunities





What Discrimination Looks Like

- The complained of action must be because of the protected characteristic (not everything employees perceive as unfair is discriminatory)
- **Types of Discrimination**
 - Disparate treatment (intentional)
 - Disparate or adverse impact (neutral policy has discriminatory effect)
- **Can include intra-group discrimination**

Consistency

Are there any coworkers who were treated differently under similar circumstances?

The Cat's Paw theory expands liability where the decision maker did not know

HR investigations can be infected by the bias of others

- An employee may establish unlawful employment discrimination when a biased non-decisionmaker influences an unbiased decisionmaker to take action that he or she otherwise would not take
- The Court unanimously rejected a “hard and fast” rule that an independent investigation cancels effect of prior discrimination

Staub v. Proctor Hospital (2011)



What Is Harassment?



- Harassment is a form of discrimination.

What's Included In Harassment

- Verbal, physical, written, or visual conduct
- Unwelcome
- Offensive to a reasonable person
- Because of a protected characteristic
- Affects employment



Verbal, Written or Physical Acts



VERBAL

- Jokes
- Questions
- Slurs, innuendos
- Over the top compliments or comments



WRITTEN

- Suggestive or obscene notes, texts, online posts
- Cartoons
- Drawings
- Photos



PHYSICAL

- Touching
- Groping
- Gestures

Unwelcome



- If conduct is harassing or discriminatory to *one* person, it's prohibited
- Just because certain conduct is welcome does not mean *all* conduct is welcome

Unwelcomeness

Every employee needs to pay attention to the responses of all others



- Verbal response (or lack of one)
- Expression changes
- Body language

Offensive



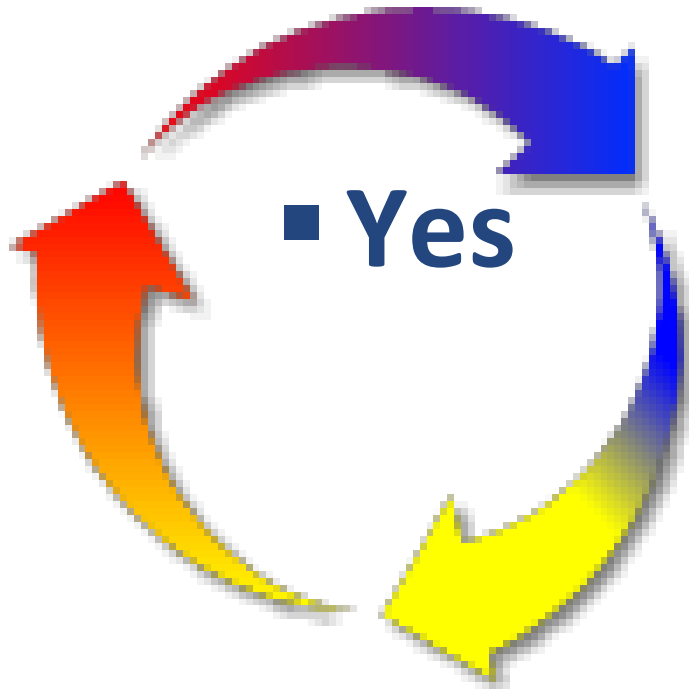
- Good Rule of Thumb-
- What would you think if the conduct was directed at your spouse, parent or child?

Affects Employment



- Conduct must be “severe” or “pervasive”
- **Severe** – How “bad” is the conduct?
- **Pervasive** – How often is the conduct occurring?

Can A Single Incident Be Enough?



■ No

Types of Harassment



- **Quid Pro Quo**

- Requires some tangible employment action, threat of loss or promise of benefit

- **Hostile Environment**

- Conduct that creates an intimidating or hostile work environment sufficient to alter the terms and conditions of employment
- Can include comments, conduct, jokes, e-mails, images, physical touching, and more



Words Kill





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REMEMBER:

Conduct prohibited
under company policies
may expand what a
court would find to be
unlawful



Your Policy Rules!

Liability for Harassment by Managers & Supervisors

- Strict liability
- Employer need not know about it
- Alaska Uses Broad Definition of “Supervisor”
for purposes of liability

Liability for Harassment by Non-Supervisors

- Triggered by “Notice” where employer knew or should have known and failed to take immediate, appropriate corrective action.

