A Daily Reporter Small Business Report








PERSONNEL ISSUES

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Use transitional work to reduce absenteeism

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Reducing employee absenteeism is a constant challenge for business managers. Absenteeism cuts across all sectors of the economy. Employee absence undermines business plans, increases operating costs and lowers productivity. When absenteeism is purportedly caused by physical or mental disability, it often carries with it additional monetary liability for the employer through state workers' compensation costs or disability insurance expense.

Many employers reduce absenteeism by providing transitional work, designed to allow the employee to work within whatever restrictions would otherwise keep the employee from showing up for work at all.

Transitional work, also known as light duty or modified work, allows an employee to stay on the job even if the employee is not able to perform all of the functions of his regular job.

As the name implies, one of the purposes of transitional work is to keep the employee functioning in some productive capacity while working toward a resumption of full duty. It would be no exaggeration to say that the development of transitional work opportunities has become the No. 1 tool of Ohio employers in reducing workers' compensation costs.

Indeed, in modern times, providing employees with a transitional work opportunity is often mandated by disability discrimination law. Employers today are familiar with their obligation to accommodate reasonable employee restrictions that arise from many medical conditions. Transitional work is a way of satisfying the employer's obligation to accommodate conditions qualifying for handicap status.

The concept of transitional work is simple. When an employee cannot perform one or more of the functions of his regular job, the job is modified, or assistance is provided, so that the employee can work without exceeding the limitation of a restriction.

A lifting restriction associated with an orthopedic condition is a classic example. If an employee can work only while lifting less than 20 lbs., the employee is told to report to work under the stipulation that the employee is not to lift in excess of the restriction. If the job occasionally requires the lifting of more than 20 lbs., then the lifting obligation is transferred to another employee or the employee is given mechanical assistance in performing the heavier lifting.

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Temporary job-reassignment is another common form of providing transitional work. During a period of temporary restriction, the employee is put to work at some other job in which all the duties of the position fit within the medical restriction. The temporary reassignment of an employee to a vacant, available position that fits within medical restrictions is generally considered one of the ways by which an employer can satisfy the obligation of reasonably accommodating a disability.

Within the state workers' compensation system, one of the most common and costly forms of payment is temporary total compensation. Temporary total is paid at two-thirds of the absent employee's average wage, up to a statutorily set ceiling. Temporary total is designed to replace the wages of an employee absent from work on account of industrial injury, during the time the employee is recuperating. Temporary total is not payable, however, when the employee is actually working, at the job on which he was injured or another. Thus, whenever an employee can be kept at work, even if in a transitional work opportunity, there is no temporary total liability.

Similarly, when an employee has been absent from work and drawing temporary total, the employee loses entitlement to temporary total when he returns to work, at his former job or any other. It is this feature of transitional work that has been especially helpful to employers in controlling workers' compensation costs. The rule is simple: When an employee is brought back to work in a light duty capacity, liability for temporary total is ended.

Further, an employee does not actually have to return to work in order for the availability of transitional work to end entitlement to temporary total. When an employer makes a written offer of transitional work within the employee's physical capabilities, that serves as an independent basis on which to stop temporary total payments.

If the employee has a chance to return to work that he is able to do and declines that

> The concept of transitional work is simple. When an employee cannot perform one or more of the functions of his regular job, the job is modified, or assistance is provided.

opportunity, the state system will not continue temporary total payments.

When fashioning an offer of work that is within a claimant's physical capabilities, it generally is best to rely on the restrictions suggested by the employee's attending physician but if those restrictions are unreasonably inflated, it is possible to secure an evaluation from an independent physician and offer work within the second doctor's estimate of capabilities.

It then is up to the state to decide which doctor is better describing what the claimant can do. If the written offer of transitional work is found to be within the employee's real capabilities, entitlement to temporary total is lost.

It also is true that virtually all forms of non-occupational disability insurance provide for a loss of entitlement when the employee has returned to work or enjoys a bona fide opportunity to return to work. Both short-term and long-term disability insurance exist to replace wages during a period of medically necessitated leave. When the employee actually has the opportunity to earn wages, the need for the disability payments does not exist.

There is no legal requirement that the transitional work be compensated at the same rate as the regular job. The transitional work does not have to be the type of activity the employee enjoys doing. A transitional job can be one specially created to allow a particular employee to work and not have need for disability payments. An employer is better off having an employee come to work and perform some useful function, as opposed to that same employee being paid for absence.

Some employers express fear of transitional work, believing that such an opportunity will result in an employee forever demanding the chance to stay in a reduced role. The most direct approach to that concern, however, is placing a time limitation on the availability of transitional work, making the chance to do light duty perform its intended function of transitioning the employee from a totally disabled state back to regular employment.

The best transitional work efforts augment a time limitation with regular employee communication on medical progress, the gradual assumption of expanding duties and even independent evaluation of the need for continuing restrictions.

The immediate economic benefit of having transitional work arises against a background of an employer's general duty to accommodate handicaps. Under disability discrimination principles, it is a rare employer who can afford to admit that it does not accommodate medical restrictions or when challenged, fail to prove a history of accommodating restrictions. Not only does transitional work save money in the short term, it does much to negate disability discrimination claims.

Vocational experts report that long term absenteeism breeds the perception of permanent inability to work. After just several months of being compensated for the inability to work, employees become far less likely ever to try to work.

Transitional work is often the right way to keep the disability mindset from taking hold. Employers who don't do what they can to create transitional work opportunities incur needless disability compensation costs and expose themselves to successful lawsuits against them.

Employers can benefit from

record-retention policies

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Determining what records to keep and for how long can be a confusing task for even the most experienced human resources or business professional. Not only are there differing federal and state laws requiring record retention, but there also are statutes of limitations, discovery rules and general business considerations that all come into play.

The costs to businesses that fail to properly maintain required records can be high. As a result, record retention needs to be an important part of every company's business strategy.

Noncompliance with record-retention requirements can lead to several undesirable results. State and federal agencies requiring record retention sometimes conduct random audits or request documents during investigations. If those agencies determine that records have been improperly destroyed, then fines may be assessed against the employer. These fines can range as high as several thousand dollars per violation and can add up very quickly.

Additionally, government agencies investigating complaints against employers or a judge or jury in litigation, may draw what is called an adverse inference against employers who fail to properly maintain records.

