

*Essentials of HR Responsibilities at the Surgery Center*

Presented by:

Roger Manning  
Managing Partner  
Excellentia Advisory Group



“Wearing Your H.R. Hat”

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**LEARNING OBJECTIVES**

- Better understanding of all the functional elements of Human Resources management.
- How to keep your organization out of the court of law.
- Understand the difference between employees & 1099's and how to treat both legally.
- Important Administrative Must-Do's to keep in compliance.
- Know what are the mandatory employee training subjects.
- Understanding of Employment Law impact on my facility.
- How to recruit, hire, train and retain employees to best practices and to do it legally.

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As the Administrator / Director, you wear many hats!



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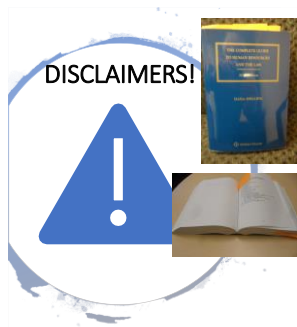
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I am not an attorney. However the information that is being presented today has been secured from HR employment law sources and is reliable and accurate to the date of this presentation.

- Mastering the content of today's conference will greatly increase your chances of mitigating litigation but there is no guarantee that you will never encounter human resources issues that lead to litigation.
- You are not an attorney. It is highly advisable that you seek out an Employment Attorney if you do not have one.

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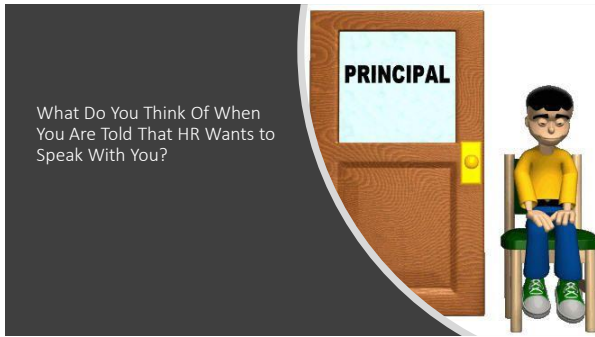
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What Do You Think Of When You Are Told That HR Wants to Speak With You?

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HR Areas of Focus

- Administrative
- Hiring and Staffing
- Retention
- Development
- Employment Law
- Adjustment
- Managing Change
- Strategic Planning

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Administrative Discussions

- Policies and the Law
- Employee Files, Storage and Privacy
- Documentation and Record Keeping
- Metrics Tracking and Why
- Mandatory Training List
- Mandatory Testing List
- Licensure & Certification
- Credentialing
- Policy Administration & Employee Handbook
- Benefits Administration

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## Keep Your Company Out of Hot Water

**Legislative News**

- FMLA
- FLSA
- Sexual Harassment
- Diversity & Race Relations
- Gender Neutral Bathrooms
- Paid Sick Time Off (State or City specific)

**HR Trends**

- Millennials & Entrance of Gen Z
- Workplace Violence
- Medical Marijuana Laws
- Gig Economy
- #METOO and Holiday Parties
- Skill Assessment vs. Reasonable Accommodations
- Changes in Case Law (federal & state)

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Policies and the Law

### IN THE COURT OF LAW:

- IF YOU DON'T HAVE A POLICY IN PLACE, THE EMPLOYEE WINS 100% OF THE TIME.
- IN EVERYTHING THAT YOU DO OR SAY WITH AN EMPLOYEE, IMAGINE EXPLAINING IT TO A JUDGE AT SOME LATER DATE.
- Documentation, Documentation and Documentation
- CAREFULLY!

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Policies and the Law

### Policies Must Be:

- Consistent – the courts hate selective enforcement
- Complete, Clear, Concise and Up-to-date
- Created by starting with Federal Law
- Next advance to State Law
- Finally layer on local (City and County)

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Policies and the Law

Courts Rulings:

- Are making companies/employers prove what their employees know!
- Policies need signatures
- Revisions need signatures
- Handbooks need signatures
- Communication sent to employee home needs return signatures
- Email is not sufficient (burden of proof that they actually read it!)
- Days remaining on vacation on pay stub is not sufficient!

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Creating & Communicating HR & People Management Policies

A policy by itself is a guideline for making sound business decisions, it is not necessarily a call to take specific action. Make sure your organization's policies cannot be construed as establishing a contractual obligation – that is the *real* purpose of having an At-Will employment policy.

<b>POLICY</b>	The Policy Statement / Title / Revision Date and Managers/Board Approvals
<b>PROCEDURES</b>	Steps used to apply or implement the policy.
<b>MANAGEMENT RESPONSIBILITIES</b>	What managers are expected to do, methods for monitoring or controlling how policy statement is implemented.
<b>CONSEQUENCES</b>	What will happen if policy is not enforced.
<b>REFERENCES</b>	To laws or legislation that may be involved with the policy.

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Creating & Communicating HR & People Management Policies

Right & Wrong Policy Statement Examples

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|--|---|
| <p><b>WRONG WAY</b></p> <ul style="list-style-type: none"> <li>• Technical jargon or other complex language that employees and jurors may not understand</li> <li>• Written by lawyer</li> <li>• Choppy or abrupt style like, "obvious" or "of course"</li> <li>• Ambiguous &amp; fuzzy descriptions</li> <li>• Overuse of lists and outlines</li> </ul> | <p><b>RIGHT WAY</b></p> <ul style="list-style-type: none"> <li>• Short sentences using simple language that employees are familiar with.</li> <li>• Friendly, responsive tone</li> <li>• "you" and "us" rather than "the employee" or "the employer"</li> <li>• Clear, concise statement of what the company intends</li> <li>• Action-oriented language expressed by active verbs</li> <li>• Employee Handbook should be read &amp; signed upon employment and any revisions.</li> </ul> |
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## P&Ps vs. Standard Operating Procedures (SOP's)

Procedure Manual is a somewhat in-depth description of how the company will treat employment related issues as they arise and on a mandatory basis as applicable. This set of policies and procedures usually apply to all workers in the organization. Some of the topics may include:

- Paid Time Off
- Corrective Action Policies
- Sexual Harassment Policies
- Workplace Safety Requirements
- Break and Mealtime Policies
- Employee Qualification Requirements for Benefits
- No Call / No Show Policy
- And many more...

(SOP) is a very detailed How-To guide used for every major task an employee performs in an organization. Not all SOPs apply to all workers in your company.