Employers May Be Liable For Harassment Committed By Third Parties

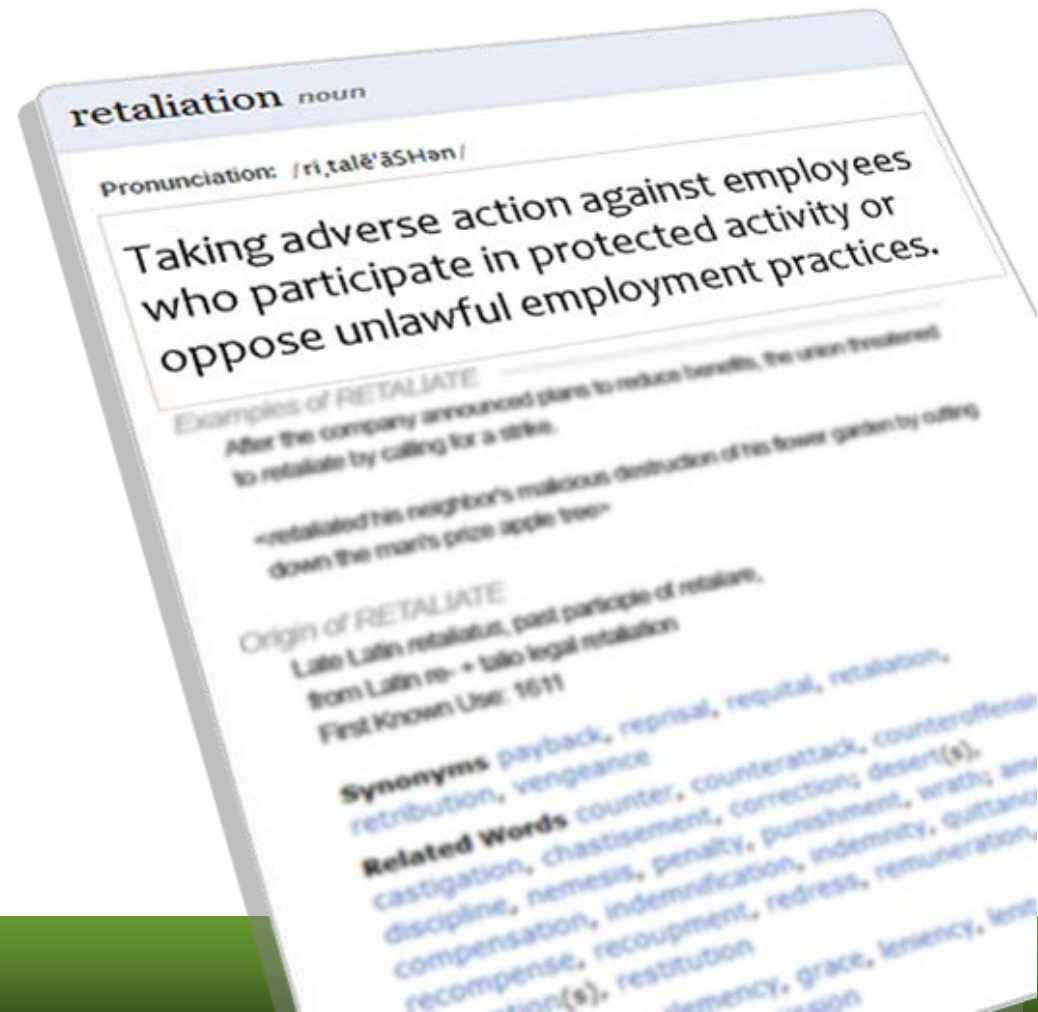
- If a supervisor or manager has knowledge of inappropriate behavior, the company is responsible, even if the misbehaving person is a client, vendor or visitor

- Nonemployees working under contract with the organization also have the right to be protected from harassing conduct.



Retaliation

Taking adverse action against employees who participate in protected activity or oppose unlawful employment practices.



Federal Whistleblower & Anti-Retaliation Acts



- Discrimination
 - Title VII
 - ADEA
 - ADA
 - FMLA
 - Equal Pay Act
 - GINA
 - Rehabilitation Act
- Union Activity (NLRA)
- Wage and Hour (FLSA)
- SOX
- False Claims Act
- Immigration (IRCA)
- Safety (OSHA)
- Workers Compensation
- Military (USERRA)
- Environmental Laws
- Banking Laws
- Bankruptcy

Alaska Laws Against Retaliation



- Some Alaska statutes:
 - Employment discrimination, AS 18.80.220
 - Workplace Safety, AS 18.60.089
 - Wage & Hour, AS 23.10.135
 - Workers Compensation, AS 23.30.020, AS 23.30.247
 - Alaska Whistleblower Act, AS 39.90.110 (Public Employers)
 - Jury service, AS 09.20.037
- Alaska common law: an employer may not retaliate in violation of public policy, including where employees have:
 - Filed safety complaints
 - Testified in a legal proceeding

Breaking It Down: Elements Common To Most Retaliation Claims



A. Employee's initial burden of proof:

1. Protected Activity
 - Participation
 - Opposition
2. Adverse Employment Action
3. Causal Nexus: element (2) resulted from element (1)

The Employee's Burden: Examples of Participation in Protected Activity

- Filing a complaint alleging discrimination
- Expressing intent to file discrimination charge
- Defending oneself from sexual harassment charges
- Complaining about not being paid overtime
- Taking a medical leave of absence
- Questioning accounting or billing practices as improper
- Engaging in union-related activity
- Requesting a meeting about an employment policy
- Testifying as a witness in employment dispute

The Employee's Burden: "Opposition"



Examples:

- Making internal reports about non-compliance with environmental regulations
- Refusing to violate a safety law
- Questioning an apparent price-fixing scheme
- Objecting that fellow employees are being discriminated against

The Supreme Court Widens the Target

The Court has broadened the definition of “opposing” discrimination

- An employee does not need to engage in active opposition to warrant protection against retaliation – responding to questions during an internal investigation protects the employee against retaliation
- The Court explained that any time an “employee communicates to her employer a belief that the employer has engaged in ... a form of employment discrimination, that communication virtually always constitutes the employee’s opposition to the activity”

Crawford v. Metropolitan Government of Nashville (2009)

Protected Activity: What is Not Protected (Generally Speaking)

- Disruptive Behavior: e.g. interruption of business meetings
- Disobeying reasonable work rules
- Knowingly false allegations
- Neglect of job duties
- “Blowing the whistle” after the job ends.



What is Not Protected Activity (Generally Speaking)

- What if the employee has engaged in unlawful conduct ???



Protected activity and adverse action must be causally connected

Causal connection is established when a protected act or otherwise illegitimate consideration is a motivating factor in a decision or action that is materially adverse to the employee.



Timing may be everything!



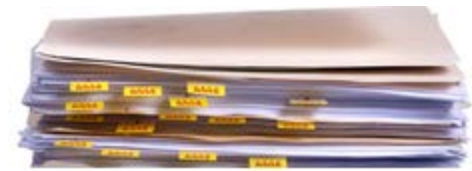
Temporal proximity alone may indicate that an adverse employment action was motivated by a discrimination complaint, but **“as the period of time separating the two lengthens, the hint of causation weakens.** In this case, the five-month interval had so weakened the hint of causation that the proximity between Smith's complaint and his termination, without more, did not raise a question of material fact on whether his termination was motivated by the complaint.”