Essentially, this means an assumption will be made that had the missing records been kept, they would have contained something harmful to the employer's defense. The specifics of the inference will vary from case to case. An example of an adverse inference might be a presumption that an employee's missing performance review in a wrongful termination action showed the employee's performance to be exemplary.

Courts may also order sanctions against an employer who fails to retain records.

Documents that are not properly maintained also can cost an employer a viable defense in litigation. For example, in a wrongful termination case in which an employer must prove it had legitimate reasons for terminating an employee, not having that employee's personnel file or discipline history will make it difficult, if not impossible, to prove the legitimacy of the termination.

Record retention can be a daunting task, especially given the day-to-day employee-related matters that take precedence over how long various documents must be retained. There is a way, however, to make it less burdensome: Create a corporate record-retention policy.

A record-retention policy brings to one place all of the various record-retention requirements for all records created by an employer. The policy, however, is only as good as the information put into it. To create a good record-retention policy, employers must do all of the following:

• Incorporate all state and federal statutory and regulatory requirements that apply to the company;

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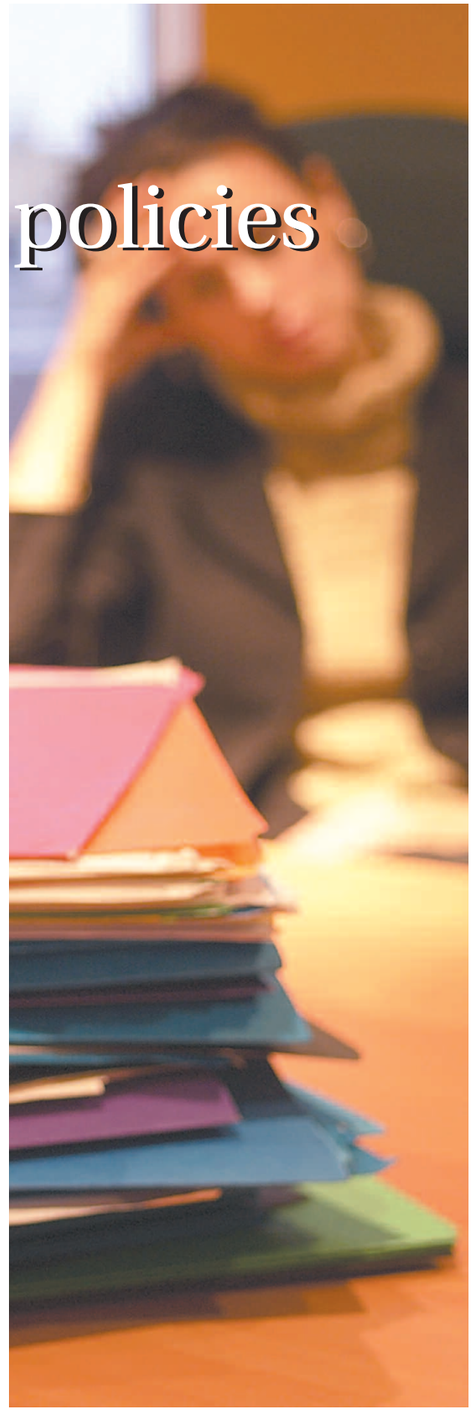

Blogs: The latest privacy and technology challenge for employers

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Privacy law comes from three sources: constitutions, statutes, and case law. Regardless of their source, however, privacy rights are rarely absolute.

Instead, courts typically apply a balancing test, weighing a particular privacy right against a competing social interest or contradictory legal principle. For example, when a patient tells her psychiatrist that she plans to murder her husband, her medical privacy rights might be outweighed by the need to protect the husband's life.

In workplace privacy matters, this sort of balancing is rarely so dramatic, but it nevertheless produces numerous danger zones for employers who often must balance a worker's real or perceived privacy interests against those of co-workers or the company itself.

As is so often the case, the increased presence of technology in and around the workplace has made the employer's job more difficult in this regard. Web logs, or blogs, can create a new privacy-related challenge for employers.

A blog is, at one level, a form of online content management, similar in many respects to a Web page. Increasingly, however, individuals create blogs and use them as personal communication tools, or online diaries or journals. Some observers have likened a blog to a cross between a diary and a newspaper. Most blogs are not password protected, meaning that other Web surfers can read the blog and, in most cases, leave comments that also can be read by other visitors.

Various experts have estimated that more than one-fourth of all Web users read blogs and that nearly half of those who read blogs also post content on blogs. Web sites such as myspace.com and xanga.com offer inexpensive (or free) "communities" in which anyone can, in a matter of minutes, create a blog.

According to the Pew Internet & American Life Project, a non-profit research center studying the Internet's social effects, more than eight million American adults have created blogs.

Many employees appear to assume their blogs are "private" (and therefore have no work-related implications) because they post their blog content from home, using a home computer.

Yet, regardless of whether the employee has posted blog material using company resources, or on company time, blog content can still form the basis for workplace discipline or termination.

Indeed, a Jan. 11 survey from the Society for Human Resource Management indicates three percent of its member respondents had disciplined an employee for blogging during the previous 12 months. Twenty percent of the employers reported having fired employees over non-work related Internet use.

Typical causes for disciplinary action include blogs that disparage co-workers or disclose company secrets. Examples of such cases include:

• Delta Airlines reportedly fired flight attendant Ellen Simonetti (known on her blog as "Queen of the Sky") because she discussed Delta's financial difficulties on her blog, and also because "she posed suggestively" in her uniform in a Delta plane (and put the photos on her blog). Simonetti alleges that male bloggers have not been dealt with as harshly by Delta, and has consequently filed a sex discrimination charge with the Equal Employment Opportunity Commission.

• Heather Armstrong was fired by a Los Angeles-area software firm after using her blog, dooce.com, to post scathing comments about her co-workers and her bosses. Among many amusing comments on her blog was her description of her own poor work ethic and the many "nappage" opportunities presented by "working from home."

• According to his blog, 99zeros.blogspot.com, Mark Jen was fired by Google because of material posted on his blog. Ironically, Google allows its employees to create and post their blogs on Google's own Web site (see http://google-blog.blogspot.com) - with the caveat that material must comply with Google's blog policy. Google also operates blogger.com, which is a free blogging site.

• Various news reports indicate that Harvard University, Starbucks, ESPN, Wells Fargo, and a host of other employers have disciplined or fired employees for various forms of blog-related behavior.

