

Employment Law

Mark A. Fahleson, Esq

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www.remboltludtke.com

Legal Best Practices Overview

- I. The Employment Relationship**
- II. Equal Employment Opportunity and Unlawful Harassment**
- III. The Interplay Between Workers' Comp, ADA & FMLA**
- IV. Overtime Requirements and Exemptions in Nebraska**
- V. Effectively Implementing FVC's Workplace Policies**
- VI. Employee Reviews & Performance Appraisals**

Pop Quiz

True or False

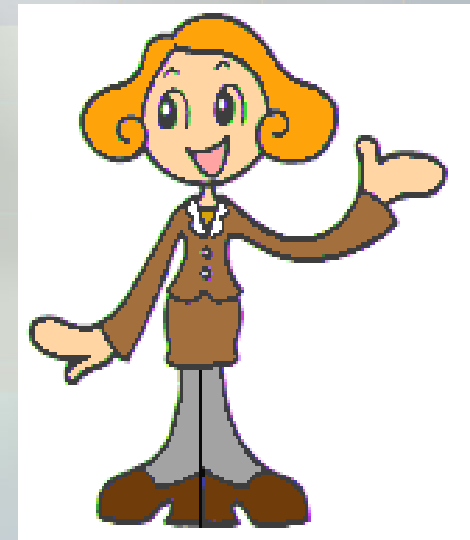
- Supervisors can be sued personally for wrongfully terminating an employee.
- “Employment at will” means that employees have the right to not join a union.
- Supervisors should avoid documenting workplace occurrences because it might come back to hurt FVC.
- Performance appraisals are for FVC’s use only and are inadmissible in court.

I. The Employment Relationship



The Employment Relationship

- **Contract Employees**
- **Temporary Employees**
- **Independent Contractors**
- **Leased Employees**
- **Employees at Will**



Employment at Will

- **Absent a contractual or legal restriction, both the employer and employee are free to terminate the employment relationship at any time for any reason whatsoever without incurring liability**



Employment at Will

- Most states recognize “employment at will”.
- Nebraska is an “at will” employment state.
- FVC is an “at will” employer.



Employment at Will

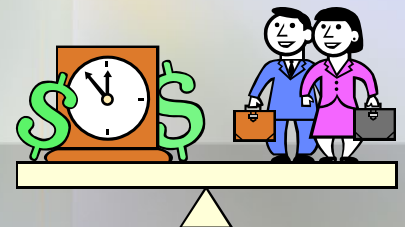
- **Statutory**
 - Title VII
 - ADA
 - FMLA
- **Contractual**
 - Implied in Fact
 - Promissory Estoppel
- **Tort**
 - Public Policy
 - Refusal to commit unlawful act
 - Fulfilling public obligations
 - Exercising right or privilege
 - Filing for Workers' Compensation Benefits



Employment at Will

Managers/Supervisors

- Some courts permit terminated employees to sue their employer and their supervisor for wrongful discharge.
- Supervisors can be required to hire their own attorneys and pay any damages awarded out of their own pocket.
- Supervisors have the primary responsibility of complying with state and federal employment laws.
- You are FVC as far as the law is concerned.



II. Equal Employment Opportunity and Unlawful Harassment

Overview

1. The Test
2. The Law
3. The Policy
4. The Supervisor



1. The Test:

- Test your knowledge of the Company's policies and the law.



2. The Law

- **Employment discrimination is prohibited by federal, state and local law.**
- **Federal law protects:**
 - Race
 - Color
 - Religion
 - National Origin
 - Age
 - Sex (including pregnancy)
 - Disability



The Law

- **Nebraska law protects:**
 - **All categories protected by Federal law, plus:**
 - **Marital Status**
 - **HIV/AIDS**



The Law

Sexual Harassment

- In 1980, EEOC first recognized sexual harassment as a form of sex discrimination.
- Anita Hill's testimony in 1991 and Paula Jones' allegations increased awareness.
- EEOC regulations define sexual harassment.
- Court cases have expanded upon EEOC definitions.



The Law

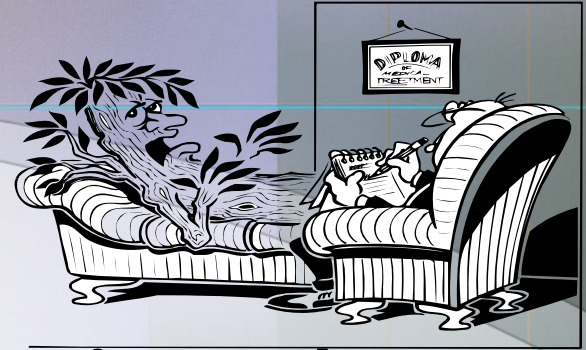
Sexual Harassment

- **The Conduct**
 - Unwelcome sexual advances.
 - Unwelcome requests for sexual favors.
 - Unwelcome verbal or physical conduct of a sexual nature.



The Law

Sexual Harassment



- The effect
 - Submission to such conduct is made a term or condition of employment;
 - Submission to or rejection of such conduct is used as the basis for an employment decision; or
 - Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

The Law

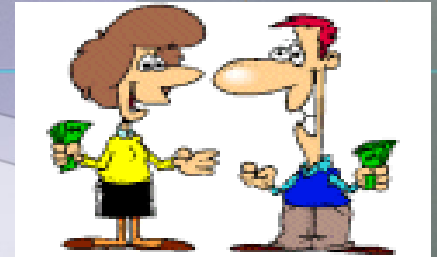
Sexual Harassment

- Two types of sexual harassment
 - Quid pro quo
 - Hostile environment



The Law

Sexual Harassment



- **Quid pro quo:**
 - “Something for something” or “This for that”.
 - Ex. Demand for sexual favors in exchange for promotion.
 - Requires tangible adverse employment action.
 - If so, employer is liable.
 - Generally committed by manager/supervisor.
 - Demand does not have to be explicit.

The Law

Sexual Harassment

- **Hostile environment:**
 - Where sexual conduct creates hostile or abusive work environment.
 - Can be perpetrated by managers, supervisors, coworkers, customers or vendors.
 - Factors courts examine:
 - Frequency
 - Severity
 - Physically threatening or humiliating
 - Unreasonably interferes with work performance.



The Law

Sexual Harassment- Examples

- Unwelcome physical fondling or touching.
- Vulgar and obscene sexual remarks and materials
- Demeaning/abusive terms directed at one sex.
- Comments on appearance.
- Invitations of a sexual nature.



The Law

Sexual Harassment- The Facts

- **A non-employee can create a hostile environment.**
- **Actual or constructive knowledge required for employer liability for non-supervisor harassment.**
- **Same sex harassment is actionable.**
- **A single incident may be enough.**
- **Protections apply to employees and applicants.**



The Law

Sexual Harassment- Other Forms

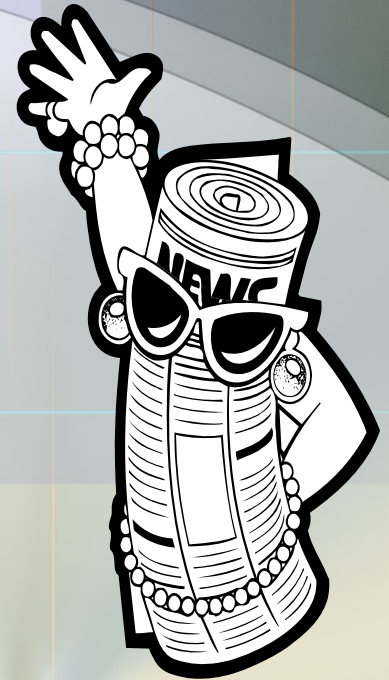
- Harassment because of sex is not the only form of unlawful harassment.
- Harassment on the basis of any other protected class is also prohibited:
 - Race/Color
 - Sex
 - Age
 - Disability
 - Religion/Creed
 - National Origin
 - Marital Status



The Law

Sexual Harassment

- How do I know if conduct is inappropriate?
 - “If you have to ask” test.
 - *Daily Newspaper* test.
 - “I’m glad no one saw that” test.



The Law

You Make the Call!!

- Joe worked on an all-male crew on an oil platform in the Gulf.
- Joe's coworkers routinely picked on him, calling him names suggesting he was a homosexual.
- On one occasion Joe's coworkers held him down in the shower while one coworker raped Joe with a bar of soap.
- Ruling?
- Unlawful Harassment
- Same-sex sexual harassment is unlawful.



The Law

You Make the Call!!