Smith v. Anchorage School District, 240 P3d 834 (Alaska 2010)

Protected Activity Redux: Theft of Company Documents

- Plaintiff employee's theft of multiple personnel files for use in her own discrimination lawsuit is **PROTECTED ACTIVITY**

Quinlan v. Curtiss-Wright Corporation, 204 N.J. 239 (N.J. 2010)



- Employee steals confidential personnel documents from his supervisor's office and shows them to affected employees. Termination is proper, and damages are limited.

O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756 (9th Cir. 1996)

Adverse Action: “Materially Adverse”

- Law does not protect against “petty slights, minor annoyances, and simple lack of good manners”
- Also, “context matters”
 - *Burlington Northern v. White*, 126 S.Ct. 2405 (2006)
- But the bar is low:
 - A remedy is available to anyone “arguably sought to be protected” by anti-retaliation statute
 - *Thompson v. North American Stainless, LP*, 131 S.Ct. 863 (2011)

Adverse Action: Less Obvious Examples

- Change of title or job duties
- Denial of promotion
- Transfer or schedule change
- Increased workload
- Heightened scrutiny
- Increased discipline
- Poor evaluations
- Defamation or name-calling
- Threats, workplace harassment



Adverse Action: It's not just management versus employee at the workplace

- Job applicants
- Subcontractor's employees
- Coworker retaliation or harassment
- Activities away from work
- Retaliation against family members



Adverse actions directed at family members

An employee and her fiancé both worked for the employer. Three weeks after she filed a sex discrimination charge with the EEOC, her fiancé was fired.

- In a unanimous decision, the Court held that a reasonable worker obviously might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired.

Where is the line?

- “We expect that firing a close family member will almost always meet the *Burlington* standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize.”

Thompson v. North American Stainless, LP, 131 S.Ct. 863 (2011)



Ten Costly Mistakes

1. Faulty investigations: biased, unsupported conclusions and inadequate fact finding
2. Company policies: those not followed and those selectively applied
3. Documentation: too much and too little
4. Ignoring comparable employees
5. Role confusion by HR



Ten Costly Mistakes

6. Close timing between protected activity and adverse action
7. Evidence of supervisor's ill will
8. Reporting procedures that don't work
9. "Lost" or destroyed documents
10. Forgetting that retaliation is not just about termination



Solutions to Avoid Costly Mistakes: Create a Culture of Compliance

1. Update or implement express anti-retaliation policies
2. Implement complaint procedures that allow employees to speak out without fear
3. Train supervisors and employees
4. Keep a healthy balance between HR and Operations



Solutions to Avoid Costly Mistakes: Use Basic Good HR Practices

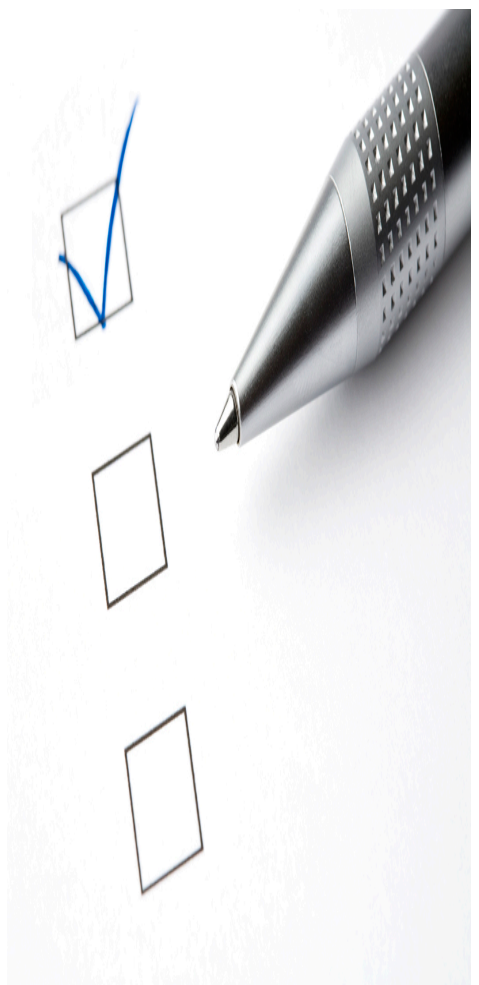
5. Documentation NOW must support LATER defenses to retaliation claims
 - Disciplinary actions
 - Performance reviews
6. Conduct investigations that are thorough, fair and unbiased
7. Carefully review all serious discipline or termination actions to ensure they are defensible against retaliation claims



Review process for serious discipline and terminations

In addition to all else that should be reviewed, the following must be carefully examined:

- **Did the employee engage in protected activity?**
 - If yes, is there a causal/temporal connection to the reasons for terminating the employee? How long has it been
 - If yes, are the reasons for termination or other discipline documented?
 - Is the decision maker biased against the employee for reasons related to the protected activity? Evidence of stray remarks?
 - Is the investigation flawed?





One Step Further

The Duty to Accommodate



- **Bona Fide Religious Beliefs (Title VII)**
 - Amended Title VII in 1972 to add this requirement
 - Accommodation of sincerely held religious beliefs/practices that conflict with work requirements
 - Undue hardship standard (less stringent than ADA)
- **Qualified Individuals with Disabilities (ADA)**
 - Reasonably accommodate unless it poses an undue hardship
 - Undue hardship is a high standard

Reasonable Accommodation Under the Americans with Disabilities Act



Who is Protected?



- A job applicant or employee with a “disability”
- Who can perform the essential functions of the current job (or a suitable alternative)
- With or without reasonable accommodation

Accommodation

What can we do to help you do your job?



Requires an interactive process with the employee and possibly his/her healthcare provider

The Interactive Process



- ✓ Employer is ON NOTICE and should initiate the Interactive Process when:
 - the employee requests
 - the employer recognizes the need (even if employee has not expressly asked)
- ✓ Identify precise limitations – Employer may seek medical information when disability is not obvious or when uncertain that the disability requires requested accommodation
- ✓ Identify essential and nonessential functions
- ✓ Identify potential accommodations
- ✓ Implement!