Most employees in Ohio and elsewhere are employees-at-will, meaning they can be terminated at any time for any reason — as long as the "true reason" for the discharge is not one that is prohibited by law (e.g. discrimination, punishment for whistle-blowing or union organizing, etc.).

While blog-based terminations usually meet this test, there also are pitfalls for the unwary employer. Before taking action against a blogging employee, consider the following:

• Concerted activity: Certain types of work-related communication may be protected by federal labor law. Section 7 of the National Labor Relations Act allows employees — including those who are not unionized — to discuss wages, benefits and other terms and conditions of work with other employees. Under Section 7, employees have the right to choose to engage in union activities and "protected concerted activity" involving two or more employees to effect changes in "terms and conditions of employment or otherwise improve their lot as employees."

While Section 7 protects concerted activity, and blogs are generally unilateral or solo activities, blog communications may in certain circumstances be seen as meant to foster employee discussion and therefore might be viewed as "concerted activity." See, e.g., Timekeeping Systems, Inc., 323 NLRB No. 30 (1997) (finding the employer committed an unfair labor practice when it fired an employee for sending an e-mail to all employees criticizing a new vacation proposal).

• State law: Some states, including California, prohibit terminating employees for certain types of lawful "off-duty conduct."

• Consistency: The employer's response to blogging issues should be consistent with its other policies. In other words, if you discipline an employee for posting discriminatory comments on his blog, you should impose similar discipline on the next employee who does so. Similarly, if an employee would be discharged for making an in-person racial slur about a co-worker, the same discipline should likely apply when the slur is posted on a widely accessible blog.

• Policy development: Employers may want to consider adopting specific blogging policies. Such policies should be crafted with the participation of upper management and should be well publicized to employees. The policies should be consistent with policies regarding harassment, e-mail and other technologies as well.

Because some bloggers post company-related information, a blogging policy should also incorporate guidelines for avoiding inappropriate disclosures. In light of the ever-changing legal and technological landscape, employers may also wish to consult legal counsel before developing and implementing their blogging policies.

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• Incorporate all business considerations, such as the company's need for certain documents;

• Consider the longest statutes of limitations that apply to the company;

• Include all company-created documents, including copies of those documents (regardless of how they are maintained, i.e. microfilm and data processing media);

• Include all non-paper documents;

• Include a schedule of document destruction;

• Include a process to suspend the schedule when litigation or a government investigation is foreseeable;

• Ensure employee compliance through careful monitoring; and

• Ensure compliance with the changing law and business considerations through annual updates.

As with all policies, the record-retention policy should be reviewed by legal counsel before it is implemented.

One way to organize a record-retention policy is to categorize similar records, then to determine the period of time those records are required to be kept. While some records may clearly fall into one category or another, it is important to note that many records may be categorized in multiple ways, each with a different legally-required retention period. Therefore, it is important to review all record retention requirements that might apply to a certain document. In developing a record-retention policy, it also is important to check state or local guidelines, as well as to consider statutes of limitations, and litigation and business considerations.

It is impossible to list every type of document that may fall into these categories. The documents listed and the retention periods discussed in this article are meant simply as general guidance. Employers should consult legal counsel with respect to the retention periods applicable to particular documents.

PAYROLL RECORDS

Generally speaking, payroll records must be retained for a minimum of three years. Payroll records may include documents that contain biographical information of employees, designate employee occupations, set work times and hours for employees, give rates and ranges of pay, note compensation earned each week or pay period (including overtime), and contain information on perquisites and fringe benefits.

Payroll records also may include collective bargaining agreements, employment contracts, sales and purchases records, plans or trusts, and customer orders, invoices, shipping and delivery records, and customer billings.

Additionally, documents that explain the basis for any wage differentials between employees of the opposite gender, such as job evaluations and job descriptions would fall into this category.

PERSONNEL RECORDS

Most jurisdictions require personnel records to be retained for at least one year from the date created, one year from the date of the personnel action to which the record relates, or one year from the date of resignation or termination. If an enforcement action is commenced, the records must be retained until final disposition. Personnel records include job applications and resumes, records relating to any employment action (such as promotion, demotion, transfer or layoff), job orders submitted to employment agencies, test papers completed by applicants, results of physical examinations, job opening advertisements and postings, documents regarding selection for training and apprenticeship, and documents relating to requests for reasonable accommodation.

BENEFITS-RELATED RECORDS

The retention period varies for benefits-related records. Records related to seniority and merit systems are required to be retained for at least one year, while records that relate to leaves of absence under the Family and Medical Leave Act must be retained for at least three years.

FMLA records include documents relating to the date FMLA leave is taken, hours of leave if less than a full day, copies of notices of leave, documents and policies regarding paid and unpaid leaves, premium payments of employee benefits, and records regarding disputes over FMLA leave.

Additionally, records that relate to employee benefits plans for employers issuing group health-care coverage must be maintained for two years and, for employers and plan administrators subject to the Employee Retirement Income Security Act, the retention period for such records is six years.

SAFETY RECORDS

The retention period for safety records also varies. Under the Occupational Safety & Health Act, the log of occupational injuries and illnesses, supplementary record of each occupational injury or illness, and annual summary of occupational injuries and illnesses for each establishment must be retained for five years. Additionally, employee exposure records and analyses using exposure or medical records must be retained for 30 years. Employee medical records required under OSHA must be retained for the duration of employment plus an additional 30 years.

MISCELLANEOUS RECORDS

Employers must retain I-9s for three years after date of hire, or one year after termination, whichever time period is greater. Employers must retain their current EEO-1 reports.

Avoid pitfalls in the termination process

Failure to train managers in legal matters may result in significant attorneys' fees, settlement costs and jury awards.

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Terminating an employee in the modern workplace can be a lot like walking through a minefield wearing clown shoes. With the slow but steady erosion of the at-will employment doctrine and the ever expanding scope of state and federal laws governing the employment relationship, one false step by an employer in the termination process can be costly. Nonetheless, while it may not be possible to disarm the mines, the clown shoes can be traded in for ballet slippers.

In reducing the risks associated with terminating employees, the first step any employer must take is educating its decision makers (i.e. supervisors and managers) of the legal restrictions on their authority to terminate employees. While the default rule of employment in the private sector continues to be that an employee serves "at will" and can be fired at any time for any reason or no reason at all, state and federal laws have created exception upon exception to this rule.

