

IHLAEF Labor & Employment Law Seminar

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Presented by

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Part I: An Overview of Recent Illinois, Cook County, Chicago and Federal Employment Laws

Illinois Employee Sick Leave Act – Eff. January 1, 2017

- It is **NOT** a paid sick leave law and does not require employers to provide sick time.
- It **ONLY** requires employers that have paid or unpaid sick leave benefits or paid time off policies, to allow employees to also use half of their available sick leave for family members' illnesses.
- The law does **NOT** require employers to allow employees to use long term disability, short term disability, an insurance policy, or other comparable benefit plan or policy for the care of family members.

Illinois Employee Sick Leave Act – Eff. January 1, 2017

An employee may use sick leave benefits for:

- Absences due to an illness, injury, or medical appointment for oneself or for the employee's child, stepchild, spouse, domestic partner, sibling, parent, mother-in-law, father-in-law, grandchild, grandparent, or stepparent.

Cook County Earned Sick Leave and City of Chicago Paid Sick Leave Ordinances – Eff. July 1, 2017

- The City of Chicago and Cook County’s Paid Sick Leave Ordinances went into effect on July 1, 2017.
- Employers were required to start tracking sick leave accrual starting on the effective date.
- The City of Chicago and Cook County have issued additional details, regulations, and clarifications to their respective Ordinances.

Cook County Earned Sick Leave and City of Chicago Paid Sick Leave Ordinances – Eff. July 1, 2017

Covered Employer

1. Employs at least one (1) covered employee; AND:
2. (a) maintains a business facility within the Cook County/City of Chicago's geographic boundaries;
and/or
3. (b) is subject to business license requirements in Chapter 54 of the Code (Cook County) or Title 4 license requirements of the MCC (City of Chicago).

Virtually ALL employers in Chicago are covered

Cook County Earned Sick Leave and City of Chicago Paid Sick Leave Ordinances – Eff. July 1, 2017

Eligible Employee

1. Works at least 80 hours within any 120-day period for a covered employer;
AND
2. Performs at least at least two (2) hours of work in any two-week period while in Chicago/Cook County.
 - Work time includes travel time for compensated business activities (traveling, deliveries, sales calls, etc.) within Chicago/Cook County’s geographic boundaries.
 - Day or temporary laborers, meaning people who contract for employment with a day and temporary labor service agency, are covered by the Chicago Ordinance.

Cook County Earned Sick Leave and City of Chicago Paid Sick Leave Ordinances – Eff. July 1, 2017

Paid Sick Leave Accrual and Carry Over

- Employees accrue one (1) hour of paid sick leave for every forty (40) hours worked.
- Exempt employees are assumed to work 40 hours in each work week, unless their normal work week is less than 40 hours, in which case they accrue based upon their normal work week.
- Employers may cap paid sick leave accrual at forty (40) hours per year.
- Employees may carry over up to half (up to a maximum of 20 hours) of accrued but unused sick leave.

Cook County Earned Sick Leave and City of Chicago Paid Sick Leave Ordinances – Eff. July 1, 2017

Paid Sick Leave Accrual and Carry Over (cont.)

- Employees who are eligible for FMLA may carry over up to an additional forty (40) hours of accrued but unused sick leave to use for FMLA purposes.
- Sick leave begins to accrue either on the 1st calendar day after the commencement of an eligible employee's employment or on the effective date of the Ordinance.

Cook County Earned Sick Leave and City of Chicago Paid Sick Leave Ordinances – Eff. July 1, 2017

Existing Policies

- Employers that provide employees with time off in an amount and manner that meets the sick leave laws' requirements are NOT required to provide additional sick leave.
- This means that an employer's existing policies must conform in all aspects required by the sick leave laws (*i.e.*, they allow employees to earn up to forty (40) hours of PTO that they can use for sick leave purposes, meet the carry over requirements, etc.).

Cook County Earned Sick Leave and City of Chicago Paid Sick Leave Ordinances – Eff. July 1, 2017

Employees NOT covered by the Chicago Paid Sick Leave Ordinance only?