- Male salesmen at Acme Auto were repeatedly touched and had their genitals grabbed by their male supervisors.
- On several occasions male supervisors thrust their pelvis on the buttocks of male salesmen.
- On at least one occasion a manager exposed his penis at work.
- Male supervisors repeatedly told crude sexual jokes and used crude sexual language while at work.
- Ruling?
- Likely same-sex sexual harassment
- EEOC obtained \$500.000 settlement.

The Law

You Make the Call!!

- Beth worked as a lifeguard for the City.
- On several occasions Beth's supervisor Bill touched Beth's body without invitation.
- On at least one occasion Bill made contact with another female lifeguard in a motion of sexual stimulation.
- Bill made crudely demeaning references to women generally.
- Bill once tackled Beth and said that except for her small breasts he would have had sex with her.
- Ruling?
- Unlawful harassment.



The Law

You Make the Call!!

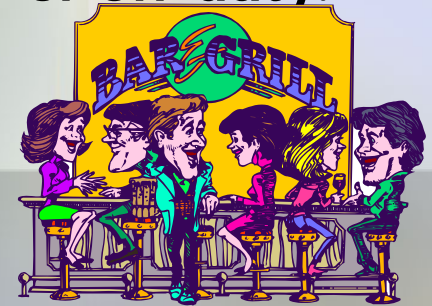
- Jones was a supervisor for USG.
- On one occasion, Jones was struck in the groin by a female USG employee.
- The female employee who struck Jones was known by USG management to have done the same thing to other male USG employees.
- Ruling?
- Unlawful harassment.
- A single incident can be enough.



The Law

You Make the Call!!

- After becoming employed by Roadway Auto Sales, Julie joined the Company's softball team.
- After every softball game, Roadway employees would go to the local tavern for refreshments. Roadway did not pay for the drinks.
- On several occasions after the games, Roadway GM Steve drank too much and asked Julie if they could be "more than friends". Julie politely declined.
- While at the tavern after a recent game, Steve grabbed Julie's buttocks. Later in the evening Steve explained to Julie, "I see that you applied for the sales manager position. Your chances will greatly improve if you will blow me!"
- Ruling?
- Likely sexual harassment
- Doesn't matter whether the conduct occurred on- or off-site.
- Doesn't matter whether the conduct occurred on- or off-duty.
- Focus is now it affects the work environment.



The Law

You Make the Call!!

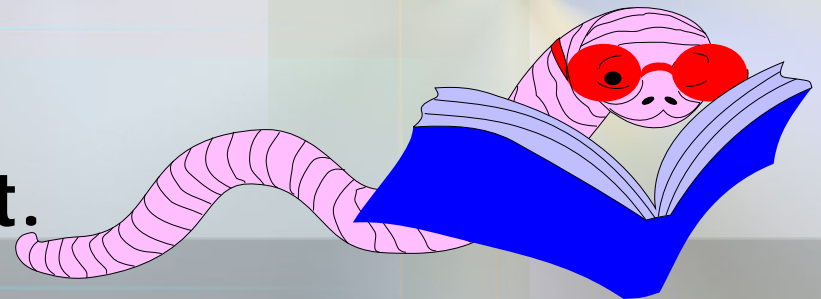
- Steve and Karen Holman are married.
- Both Steve and Karen work for the Department of Roads and are supervised by Gene Uhrich.
- On several occasions Uhrich propositioned Karen for sex, which she refused. She was later denied a pay increase.
- Uhrich also propositioned Steve by grabbing Steve's head while asking for sexual favors. Steve also rebuffed Uhrich's requests.
- Both Steve and Karen claim they have been sexually harassed.
- Ruling?
- Likely No sexual harassment.
- Harassment must be "because of" sex.
- Uhrich is an "equal opportunity harasser".



The Law

You Make the Call!!

- Katie worked for WhiteCo as a production line worker.
- On one occasion Katie's supervisor, Rick, told Katie that her new hair style looked "nice".
- Several months later Rick repeated a joke that he had heard a comedian tell on television about the differences between women and men: Katie was not present in the group of coworkers listening to Rick retell the joke.
- Ruling?
- No sexual harassment.



The Law

You Make the Call!!

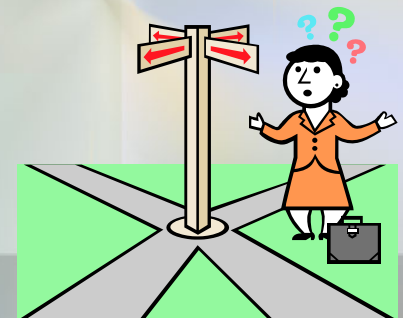


- Vicki was a resident physician at St. Louis Hospital.
- Schweiss, the supervisor of the residents, would refer to female residents by their first name, while referring to the male residents as "Doctor."
- Schweiss told Vicki she was a "beautiful young lady" and should consider modeling.
- Schweiss called Vicki and another female resident "the anesthesia babes."
- Schweiss never propositioned Vicki for sex.
- Ruling?
- Likely sexual harassment.
- Frequent derogatory comments by supervisor to female staff was likely "severe or pervasive."

The Law

You Make the Call!!

- Cindy worked at the Pizza Barn as a waitress.
- After serving two male customers their second pitcher of beer, the customers asked Cindy if she would have sex with them.
- Cindy complained to her supervisor, who told her that she had to serve the customers. "You're a waitress-go wait," said the supervisor.
- When Cindy returned to the customers' table, one of the customers grabbed Cindy's breast, while the other touched her buttocks.
- Cindy brought a claim of sexual harassment against the Pizza Barn.
- Ruling?
- Unlawful harassment
- Harasser can be a non-employee.



The Law

You Make the Call!!

- Ross, a black male, worked for Superior County.
- Ross was supervised by Johnson, also a black male.
- Johnson repeatedly called Ross "n*!!#r" and black boy and referred to Ross's wife, who was white, as "whitey."
- Ruling?
- Unlawful race harassment



The Law

You Make the Call!!

- **Greg, a black male, works for the Housing Authority.**
- **One day Greg entered the office of his supervisor, a white male. Greg noticed a noose hanging on the wall behind his supervisor's desk**
- **Greg complained to his supervisor, who said "it was a joke."**
- **Ruling?**
- **Possibly unlawful race harassment.**
- **One incident, if severe, may be sufficient.**

The Law

You Make the Call!!

- Sami, a black Muslim man from Sudan, was employed by Jetco
- Coworkers frequently told Sami that “you foreigners need to go back to your own country.”
- Coworkers joked that Sami’s mother had sex with camels.
- After September 11th, Sami’s coworkers began telling him that the Muslim religion was “f*!!\$ed up” and telling Sami that he better get on his knees and start praying to “Allah.”
- Sami discovered a picture of Osama Bin Laden taped to his locker
- Ruling?
- Likely unlawful religion harassment and national origin harassment.

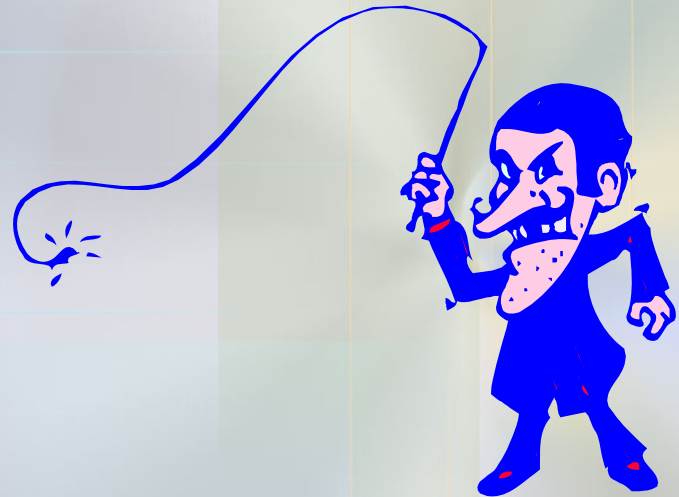
The Law

You Make the Call!!

- Rick Fox injured his back while working for GM
- Fox returned to work, but repeatedly needed to take leaves of absence due to his back.
- When Fox did return to work, his physician restricted Fox to light duty work only.
- While working at the light duty table, Fox's supervisor asked him to perform a task beyond his restrictions. When Fox refused, the supervisor stated, "I don't need any of you handicapped mother f*!!\$ers. Go home."
- Fox's foreman later asked him, "How do you take a sh*t with these restrictions?"
- GM told employees not to talk to Fox or other disabled employees while they were working.
- Fox continued to be able to perform numerous jobs at GM, but his supervisors continued to put him in jobs he couldn't do.
- Ruling?
- Likely unlawful disability harassment.