Evaluating Religious Accommodation Requests

- Exactly what is being sought?
 - Is it one-time, sporadic, or regular?
 - Is there another way for the individual to achieve the same goal? (i.e. religious stricture or personal preference?)
 - What does the employee suggest?
- Do you need more information about the religious context?
- What will be your evidence of “undue hardship?”
 - What is the cost of accommodating: monetary, safety, efficiency, impact on customers or other employees?


Family Medical Leave Act

Eligibility and Reasons for Leave



Who is Eligible for FMLA?*

Employees Who...

- 
- Experience a qualifying reason for leave
 - Work for a covered employer (50+ employees total)
 - Have accumulated **12 months** of service
 - Breaks in service may count
 - Non-FMLA leave ripening into FMLA leave
 - Presumed met if no time records
 - Worked **1,250 hours** in last 12 months
 - Work at a jobsite with **50+ employees within a 75-mile radius**

**ineligibility for FMLA may not = ineligibility for medical leave*

Reasons for Leave

- **Birth or placement** of a child (12 weeks in a single 12-month period)
- **To care for a spouse, parent or child** with a serious health condition (12 weeks)
- **The employee's own serious health condition** (12 weeks)
- **A qualifying exigency** (12 weeks)
- **To care for a covered servicemember** (26 weeks)



Birth or Placement of a Child

Bonding Leave

- **Mom and Dad both allowed**
 - Leave for prenatal care/incapacity
 - Adoptive requirements
 - Birth/placement
- **Husband and wife rule**
 - As long as baby is healthy
- **Within 12 months of birth**
- **Single block of leave unless employer agrees otherwise**



“Serious Health Condition”

An illness, injury, impairment or physical or mental condition that involves:

1. **Inpatient Care (overnight stay or subsequent treatment in connection with that stay)**
2. **Continuing Treatment**
 - a) Incapacity of 3+ consecutive days and
 - a) Treatment 2+ times within 30 days; or
 - b) A regimen of treatment
 - b) Pregnancy or prenatal care
 - c) Chronic condition
 - d) Permanent or long-term condition
 - e) Condition requiring multiple treatments



Family Care Leave



- **Serious Health Condition: parent, spouse, child**
- **Available where family member is unable to care for own basic medical, hygienic or nutritional needs (activities of daily living standard)**
- **Available for transport to/from medical appointments**
- **Includes providing psychological comfort**
- **Employee does not have to be only person available**



“Providing Care” Takes on a New Meaning



- Employee requested FMLA time to take her terminally ill mother on a “make a wish” type trip to Las Vegas.
- Employee said she would be absent from work for six days to care for her mom during the trip and asked for FMLA—employer denied the request.
- Employee went anyway, and was fired.
- In addition to administering her mom’s medicine and generally looking after her while in Vegas, the employee also “spent time with her mother **playing slots, shopping on the strip, people-watching, and dining at restaurants.**”
- Employee fully acknowledged that her mom was not heading to Vegas for medical care, therapy or any kind of treatment.
- Court said that FMLA doesn’t require medical treatment—it just requires care—which the employee had to provide her mother (bathing, feeding, assistance moving, etc.).
- Judgment for the plaintiff—affirmed by the Court of Appeals.



--Ballard v. Chicago Park District, 741 F.3d 838 (7th Cir. 2014)

Family Members for Family Care Leave

- **Parent**
 - Biological, adoptive, foster, step
 - No in-laws
 - *In loco parentis*
- **Child**
 - Under age 18 (unless mental/physical disability, or qualifying exigency leaves)
 - *In loco parentis*
- **Spouse**
 - Including common law if state recognizes it



Getting Paid During FMLA

- **General rule: FMLA leave is unpaid leave**
- **May be concurrent with other paid leave**



What About Health Benefits?



- Continue at same level as when the employee was actively working
- Keep them informed (open enrollment, etc.)
- Employee/employer contributions remain unchanged
- Collecting premiums

Benefits, cont'd

- **When employees don't pay their share of premiums**
 - 30 day grace period
 - 15 day notice of cancelation
 - Check your plan documents
 - But this is not a COBRA qualifying event
- **Absolute right to reinstatement of benefits coverage**
- **Recovering premiums**
- **Accrual of vacation, sick time, seniority, etc. based on policy**



Common Question:

Can We/Should We Force an Employee To Take FMLA?

- DOL says “in all circumstances, it is the employer’s burden to designate leave as FMLA-qualifying” and if information is lacking, it is the employer’s responsibility to inquire further
 - In other words, if leave is FMLA qualifying, and you fail to designate it as such, the employer suffers the consequences
- **BUT—cannot force an employee to take more leave than is medically necessary (arises most often in the intermittent leave context)**

What Happens to their Jobs?

- **Reinstatement**
 - To the same or “equivalent position” (pay, benefits, working conditions)
 - “no greater right” (position elimination, layoff, termination for misconduct, Key Employee exception)
- **No such thing as “undue hardship”**
- **Discovery of performance issues**





Question:

Is the time that Sandy is late covered by the FMLA?

- A. No, because Sandy has not asked for FMLA leave.
- B. No, a couple of hours is not “serious” under the FMLA
- C. No, sporadic time off in few hour chunks is not “leave” under FMLA.
- D. No, because of both A, B & C.
- E. Yes, Sandy has given you sufficient notice under FMLA.

Answer:

E is the correct Answer

- Employees must give notice of the need for leave to be protected by the FMLA. While an employee requesting leave need not expressly assert rights under the FMLA or even mention the FMLA in order to be eligible for such leave, some notice is required. When the need for leave is foreseeable, employees must give 30 days notice. If not foreseeable, the employee must give notice as soon as practicable.