For example, employers are legally prohibited from terminating an employee on the basis of his or her race, sex, color, religion, national origin, age, disability, military service, use of employee benefits, and use of certain types of family and medical leaves of absence.

It also is illegal for an employer to terminate (or otherwise discipline) an employee for lodging complaints about any of the foregoing types of discrimination, whether the complaint regards discrimination to that employee or others.

The foregoing represents only a fraction of the legal restrictions on termination facing private employers. Furthermore, public and unionized employers face additional contractual and due process restrictions on termination.

Although confronting this morass of legal regulations may be daunting, it is incumbent upon employers to impart upon supervisory and managerial employees at least a rudimentary awareness of the legal obligations and restrictions regarding their authority to discipline employees.

While training managers in legal matters may not be a company's first priority, failure to do so may result in significant attorneys' fees, settlement costs and jury awards that can be costly to a company's bottom line.

REDUCING RISK: SOUND POLICIES

In addition to educating decision-makers, employers can reduce their risks of liability for wrongful terminations by creating and disseminating sound policies regarding termination. At the very least, an employee handbook or policy manual should include the following policies relevant to termination:

- At-will employment disclaimer;
- Equal opportunity employment policy;
- Anti-discrimination, anti-harassment and anti-retaliation policies;
- Discrimination and harassment reporting policies;
- Code of conduct (explaining that a non-exhaustive list of prohibited activities will lead to discipline, up to and including termination); and
- Attendance policy.

Regardless of what policies an employer maintains regarding discipline and termination, it is imperative that an employer follow its policies when making decisions to terminate. While an employer's failure to follow its own disciplinary policies may not be illegal, it will certainly place the employer in a difficult position if faced with a lawsuit alleging any type of wrongful termination.

Conversely, an employer who follows policies will be able to defend any termination decision by arguing that the decision was made pursuant to an objective, non-discriminatory policy of which the employee was aware.

REDUCING RISK: EXECUTION

As an old business adage goes, there are three reasons why good strategies fail: execution, execution, and execution.

The same goes for an employer's decision to terminate an employee. The employer can conduct all of the training in the world and create superb employment policies, but still face liability if it poorly executes any given termination decision.

Proper execution involves taking the following steps prior to the final termination decision:

- Investigation (when necessary): If the employee is being terminated for misconduct, the employer should investigate the misconduct and collect written witness statements (signed and dated). If appropriate, the employer should also get a written statement from the employee under investigation. This not only will give the employee a chance to have his or her say, which may in turn diffuse a potential wrongful termination claim, but will lock the employee into his or her version of the events in question before the employee speaks with a lawyer.
- Documentation: Part and parcel to the investigation step, the employer must document the misconduct in writing. If the employee is being terminated for performance problems instead, there should be documentation in the file concerning the employee's poor performance. Regardless of the reason for the termination, the reason should be stated clearly on a termination notification form.
- Review: Once a preliminary decision to terminate is made (and before the employee is informed), the employer should review decisions it has made in the past for other employees involved in the same or similar conduct. This will ensure that the decision is in line with past decisions that may or may not involve individuals of a different protected category (i.e. race, gender, age, etc.). In addition to reviewing past decisions, another company official, preferably a human resources representative, should review the final decision to terminate.

If the foregoing steps are taken, an employer's risk of liability for wrongful termination can be reduced significantly. While taking these steps may not prevent a disgruntled employee from filing a lawsuit against the employer, it may prevent the employer from stepping on a landmine.

Should I invest in training programs for my employees?

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Employee training programs are valuable for organizations of all sizes. An investment in employee training programs may dramatically improve the performance of individual employees and the organization as a whole.

In addition, from a purely legal standpoint, effective training programs may permit an employer to avoid situations that expose an organization to legal risk or, at a minimum, reduce the potential monetary exposure that otherwise might exist.

The benefits of employee training programs may be realized over the short term and long term. Employers should view employee training as an investment rather than an expense. Training programs can and should be tailored to the intended audience and the needs of the organization. A thoughtfully-designed training program will offer different types of training to different types of employees.

The most obvious benefits from employee training programs are improved employee performance and productivity. In addition, effective training programs can lead to increased job satisfaction and morale. Not only do employees perform better but employee turnover (and the costs associated with it) may be reduced.

Moreover, a well-trained employee can be an innovator. A long-term investment in training may empower employees to improve processes and systems and prepare them to take on greater responsibilities and advance within the organization.

Finally, employee training can be an invaluable risk management tool for employers of all sizes.

Training topics and programs come in all shapes and sizes and can be tailored to fit any employer's needs. Many programs can be designed and provided internally by human resources professionals or other individuals possessing the necessary knowledge and skills. Some training sessions are most effective when provided by an outside service provider such as a consultant or law firm.

One common topic of employee training is in the area of communication and human relations. The ability of a company's employees to interact productively and professionally with each other as well as with customers is critical to the effective operation of any organization.

Modern workplaces include people from varied backgrounds, skills and personalities. The most effective employees are able to recognize the value that different views and styles bring to an organization.

Many employers require employees to participate as a group in team building training sessions. These sessions can vary greatly in length and sophistication. There may be an exercise that leads or concludes a staff meeting. On the other hand, team-building might involve a multi-day retreat away from the office.

Communications training may also increase an employee's ability to interact with potential customers. In today's global economy, training in foreign languages and cultures can dramatically expand the number of customers with whom an employee can work. Finally, some employees might benefit from training on public speaking or public relations techniques.

Training also may enhance an employee's skill set. Teaching employees new skills and providing them with new capabilities keeps them more interested and productive at work and expands the capabilities of a business.

Technology training on the proper operation of basic office equipment such as computers, phone systems or copy machines can be especially useful. More specialized training may be required for some employees such as teaching a lab technician how to operate a new scientific instrument or teaching a manufacturing employee to follow a new production process. These types of training programs can improve quality and expand capabilities.

Skills development is not limited to the instruction of technical skills. For many positions, the most important skill is the ability to understand and meet the needs of a customer. Constant training and monitoring of customer service employees is crucial to maintaining and expanding a customer base.

Last, but not least, employee training programs are essential to avoiding situations that expose an employer to legal risk. They also are critical to minimizing actual damage awards.

No employer should overlook the importance of harassment, discrimination and diversity training. Strong anti-harassment/anti-discrimination polices and training programs can be the difference in successfully defending a lawsuit.