3. The Policy

- **Equal Employment Opportunity**
 - The Company will not discriminate against:
 - Employees
 - Applicants
 - The Company will provide equal employment opportunity without regard to:
 - Race/Color
 - Sex
 - Age
 - Disability
 - Religion/Creed
 - National Origin
 - Marital Status



The Policy

- **Policy Against Unlawful Harassment**
 - Sexual harassment is strictly prohibited.
 - Harassment based on other protected classes is strictly prohibited:
 - Race/Color
 - Sex
 - Age
 - Disability
 - Religion/Creed
 - National Origin
 - Marital Status



The Policy

- **Employees who are the subject of harassment or witness the harassment of other employees must promptly report it to Company management.**
- **Reporting Procedure - - multiple avenues to complain:**
 - Supervisor; or
 - General Manager; or
 - Board of Directors



The Policy

- The Company will promptly investigate all complaints.
- The employee's complaint will be kept confidential *to the extent possible*.
- Employees found to have engaged in any form of harassment will be subject to discipline, up to and including discharge.



The Policy

- The Company will not tolerate any form of retaliation against an employee alleging harassment or who participates in the investigation.
- Employees found to have threatened or retaliated against an employee for bringing a complaint or participating in its investigation will be subject to disciplinary action, up to and including discharge.



The Policy

Application of

- Jane works for the Company and is supervised by Ron.
- Jane believes that Ron has made inappropriate comments to her based on her sex.
- What should Jane do?
 - Follow Company policy - - promptly report it to:
 - Supervisor: No, not comfortable.
 - General Manager; or
 - Board of Directors



4. The Supervisor

Role

- **Supervisors have special responsibilities.**
 - May have personal legal liability.
- **Supervisors are legally obligated to:**
 - Be on the lookout for unlawful harassment and/or discrimination.
 - Prevent unlawful harassment and/or discrimination.
 - Promptly and thoroughly investigate.
 - Promptly remedy.



The Supervisor

How Should you Respond?

John -

Today will be my last
day. I just don't feel
comfortable here anymore.

Army

The Supervisor

The Eyes and Ears of the Company

- Employees are not required to use “magic words”
 - Ex. “I don’t feel comfortable working in that department any longer.”
- Even facially trivial or frivolous claims should be investigated.
- Knowledge of improper conduct, even without an employee complaint triggers a supervisor’s duty.
 - Can’t bury your head in the sand.
 - Obligation to be on the lookout.



The Supervisor

Duty to Investigate

- Federal and state law requires a *prompt* and *thorough* investigation.
 - “Prompt” means:
 - Within the week, or sooner.
 - Immediate actions to protect complainant, if necessary.
 - “Thorough” means:
 - Objective.
 - No loose ends.
 - Would stand up in court.
 - Documented.



The Supervisor

How to Conduct an Investigation

- **Pre-investigation.**
 - May be necessary to get upper-management involved.
 - Consider immediate steps.
 - Identify witnesses and gather relevant documents.
- **Choose investigator.**
 - Witness for interviews preferred.
- **Limit access to those with “need to know.”**
- **Prepare for each interview.**
 - Review:
 - The law
 - Policies
 - Documents



The Supervisor

How to Conduct an Investigation



- **Interview Complainant.**
- **Don't promise confidentiality.**
- **Be objective.**
- **Who? What? When? Where? Why? Witnesses?**
- **Ask how conduct affected Complainant.**
- **Take detailed notes.**
 - **At end of interview, review your notes with Complainant.**
- **Ask how Complainant wants situation resolved.**
- **Reiterate the Company's Anti-Harassment Policy.**
- **Reiterate the Company's Anti-Retaliation Policy.**

The Supervisor

How to Conduct an Investigation



- **Interview Alleged Harasser.**
 - Advise that no judgment has been made.
 - Review allegations point-by-point.
 - Obtain response to each specific allegation.
 - Who? What? When? Where? Why? Witnesses?
 - Note reaction.
 - Take detailed notes.
 - At end of interview, review your notes with Alleged Harasser.
 - Reiterate the Company's Anti-Harassment Policy.
 - Reiterate the Company's Anti-Retaliation Policy.

The Supervisor

How to Conduct an Investigation

- Interview Other Witnesses.
- Don't promise confidentiality.
- Use "The Funnel" questioning technique:
 - Start with broad, open-ended questions.
 - Do you know why you are here?
 - Have you ever witnessed...
 - Proceed to more specific questions.
 - Who? What? When? Where? Why? Witnesses?
- Take detailed notes.
 - At end of interview, review your notes with Witnesses.
- Reiterate the Company's Anti-Harassment Policy.
- Reiterate the Company's Anti-Retaliation Policy.



The Supervisor

How to Conduct an Investigation

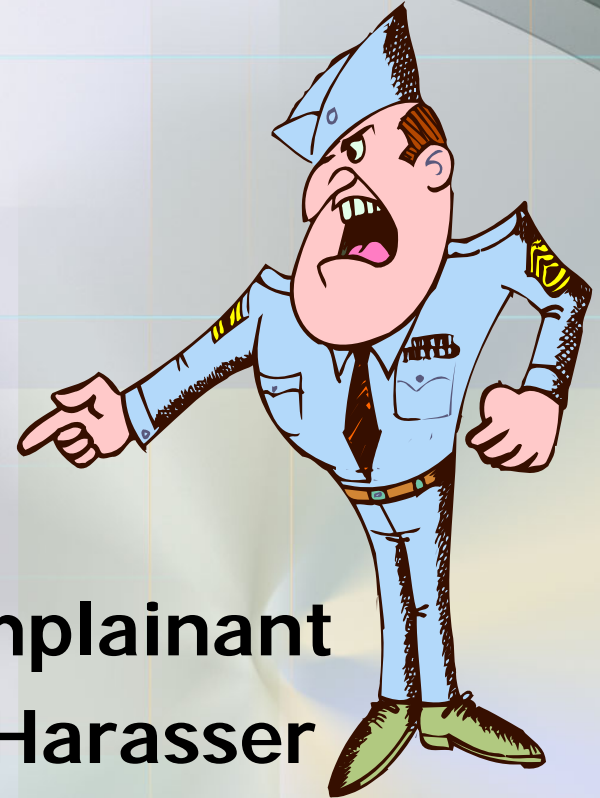
- **Follow-up interview with:**
 - Complainant
 - Alleged Harasser
 - Any witnesses
- **Objectively analyze evidence.**
- **Make a determination based upon the evidence.**



The Supervisor

Taking Appropriate Action

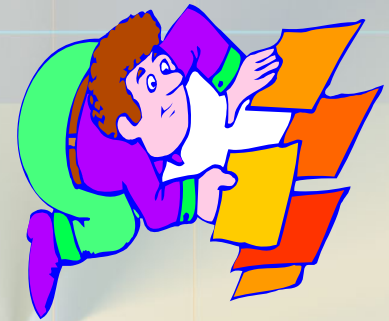
- Law requires *prompt* and *effective* corrective action.
- Evaluate the evidence.
- Consider:
 - Severity
 - Frequency
 - Remedy requested by Complainant
 - Past incidents by Alleged Harasser



The Supervisor

Taking Appropriate Action

- Before terminating Harasser, consider:
 - Is Harasser in a protected class?
 - What does our handbook require?
 - How have other, similarly-situated employees been treated?
 - Is penalty of termination reasonable?
 - What will:
 - Prevent further incidents?
 - Protect Complainant and other employees?
 - Who is the decision-maker?
 - Preferably person who hired Harasser.



The Supervisor

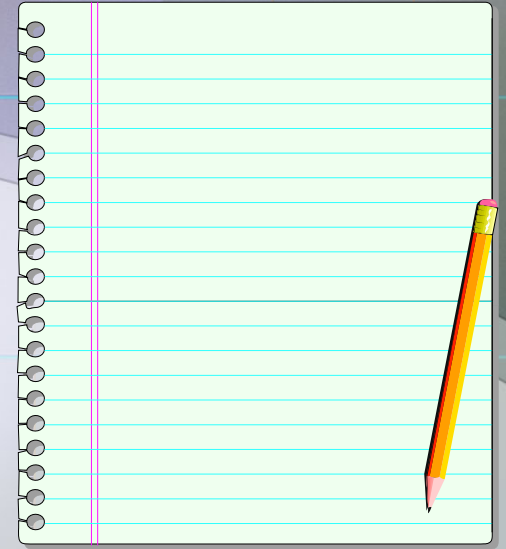
Taking Appropriate Action

- **Other Possible Remedies:**
 - Intra-company transfer;
 - Written warning;
 - Demotion;
 - Suspension;
 - EEO/Harassment Awareness Training;
 - Community Service.
- **Will Complainant be Made Whole if Adverse Employment Action is Taken?**



The Supervisor

Follow-Up



- **Meet with Complainant**
 - **Inform Complainant**
 - Investigation has been concluded.
 - Conclusion reached by investigation.
 - Do not give notes to Complainant.
 - Remedial action taken.
 - To complain immediately pursuant to policy if any further events occur.