Military Leave Under the FMLA



- Military Caregiver Leave (up to 26 weeks): for the care of service member undergoing medical treatment for a serious injury or illness
- Qualifying Exigency Leave (up to 12 weeks): for a spouse, child or parent who is a member of the Armed Forces, National Guard or Reserves, on federal active duty/called to duty *in a foreign country*

The Fair Labor Standards Act (1938)

- ◆ Minimum wage
- ◆ Overtime
- ◆ Child labor
- ◆ Record keeping





Minimum Wage

- ◆ Current federal minimum wage is \$7.25 (higher for federal contractors)
- ◆ Current Alaska minimum wage is \$8.75 (higher for school bus drivers)
- ◆ Employees must be paid at least the minimum wage for all hours
- ◆ Many deductions that bring pay below minimum wage are unlawful

Overtime

- Employer who requires *or permits* an employee to work overtime is generally required to pay a premium for the overtime work.
- The premium is 1.5 times their “regular” (straight time) rate.

Overtime



- Fair Labor Standards Act (FLSA) requires that employees must receive overtime pay for hours worked in excess of 40 in a week.
- Alaska requires overtime pay for all hours worked in excess of 8 in a day or 40 straight time hours in a week.

Overtime



- “Regular rate of pay” can be a moving target



Overtime

- FLSA requires bonuses and incentive payments to be included as part of an employee's regular rate of pay in computing overtime.



WEEKLY TIMESHEET

	Mon	Tu	Wed
Start Time	9 AM	9 AM	
End Time	5 PM	6 PM	
Reg Time	8 -	8 -	
Over Time		1 -	

Overtime

- Alaska does not allow compensatory or “comp” time (time off in another week in lieu of overtime pay).
- Alaska does not generally allow fixed pay for flexible hours.
- Alaska requires that all hours worked by all employees must be recorded.

Exemptions from Overtime

Exempt or Non-exempt

Exemption Fundamentals

◆ Most Frequently Used Exempt classifications:

- **Executive Exemption**
- **Administrative Exemption**
- **Professional Exemption**
- **Computer Related Exemption**
- **Outside Sales Exemption**

Executive Exemption

◆ Criteria:

- ◆ The employee must be compensated on a salary basis at a rate not less than \$780 per week;
- ◆ The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- ◆ The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- ◆ The employee must have the authority to hire or fire, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.



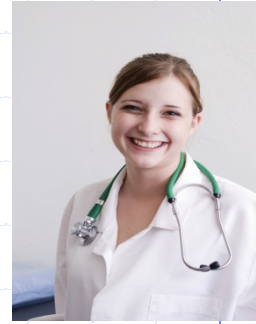
Administrative Exemption



◆ Criteria

- ◆ The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$780 per week;
- ◆ The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- ◆ The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Learned Or Creative Professional Exemption



◆ Criteria:

- Compensated on a salary basis at a rate not less than \$780/week
- **Learned Professional:** Primary duty is to perform work requiring advanced knowledge which is predominantly intellectual in character and which requires the consistent exercise of discretion and judgment in a field of science or learning, such as law, medicine, nursing, accounting, actuarial computation, engineering, education, and various types of physical, chemical, and biological sciences customarily acquired by a prolonged course of specialized intellectual instruction.
- **Creative Professional:** Primary duty is to perform work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor, such as music, writing, acting, and the graphic arts.

Computer Professional Exemption

- ◆ For computer systems analysts, computer programmers, software engineers, and similarly skilled workers in the computer field
- ◆ Involved in the theoretical or practical application of highly specialized information to computer systems analysis, programming, or software engineering
- ◆ Regularly exercise discretion and independent judgment
- ◆ Not the help desk employee!



Outside Sales Exemption



- ◆ Customarily and regularly spends more than 1/2 of his/her working time away from the employer's place of business
- ◆ Selling tangible and intangible items or obtaining orders or contracts
- ◆ No minimum salary requirement

Three Rules to Remember

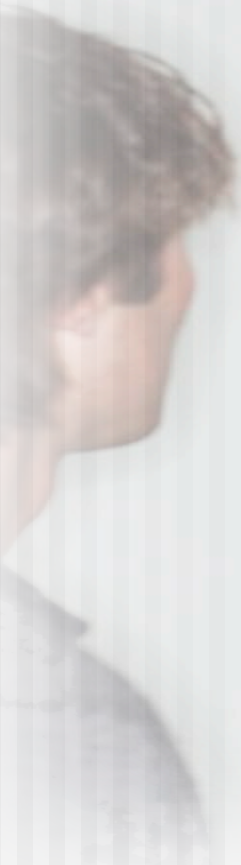
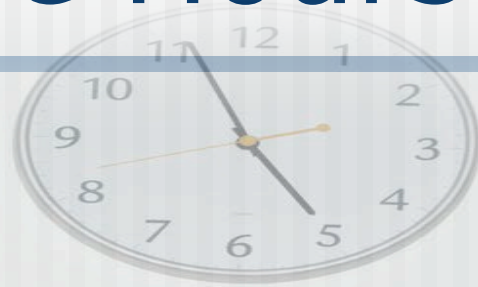
1. Salary \neq Exempt
2. Creative job titles do not make exempt employees
3. Similarly titled employees will not necessarily have the same FLSA status



Hours Worked?



What Are Hours Worked?



Rest & Meal Periods



- A meal period of minimum 30 uninterrupted minutes need not be paid.
- All rest periods less than 20 minutes long must be paid.
- Paid lunches can turn into overtime wages.



Pre- and Post-Shift Activities

■ Likely Is Work:

- Booting up and turning off the computer
- Reading emails
- Shift-change conversations
- Required donning/doffing

■ Likely Not work:

- Waiting to punch a time clock
- Going through security
- Walking from the parking lot to the work area

“Hours Worked” Typically Does Not Include...