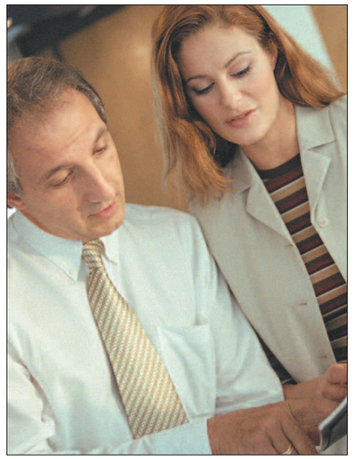
Employers should maintain strong discrimination and anti-harassment policies and train all employees to understand their rights and obligations under those policies. Diversity and harassment training can be provided in-house, by a law firm or a specialized consulting service.

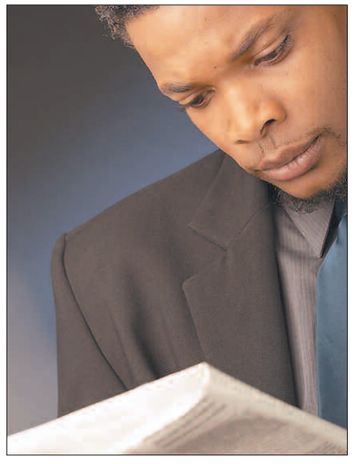
As with any training program, employers should make sure that the program is designed to fit their industries and to be consistent with the laws of the state(s) in which they operate.

In recent years, ethics training has become more common. Ethics training helps employees deal with ethical issues they encounter in their work and empowers them to recognize and report unethical activities of others.

Training employees on safety rules and safe work techniques can effectively reduce the number and severity of work-related injuries. Effective safety training programs that identify unsafe work practices can quickly pay for themselves by reducing an employer's workers' compensation expenses.

Every employer could benefit from some combination of the above training programs. It is critical for each employer to evaluate its overall training goals and existing employee resources to determine what type of training would be most beneficial to the organization.





What types of questions should an employer ask (and avoid)?

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Interviewing potential employees can be a tricky undertaking. The interviewer is tasked with asking questions that allow the company to assess whether the potential employee has the qualifications and qualities to succeed at the job while, at the same time, avoiding questions that may serve to violate employment laws and place the employer at risk for a discrimination claim.

When conducting job interviews, it is important that employers focus on job-related questions that allow the company to evaluate the applicant's qualifications and qualities for the position being filled. In order to accomplish this, the interviewer must have a detailed understanding of the skills, abilities and behavioral qualities necessary for the applicant to succeed at the job.

In order to assess whether an applicant has the skills and abilities for the job in question, the interviewer should concentrate on questions regarding the applicant's education, technical ability, communication skills, and prior job experience.

In order to make the most of these questions, the interviewer may elect to ask open-ended questions to determine whether the applicant is articulate and friendly.

Rather than simple questions such as "Where did you go to school?" and "Where did you work before?" the interviewer may instead ask questions such as "How has your education prepared you for this position?" or "In what ways will your prior work experience help you succeed with this job?"

In addition to assessing an applicant's skills and abilities, an employer should also seek to determine whether the applicant has the behavioral qualities necessary to succeed at the job. For example, does the job require the ability to work under constant pressure? Does it require regular team work? Does it require extra hours at times? What types of organizational skills and/or problem solving skills are required?

Rather than asking "softball" questions such as "are you willing to work late?" and "are you good under pressure?" the interviewer should concentrate on questions that require the applicant to formulate a specific, detailed response. For example, "describe the organizational skills you feel are necessary and important to succeed at this position?"

Moreover, the interviewer should incorporate scenario-based questions designed to determine how the applicant would respond in certain situations. For example, the interviewer may describe a job-related "crisis" and ask the applicant how he or she would respond.

Job-related questions designed to assess an applicant's skills, abilities and behavior qualities will allow the interviewer to evaluate the applicant without triggering potentially troublesome or impermissible topics of discussion.

There are many questions an interviewer should avoid asking potential employees during a job interview. Even when asked with the best of intentions, these questions can make employers vulnerable to charges of discrimination from an unsuccessful applicant.

Age: It is not permissible to ask an applicant "how old are you" or "when did you graduate high school?" An interviewer should also avoid words that might indicate a bias based on age, such as calling the interviewee a "kid" or "old-timer." It is, however, permissible to ask whether the applicant is at least 18-years-old, since it may impact whether the applicant is allowed to be employed and under what conditions (if a minor).

Religion: It is not permissible to ask about an applicant's religion. If that information is volunteered by the applicant, politely move on. It is appropriate, however, to inform the applicant whether work will be required on Saturday or Sunday, and ask if he or she can work on those days. A description of an employee's regular work hours or shifts also is allowed.

Marital status: While questions about marriage may naturally come up, it is best that they be avoided. Information regarding marital status and maiden names is rarely, if ever, job-related and can indicate an applicant's protected status (e.g., ethnicity, national origin, or religion). However, a question such as "have you ever used another name?" would be permissible, since this information may be needed to perform reference checks.

Family status: Similarly, questions regarding whether the applicant has or is planning to have children also should be avoided. Interviewers can, however, ask about an applicant's willingness to relocate, work overtime, or travel, assuming those issues are legitimately related to the job in question.

Race and national origin: It is not permissible to ask about an applicant's race, nationality, or place of birth. If foreign languages are relevant to the job, however, interviewers may ask about the languages the applicant reads, writes or speaks.

Citizenship: Interviewers should not ask if an applicant is a citizen. An interviewer may, however, ask whether the applicant is authorized to work in the United States.

Disabilities or physical conditions: Questions about disabilities are particularly troublesome. It is not permissible to ask an applicant whether he or she has a disability. Questions such as "please list any conditions or diseases for which you have been treated," "how many days did you miss work because of illness last year?" or "do you have any physical defects precluding you from performing certain kinds of work?" are also not permitted.

However, because the physical capabilities of applicants may be relevant to the job, interviewers may ask whether the applicant is capable of performing essential job-related functions, with or without reasonable accommodation. A description of a particular work scenario, accompanied by a question about how the applicant would handle that situation, is a good way to avoid potentially impermissible questions regarding disability.

Gender: Interviewers generally should not reference an applicant's gender. Under no circumstances should the interviewer indicate his or her preference for a man or woman to fill the job in question.