- New employee Onboarding Process
- Completion of the W-4
- Proper completion of the I-9
- Conducting a Performance Review
- How to conduct salary review
- How to conduct employee survey
- Managing employee disciplinary process
- Employee filing a grievance
- Quarterly inventory maintenance
- How to clean & disinfect the OR's
- And many more...




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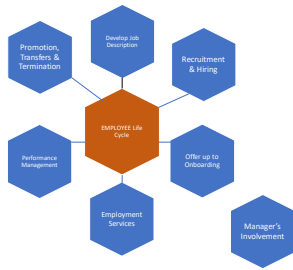
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## Employee Life Cycle

1. Develop Job Description & Expectations
2. Recruitment, Interviewing & Hiring
3. Offer to Onboarding to Orientation
4. Employment Services
  - a. Employee Handbook
  - b. Benefits
  - c. Payroll & Compensation
  - d. Recognition Programs
  - e. Work Place Culture/Dignity
5. Performance Management
  - a. Training & Development
  - b. Performance Reviews
  - c. Coaching & Mentoring
  - d. Dealing with Difficulty Employees
6. Promotion, Transfers & Terminations
  - a. Documentation
  - b. Discrimination Challenges
  - c. Employment At-Will vs. Unlawful Discharges

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Employment Law



Employee Life Cycle

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Department of Labor	Equal Employment Opportunity Council	National Labor Relations Board
Wages and Hours (FLSA)	Title VII of the Civil Rights Act	Employee Rights
Workplace Safety & Health (OSHA)	The Equal Pay Act	Protected Concerted Activity
Worker's Compensation	Age Discrimination in Employment Act	Employer Rights & Obligations
Employee Benefits Security (COBRA & HIPAA)	Americans With Disability Act (ADA)	Jurisdictional Standards
Unions & their Members	The Rehabilitation Act	State and Local Laws
Employee Protection & Treatment	The Genetic Information Nondiscrimination Act (GINA)	Worker's Compensation
Veteran Employment Training and Services	Discrimination	Child Labor Laws
Employee Polygraph Protection Act	Sexual Harassment	Minimum Wage
Garnishment of Wages	ADAA – Age Discrimination in Employment Act	Discrimination
The Family Medical Leave Act (FMLA)	USERRA – Uniform Service Employment Act	Leave Laws
Migrant and Seasonal Agricultural Workers	WARN – Workers Adjustment and Retraining Notification Act	
Mine Safety & Health		

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See Page 43

**Employee Files & Storage**

**What Needs to Be Separated in an Employee File?**

Keep these together:

- Employment Records
- Payroll Information
- Performance Appraisals
- Employee Relations
- Training & Development
- Employee Separations
- Benefits
- Wage/Salary Administration

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See Page 43

### Employee Files & Storage

#### What Probably Should NOT Be in a Personnel File:

- Medical Records
- Investigation Records
- Security Clearance Investigation Records
- I-9 (you can keep all current & prior employees I9's together in folder)

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See page 43

### Employee Files & Storage

<b>Job Advertisements and Internal Job Postings</b>	Retain for 1 year • Per the ADA, ADEA, and FLSA
<b>Resumes and Applications</b>	Retain for 1 year • Per the ADA, Rehabilitation Act, Title VII, and the ADEA
<b>Employment Action Records</b> Record types: training promotions, demotions, transfers, and terminations	Retain for 1 year • Per the ADA, ADEA, Title VII and now GINA
<b>Safety and Health Records</b>	Retain for 3 years • Per OSHA
<b>Basic Employment and Earnings Records</b>	Retain for 2 years
<b>Payroll Records</b>	Retain for 3 years • Per FLSA
<b>Tax Records</b>	Retain for 4 years • Per FICA & FLTA
<b>Retirement and Pension Records</b>	Retain for 6 years • Per Employee Retirement Income Security Act (ERISA)
<b>Leave Records</b>	Retain for 3 years • Per FMLA
<b>Job-Related Illness and Injury Records</b>	Retain for 5 years / 30 years for medical exams in cases of exposure to toxic substances or bloodborne pathogens

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See page 43

### Employee Files & Storage

<b>OSHA</b>	Employee exposure to toxic substances is very long. 30 years
<b>Equal Pay Act</b>	Records of any pay differential imposed on the basis of sex must be kept for 2 years
<b>Discrimination Charges</b>	Must be retained until the charge is disposed of

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Employee Files & Storage; the I-9 See page 44

- Retain employee's completed Forms I-9 for the length of employment
- When an individual's employment is terminated, the Form I-9 is retained for either
  - Three years after the date of hire, or
  - One year after the date of employment is terminated, whichever is later
- Per the Immigration Reform and Control Act of 1986 (IRCA)

1. Enter date employee started work: _____		
Add 3 years to line 1	A. _____	
2. Termination Date: _____		
Add 1 year to line 2	B. _____	
Which date is later: A or B?		
Enter later date here	C. _____	

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Employee Files & Storage; the I-9 See handout

- Spanish I-9 was designed to be used only by Puerto Rico. Do not use for continental U.S. Spanish speaking citizens. If you do, you will be fined.
- If I-9 is incomplete or missing, you must update before discovered through ICE audit. IF incomplete or missing, you will be fined.
- Do not use abbreviations on the form. No signature stamps? You may be fined.
- Do not leave boxes blank. You may be fined.
- If you have more than one company that your employee is hired by (clinic, practice and surgery center), employee must have separate I-9's.
- If you use e-verify, only need the M-775. Some states like CA and SC, mandate use of e-verify.
- If employee started employment with you before 1986, you don't need an I-9.



Are You Serious!

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The FLSA applies only to employees – not to independent contractors.

See page 20 - 21



### Definition of an Employee by the IRS

- The IRS has identified **20 factors** as an aid to determining whether an individual is an employee or an independent contractor.

- Behavioral control.
- Financial control.
- Type of relationship of the parties.

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See Page 20 - 24

### Independent Contractors - 1099

➤ Instructions.	➤ Payment by hour, week, or month.
➤ Training.	➤ Payment of business or traveling expenses.
➤ Integration.	➤ Furnishing tools or materials.
➤ Services rendered personally.	➤ Significant investment.
➤ Hiring, Supervising, and paying assistants.	➤ Realization of profit or loss.
➤ Continuing relationship.	➤ Working for more than one firm at a time.
➤ Set hours of work.	➤ Making services available to the general public.
➤ Full-time required.	➤ Right to discharge.
➤ Doing work on employer's premises.	➤ Right to terminate.
➤ Order or sequence set.	
➤ Oral or Written reports.	