- Periods in which employee is completely relieved of duty, and the employee can use the time effectively for personal activities
- “Walking, riding or traveling to and from the actual place of performance of the principal work activities”

And Remember...

Work Not Requested Is
Still Hours Worked


“Off the Clock” Work =
Hours Worked



How to Count (or Not Count) Travel Time



Travel Time

- 
- ◆ Home-to-work travel - to first place of work in the day, and from last place of work to home is not work time
 - ◆ Job-to-job travel - from one place of work in the day to another place of work is work time

Travel Time

- ◆ Out-of-town overnight travel time spent as a passenger in a car, plane, train or bus outside of regular work hours is not work time
- ◆ Out-of-town single day trips - for employees who customarily work at one location, the excess of the time spent traveling over the customary home-to-work commute is work time

TRAVEL TIME



**FROM WORKSITE
TO WORKSITE**

+

DURING WORKDAY = COMPENSABLE



**FROM HOME
TO WORKSITE**

+

EMERGENCY

+

**AFTER NORMAL
WORK HOURS**

=

**NOT
COMPENSABLE**



**FROM HOME
TO CUSTOMER**

+

EMERGENCY

+

**AFTER NORMAL
WORK HOURS**

=

COMPENSABLE



**FROM HOME TO
ANOTHER CITY**

+

**FOR TRAINING
NO OVERNIGHT**

+

**OUTSIDE NORMAL
WORK HOURS**

=

**NOT
COMPENSABLE**



**FROM HOME TO
ANOTHER CITY**

+

**EMPLOYER'S REQUEST &
"SPECIAL ASSIGNMENT"
& NO OVERNIGHT**

+

**OUTSIDE NORMAL
WORK HOURS**

=

**COMPENSABLE
LESS NORMAL
COMMUTE TIME**



NOT WORKING

+

**OUTSIDE NORMAL
WORK HOURS**

=

**NOT
COMPENSABLE**



**TRAVEL ON
WEEKEND**

+

**SHIFT IS M-F
8:30 AM - 5:00 PM;
FLY SUN 10 AM**

+

**DURING NORMAL
WORK HOURS**

=

COMPENSABLE

TRAVEL TIME



**FROM HOME
TO WORKSITE**

+

**NO EMPLOYEE
PASSENGERS**

=

**NOT
COMPENSABLE**



**FROM HOME
TO NEW WORKSITE**

+

**NEW WORKSITE
LONGER COMMUTE
FROM HOME**

=

**NOT
COMPENSABLE**



**FROM HOME
TO WORKSITE**

+

**NO EMPLOYEE
PASSENGERS**

+

VOLUNTARY

=

**NOT
COMPENSABLE**



**FROM HOME
TO WORKSITE**

+

**NO EMPLOYEE
PASSENGERS**

+

VOLUNTARY

=

**DEPENDS ON
VEHICLE**



(with passengers)

**FROM HOME
TO WORKSITE**

+

**PICK UP OTHER
EMPLOYEES**

+

**EMPLOYER'S
REQUEST**

=

COMPENSABLE



(with passengers)

**FROM HOME
TO WORKSITE**

+

**PICK UP OTHER
EMPLOYEES**

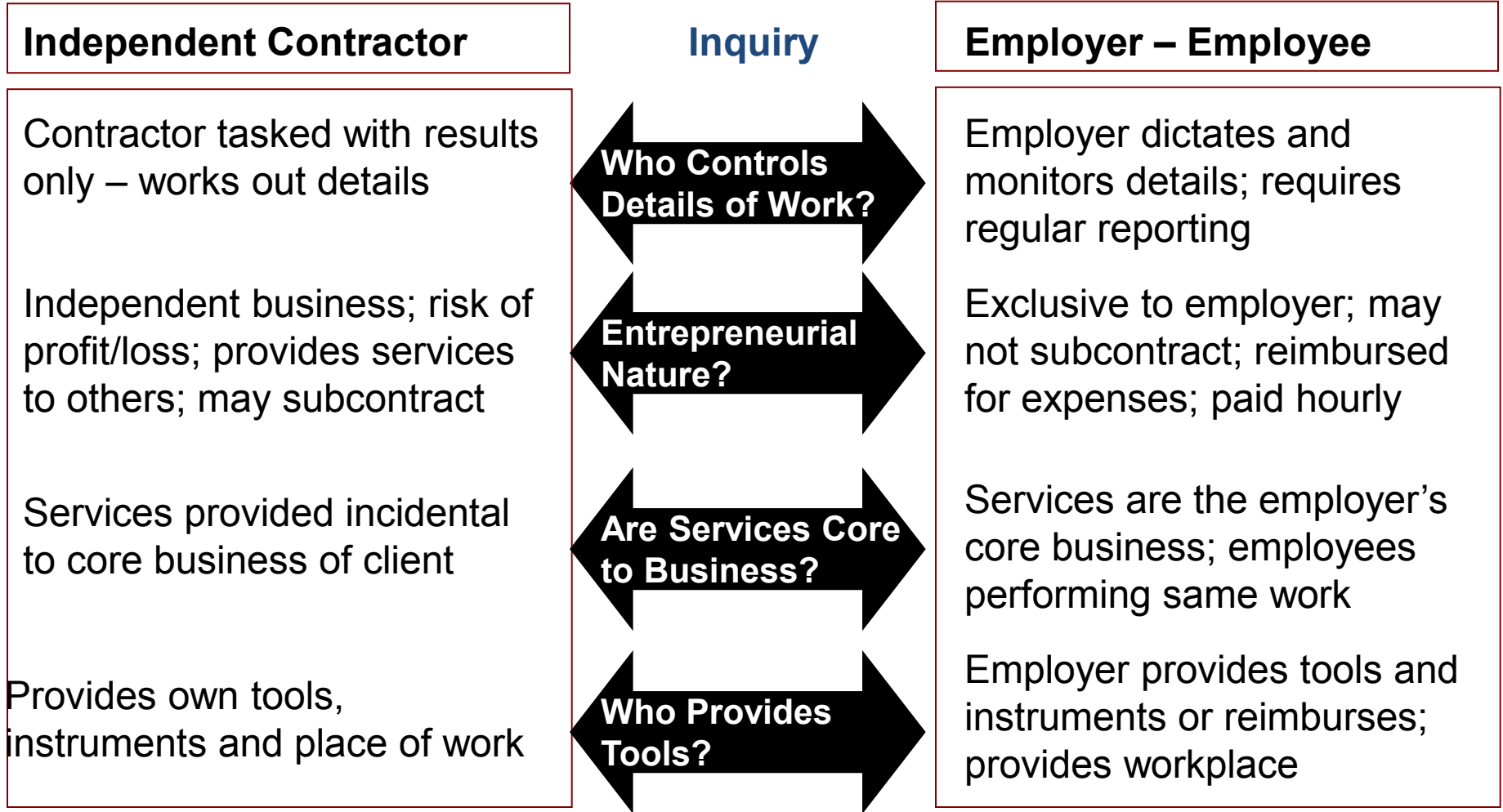
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**VOLUNTARY
CAR POOL**