The Supervisor

Follow-Up

- **Thoroughly document investigation:**
 - May be the most important thing you do as a supervisor.
 - In every employment claim it's the employee's word against yours - - why take a chance?
 - Must be:
 - Accurate.
 - Contemporaneous.
 - Preserved.
 - Kept confidential.
 - Prepared knowing that one day it might end up in court.



Recap

- The Company has a strong policy against unlawful discrimination.
- The Company has a strong policy against unlawful harassment.
- All incidents of discrimination and harassment must be promptly reported to Company management.
- Follow the policy, there's always someone to report to.
- The Company will promptly and thoroughly investigate all complaints.
 - Be objective.
 - Document, Document, Document!!
- The Company will promptly correct all instances of harassment.
- Retaliation will not be tolerated.



III. The Interplay Between Workers' Comp, ADA & FMLA



Overview

- **The History of Workers' Compensation Law**
- **The Bermuda Triangle**
 - Workers' Comp
 - Americans with Disabilities Act (ADA)
 - Family and Medical Leave Act (FMLA)
- **Getting Work Comp Claimants Back to Work**
- **Disciplining and Terminating Work Comp Claimants**
- **Case Studies**

The History of Work Comp

- First workers' compensation laws were adopted in the late 1800s.
- Predominantly state, not federal law.
- Nebraska adopted its workers' compensation law in 1913
- Prior to workers' compensation:
 - Employees brought “personal injury” claims for work-related injuries.
 - Employee claims were subject to multiple employer defenses.
 - Cases were often tried to juries.
 - Employees rarely won.



The History of Work Comp

- **Workers' Compensation is the exclusive remedy for work-related injury.**
- **Workers' Compensation is the ultimate compromise:**
 - **Employees are entitled to recover for all work-related injuries not resulting from willful negligence.**
 - **Recovery is limited.**



The History of Work Comp

Workers' Compensation Law Today

- When personal injury is caused to an employee by *accident or occupational disease arising out of and in the course of* the employee's employment, the employee shall receive workers' compensation benefits provided the employee was not willfully negligent at the time of the injury.

Neb.Rev.Stat. §48-101



The Bermuda Triangle

- **Workers' Compensation Laws**
- **ADA**
- **FMLA**



Americans with Disabilities Act

- **ADA prohibits discrimination in employment against qualified individuals with disabilities.**
 - Who is a “qualified individual”?
 - What is a “disability”?
- **Requires employers to provide “reasonable accommodations” to qualified individuals with disabilities.**
- **Remedies for violations include:**
 - Reinstatement
 - Backpay
 - Equitable relief
 - Compensatory damages
 - Punitive damages



Americans with Disabilities Act

What is a “disability”?

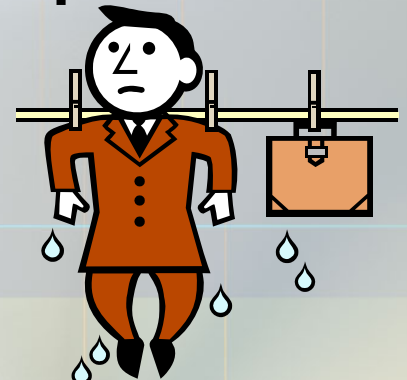
- A physical or mental impairment that:
 - Substantially limits a major life activity.
 - Must have a record of such impairment.
 - Must be regarded as having such an impairment.
- Cause of disability can be work or non-work related.



Americans with Disabilities Act

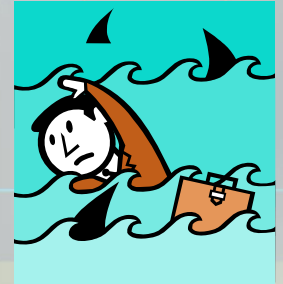
What is a “disability”?

- **Substantially limits one or more major life activities.**
 - **Life Activities:** caring for oneself, walking, seeing, hearing, speaking, breathing, learning, reproduction and working.
 - **Substantially limits depends on:**
 - Nature and severity of impairment;
 - Duration of impairment; and
 - Permanency/Long-term impact of impairment.
- **Major life activity of “working”:**
 - Geographical area.
 - Types of jobs individual is disqualified from.
 - Disqualification from one particular job is not enough.



Americans with Disabilities Act

- **Duty to reasonably accommodate.**
 - Accommodation = any change in the work environment or the way things are customarily done.
 - Examples:
 - Job restructuring
 - Modified work schedule
 - Modifying work station
 - Assignment of vacant position
- **Duty to reasonably accommodate doesn't exist where:**
 - Accommodation would be an “undue hardship” on employer.
 - Significant difficulty expense
 - Employee poses a “direct threat” to health or safety of other employees.
 - Requires significant risk of substantial harm.



Americans with Disabilities Act

You be the Judge

- Ella Williams worked for Toyota on the assembly line and developed carpal tunnel syndrome.
- Toyota modified Williams' job duties to avoid these types of tasks.
- A couple of years later, Williams' job duties changed to include work that required her to hold her hands and arms up around shoulder height for several hours at a time.
- Williams asked to be returned to her previous duties which involved minimal use of her hands and arms. Williams was eventually placed under a no-work-of-any-kind restriction by her treating physician.
- A little over a month later, Toyota terminated Williams' employment, citing her poor attendance record as the reason.
- Williams claimed that she was "disabled" under the ADA because her carpal tunnel prevented her from engaging in the major life activities of working.
- Ruling?
- Williams was not "disabled" under the ADA.
- Could still perform many jobs, if not the particular job she held.

Family and Medical Leave Act

The Basics



- **Adopted in 1993**
- **Covered employers:**
 - All public employers, regardless of size; and
 - Private employers who employ 50 or more employees for at least 20 workweeks in the current or preceding calendar year.
- **Eligible employees:**
 - Worked for the employer at least 12 months;
 - Worked at least 1,250 hours during the 12 months prior to the FMLA leave; and
 - Work at a location where at least 50 employees are employed at the location or within 75 miles of the location.

Family and Medical Leave Act

When does an “eligible employee” qualify for FMLA benefits?

- For the birth of a child or to care for a newborn;**
- For the placement of a child with the employee for adoption or foster care, and to care for the child;**
- To care for an immediate family member with a “serious health condition”;**
- When the employee is unable to work because of a “serious health condition.”**

Family and Medical Leave Act

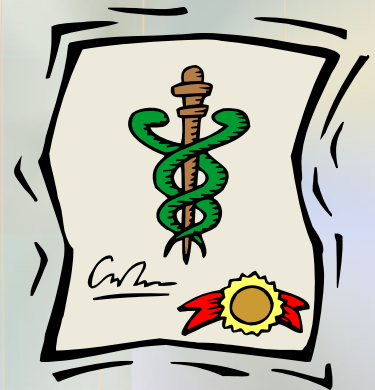
What is a “serious health condition”?

- An illness, impairment or physical or mental condition that involves:
 - Any period of incapacity or treatment with inpatient, overnight stay at hospital.
 - Any period of incapacity requiring absence of more than 3 calendar days from work, school, or other regular activities that also involves continuing treatment by a health care provider.
 - Any period of incapacity due to pregnancy or prenatal care.
 - Any period of incapacity due to a chronic serious health condition
 - Asthma
 - Epilepsy
 - A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective; or
 - Terminal disease
 - Any absences to receive multiple treatments that would likely result in incapacity of more than 3 consecutive days if left untreated.
 - Chemotherapy
 - Dialysis



Family and Medical Leave Act

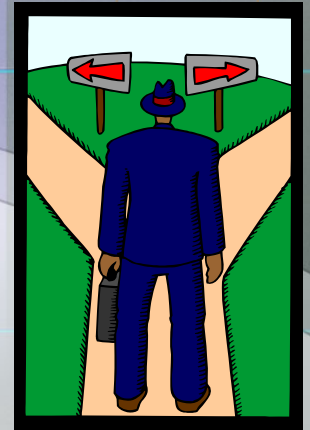
- **Benefits granted to eligible employees:**
 - Up to 12 weeks of unpaid leave;
 - Maintenance of health insurance benefits during leave;
 - Reinstatement to the same or equivalent job.