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### Tips for Legally Managing Contract Labor ie: 1099's

1. Require a contractual agreement for working relationship with your company.
2. Don't reference them as employees.
3. Write out checks to the business name, not the individual name.
4. Issue the form 1099 to business name of the independent contractor and FEIN number (NOT a W-4)
5. Ask the contractor to provide 1099 forms from other companies worked for.
6. Ask for proof of contractor's independent business identity.
7. Do not require the IC to wear your company uniform unless for security or safety reasons.
8. Pay IC's by the job and not by the hour.
9. Do not give an IC a training manual or require to participate in your company training program.
10. Don't require attendance at company meetings.
11. Don't require to only work for your company.
12. IC contracts should have a beginning date and an end.
13. Termination as outline within the IC contract.

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Employers are required to educate employees about their legal rights by displaying a number of posters issued by federal agencies.



A general overview on posting requirements appears in the Wage and Hour Division's *Workplace Posters*, <https://www.dol.gov/whd/resources/posters.htm>

#### Mandatory posters include:

- Employee Rights Under the Fair Labor Standards Act
- Job Safety and Health: It's the Law
- Employee Rights and Responsibilities under the Family and Medical Leave Act
- Equal Employment Opportunity Is the Law
- Migrant and Seasonal Agricultural Worker Protection Act Notice
- Employee Rights for Workers with Disabilities Paid at Special Minimum Wages
- Employee Polygraph Protection Act Notice
- Your Rights Under USERRA
- Genetic Information Nondiscrimination Act Information
- Minimum Wage

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ASC  
Mandatory  
Training List

- HIPAA TRAINING
- OSHA TRAINING
- BLOODBORNE PATHOGENS
- FIRE IN THE OR TRAINING
- FIRE SAFETY TRAINING
- MALIGNANT HYPOTHERMIA TRAINING
- SHARPS INJURY TRAINING
- SAFE INJECTION TRAINING
- D.O.T. TRAINING (EVERY 3 YEARS)

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ASC  
Education  
and Training  
List

- ALL THE ANNUAL TRAINING LISTED
- INFECTION CONTROL ( \_\_\_ + HOURS)
- WEBINARS / VIEW-UPON-DEMAND
- CONFERENCES
- VENDOR PROVIDED
- COMPETENCY-BASED TRAINING

Store your Certificates of Completion and CEU's in employee HR file so that they can be reviewed by surveyors.

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ASC  
Mandatory  
Documents  
List

- APPLICATION
- SIGNED CONFIDENTIALITY & NON-DISCLOSURE
- TB (MANDATORY) & OTHER HEALTH DOCUMENTS (OPTIONAL)
- REFERENCES
- LICENSE VERIFICATION
- BOARD CERTIFICATIONS (PHYSICIANS)
- CPR / BCLS
- ACLS / PALS
- ORIENTATION CHECKLIST
- BACKGROUND CHECK
- 90-DAY REVIEW
- DOCUMENTATION OF ALL THE MANDATORY TRAINING LIST

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ASC  
Health  
Testing List

- HEPB - **REQUIRED**
- TB - **REQUIRED**
  - CXR - **REQUIRED IF TB POSITIVE**

SEE YOUR STATE

- MMR
- MEASLES
- MUMPS
- RUBELLA
- HEP C
- VARICELLA
- TETANUS
- TDAP
- INFLUENZA

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Licensure, Certification & Credentialing

- Verify professional licensure and standing in current state and conduct national licensure search
- Verify college education; have them order college transcripts (Best Practice)
  - Do not accept copies from them!
- Obtain copies of certifications; keep schedule of renewal dates
- Conduct your own physician credentialing
- CPR

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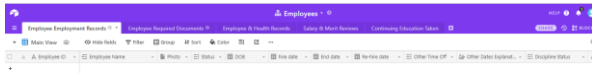
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Organization of Data



Airtable



<https://airtable.com/tblq9VWRK1ScGxZnm/viwara50D9dle2iG>

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Benefits Administration

See Page 10

- Keep records of employee vital statistics and family members needs for benefits; medical history applications kept in separate file from personnel records; locked
- Open Enrollment announcements if originally declined
- Preparation for contract renewal / obtaining bids from 3 or more
- Consolidated Omnibus Budget Reconciliation Act (COBRA) – See Page 10
- Overview of Employee Leave – See Page 12 - 18

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Employee Handbook

- To help defend you in court! Consistency!!
- To provide organization, structure, culture and sanity to your company!

- What is the Purpose of an Employee Handbook?
- This is a policy manual.
  - Must be written clearly, concisely and no room for misinterpretation.
- What Should the Employee handbook contain?
  - Rules in order to provide sanity and civility in the work place!
  - Policies on work environment & how to maintain work environment.
  - Policies on how to treat each other.
  - Policies on work ethic and performance expectations.
  - Policies on proper behavior and conduct supported by various agencies.
  - FMLA, FLSA, ADA, EEOC, Anti-Discrimination of any protected classes, sexual harassment
- Employee must be given at time of employment.
- Employee must read and sign the acceptance page and return to manager. This signed document must be placed in personnel file.
- Handbook must be used consistently with all employees in disciplinary actions or management of the team.




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See handout checklist



1. Does your handbook clearly state that it is not to be considered a contract in any way and that you reserve the right to change it at any time?
2. If your handbook lists offenses warranting discipline, including discharge, does it make clear that your list is not exhaustive?
3. Does your handbook encourage employees to bring their complaints to their union or to management?
4. Does your handbook make clear that harassment of any type is not tolerated?
5. Does it clearly provide specific procedures for addressing complaints of harassment?
6. Do the benefits policies contained in the handbook comply with federal and state laws?

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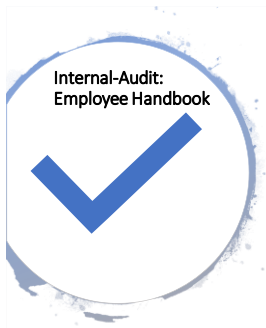
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- 7. Do all employees receive copies of the handbook each time it is revised?
- 8. Do you employees sign a receipt or acknowledgement when they receive the handbook or any revisions?
- 9. Is your handbook up to date in all areas?
- 10. Do you submit the handbook to attorney review regularly to confirm it does not conflict with federal and state laws or local regulations?
- 11. Is the handbook written in plain English understandable by all levels of education present in your organization?
- 12. Is the language respectful of employees?