=

**NOT
COMPENSABLE**

Determining Contractor Status –



Determining Contractor Status, cont. –

Independent Contractor

Highly skilled work requiring independent judgment

Paid by the job, by the project, or by the piece

Provides own bid, negotiated contract, and invoices for services; waives benefits

Work customarily performed by independent profession

Inquiry

Skill and Judgment?

Nature of Payment?

Parties' Intent?

Industry Norm?

Employer – Employee

Unskilled work requiring little independent judgment

Paid by the hour or fixed salary per pay period

Employer provides terms, or terms unclear, and pays regardless of invoices

Work typically performed by employees in industry

Independent Contractor “Smell Test”

- How much instruction and guidance, by whom?
- Does worker have distinct skills, expertise, tools?
- Length of assignment, method of payment?
- Work for other companies?
- Does worker really have his/her own business?
- Intent of parties?



Drug & Alcohol Testing

- **Employers may require drug and/or alcohol testing of employees.**
- **Employers with a policy that strictly conforms to Alaska Statutes 23.10.600 - 23.10.699 are immune from most claims that may be related to their drug and alcohol testing program.**

Drug & Alcohol Testing



Union Basics—
Understanding
Labor
Relations
Jargon And
Unionization
Basics



Labor Relations Jargon

- **National Labor Relations Act:** Provisions of federal law that govern the relationship between management, unions and unionized employees.
- **Union:** Any organization in which employees participate and which exists for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work.
- **Bargaining Unit:** A designated group of represented employees sharing a community of interests represented by a single union.
- **Collective Bargaining Agreement (CBA):** The contract between an employer and an employee organization that sets forth the bargained-upon terms and conditions of employment.

Labor Relations Jargon

- **Grievance**: Problem presented by employee to management; usually refers to problem formally posed through written union-employer grievance procedure.
- **Arbitration**: The procedure of having outside third party decide disputes arising under collective bargaining agreement. Usually compulsory when written into contract.
- **Unfair Labor Practice**: A determination by the NLRB that certain action or inactions by an employer or union have violated certain provisions of the NLRA.
- **Union Steward**: Representative elected by employees or appointed by the union to represent them.

Collective Bargaining



The Law of Collective Bargaining

- **Section 8(d) of the Act provides:**

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, **but such obligations does not compel either party to agree to a proposal or require the making of a concession.**

The Duty to Bargain

- **An Employer has a duty:**
 - To meet at “reasonable times” and places, with the Union’s designated representatives.
 - To bargain over all “mandatory subjects.”
 - To provide relevant information.
 - To bargain with a sincere intent to reach agreement.

The Duty to Bargain

- To reduce all agreements to writing, upon the request of either side.
- In absence of an agreement, to bargain to impasse before unilaterally implementing proposal.

The Duty to Bargain is Continuing



- The duty to bargain is continuing.

Contract
Administration
Knowing the
CBA



The Rule Book



- The language of a collective bargaining agreement is the rule book.

The First Rule of Contract Administration



- Ask HR or a member of the Company's negotiating team if you don't understand the intent of the language.

Understanding the Rules For Contract Administration

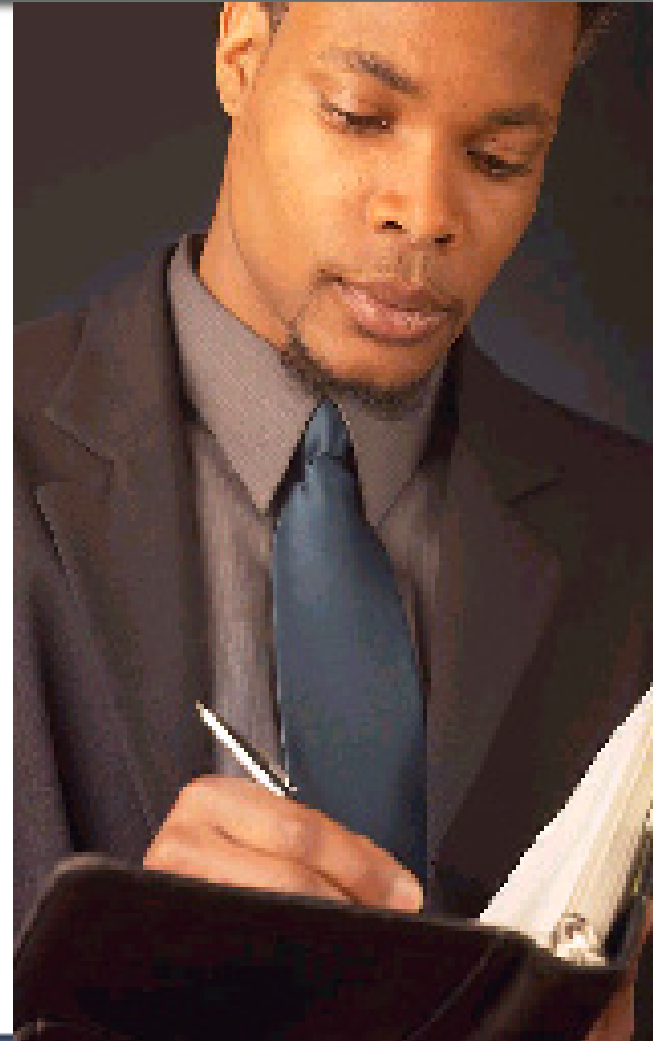
- The CBA is a product of extensive bargaining and compromise.
- The CBA is a double-edged sword—it defines “rights” and “obligations”.
- All decisions set precedents, good or bad.
- There is “one” contract, “one” management team.