Even with the careful selection of interview questions, an applicant may still volunteer information an interviewer would prefer not to hear. In these situations, the interviewer should not pursue the volunteered information and should not make note of it. Though the interviewer will not likely forget the volunteered information, it is best to remove it as a factor and focus on job-related criteria to select the most qualified applicant.

Maintaining employment at will

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Most employers probably are familiar with the doctrine of employment at will. It is the traditional employment relationship in the United States.

The doctrine provides that an employer may terminate an employee at any time for any reason or for no reason at all, with or without notice. Likewise, an employee may resign at any time for any reason, with or without notice.

While the law assumes that most employment relationships are at will, employers would be mistaken to conclude that nothing further need be done to keep it that way. Employer actions and statements can reinforce, or undermine, the employment-at-will relationship. In the worst case scenario, employer conduct can turn an employment-at-will relationship into a relationship that can only be terminated "for cause."

For an employer to avoid becoming its own worst enemy, it should take a number of steps. The following checklist summarizes some cost-effective measures an employer can take to preserve the at will employment status of their employees:

First, include an affirmative statement of at-will employment on all job applications. This will assist in limiting implied contract and promissory estoppel causes of action.

Second, job applications should disclaim any reference to employment contracts, or duration of employment. This usually can be accomplished by including an appropriately worded statement above the line where applicants sign the application.

Third, pay particular attention to statements by job interviewers regarding compensation, benefits and the duration of employment. Statements like these can lead to an implied breach of contract claim.

Fourth, be careful not to communicate ambiguous statements about employment duration in offer letters. Offer letters and other company correspondence should reiterate an employer's employment-at-will policy.

Fifth, employee handbooks and policy and procedure manuals should include appropriate statements that employment is at will, and that the at-will relationship only can be altered by a written agreement signed by a company officer.

Sixth, employers should be conscious of supervisor statements, company communications, and information appearing on a company's Internet or intranet Web sites. Employers should train supervisors in the proper language to use in disciplinary documents, coaching sessions, and performance evaluations.

Finally, employers should take the opportunity to reaffirm that the employment relationship is at will at appropriate times and in appropriate communications to employees.

Implementing these proactive measures will help preserve the at-will employment status of employees. However, it does not give an employer a free hand when it comes to termination decisions. An important exception to the employment-at-will doctrine is that employees may not be terminated for unlawful reasons.

Unlawful reasons for termination include illegal discrimination, retaliation, and violations of public policy. Illegal discrimination includes any employment decisions based on an employee's protected class status. In Ohio, protected classes include an employee's age, sex, race, color, national origin, disability, religion, ancestry, and in some municipalities, sexual orientation.

These principles are fairly straightforward. For example, if an employer terminates an employee because she is pregnant or because the employee filed a workers' compensation claim, the employer has acted unlawfully. Where the termination decision becomes more complex is in determining whether a termination of an employee will violate "public policy."

The public policy exception to the employment-at-will doctrine prohibits the termination of an employee under circumstances that would contradict an established public policy of a particular state or jurisdiction. While not all states recognize the public policy exception, Ohio courts have identified a number of reasons for termination that violate Ohio's public policy.

For example, Ohio courts have ruled that when an employer terminates an employee for consulting an attorney regarding an issue that affects the employer's business interests, the employer has violated the clear public policy of Ohio.

In one such case, the employee consulted the attorney for the purpose of bringing a lawsuit against one of the employer's clients. Even in that case, the Ohio court ruled that employees have a legal right to consult an attorney regarding potential legal claims without fear of losing their jobs.

Unfortunately, a list of every potential public policy exception to at-will employment does not exist. In fact, courts continue to identify new violations of public policy as more at-will employees sue employers for wrongful termination.

Ensuring that a potential termination does not violate a state's public policy, therefore, depends on the specific facts and circumstances of the termination. If an employer is uncertain whether it may properly terminate an at-will employee, the employer should seek the advice of an employment law attorney.

It is important to maintain an employment-at-will relationship. Doing so can decrease the number of legal claims to which an employer is exposed. However, it does not eliminate the possibility of a claim of unlawful termination. Employers must also carefully consider a termination decision to ensure that it can be properly justified on legal grounds.


Sexual harassment — an ounce of protection

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Two co-workers go out to lunch. Over salads, one asks the other on a date; the offer is refused. Back at the office the dance continues with flowers, candy, pictures of the aggressor left about, and calls to the home of the object of affection. At what point might this situation shift from unrequited love to a successful sexual harassment lawsuit?

We all know that sexual harassment is a form of illegal sex discrimination. We also know that sexual harassment in the workplace is often difficult to define. Clearly, behavior that might be acceptable in a social setting is often not appropriate at work.

However, did you know that under Title VII of the Civil Rights Act of 1964, you may be vicariously liable for the behavior of your employees, maybe even of your customers, if that behavior is later determined to be sexual harassment?

Employers are increasingly looking for methods to protect themselves from liability that might arise from their employees' actions.

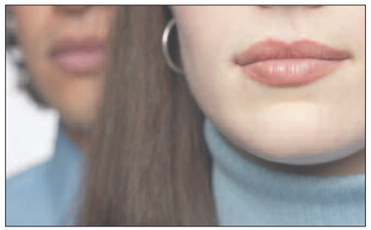
First, let's quickly review what behavior can constitute sexual harassment. Two types of sexual harassment exist: (1) quid pro quo; and, (2) hostile work environment.

Quid pro quo harassment occurs when a supervisor's sexual advances alter an employee's terms and conditions of employment, i.e., if the employee submits to the demand, a benefit will be granted or, conversely, if the employee refuses the demand the benefit is withheld or the employee is terminated.

Quid pro quo harassment is fairly easy to identify. Only employees who can give or take away workplace benefits (e.g. supervisors) may commit quid pro quo sexual harassment. Courts view quid pro quo harassment as particularly severe because the supervisor is abusing the power bestowed upon him or her by the company in order to commit the harassment. An employer is strictly liable for quid pro quo harassment if an employee can demonstrate that the supervisor used the employee's acceptance or rejection of the sexual advances as the basis for a decision affecting the employee's job.

In a hostile work environment situation, the behaviors that can lead to employer liability can be committed by anyone — supervisors, subordinates, customers, vendors, and other third parties. And remember that no one is immune from sexual harassment. Woman can be harassers, men can be harassers, and men and women can be victims of sexual harassment, and persons of one sex can sexually harass persons of the same sex.