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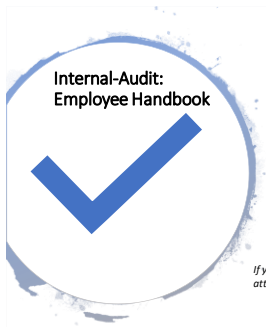
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- 13. Are the rules described in the handbook enforced without bias?
- 14. Do you make sure that your employees read the handbook?
- 15. Is the handbook free of political statements, including the organization's opinions regarding labor organizing?

*If you answered "No" to any of these questions, you should have an attorney review your handbook as soon as possible.*

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### ADMINISTRATION

#### WHAT ARE THE MAIN TAKE-AWAYS?

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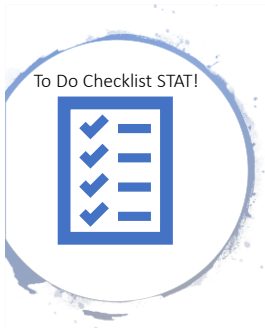
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- ✓ Review Policies for completeness, clarity and legality, federal, state and locally
- ✓ Am I missing any Policies?
- ✓ Do I have Board approvals in meeting minutes?
- ✓ Employee Handbook completeness, clarity & signatures
- ✓ Proper separation employee files, storage guidelines & security
- ✓ I-9 audit / completeness / separate
- ✓ Job Descriptions and employment ads with ADA language
- ✓ Create Metric Tracking list that makes sense for my facility
- ✓ Create KPI's that make sense for my facility
- ✓ Implement annual Mandatory Training List
- ✓ Implement Infection Prevention Training
- ✓ Ensure employee files have mandatory documents and health testing

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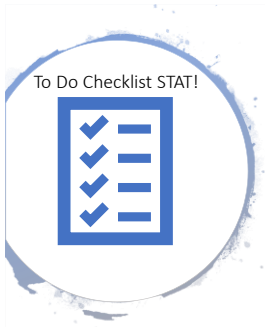
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- ✓ Audit for licensure, education, certifications and renewals
- ✓ Audit for Physician Credentialing
- ✓ Prepare for Benefits Contract Renewal
- ✓ What can I do to train my managers more?
- ✓ What HR-related "goals" can you identify right now that need KPD's improved upon based upon KPI's?

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- Onboarding
- Use of the Employee Handbook
- Ongoing Training
- Timely Performance Reviews
- Salary Reviews
- Incentive Programs
- Team Building / Cross Training
- Career Development Consultation
- Probation & Termination

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On-Boarding

• On-boarding is the processes of getting a new employee hired and integrated into your company. It officially begins with the acceptance of the job offer through several months post start date.

On-Boarding Checklist:

- Job Offer in Writing
- If recruiter involved, have them involved
- Welcome Letter outlining What To Expect
- Complete New hire package including benefit package details, Application, Employee Handbook, signature pages, ADA compliant Job Description, and all HR mandatory administrative documents.
- List of Pre-Employment Requirements
- Assignment to a company mentor or buddy
- Well-defined Training Program and Assignment to Trainer(s)
- Well-defined Performance Expectations in writing
- Follow-Up meetings at pre-determined time intervals to take care of questions & needs
- 30-60-90 day performance review
- 6 month performance review
- Annual performance review

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See handout-New Hire checklist

## The First Day/Week

- Employee Handbook
- General Orientation to Company, Center, Territory, Job Description & Performance Expectations
- Introductions / Who's Who / Organizational Chart
- Policies Review (HR, Clinical & Operations)
- Administrative Procedures / S.O.P.s
- Review training plans

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Employee Handbook

- To help defend you in court! Consistency!!
- To provide organization, structure, culture and sanity to your company!

- What is the Purpose of an Employee Handbook?
  - This is a policy manual.
  - Must be written clearly, concisely and no room for misinterpretation.
- What Should the Employee handbook contain?
  - Rules in order to provide sanity and civility in the work place!
  - Policies on work environment & how to maintain work environment.
  - Policies on how to treat each other.
  - Policies on work ethic and performance expectations.
  - Policies on proper behavior and conduct supported by various agencies.
  - FMLA, FLSA, ADA, EEOC, Anti-Discrimination of any protected classes, sexual harassment
- Employee must be given at time of employment.
- Employee must read and sign the acceptance page and return to manager. This signed document must be placed in personnel file.
- Handbook must be used consistently with all employees in disciplinary actions or management of the team.




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### Ongoing Training

- Do you have a your training planned out for the year? For next year?
- Strategy and/or basis for training?
- Is it on a calendar for all to see? Flyer announcements?
- Are you planning for Provider participation?
- Vendors/outside speakers/ webinars/VUD
- Give out as employee assignments for job enrichment
- CMS says infection prevention should be on on-going training program

<https://airtable.com/tblhwfYASiKwVbFK/vwe80UB3XLS7YkUq>

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See page 35

### Timely Performance Reviews

- Performance Review is not the same as a Salary Review
- What does timely mean?
- Protocol
  - Advance Notice. Specific date.
  - Privacy!
  - Free from interruptions or conflicts of schedule.
  - Have employee fill out pre-conference questionnaire.
  - Evaluator should use observations & objective data as the basis of the evaluation.
  - Present confidently, unwavering
  - Listen to employee; take notes
  - Have them sign the PR

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### Salary Reviews – But First...

1. Have you established value for each position in your company?
  - Market pricing for the position?
2. Have you considered your company's competitive posture?
  - How competitive are we to similar size and specialty centers?
  - Do you need to pay at a higher-than-market level so to retain your current employees?
  - Do you want to pay at a higher-than-market level to attract more quality candidates?
  - Do you need to pay lower-than-market level because that's all your company can afford?
3. Can you define compensable leverage for your company?
  - When employees are promoted to a higher position within your organization, will they receive an increase in salary rate that is similar to, greater than (i.e., higher leverage) or less than (i.e., lower leverage) the rate increase provided, on average, in the market?

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Salary Reviews – But First...

- 4. Look at external inequalities.
    - Are there certain companies, divisions or departments where employees are paid a premium or a deficit compared to the market rates for their jobs?
    - Is your company's salary practice more competitive for higher-level jobs than lower-level jobs, or vice versa?
  - 5. Have you developed a salary structure for your organization?
    - Market analysis
  - 6. Get your current employees up to par!
- A salary review must be supported by prior performance review(s) from current review period.