ADA, FMLA and Workers' Comp

The Bermuda Triangle

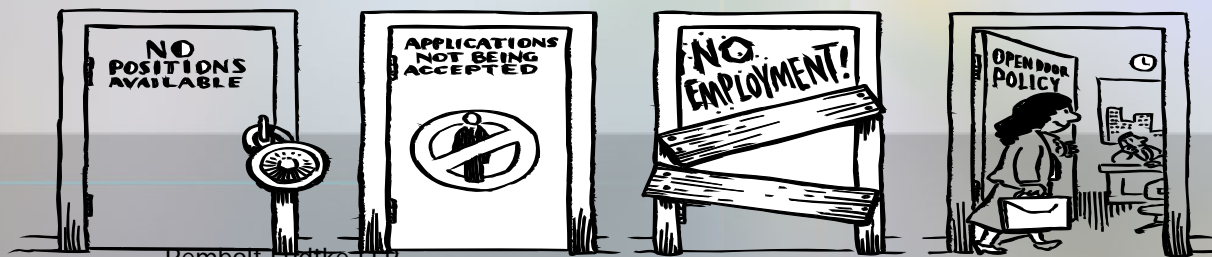
- A work-related injury can be:
 - An “accident and injury” for workers’ compensation;
 - A “disability” under the ADA; and
 - A “serious health condition” under the FMLA.
- Which law applies determines:
 - Whether the “disability” must be reasonably accommodated;
 - What limitations exist to terminate the employee;
 - What benefits must be paid; and
 - Whether reinstatement is guaranteed.



Disciplining and Terminating Employees

Work Comp

- You cannot terminate an employee simply for having a work-related injury.
- You cannot terminate an employee for filing for workers' compensation benefits.
- You can hold employees who sustain a work-related injury to the same rules and policies as all other employees.



Return to Work

Light or Full Duty

- Start with a detailed job description.
- Use a “Fitness for Duty” form.
 - Requires doctor to answer specific questions.
 - Condition/Injury;
 - Impairment;
 - Duration;
 - Functional abilities of employee; and
 - When is the employee’s next doctor’s appointment
 - Attach job description.
- If injury is related, you may communicate with doctor.
- If FMLA only, you may not.

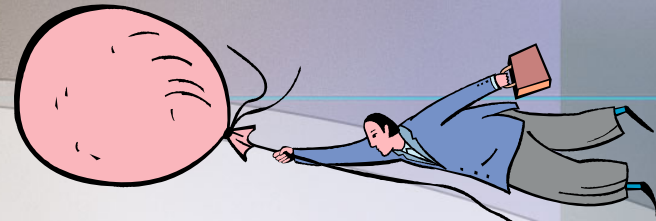


Employee Medical Information

- Numerous reasons why employee medical information must be kept confidential:
 - Common law invasion of privacy; and
 - ADA requires it
- ADA requires that it be kept in a separate file.
 - Includes workers' compensation medical information.



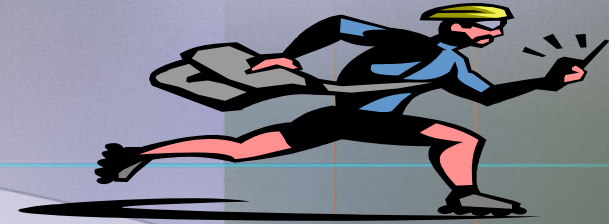
Light Duty



- **Benefits:**
 - Better for employee's mental and physical health;
 - Generally accelerates recovery process;
 - Helps coworkers who are filling in during employee's absence;
 - May be a reasonable accommodation under the ADA; and
 - Especially important where vocational rehabilitation is at issue.
- **Detriments:**
 - Can prolong length of disability;
 - Can hurt coworker morale; and
 - If light duty is done in one instance, may limit The Company's ability to decline light duty to another.

Light Duty

Things to Remember



- All employees must be eligible for light duty, regardless of cause of injury.
- All light duty should be temporary.
 - Do not create any permanent light duty positions.
- Employees should generally be held to the same policies.
 - Unless modification of policy is necessary as to “reasonable accommodation” under the ADA.
- Do not allow employees to harass employees on light duty.

Return to Work

Light Duty/Accommodating Restrictions

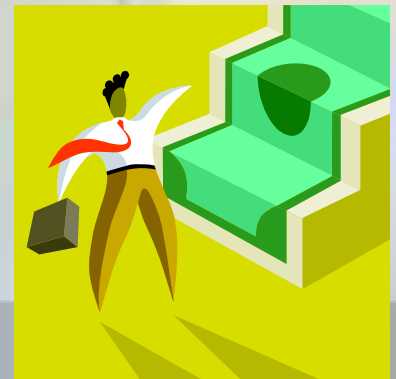
- Susan works as a laborer, a position that requires repetitive bending and frequent lifting of objects 50 lbs or more. Today, Susan injures her back while lifting a stack of steel at work. After reporting the incident to her supervisor, she is sent for medical treatment and does not return to work that day. Susan reports for work the next morning with a note from her doctor releasing Susan to return to work, light-duty only for 4 weeks, with a 20 lb lifting restriction and no repetitive bending.
- What do you do?



Return to Work

Light Duty/Accommodating Restrictions

- Rick injures his low back while tying down a tarp. After undergoing back surgery, Rick's doctor has declared Rick to be at "maximum medical improvement" with a permanent lifting restriction of 20 lbs, and only occasional bending, twisting and lifting. Rick's previous position required frequent bending, twisting and lifting of material 75 lbs or more.
- What do you do?



Return to Work

Interactive Process/Reasonable Accommodation

- Humphrey worked as a medical transcriptionist for Memorial Hospital. She developed an obsessive compulsive eating disorder which caused her to do such things as wash her hair for up to three hours, dress very slowly, and check continually for papers for work. These actions would cause Humphrey to be late for work or miss work all together. The Hospital allowed her an accommodation of coming to work at any time during the day, as long as she worked 8 hrs per day. Humphrey still missed work, and requested a different accommodation of working from home. It was company policy that any employee involved in a disciplinary action, which Humphrey was, was not eligible to work at home. Humphrey was denied her request.
- Humphrey sued under the ADA alleging Memorial Hospital failed to reasonably accommodate her disability.
- Ruling?



Return to Work

Workers' Comp

- **Sally is a welder. While lifting a sheet of metal to weld, she falls to the floor and injures her back. Following extensive physical therapy, Sally is released to return to work. She is temporarily released with a 50 lb weight restriction. You find her a job painting screw heads. After one day of this work, Sally says that it is too mentally stressful for to paint screw heads (the only job available with a 50 lb restriction) and wants to go home.**
- **Do you have to put her back on workers' compensation leave?**

Return to Work

Workers' Comp



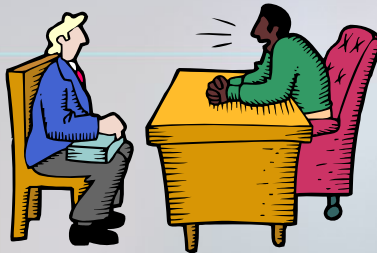
- Anna Nicole is a typist for Old Man Inc. She breaks her wrist while trying to move a desk with a coworker. Anna Nicole is unable to work for six weeks and receives workers' compensation. After Anna Nicole's wrist completely heals, she asks to return to work. A physician indicates that there is little risk that repetitive motion will damage Anna Nicole's wrist. However, the Company refuses her request to return to the typist position because it believes that any repetitive motion will cause serious and permanent re-injury to her wrist.
- Does the Company have to return Anna Nicole to her former position?

Recap



- ADA, FMLA and Workers' Comp laws must always be considered.
 - Not every injury is a “disability” under the ADA
 - Not every injury is a “serious health condition” under the FMLA.
- Employees with work-related injuries can be held to standard company policies and rules.
 - *Caveat*: Unless necessary for a reasonable accommodation.
- Documentation is critical.
- When in doubt, ask yourself: What would a jury of employees think about our decision to terminate?

IV. Overtime Requirements and Exemptions in Nebraska



Overview

- 1. Wage & Hour**
- 2. The “White Collar” Overtime Exemptions**
- 3. Overtime & Hours Worked**
- 4. Common Pitfalls with FLSA and Nebraska Wage Payment and Collection Act**

Pop Quiz

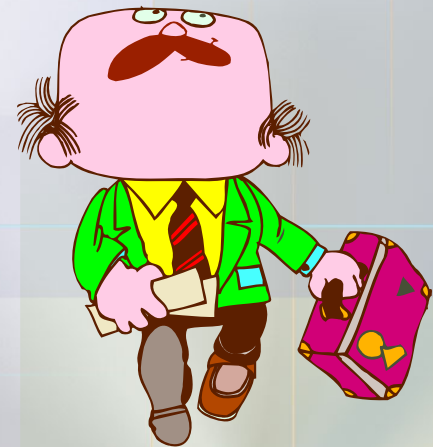
True or False

- 16 year olds can operate a motor vehicle on-the-job if they have a valid drivers license.
- Bookkeepers and other office staff are exempt from overtime.
- Employers may deduct cash register shortages from the responsible employee's paycheck.
- Salaried employees are not eligible for overtime pay.
- Bonuses must be included in an employee's wages when calculating overtime pay owed to the employee.
- Federal law requires a 15-minute break for every 4-hours worked, but employers are not required to pay employees for it.
- Nebraska law requires an employer to pay a terminated employee all wages owed within 7 days of the date of termination.
- When an employee is terminated, employers may deduct the value of Company tools the employee failed to return from the employee's final paycheck.