Hostile work environment sexual harassment includes certain unwelcome sexual advances, comments, jokes, posters, etc., that



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are offensive to the recipient which also would be offensive to a reasonable person.

Whether a workplace environment is sufficiently sexually hostile or abusive to have left the realm of boorish and become a cognizable legal claim requires an examination of all the surrounding circumstances.

The conduct must first be unwelcome. In this context, "welcome" is not the same as "consensual." An employee need not be criminally assaulted in order to prove that he or she found the behavior to be unwelcome.

Unwelcome and harassing conduct may include sexual advances, suggestive or lewd remarks, jokes, profanity, and gossip (including through e-mail), unwanted hugs, touches, kisses or staring at body parts, as well as impeding or blocking movement, and derogatory posters, pictures, cartoons or magazines.

This obviously includes pornography or other sexually explicit materials in the workplace, but simply blocking an employee's movements or invading a person's personal space could also constitute unwelcome sexual harassment.

Inviting the offensive conduct does not excuse sexual harassment, and clothing and appearance does not excuse harassment either. In other words, "he flirted first" is always a poor defense. "I was just kidding" is equally ineffective if the behavior in fact meets the legal standard.

But it takes more than the mere existence of offensive or abusive conduct to establish a hostile work environment. The alleged harassing behavior must also be frequent, severe, threatening or humiliating, and must unreasonably affect the victim's work performance.

Determining whether a sexually hostile work environment exists is not an exact science. There is no specific combination of factors that equals sexual harassment. It is helpful to think of harassing behavior on a sliding scale.

On one end of the scale is a single lewd comment or joke. Standing alone, one offensive joke does not create a hostile work environment. At the other end of the scale is ongoing offensive conduct or physical behaviors such as sexual assault. This will almost always be sexual harassment. The best way to avoid liability is to make sure you never step on the scale.

Employers may avoid liability for hostile environment sexual harassment if they exercise reasonable care to prevent and correct promptly any harassing behavior, and create a safe environment for employees to report alleged harassment. Employers are not liable to employees who unreasonably fail to take advantage of preventive or corrective opportunities to avoid harm.

There are a number of steps employers can take to reduce their liability for sexual harassment claims. All employers should: (1) develop and adopt a written policy regarding sexual harassment; (2) communicate that policy to all employees, particularly supervisors, through notices, personnel manuals and discussions; (3) conduct training sessions; (4) develop a complaint procedure; and, (5) establish a discreet investigative procedure.

Educating employees is probably the single most cost-effective way of eliminating sexual harassment from the workplace. Encourage your employees to report potential problems without fear of retaliation. Constantly monitor the workplace and lead by example. Conduct discreet and prompt investigations into every alleged report of sexual harassment.

Do not wait to investigate alleged sexual harassment until a formal complaint is filed. By then it may be too late to resolve the matter without substantial business ramifications and legal costs. Nearly every sexual harassment case is the result of a lost opportunity to act.

Although a complex and sometimes confusing issue, addressing inappropriate behavior immediately will go far in avoiding bigger problems.

Health benefits vary greatly among employers


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There are currently no federal laws or regulations that require employers to provide health benefits (such as medical, vision, dental, or prescription coverage) to their employees. On the contrary, this is a voluntary decision to be made by each employer. For those employers who voluntarily offer health benefits to their employees, a patchwork of laws and regulations place requirements, conditions and limits on such health plans, as well as the employers who offer them.

Employee health plans can take a variety of forms. For example, health plans can be insured or self-insured. Fully-insured health plans are those in which the employer pays a monthly premium to an insurance company. Self-insured health plans, on the other hand, are those in which the employer pays claims costs as they become due.

Self-insured plans may be self-administered, meaning that the employer pays the claims when due; or the employer may contract with a third-party administrator (such as an insurance company), pay claims costs to the TPA on a regular basis, and the TPA then pays the claims on behalf of the employer.

An employer may purchase a stop loss policy to protect against unexpected claims experience, but the purchase of a stop loss policy does not make a health plan "insured."

Self-insured employee health plans may be funded or unfunded. Funded health plans are those in which the employer sets aside specific funds in a trust (such as a tax-exempt voluntary employees' beneficiary association), at a single time or on a periodic basis, to pay estimated claims costs for the plan year.

In an unfunded health plan, the employer pays claims costs from the employer's general assets as needed, without segregating funds to pay such costs.

Employers may require that employees share in the costs of the health plan. Many employers require employees to pay some or nearly all health benefits costs, often on a pre-tax basis via regular payroll deductions.

Further, even those employers who do not require regular employee contributions share health benefits costs with employees through utilization of deductibles (the initial out-of-pocket payment required from the participant before the health plan pays any benefit), co-payments (the payment made by the participant at the time services are provided), and co-insurance (the portion of expenses required to be paid by the participant for a given service, often on an 80/20 or 90/10 basis, which may vary depending on whether the health care provider is "preferred" or "in-network").

There is no single law or regulation that governs employee health plans; rather, the legal requirements applicable to employee health plans are included in a number of laws and regulations, which can complicate and confuse employers' compliance efforts.

Applicable laws and regulations include:

- The Employee Retirement Income Security Act of 1974: ERISA, the key legal piece for employee group health plans, regulates both welfare benefit plans and retirement plans and provides important protections for participants and beneficiaries. Specifically, ERISA regulates the content of group heath plans; imposes a variety of reporting and disclosure requirements on plan administrators (typically, the employer); establishes standards of conduct, responsibility, and obligations to be met by plan fiduciaries; and mandates remedies, sanctions, and access to the federal court system when a requirement has not been met. ERISA also preempts the application of many state laws.
- The Consolidated Omnibus Budget Reconciliation Act of 1985: COBRA (also a part of ERISA) requires employers to provide continued group health plan coverage to employees, their spouses, and their dependents when certain "qualifying events" occur, including, without limitation, the death of a covered employee, termination of a covered employee's employment for reasons other than gross misconduct, reduction in number of hours employee is employed, and divorce or separation of the covered employee and spouse. The length of COBRA coverage is usually 18 months, although it may be extended to 29 or 36 months or terminated early under certain circumstances.
- The Americans with Disabilities Act of 1990: ADA prohibits employers from discriminating against disabled employees with respect to any term, condition, or privilege of employment, including health benefits.
- The Age Discrimination in Employment Act of 1967: Federal ADEA prohibits age discrimination in employee health plans (such as providing lesser benefits to older workers based on age).
- The Family and Medical Leave Act of 1993: FMLA requires certain employers to allow employees to take leaves of absence for up to 12 weeks in a given 12-month employment period for certain family or medical conditions. FMLA mandates that group health plan coverage be continued during any such leave on the same terms and conditions as would have applied had the employee continued working. An employer can require that an employee on FMLA leave continue to pay his or her regular share of the cost of health plan coverage during the period of leave as well.
- The Health Insurance Portability and Accountability Act of 1996: HIPAA imposes limits on pre-existing conditions; provides special enrollment rights to employees, their spouses, and their dependents under certain circumstances (such as marriage or birth or adoption of a child); and prohibits discrimination on the basis of certain health factors. HIPAA also imposes privacy and security requirements on employee health plans designed to protect certain participant health information maintained by or on behalf of the health plan.