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Probation & Termination

See page 34

Litigation Prevention

- Three overriding factors should be considered when issuing discipline:
  - Prior Notice;
  - Fair Investigation; and
  - Consistent Application

The following are key employment litigation prevention principles:

1. **Communicate effectively** with job applicants, employees, and former employees to put reasonable limits on their expectations.
2. **Make written records** of employment-related problems and the steps taken to resolve them.
3. **Treat employees** in similar circumstances consistently using **progressive disciplinary methodology** at all times.
4. Handle employee complaints **empathetically, promptly, and effectively**, by an internal procedure.
5. Consciously **consider the fairness** of every action involving job applicants, employees, and former employees.
6. Conduct the process by which the business reaches employment-related decisions fairly and **assure that it looks fair to all.**

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Be the Top Competitive Employer in the Area

ie: Compensation Package

- Base Salary –review industry stats
- Annual/ Quarterly Bonus based upon MBO's & goals
- Contest Bonuses / create fun, engaging & competitive environment
- Stock Options
- Stock Units
- Profit Sharing
- 401K contribution
- Health & Wellness (Medical, Dental, Vision, EAP, Medical Savings Account)
- Life Insurance, Accidental Death, Long & Short Term Disability)
- Professional Liability coverage
- Perks (food, gym membership, cell phone, laptop, tuition reimbursement allowance, flex time, PTO/vacation)

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### Retention, Training & Development

WHAT ARE THE MAIN TAKE-AWAYS?



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### To Do Checklist STAT!



- ✓ Implement a better On-boarding program
- ✓ Make new hires' 1<sup>st</sup> day memorable and indicative of how much they are valued
- ✓ Create a monthly training calendar one year in advance
- ✓ Utilize Employee Handbook more in terms of in-service training, correcting questionable employee behavior before it gets worse
- ✓ Pre-plan all employees Performance Reviews and set dates
- ✓ Clear termination policy including disciplinary steps prior to termination
- ✓ Review industry & market stats to be a leader in hiring practices

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### Employment Laws



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- **Title VII of the Civil Rights Act of 1964**
  - Prohibits discrimination and harassment based on an individual's race, color, sex (pregnancy), national origin and religion
- **The Age Discrimination in Employment Act of 1967 (ADEA)**
  - Prohibits discrimination based on an individual's age.
- **The Americans with Disabilities Act of 1990 (ADA)**
  - Prohibits discrimination against qualified individuals with a disability
  - Requires reasonable accommodation
- **The Vietnam Era Veterans Readjustment Assistance Act of 1974**
  - Requires covered federal government contractors and subcontractors to take affirmative action to employ and advance in employment specific categories of veteran protected by the Act and prohibits discrimination against such veterans.
- **Civil Rights Act of 1886 (1991 Claims)**
  - Prohibits discrimination based on race in employment relationships
- **Equal Pay Act of 1963 (EPA)**
  - Protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination.

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- **The Uniformed Services Employment and Reemployment Rights Act of 1994**
  - Protects service members' reemployment rights when returning from a period of service in the uniformed services, including those called up from the reserves or National Guard, and prohibits employer discrimination based on military service or obligation.
- **The Immigration Reform and Control Act of 1986**
  - Requires employers to attest that their employees are authorized to work in the United States and makes it illegal to knowingly hire or recruit unauthorized immigrants
  - Prohibits discrimination based on citizenship status
- **National Labor Relations Act, Section 7**
  - Permits employees to form, join or assist labor organizations, to bargain collectively, and to engage in certain concerted activities.
  - Prohibits discrimination against employees who participate in union activities and other collective activities related to the terms and conditions of their employment.
- **Genetic Information Non-Discrimination Act (GINA)**
  - Prohibits the use of genetic information (such as information about a person's medical history or his or her family medical history) in making employment decisions.

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- **Family Medical Leave Act (FMLA) Basic Overview**
  - Requires reasonable accommodation.
  - Must have worked for the employer for at least 12 months, worked 1,250 hours during the 12 month period prior to leave and who works at a site where there are 50 or more employees within a 75-mile radius.
- **Military Leave**
- **American Disabilities Act (ADA) Basics**
  - Prohibits discrimination against applicants and employees who are "qualified individuals with a disability."
  - Requires reasonable accommodation.
  - Must be qualified individual with a disability – one who, with or without reasonable accommodation, can perform the essential functions of the job held or sought.
- **Workers Compensation**
  - State laws that provide for compensation and rehabilitation of employees injured on the job, while minimizing employer liability.
  - Must be an employee who has an injury arising out of and in the course of employment.
  - Interplay Between FMLA, ADA and Workers Compensation
- **Fair Labor Standards Act (FLSA)**

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### Let's Talk Discrimination & Compliance Title VII of the Civil Rights Act of 1964

- Applies to employers with fifteen or more employees.
- Prohibits discrimination based upon race, color, sex, religion, national origin, pregnancy and/or disability.
- Covers hiring (recruiting, advertising, job descriptions), discipline, discharge, compensation, and advancement opportunities.
- Requires all employment actions be applied uniformly and be specifically job-related.



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### Civil Rights Act of 1991

- Applies to employers with fifteen or more employees.
- Identifies *disparate impact* and allows for the investigation and lawful challenge of a discrimination impact to employees under questionable employment practices.
- Requires that any adverse impact be validated as job-related and consistent with business necessity.
- Allows women and the disabled to claim punitive damages for discrimination.
- Covers US Citizens employed at US company's international locations
- Allows for jury trials.
- Employer has the burden of proof to show non-discriminatory practices.



How Should Civil Rights  
Obligations Impact Your  
Organization?

- Treat everyone equally consistently.
- Demand what is required of the job.
- Document what you do, what you said and agreed upon with the employee.
- Review results of your hiring statistics.

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### Review & Update Employee P&P's against Discrimination.

- **Pregnancy Discrimination:** In 2015, the EEOC revised its Enforcement Guidance on Pregnancy Discrimination to reflect the Supreme Court's decision in *Young v. UPS* that women may be able to prove pregnancy discrimination if an employer's "neutral" light duty policy accommodated a large percentage of non-pregnant workers, but did not accommodate a large percentage of pregnant workers with similar work restrictions. While the decision in *Young* did not address the specific extent to which employers must accommodate pregnant workers, the EEOC guidance makes clear that employer policies that are facially neutral and not intended to discriminate on the basis of pregnancy may, nonetheless, be found to violate the Pregnancy Discrimination Act (PDA) if the policy imposes significant burdens on pregnant employees without a sufficiently strong justification.

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Review & Update Employee P&P's against Discrimination.

- **Religious Discrimination:** In a nearly unanimous landmark decision, *EEOC v. Abercrombie & Fitch Stores, Inc.*, the Supreme Court ruled in 2015 that Title VII of the Civil Rights Act prohibits an employer from refusing to hire an applicant if that refusal is motivated by the desire to avoid accommodating a religious practice, even if the employer has "no more than an unsubstantiated suspicion that an accommodation would be needed." This decision means that it is no longer necessary for an employee to demonstrate that the employer had actual knowledge of the employee's desire for a religious accommodation if the surrounding circumstances should have alerted the employer to such need or the employer otherwise suspected that there was a need.