1. Wage & Hour Fair Labor Standards Act of 1938

- Adopted in 1938
- Addresses:
 - Minimum Wages;
 - Overtime Pay;
 - Child Labor; and
 - Recordkeeping.
- Does Not Require:
 - Vacation and Holiday Pay;
 - Severance Pay;
 - Premium Pay for Weekends or Holidays; and
 - Meal or Rest Periods.



Wage & Hour

Overtime

- Requires nonexempt employees to be paid:
 - 1 ½ times
 - “regular rate of pay”
 - for all “hours worked” over 40
 - in a “workweek.”



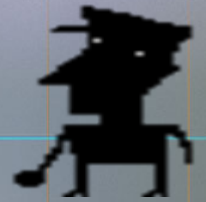
Wage & Hour

Overtime

- Over the 60 years of the FLSA, Congress has created and repealed numerous overtime exemptions.
- Most common exemptions are the “white collar” exemptions.
 - Executive
 - Administrative
 - Professional
 - Outside salespersons



2. White Collar Exemptions Overtime

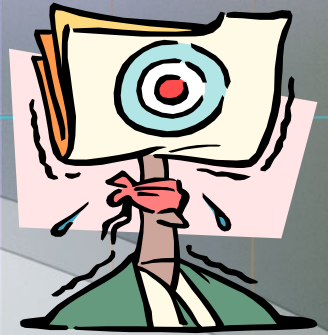


- The White Collar Exemptions have 3 basic requirements in common:
 - Employee must perform work of an exempt nature;
 - Employee must spend sufficient time performing exempt work or it must constitute the employee's primary duty; and
 - Employee must be paid on a salary basis of at least a specified amount.

Doesn't apply to Outside Sales Exemption.

White Collar Exemptions

Executive Exemption



- Salary test:
 - Must be paid on a “salaried” basis.
 - Minimum salary: \$455/week; \$23,660/year.
- Duties test:
 - Primary duty consists of managing the enterprise in which they are employed or a customarily recognized department or subdivision;
 - Customarily and regularly direct the work of 2 or more employees; and
 - Has the authority to hire or fire or whose suggestions and recommendations regarding such are given “particular weight.”

White Collar Exemptions

Executive Exemption

- “Primary duty”
 - Generally an employee who spends more than 50 percent of time in management work.
 - Is management the employee’s most important duty?
- “Management”
 - Responsibility for such things as:
 - Interviewing
 - Hiring
 - Training
 - Setting wage rates and hours of work
 - Directing work
 - Appraising performance
 - Disciplining and discharge
 - Determining products/services bought and sold
 - Controlling flow and distribution of products/services



White Collar Exemptions

Executive Exemption

- “Department” or “Subdivision”
 - Regulations distinguish:
 - Collection of workers assigned from time to time to job (No).
 - Unit with permanent status and function (Yes).
 - Includes “shift”
- Customary and Regular Direction of 2 or more employees:
 - Employees must be in department/division supervised.
 - 2 employees must be full-time equivalents.
 - Supervising combination of FT and PT is allowed where total hours supervised exceeds 80 per week.

White Collar Exemptions

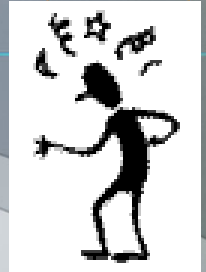
Executive Exemption

- Authority to Hire or Fire; or
- Suggestions and recommendations given “particular weight”
 - Section 541.105
 - Is it part of employee’s duties to make such suggestions?
 - Frequent suggestions are made and relied on.
 - Can have “particular weight” even if employee lacks ultimate authority to decide change in status.



White Collar Exemptions

Executive Exemption



- Examples:
 - Exempt:
 - Golf course manager who spent 50 percent plus of time on non-manual management, including hiring, firing, keeping financial records, overseeing operations and supervising more than 2 FT employees.
 - Non-exempt:
 - Working foreman who devoted virtually all working time to repairing vehicles, waiting on customers, and cleaning service area.
 - Crew supervisor who worked right along with the crew and did common labor.

White Collar Exemptions

Professional Exemption

- Must have primary duty performing:
 - Work requiring knowledge of an advanced type in a field of science or learning customarily acquired by prolonged course of study (“learned profession”).
 - Work that is original and creative in character in a recognized field of artistic endeavor (“artistic professional”).
 - Teaching, tutoring, instructing or lecturing (“teachers”).
 - Work that requires theoretical and practical application of highly-specialized knowledge in computers (“certain computer professionals”).



White Collar Exemptions

Professional Exemption

- Salary test:
 - Exemption: Computer Professionals
 - Must be paid more than \$27.63/hour
 - \$455/week; \$23,660/year
- Duties test:
 - Primary duty is:
 - Learned professional
 - Artistic professional
 - Teacher
 - Qualified computer professional



White Collar Exemptions

Professional Exemption

• Examples:

– Learned Professional

- Medicine
- Law

– But not paralegals

– Artistic Professional

- Musicians
- Actors/Actresses
- Authors
- Graphic Artists
- Journalists
- maybe

– Teacher

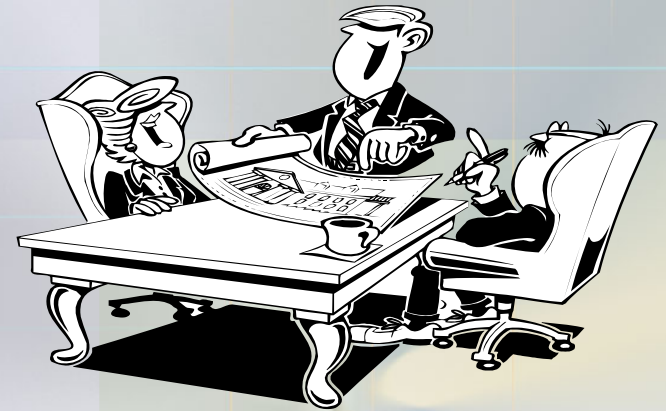
- Pre-school Teacher
- College instructor
- College instructor
- Music teacher
- But not dormitory parents



White Collar Exemptions

Professional Exemption

- Computer Professionals
 - Added to professional exemption by Congress in 1990
 - Applies to employees who are highly skilled in:
 - Computer systems analysis;
 - Programming; or
 - Software functions.
 - Includes:
 - Computer programmer;
 - Systems analyst; and
 - Systems engineer
 - Excludes:
 - Computer repair personnel; and
 - Employees who maintain computer hardware.
 - Salary base not required if hourly rate exceeds \$27.36/hour



White Collar Exemptions

Administrative Exemption

- Salary Requirement:
 - \$455/week; \$23,660/year
- Duties Requirement:
 - Primary duty
 - Is office or non-manual work that is directly related to the management policies or general business operations of the company or its customers; and
 - Includes the exercise of direction and independent judgment with respect to matters of significance.



White Collar Exemptions

Administrative Exemption

- Office or Non-manual work
 - Employee who spends majority of time in manual labor is not exempt.
 - Performance of some manual work will not destroy exemption.
- Directly Related to Management or Operations
 - Meant to distinguish
 - Administrative operations (exempt)
 - Production operations or sales (not exempt)
 - Example:
 - HR clerk (not exempt)
 - HR Director (exempt)



White Collar Exemption

Administrative Exemption

- Exercises discretion and independent judgment with respect to matters of significance.
 - Involves comparing and evaluating possible courses of conduct and making a decision after the possibilities have been considered.
 - “Discretion” and “Independent” imply:
 - Freedom from immediate supervision/direction; and
 - Regarding matters of significance.
 - Entails making or recommending decisions:
 - In a matter that is distinguished from the use of skill or merely following procedures; and
 - Involving matters of significance.