Understanding the Rules For Contract Administration

- Don't compromise the compromise!
- Respect and enforce the compromises agreed to in the contract.
- Stick to the contract's set of working conditions.
- The contract decides what's fair — not you or the employee.

Understanding the Rules For Contract Administration

- Avoid adding to, subtracting from or modifying the agreed upon set of working conditions.
- Deviation may create “past practice.”



Why is a “*Past Practice*” Important?

- A past practice establishes employee terms and conditions of employment.
- A past practice may only be changed by “agreement” of the parties, or at “impasse.”
- A past practice may restrict the exercise of the legitimate functions of management.

Why is a “*Past Practice*” Important?

- **A past practice can relate to any working condition no matter how small;**
 - Hours
 - Schedule
 - Dress code
 - Breaks
 - Etc...

Grievances and Arbitration

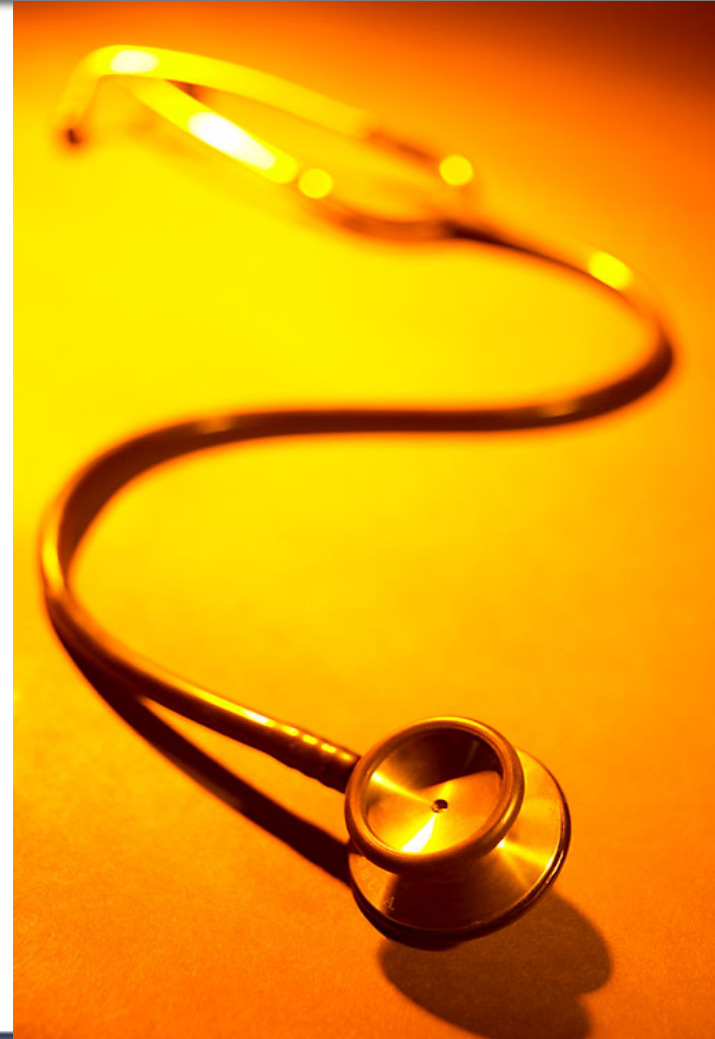


Definition and Causes of Grievances

- **An employee complaint arising out of the employment relationship:**
 - A deviation from the collective bargaining agreement
 - A faulty interpretation of the agreement
 - A misapplication of the agreement

Definition and Causes of Grievances

- An improper application of personnel policies, rules, procedure.
- An improper application or interpretation of a past practice.
- A challenge to the reasonableness of disciplinary action.



Grievance Procedure Checklist



- **Be familiar with contract language**
- **Follow formalities in procedure**
 - Time limits
 - Definition of a “grievance”

Grievance Procedure Checklist



- Don't be afraid to stick to your guns if you're right.
- Risks of settling too easily.
- Use of "non-precedent" settlement (avoid past practice).

Arbitration



- A proceeding *voluntarily chosen* by the parties who want a dispute determined by an impartial judge of their own mutual selection.

Arbitration



- The Arbitrator's decision is based on the merits of the case, and both parties agree in advance to accept the decision as *final and binding*.

Arbitration



- Final step in dispute resolution procedure.
- Arbitrator interprets and applies the contract, but has no authority to “change” any of its terms.

Recommendations & Best Practices



Recommendations & Best Practices



- Know the CBA.
- Understand that the CBA confers “rights” and “obligations” on both parties.
- “Fairness” is for the CBA to decide, not you.

Recommendations & Best Practices



- Demand & expect that everyone know and follow the rules.
- Don't unnecessarily "bend the rules."
- Choose your battles carefully.

How Should You Respond to Union Organizing?

F Facts

O Opinion

E Experience/examples

What You Should Avoid

T Threats

I Interrogation

P Promises

S Spying

Questions?





THANK YOU

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