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Review & Update Employee P&P's against Discrimination.

- **Sexual Orientation Discrimination:** In July 2015, the EEOC published a groundbreaking decision, ruling that sexual orientation discrimination is a form of "sex" discrimination prohibited by Title VII of the Civil Rights Act. Although federal courts have yet to adopt this expansive view of Title VII, a recent decision by a federal district court in California that sexual orientation discrimination is considered prohibited sex or gender discrimination under Title IX (governing discrimination in schools and colleges) signals that it shouldn't be long before the courts take up the issue. Employers should also be aware that they may be found liable for sexual orientation discrimination under state and local laws, as demonstrated by a 2015 decision from a federal district court for the Eastern District of New York in the matter of *Roberts v. United Parcel Serv., Inc.*, in which the Court upheld a jury's \$100,000 verdict for an employee on her sexual orientation discrimination/hostile work environment and retaliation claims under the NYC Human Rights Law.

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Review & Update Employee P&P's against Discrimination.

- **Gender Identity and/or Expression Discrimination:** As of 2015, at least 19 states (CA, CO, CT, DE, HI, IL, IA, MA, MD, ME, MN, NV, NJ, NM, OR, RI, UT, VT and WA) and the District of Columbia have enacted laws prohibiting discrimination in employment based on a worker's gender identity or expression. In addition, more than 200 cities and counties have passed such laws. Governors in a number of other states, including Missouri, Kentucky, New York and Pennsylvania have signed executive orders prohibiting such discrimination against state workers. Notwithstanding the recent revocation of the Houston city law prohibiting gender preference discrimination, signs indicate that this trend will continue. For example, New York's Governor Cuomo announced in October 2015 that, in 2016, New York State will start including gender identity and expression protections under the state's current prohibitions on discrimination in employment based on "sex."

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### Equal Pay Act

The EPA is an amendment to the FAIR LABOR STANDARDS ACT, designed to narrow the gap in compensation caused by sex-based discrimination. EPA provides that employers may not pay unequal wages to men and women who perform jobs that require substantially equal skill, effort and responsibility and that are performed under similar working conditions within the same establishment.

- Skill
  - Measured by factors such as the experience, ability, education, training required to perform the job. The issue is what skills are required for the job, not what skills the individual employees may have.

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### Equal Pay Act

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- Effort
  - The amount of physical or mental exertion needed to perform the job.
- Responsibility
  - The degree of accountability required in performing the job. For example, a billing office person that is responsible for accepting customer's payments (cash, checks) has more responsibility than other billing office people.

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### Equal Pay Act

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- Working Conditions
  - This encompasses 2 factors: (1) physical surroundings like temperature, fumes and ventilation; and (2) hazards.

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### Equal Pay Act

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- Establishment
  - The prohibition against compensation discrimination under EPA applies only to jobs within an establishment. An establishment is a distinct physical place of business rather than an entire business consisting of several places of business.
  - But, in some circumstances, physically separate places of business may be treated as one establishment. Example: a central HQ office unit hires employees, sets their compensation and then assigns them to separate work locations.

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### Equal Pay Act

Pay differentials are permitted when they are based upon:

- Seniority
- Merit
- Quantity of production
- Quality of production
- Or other work performance factors other than sex

These are known as affirmative defenses and it is the employer's burden to prove that they apply to the situation. In correcting a pay differential, no employee's salary can be reduced. Instead the pay of the lower paid employee(s) must be increased.

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### ADEA



- Prohibits discrimination over 40 on the basis of age.
- Covers employment practices in recruiting, advertising, pre-employment inquiries, interviewing, hiring, terms & conditions of employment, and termination.
- Prohibits mandatory retirement at any age (bona fide executives at least 65 years of age who meet outlined qualification are not protected.)
- Age can be a factor of discrimination when the following applies:
  - BFOQ necessary to the normal operation of the company or business (very few BFOQ's exist)
  - When observing terms of a seniority system or employee benefit plan.
- Discriminated employees may sue for monetary damages including back pay, attorney's fees, court costs and other damages.
- May request a jury trial.
- May be terminated for cause
- Older Worker's Benefit Protection Act expanded coverage to ADEA who provide knowing releases of liability in exchange for considerations (something additional and of value)

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### Americans with Disabilities Act (ADA)



- Applies to employers with more than fifteen employees.
- Prohibits discrimination of disabled persons whether real or perceived.
- Requires employers to differentiate between *essential* and *non-essential job functions*, and not to penalize a disabled worker only unable to perform the non-essential functions or able to perform the essential functions with a *reasonable accommodation*.
- Employers must make reasonable accommodations when necessary to remove workplace barriers.
- Establish whether or not the disability prevents an otherwise qualified job applicant from performing the job.

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### Americans with Disabilities Act (ADA)



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| <p><b>PRE-EMPLOYMENT</b></p> <ul style="list-style-type: none"> <li>• Employer can ask about the ability to do the job with or without accommodation.</li> <li>• Employer can ask questions to qualify the ability of the applicant.</li> <li>• Employer cannot ask about the disability or any measures the applicant uses to mitigate it.</li> </ul> | <p><b>POST-EMPLOYMENT</b></p> <ul style="list-style-type: none"> <li>• Employer can require medical examination or ask health questions.</li> <li>• Employer can withdraw offer based on information discovered in health examination if it will impact the applicants ability to do the essential functions of the job hired to do.</li> <li>• Employer cannot withdraw offer based on customer or clients concerns.</li> </ul> |
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### Reasonable Accommodations: Americans with Disabilities Act (ADA)



1. **Recognizing an Accommodation Request**
2. **Gathering Information**  
Identify the essential functions of the job both mental and physical. Establish whether or not the disability prevents an otherwise qualified job applicant from performing the job.
3. **Exploring Accommodation Options**  
Discuss possible reasonable accommodations with employee/applicant.
4. **Choosing an Accommodation**  
Decide which, if any, accommodations address the issue with undue burden on the company.
5. **Implementing the Accommodation**  
If multiple solutions, select the most effective.
6. **Monitoring the Accommodation**

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### Americans with Disabilities Act (ADA)



#### Reasonable Accommodations Exceptions:

- **Food Handling & Certain Healthcare** – If a job required food handling or intimate patient care, an employer can refuse to hire someone with an infectious or communicable disease if a reasonable accommodation cannot eliminate the risk of transmitting the disease.
- **Religious Institutions** – Churches and other religious institutions may prefer applicants to confirm to the tenant of their religion over otherwise qualified candidates.
- **Direct Threat** – Employers may refuse to hire a qualified applicant with a disability if hiring him or her would pose a direct threat to that applicant's own health or to the health and safety of other employees.
- **Undue Hardship** – Employer are not required to make a reasonable accommodation if it would cause employer an undue hardship.