- Employees under the age of 18.
- Trainees taking part in a program for no more than six months, pending state approval.
- Subsidized temporary youth employment or transitional employment programs.

Cook County Earned Sick Leave and City of Chicago Paid Sick Leave Ordinances – Eff. July 1, 2017

Paid Sick Leave Use

An employee may use sick leave benefits:

- When the employee is ill or injured, for the purpose of receiving medical care, treatment, diagnosis or preventative medical care;
- A member of the employee's family is ill or injured or to care for a family member receiving medical care;
- The employee or a member of his/her family is a victim of domestic violence; or
- If the Company is closed due to a public health emergency, or the employee needs to care for a child whose school or place of care has been closed due to a public health emergency.

Cook County Earned Sick Leave and City of Chicago Paid Sick Leave Ordinances – Eff. July 1, 2017

Note:

“Family member” is broadly defined to include an employee’s child or parent (including biological, adoptive, step, foster, or one who stands or stood in place of a parent to a child), legal guardian or ward, spouse, domestic partner, spouse or domestic partner's parent, sibling, grandparent, grandchild, or any other individual related by blood or whose close association with the employee is the equivalent of a family relationship.

Cook County Earned Sick Leave and City of Chicago Paid Sick Leave Ordinances – Eff. July 1, 2017

Paid Sick Leave Use (cont.)

- Employees must be allowed to use their accrued paid sick leave no later than on the 180th day following their start of employment.
- Employers may limit the amount of paid sick leave employees use per 12-month period to 40 hours.
- The 12-month period is calculated starting from when the employee began accruing paid sick leave.
- If an employee carried over 40 hours of paid sick leave for FMLA purposes, the employer can limit the employee to use up to an additional 20 hours for FMLA purposes.

Cook County Earned Sick Leave and City of Chicago Paid Sick Leave Ordinances – Eff. July 1, 2017

Paid Sick Leave Use (cont.)

- If an employee is absent for more than 3 consecutive work days, the employer may request certification for the use of paid sick leave.
- The employer cannot require that the employee disclose the underlying condition, unless permitted by law.
- Employers cannot delay paying wages while waiting for certification.

Cook County Earned Sick Leave and City of Chicago Paid Sick Leave Ordinances – Eff. July 1, 2017

Rate of Pay

- **Non-Tipped Employees:** Must be paid the same rate as the employee regularly earns during hours worked.
- **Tipped Employees in Chicago:** Must be paid at a rate equivalent to or greater than the full Chicago minimum wage.

Cook County Earned Sick Leave and City of Chicago Paid Sick Leave Ordinances – Eff. July 1, 2017

Finding Replacements:

- Employers cannot require employees to find a replacement to cover their shift when the employee needs to use paid sick leave.

Tracking:

- Employers cannot require employees to take sick leave in more than four (4) hour increments. Sick leave accrues in hourly increments (no fractional accruals).

Cook County Earned Sick Leave and City of Chicago Paid Sick Leave Ordinances – Eff. July 1, 2017

Notification Requirements:

- If the need for sick leave is foreseeable, the Company may require up to seven (7) days' notice.
- If the need is not foreseeable, the Company may require the employee to give notice as soon as is practicable on the day the employee intends to take sick leave by notifying the employer via phone, email, or text message.

Cook County Earned Sick Leave and City of Chicago Paid Sick Leave Ordinances – Eff. July 1, 2017

Retaliation

- An employer cannot use absence-control policies to count paid sick leave as an absence that triggers discipline, discharge, demotion, suspension, or any other adverse activity.
- However, employers may take disciplinary action, up to and including termination, against an employee who uses paid sick leave for purposes not allowed by the Ordinances.

Cook County Earned Sick Leave and City of Chicago Paid Sick Leave Ordinances – Eff. July 1, 2017

Payment Upon Employment Separation:

- Employers are not required to pay an employee accrued but unused paid sick leave upon separation of employment.