White Collar Exemptions

Administrative Exemption

- Examples:
 - Exempt:
 - Certified Public Accountant
 - Bank credit manager
 - Building inspectors who make recommendations
 - Non-Exempt:
 - Bookkeeper
 - Personal Banker
 - Building inspectors who merely look for compliance
 - Secretaries
 - Receptionist



White Collar Exemptions

Outside Sales Exemption

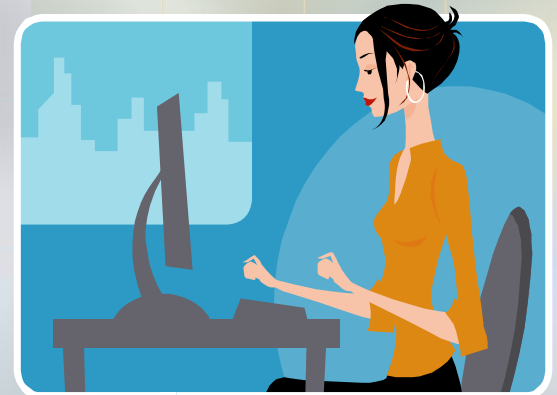
- Duties Test:
 - Primary duty is:
 - Making sales; or
 - Obtaining orders or contracts for services or for the use of facilities for which money will be paid; AND
 - Who is customarily and regularly engaged away from the employer's place of business in performing such primary duty.



White Collar Exemptions

Outside Sales Exemption

- **Making Sales or Obtaining Orders.**
 - Employees who both sell and provide the services are not covered.
- **Away from Employer's Place of Business.**
 - Working "outside" is not enough
 - Inside sales (e.g. phone, fax, mail) are not covered.
 - Any fixed site (home or office) used by salesperson is considered the employer's place of business.
- **Incidental to and in Conjunction with Sales Work.**
 - Still is exempt work
 - Includes:
 - Incidental deliveries and collections;
 - Writing sales reports;
 - Attendance at sales conferences; and
 - Revising product catalog.



3. Overtime & Hours Worked

Hours Worked

- FLSA overtime requirements mandate payment of 1 ½ times employees regular rate of pay for all “hours worked” by a nonexempt employee over 40 hours in a workweek.
- “Hours worked”
 - FLSA defines “employ” as “to suffer or permit to work”.
 - Has been defined by courts to mean:
 - Physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer.



Hours Worked

Special Issues

- Waiting Time
 - Compensable
 - Idle time while waiting for machinery to be repaired.
 - Employees required to report to work but not punch in until customers arrived.
 - On-call time where employee is “engaged to wait”.
- Rest and Meal Periods
 - Rest periods of 20 minutes or less are compensable
 - In order to be noncompensable, employee must be completely relieved of work.
 - Meal breaks are noncompensable if:
 - 30 minutes or more in duration.
 - Employee is completely relieved of work.



Hours Worked

Special Issues

- Sleeping Time
 - If on duty for less than 24 hours, sleep time is compensable.
 - If more than 24 hours, employer and employee may by agreement exclude sleep time if sleeping facilities are provided by employer.
- Preparatory and Concluding Activities
 - Is activity closely related to employee's principal activity and indispensable to its performance?
 - Showering;
 - Changing into uniform;
 - Sharpening knives;
 - Cleaning machines; and
 - Riding to work on Company-provided bus.



Hours Worked

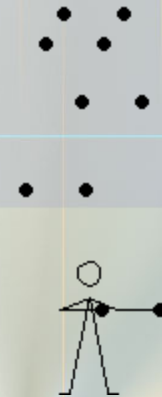
Special Issues

- **Lectures, Meetings and Training**
 - **Compensable, unless all 4 criteria are met:**
 - Attendance is outside employee's regular working hours;
 - Attendance is truly voluntary;
 - Course/lecture/meeting is not directly related to employee's job; and
 - Employee does not perform any productive work during such attendance.
- **Travel Time**
 - Travel to and from work generally not compensable.
 - Travel job-site to job-site during the day is compensable.
 - Travel in emergency or call-back situations may be compensable.
 - **Overnight travel:**
 - All time spent traveling during normal work hours is "hours worked".
 - Includes weekends and holidays when travel hours correspond to hours employee normally worked during the regular work week.

Hours Worked

Special Issues

- **Medical Attention**
 - If on employer's premises or at employer's direction during normal work hours, it is generally "hours worked".
- **Charitable Work**
 - Is "hours worked" if:
 - Done at employer's request;
 - Done under employer's direction or control; or
 - Done while employee is required to remain on employer's premises.



4. Common Pitfalls with the FLSA and Nebraska Wage Payment and Collection Act

- **Allowing 16 and 17 year olds to operate motor vehicles**
 - **Drive for Teen Employment Act (Oct. 1998)**
 - **16 year olds can never operate motor vehicle on-the-job.**
 - **17 year old can, provided:**
 - **Daylight hours only;**
 - **Completed state-approved drivers ed course;**
 - **Instructed to wear seatbelts;**
 - **Severe limitations on transporting passengers or goods;**
 - **Cannot drive beyond 30 mile radius from work; and**
 - **No more than 1/3 of time in any workday or 20% in a workweek.**



Common Pitfalls

- **Classifying Nonexempt Employees as Exempt**
 - Must be able to point to applicable exemption.
 - Titles don't matter.
 - White collar exemptions have duties and salary test.
 - **Salary Test:**
 - Employee receives predetermined amount not subject to reduction because of variations in quality or quantity of work.
 - Policies that tend to jeopardize salary-basis test:
 - Section 541.602



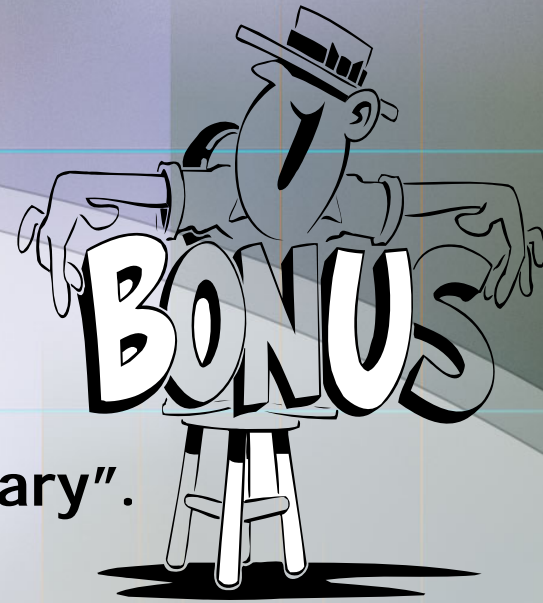
Common Pitfalls

- **Ignoring What is Meant by “Hours Worked”**
 - Eager Beavers
 - Working off the clock
 - Preparatory activities



Common Pitfalls

- **Calculating “Regular Rate”**
 - **Bonuses**
 - **Must be included unless “discretionary”.**
 - Whether to be awarded.
 - Amount.
 - **Prizes & Awards**
 - **Must be included if given as remuneration for employment.**
 - To be excluded:
 - » Not paid to employee for employment.
 - » Non-work activities.
 - » Amount of time spent competing for prize/award.
 - » Not a thing of value that is part of wages.



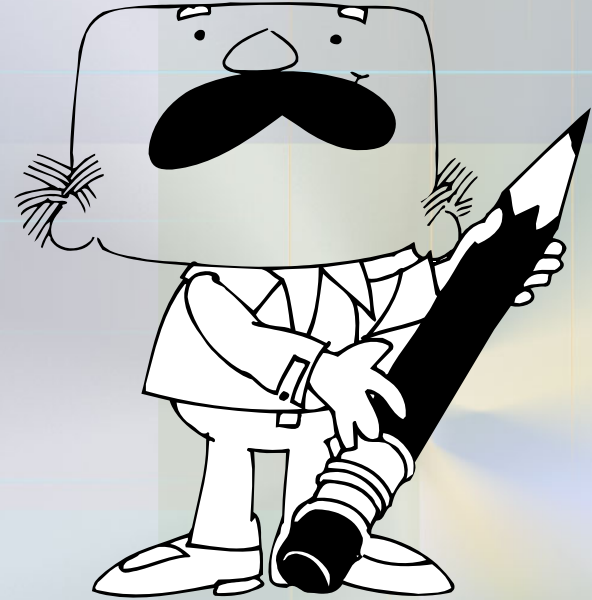
Common Pitfalls

- **Improper Treatment of Rest & Lunch Breaks**
 - Rest breaks between 5 and 20 minutes are “hours worked”.
 - Bona fide meal breaks of 30 or minutes are not “hours worked”
 - Employee must be completely relieved of work.
 - Employee need not be allowed to leave the premises.