"Undue hardship" is defined as an action requiring significant difficulty or expense when considered in light of a number of factors.

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### ADA Resources for Writing Job Descriptions and Job Advertisements



WRITING ADA COMPLIANT JOB DESCRIPTIONS – JOB ACCOMMODATION NETWORK  
<https://ada.humanresources.com/resources/ada-compliant-job-descriptions>



SEE HANDOUT: ADA COMPLIANT WORDS



SHRM  
<https://www.shrm.org/tesour>  
CENTERS FOR DIVERSITY AND INCLUSION  
SAMPLE COMPLIANT JOB DESCRIPTIONS  
GUIDE TO WRITING ADA COMPLIANT  
JOB ADVERTISING

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### Unwanted Behaviors

#### PHYSICAL

- Fondling
- Pinching
- Patting
- Kissing
- Brushing Up Against
- Putting Your Arms Around Someone

#### VERBAL

- Wolf whistling
- Making Sexual Jokes
- Sexually Charged Banter
- Asking About Sexual Activities
- Commenting on Anatomy
- Terms of Endearment

#### ENVIRONMENTAL

- Leering
- Sharing Pornography
- Making Sexual Gestures or Sounds
- Texting Obscene Messages
- Flirting
- Emailing same
- Giving Gifts of Sexual Nature
- Posting Aharang of suggestive artwork or offensive signs, posters, etc.

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## Sexual Harassment Defined

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical contact of a sexual nature constitutes harassment and is illegal in the workplace.

- **Unwelcome:** Because sexual attraction may often play a role in the day-to-day social exchange between employees, "the distinction between invited, uninvited-but-welcome, offensive-but-tolerated, and flatly "rejected" sexual advances is crucial for us to understand.
- **Verbal:** Does not need to be of a sexual nature, however, and can include offensive remarks about a person's sex or sexual orientation. For example, it is illegal to harass a woman by making offensive comments about women in general.
- **Party:** Both victim and the harasser can be either a woman or man and the victim and harasser can be the same sex.
- **Quid Pro Quo:** (this for that): Submission to such conduct or rejection of such conduct is used as a condition for an individual's employment or advancement.
- **Hostile Work Environment:** Although the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment and will impact morale, teamwork and productivity.

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## Sexual Harassment – What Employers Must Do

- Create, Publish and Communicate Your Sexual Harassment Policy. (Employee Handbook, individual policies, Posters, In-service training)
- Be a Role Model for employees.
- Identify potential problems and address them promptly.
- Train your supervisor and managers.
- Create an Open-Door Policy – make your employees comfortable in confiding in you.
- Create, Publish and Communicate our Non-Retaliation Policy
- Maintain confidentiality to the extent possible
- Take action on all complaints immediately and even if he/she asks you not to.

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## Sexual Harassment – What About Outside Company Workplace and Hours?

1. Say No
2. Report to your employer the incident, the location and hour for the record.

**What Should the Employer Do?**

1. Listen with interest and compassion.
2. Employer cannot take action on offender but should counsel offender of awareness and how it is affecting the victims work performance and ask that it stop.
3. Counsel the victim employee to seek outside counseling and/or legal counsel.
4. Counsel the victim to call the police if harassment is escalating and feeling of threat and fear.

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### Sexual Harassment – What Should You Do If You Think You are Sexually Harassed.

1. Say NO
2. Report it to your employer
3. Write the incident down with specific facts
4. Keep your work records
5. Talk to others for support
6. Go back to employer if problem continues.

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### Office Parties, Sexual Harassment & #METOO

- **Vicarious liability**
- **Complaints of sexual harassment can have serious repercussions for employers, not least because they can be held vicariously liable for the wrongdoing of an employee. Vicarious liability is a legal principle which imposes liability on one person for wrongs committed by another person. In the employment relationship, an employer can become vicariously liable for the wrongdoing of its staff, such as sexual harassment, carried out in the course of employment. Importantly, work-organized Christmas parties or similar work-related events outside of the office are regarded as being sufficiently closely related to work to give rise to vicarious liability if an employee acts inappropriately at the Christmas party.**
- **With more people now willing to publicize their experiences of sexual harassment and unwanted behavior on social media, it's easy to see how an incident at a Christmas party could also turn into a public relations disaster if employers fail to adequately protect their employees.**
- **An employer will not be vicariously liable, however, where it took reasonable steps to prevent the wrongdoing from taking place so that the employee was acting on a "frolic of their own" in committing the wrongdoing.**




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### Office Parties, Sexual Harassment & #METOO

#### TIPS to Avoid Vicarious Liability

- **Circulate an office email: this should be done several weeks prior to the event. Not only should this email contain the basics (the venue, time etc.) but highlight that this is a work-related function even if it is taking place after hours and at an external venue.**
- **Attach a clear Christmas party policy. It is preferable to do this rather than relying on any existing conduct or work/alcohol and substance abuse policies. This will ensure that there's no confusion among employees and everyone is aware of what will be regarded as inappropriate behavior.**
- **Arrange transportation: If the party is being held away from the workplace (as they normally are), it is best practice to protect employees by providing suitable transport both to and from the venue (this is of particular importance for any disabled employees).**
- **Be wary of the after party: while an employer may be liable for an employee's wrongdoing at the Christmas party itself, employers should make it clear that they will not endorse any unofficial after party that some employees may be planning separately. Such after party events are often a grey area in terms of whether an employer is vicariously liable for acts which take place there and it is preferable that they don't happen at all. However, if they are to go ahead, employers need to distance themselves from it, making clear that it is to be held at a different location and they will not be making a financial contribution. If an incident occurs, these measures will help prove that the after party was not in the course of employment and an employee who committed any wrongdoing was on a "frolic of their own".**
- **Make sure that employees have the ability to raise complaints in the knowledge that they will be taken seriously and investigated. Having a clear bullying and harassment policy will assist with this.**




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### Discrimination Costs



#### HIGH COST OF NON-COMPLIANCE

1. Lawsuits against you personally. \$300K to \$1MM
2. Sexual Harassment \$70,000+
3. OSHA budget increased to \$8MM to conduct more audits
4. I-9 fines typically \$100+ per line per person
5. I.C.E. budget increased to \$20MM to conduct more I-9 audits this coming year.
6. FMLA violations \$15,000+ just for calling an employee while on leave)
7. HIPAA \$50K to \$1.5MM and imprisonment
8. Labor Law Poster violations \$100 FMLA, \$7000 OSHA and up to \$10,000 on variety of poster violations

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### Fair Labor Standards Act (FLSA)

The FLSA establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in Federal, State, and local governments.