Not surprisingly, many complex issues can arise in the employee health benefits arena. Employers who offer health benefits to their employees (as well as those considering whether to provide such benefits) are wise to engage an experienced employee benefits practitioner to help navigate through the patchwork of requirements, conditions, and limits applicable to health benefit plans.

Avoid common mistakes in administering the FMLA

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Recognizing a need to "balance the demands of the workplace with the needs of families," Congress enacted the Family and Medical Leave Act of 1993. The FMLA entitles eligible employees to take up to 12 weeks of unpaid, job-protected leave in a 12-month period for specified family and medical reasons.

The FMLA regulations hold employers responsible for ensuring that employees are aware of their FMLA rights. Thus, if an employer has a handbook or other written material that describes the employer's policies, such written materials must contain the employer's FMLA policy.

The FMLA regulations also contain provisions designed for employers to control leave and prevent abuse. However, many of these provisions will not apply unless the employer chooses to include them in its FMLA policy and employee handbook. Following are some of the ways employers can control leave and prevent potential abuse through their FMLA policies.

METHOD FOR 'LEAVE YEAR'

Under the FMLA, an employee is entitled to a total of 12 weeks of leave for specified reasons during any 12-month period or "leave year." The employer may choose between four options for calculating the leave year:

(1) the calendar year;

(2) any fixed 12-month period that serves as the leave year (e.g., the fiscal year or the year beginning on the employee's date-of-hire);

(3) the 12-month period measured forward from the date the employee's first leave begins; or

(4) a "rolling" 12-month period measured backward from the date the employee uses any FMLA leave.

The employer is required to choose one of the four methods for computing the leave year. If an employer fails to designate the 12-month period, an employee who requests leave is entitled to the leave year that provides the employee with the most beneficial outcome.

INTERMITTENT LEAVE

Employers have the option of prohibiting or permitting FMLA leave to be taken intermittently, if the reason for the leave is the birth, placement of a child for adoption or foster care. Employers should make this decision and include it in their FMLA policies.

REQUIRE MEDICAL CERTIFICATION

An employer may require an employee who is taking leave because of the employee's own, or a family member's, serious health condition to have the employee's health care provider certify the medical facts justifying the employee's need for FMLA leave.

To ensure that employees are not taking FMLA leave for illnesses that do not constitute serious health conditions (such as, for the common cold or flu), written medical certification should be included in the employer's FMLA policy as a requirement for leave. The employer should also explain the consequences of failing to provide timely medical certification.

REQUIRE USE OF PAID LEAVE

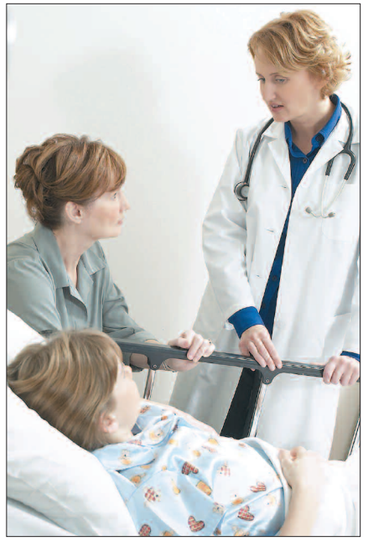
The FMLA regulations permit employers to require that paid vacation, personal leave or family leave be used concurrently with any FMLA unpaid leave and count the paid leave against the employee's 12-week FMLA leave entitlement. Employers also may require that paid sick leave or paid medical leave be used concurrently with unpaid FMLA leave taken to care for a seriously ill family member or for the employee's own serious health condition. Thus, employers can require employees to use available paid time-off concurrently with unpaid FMLA leave. Such a requirement may decrease overall absentee rates.

PAYMENT OF HEALTH INSURANCE PREMIUMS

Under the FMLA, the employer must maintain the employee's coverage under any group health plan on the same conditions as coverage would have been provided if the employee had not taken leave. If, under an employer's plan, employees pay a share of the premium costs, then the employer must explain to the employee in writing how the employee should pay his or her share of the premium while the employee is on FMLA leave.

SPOUSES EMPLOYED BY SAME EMPLOYER

The FMLA regulations permit an employer to limit spouses to a combined total of 12 weeks FMLA leave for the birth, adoption or placement of a child or to care for a parent with a serious health condition. This limitation must be in writing in the employer's FMLA policy.



RETURN TO WORK

Before permitting employees to return from leave for a serious health condition, an employer may require employees to provide a fitness-for-duty certificate from their health-care provider stating that they are able to resume work. Employers may only institute this requirement if it is part of a uniformly enforced policy or practice for all health-related absences. Accordingly, such a requirement should be included in the employer's FMLA policy.

LIMIT RESTORATION RIGHTS

The employer's FMLA policy must include notification of an employee's right to restoration to the same or equivalent job upon return from FMLA leave. However, not all employees who take FMLA leave must be restored to their positions or equivalent positions upon returning to work.

The FMLA regulations allow an employer to deny certain "key employees" (i.e., salaried employees who are among the highest paid 10 percent of the employer's employees) restoration following FMLA leave in certain situations, for example if the denial of restoration is necessary to prevent substantial and grievous injury to the employer's operations. The regulations require employers to explain the conditions required for such a denial in its FMLA policy.

As with many employment laws, the FMLA's details are often complicated and confusing. Maintaining a clear FMLA policy and including it in the employee handbook are the first steps to avoiding some common mistakes in administering the FMLA.

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