Common Pitfalls

- **Improper Treatment of On-Call and Travel Time**
 - On-Call time
 - Travel Time



Common Pitfalls



- **Comp Time**
 - **Public-sector employers may offer “comp time”.**
 - Must be paid pursuant to the CBA, agreement or understanding.
 - Must accrue at rate not less than 1 ½ hours/overtime hour.
 - Maximum accrual.
 - 240 hours for most employees.
 - 480 for public safety, emergency response and seasonal employees.
 - Employer may compel use of comp time.
 - Employee may cash out comp time
 - » Upon separation, rate is higher of final rate or average of last 3 years.
 - **Private-sector employers generally cannot offer “comp time”.**
 - **Exception: Time off is taken during the same pay period in which the overtime is earned.**
 - Can’t apply to employees paid on a weekly basis.
 - Must be pursuant to a written “time off” plan.

Common Pitfalls

- **Deductions from Pay**
 - Certain deductions may result in violation of minimum wage provisions.
 - Cash register shortages.
 - *Exception:* Admission or conviction for embezzlement.
 - Customers failing to pay bad accounts.
 - Employee accounts.
 - Uniforms.
 - Certain deductions may jeopardize “white collar” exemptions.
 - Absences occasioned by employer.
 - Store closed 3 days for special inventory.
 - Deductions for absences of less than 1 day.
 - Disciplinary deductions for anything other than that allowed by Section 541.602(b)(5)
 - **Nebraska Wage Payment & Collection Act.**
 - No deductions unless:
 - Required by law;
 - Required by court order; or
 - Authorized in writing by employee.



Pop Quiz



True or False

- 16 year olds can operate a motor vehicle on-the-job if they have a valid drivers license.
- Bookkeepers and other office staff are exempt from overtime.
- Employers may deduct cash register shortages from the responsible employee's paycheck.
- Salaried employees are not eligible for overtime pay.
- Bonuses must be included in an employee's wages when calculating overtime pay owed to the employee.
- Federal law requires a 15-minute break for every 4-hours worked, but employers are not required to employees for it.
- Nebraska law requires an employer to pay a terminated employee all wages owed within 7 days of the date of termination.
- When an employee is terminated, employers may deduct the value of Company tools the employee failed to return from the employee's final paycheck

V. Effectively Implementing Workplace Policies



Policies

Reporting Work Accidents/Injuries

- **Employees must:**
 - Report all injuries, no matter how slight, to their supervisor immediately.
 - Even if injury does not seem serious, they must report it to you.
- **Supervisors must:**
 - Thoroughly and accurately document the accident and alleged injuries.
 - The sooner, the better.
 - Get the employee to sign the Incident/Injury Investigation Report.



Example of Investigation Report:

Incident/Injury Investigation Report

Investigator's Name (Print): John Doe Area Supervisor: Jane Doe Report Date: 11/3/04

Name of Injured/Near Injured Employee: Sam Smith Job/Position: mat Handler

Division # 20 Date of Incident/Injury: 11/15/04 Time of Incident/Injury: 4:30 AM

Exact Location Where Incident/Injury Occurred: Print Dept.

Witness interviewed: _____

Treatment: ☐ None ☒ First Aid ☒ Doctor ☐ Hospital

Did Injury result in days away from work? ☐ Yes ☒ No

If "Yes", was the employee contacted at home to show our concern for him/her? ☐ Yes ☒ No

If "Yes", by whom? ☐ Supervisor, ☐ HR Person, ☐ Other

✓ NATURE OF INJURY and Write in Body Part(s) affected after each:

1. <input type="checkbox"/> Cut/Puncture:	6. <input type="checkbox"/> Amputation:	11. <input type="checkbox"/> Burn/ heat, light, chemical
2. <input checked="" type="checkbox"/> Contusions:	7. <input type="checkbox"/> Hernia:	12. <input type="checkbox"/> Electrical Shock:
3. <input type="checkbox"/> Strain/Sprain:	8. <input type="checkbox"/> Abrasion:	13. <input type="checkbox"/> Heat Exhaustion:
4. <input type="checkbox"/> Fracture:	9. <input type="checkbox"/> Dermatitis:	14. <input type="checkbox"/> Near Miss:
5. <input type="checkbox"/> Dislocation:	10. <input type="checkbox"/> Poisoning:	15. <input type="checkbox"/> Other:

Shade BODY PART(s) on Correct Side, Describe Injury And Draw Arrow to Area(s)

Front Back

Example of Investigation Report:

Make sure employee signs and dates it!

Supervisor Comments: What happened and why? AND, what part will you play in helping prevent it from happening again?	
A BEAM FELL ON THE BACK OF HIS LEG, HE WASN'T WATCHING WHAT HE WAS DOING, WILL KEEP TEACHING HOW TO BE SAFELY MINDFUL AROUND MOVING MATERIAL, TO BE MORE ALERT AND TO WORK IN A MORE SAFER WAY OF GETTING THE JOB DONE.	
Supervisor's Signature: <i>Jane Doe</i>	Date: 12-7-2004
Employee Comments: What happened and why? AND, what can be done to prevent it from happening again to yourself or others?	
I had just moved a beam and came back for the next one. I was standing in front of the beam which was moving on the track, and I turned my back to the beam to catch the hooks on the crane when the beam fell over hitting the back of my right calf. Learned not to turn my back on moving material.	
<i>Sam Smith</i>	12-7-2004

Company Policies:

Attendance/Punctuality

- Employees are expected to arrive on time at their scheduled start times ready for work.
- Excessive absenteeism or tardiness will not be tolerated.
- Absenteeism reporting procedure:
 - Excused v. unexcused.
 - Consistency is the key!



Company Policies

Documentation, Discipline & Discharge

- **Keys to disciplining & discharging employees.**
 - Did the employee have knowledge of the work policy at issue?
 - Did the employee clearly violate a Company policy?
 - Read the policy!
 - Is our policy being administered consistently?
 - What other legitimate factors are at issue?
 - Documented prior violations.
 - Past work performance.
 - Is discipline consistent with past infractions?
 - Are you implementing discipline in a respectful manner?



VI. Employee Review and Performance Appraisals



Reviews & Appraisals

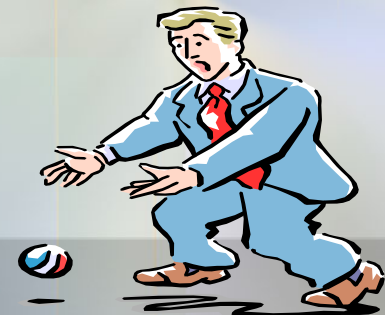
- Can serve as a positive tool for improving employee performance.
- Must be taken seriously by supervisor and employee.
- Not the only time to provide employees with feedback.



Reviews & Appraisals

Double-Edged Sword?

- Performance evaluations can serve as the basis for lawsuits against the Company and the supervisor.
 - Liability can result from positive and negative evaluations.
 - Liability can result from saying too much and saying too little.
 - Liability can result from not conducting an evaluation when scheduled.



Reviews & Appraisals

Case Study

- **Soft Rock hired Tiffany Teapot in July 1999 as a secretary. In July 2000, Teapot is promoted to office manager. A year later in July 2001, Teapot receives her annual performance review, in which Teapot's supervisor states that Teapot was a "stellar, ten out of ten stars" employee. In August 2001, Teapot announced that she was pregnant. On September 1, 2001, Teapot was demoted to secretary. Eight weeks later, on November 1, 2001, Teapot was fired for poor performance.**
- **Is Soft Rock on solid ground??**

Reviews & Appraisals

Avoiding Liability



Important
DATE!

- Before the Evaluation:
 - Get the employee's last evaluation.
 - Get documentation from personnel file.
- During the Evaluation:
 - Explain review process to employee.
 - Evaluate employee on entire evaluation period.
 - Be honest:
 - If attendance stinks, say it in a constructive way.
 - Use specific examples.
 - *Every* employee can improve his/her performance.
 - If your employees are getting "superiors" in all categories, come see me.
 - Stick to the facts.
 - Prepare knowing that it may end up in court.

Reviews & Appraisals

Avoiding Liability

- **After the Evaluation:**
 - Be certain to get the evaluation signed and dated.
 - Make certain the evaluation goes into the personnel file.



Pop Quiz



True or False

- *Supervisors can be sued personally for wrongfully terminating an employee.*
 - True, under many employment laws.
- *Employment at will means that employees have the right to not join an union.*
 - False, it has nothing to do with union membership.
- *Supervisors should avoid documenting workplace occurrences because it might come back to hurt the Company.*
 - False, Always, Always, Always, Document, Document, Document!!
- *Performance Appraisals are for Company use only and are inadmissible in court.*
 - False, Performance appraisals are highly relevant and persuasive with juries.

Mark A. Fahleson

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