- Law about who may be eligible for overtime pay under FLSA rules:
  - Only non-exempt workers are eligible for overtime pay.
  - An employee is exempt if they meet all three tests:
    - ✓ Salary Level Test: The employee is paid at \$23,600 per year or \$455/week.
    - ✓ Many states have their own minimum wage laws.
    - ✓ Salary Basis Test: The employee has a "guaranteed minimum" pay that is not reduced if he/she works fewer than the normal number of hours.
    - ✓ Duties Test: Job duties qualify as professional, managerial or administrative
- Understanding How to Calculate Overtime Pay
  - Overtime pay depends upon the employee's regular rate of pay.
  - Regular rate of pay includes all forms of remuneration (bonus)
  - The method to calculate OT pay is to divide the total pay by total hours worked in the workweek and then pay one-and half of the resulting regular pay rate for each overtime hour worked.

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### Fair Labor Standards Act (FLSA)

#### Executive Exemption

- To qualify for the executive exemption, all of the following tests must be met:
- An employee must earn a salary of at least \$455 per week or \$23,660 annually.
- The employee's primary duty must be managing the employing enterprise or one of its recognized departments or subdivisions.
- The employee must customarily or regularly direct the work of two or more other employees.
- The employee must have the authority to hire or fire other employees, 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.
- There is an additional category of exempt executive that includes employees who own at least a 20% equity interest in a business if they also are actively engaged in managing the business, regardless of what they earn weekly.

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### Fair Labor Standards Act (FLSA)

#### Administrative Exemption

- To qualify for the administrative exemption, all of the following tests must be met:
- An employee must earn a salary of at least \$455 per week or \$23,660 annually.
- The employee's primary duty must be the performance of office or non-manual work directly related to the management policies or general business operations of the employer or its customers, such as work in functional areas such as tax, finance, accounting, auditing, insurance, quality control, purchasing, procurement, advertising, marketing, research, safety and health, human resources, employee benefits, labor relations, public relations, government relations, computer network, internet and database administration, legal and regulatory compliance, and similar activities.
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to significant matters, involving the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. Generally, it means the employee has authority to make an independent choice, free from immediate direction or supervision.

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### Fair Labor Standards Act (FLSA)

#### Professional Exemption

- To qualify for the professional exemption, the following tests must be met:
- An exempt professional must earn a salary of at least \$ \_\_\_\_\_ per week or \$ \_\_\_\_\_ annually.
- In addition to the salary requirement, an exempt professional must have a primary duty of performing office or non-manual work that requires one of the following:
  - Knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.
  - Invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.
- The first prong of the above duties test is commonly referred to as the duties test for "learned professionals," while the second prong sets forth the test for "artistic professionals."

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### Fair Labor Standards Act (FLSA)

#### Highly-Compensated Workers

- The regulations contain a special rule for "highly-compensated" workers who are:
  - Paid total annual compensation of \$ \_\_\_\_\_ or more, which includes at least \$ \_\_\_\_\_ per week paid on a salary basis.
  - The employee's primary duty includes performing office or non-manual work; and
  - The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.
- So, an employee may qualify as an exempt highly-compensated executive if the employee customarily and regularly directs the work of two or more other employees, even though the employee does not meet all of the other requirements in the standard test for exemption as an executive.

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## Fair Labor Standards Act (FLSA)

### Outside Salespeople

- Outside salespeople fall into a special category of exempt employees who do not have to be paid a salary nor receive minimum wages or overtime pay .
- An outside sales employee is someone who is "customarily and regularly engaged" away from the employer's place of business in making sales or obtaining orders for the sale of goods or services, and that such person's pay is determined by a compensation agreement .
- Outside sales for exemption purposes do not include sales made by mail, telephone or the internet unless such contact is used in addition to personal calls .

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## Fair Labor Standards Act (FLSA)

### Computer Professional

- Another "white collar" exemption that does not necessarily require a salary to be valid is an exempt "computer professional ." The definitions found in 29 C. F. R. 541. 400 apply the exemption to any computer employee paid on a salary or fee basis at least \$\_\_\_\_\_ per week, exclusive of board, lodging, or other facilities, or else paid an hourly wage of not less than \$\_\_\_\_\_ an hour .
- In addition, the exemptions apply only to computer employees whose primary duty consists of:
  - The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
  - The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
  - The design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
  - A combination of the aforementioned duties, the performance of which requires the same level of skills .
- The regulations exclude workers who build or install computer hardware or who are merely skilled computer operators . The exemption applies only to the true software programming, design, or systems analysis experts .

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The purpose of the Federal Unemployment Tax Act (FUTA) is to insure diligent workers against the uncertainties of enforced unemployment not voluntarily entered by the worker.

Unemployment insurance is based on a dual program of federal and state statutes. Each state administers a separate unemployment insurance program based on federal standards. There are various federal rules for nonprofit organizations and governmental entities. A combination of federal and state law determine which employees are eligible.

## Unemployment Compensation



### WHAT DO THE COURTS LOOK AT:

1. Treatment of the employee
2. Circumstances of the termination
3. Company's Policies, Procedures and Standards
4. "Just Cause" Termination
5. Employee's control of the situation

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Managing Change & Strategic HR

- Strategic Thinking & the Future
- Future Services & Opportunities Needing New Skills & Talent
- Conflict Resolution
- Managing the Difficult Employee or Physician
- Reframing for Opportunity
- Managing Census Drops / Business Downturns
- Competency Testing
- Employee Surveys on Satisfaction, Culture, & Leadership
- Patient Satisfaction & Physician Satisfaction
- Analyze, Trends, Goals and Plans of Action

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### What Is Your Bottom Line... Strategically Speaking?

- Do everything in effort to keep your company out of court of law.
- Allow ALL of your employees to perform to the best of their abilities.
- Allow your MANAGERS to do the same.
- Do everything that you can to put the very best people on the playing field each and every day.
- Strategically assist your company to grow.

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### Questions?

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[www.excellentiagroup.com/webinars.html](http://www.excellentiagroup.com/webinars.html)

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