Cook County Earned Sick Leave and City of Chicago Paid Sick Leave Ordinances – Eff. July 1, 2017

Posting

- The City of Chicago and Cook County notice and posting requirements have been made publicly available:
 - The Chicago Paid Sick Leave Poster is published by the Commissioner of Business Affairs and Consumer Protection, the webpage is located at <https://www.cityofchicago.org/city/en/depts/bacp/provdrs/consumer/alerts/2017/june/paidsickleave.html>
- The Cook County Paid Sick Leave Poster is published by the Cook County Commission on Human Rights, the webpage is located at: <https://www.cookcountyil.gov/service/earned-sick-leave-ordinance-0>

Cook County Earned Sick Leave and City of Chicago Paid Sick Leave Ordinances – Eff. July 1, 2017

- The Cook County and City of Chicago Paid Sick Leave Ordinances allow covered employers to:
 - Impose written rules for the minimum increments of time (4 hours or less) in which earned sick leave can be used; the type and timing of notice required for reasonably foreseeable absences; and the minimum duration of employment before initial earned sick leave (not to exceed 180 days)
 - Adopt equivalent alternative practices to meet its Ordinance obligations (e.g., grant estimated earned sick leave for the year up front)

Cook County Earned Sick Leave and City of Chicago Paid Sick Leave Ordinances – Eff. July 1, 2017

Collective Bargaining Agreements

- Employers who have a CBA in place before July 1, 2017, are not required to comply with the sick leave ordinances until the CBA expires.
- For collective bargaining agreements entered into on or after July 1, 2017, the paid sick leave requirements may be waived in a bona fide collective bargaining agreement, but only if the waiver is explicit.

Cook County Earned Sick Leave and City of Chicago Paid Sick Leave Ordinances – Eff. July 1, 2017

Policy Drafting Considerations

- Is the employer going to require employees to accrue time or are they going to front load sick leave?
- How is the employer going to track earned sick leave?
- How is the employer going to track used sick leave?
 - If someone is absent from an entire shift, you would deduct the length of the scheduled shift not worked from the employee's sick leave bank.
 - If an employee does not need to take off an entire shift (for example, for a doctor's appointment), you can require the employee to use four (4) hours of sick leave or the length of their shift, whichever is less.

Cook County Earned Sick Leave and City of Chicago Paid Sick Leave Ordinances – Eff. July 1, 2017

Policy Drafting Considerations (cont.)

- How is the employer going to track carried over sick leave?
- Is the employer going to merge sick leave with PTO or have a separate sick leave policy?
 - With one combined PTO policy, all earned time must be paid out on termination of employment.
 - Even with the combined PTO policy, the carry over requirements will apply.

Paid Sick Leave Laws

- **States mandating paid sick leave:** California, Connecticut, Massachusetts, Oregon, Vermont, Rhode Island (Governor is expected to sign the bill)
- **States with one or more cities that mandate paid sick leave:** California, Illinois, Minnesota, New Jersey, New York, Oregon, Pennsylvania, Washington
- **More to come!**

State of Illinois and City of Chicago Minimum Wage

- In the **State of Illinois**, the minimum wage is **\$8.25**.
- **The City of Chicago** current minimum hourly wage is **\$11.00** for non-tipped employees and the minimum cash wage for tipped employees is **\$6.10**/hour.

Effective Date	Non-Tipped Employees	Tipped Employees
July 1, 2017	\$11.00	Increases with CPI*
July 1, 2018	\$12.00	Increases with CPI*
July 1, 2019	\$13.00	Increases with CPI*
July 1, 2020 (and forward)	Increases with CPI*	Increases with CPI*

* The City of Chicago Minimum Wage Ordinance provides that the minimum wage will not increase when the unemployment rate in Chicago for the preceding year was equal to or greater than 8.5 percent. The Ordinance also provides that if the CPI increases by more than 2.5 percent in any year, the minimum wage increase shall be capped at 2.5 percent. The CPI increases will be announced each year on or before June 1st.

Note: Employees are entitled to the highest minimum wage set by any applicable federal, state, or local law or ordinance. Employers should always confirm which statutes/ordinances would be applicable to it in a given geographical area.

Cook County Minimum Wage

- **In Cook County**, the current minimum hourly wage is **\$10.00** and the current minimum cash wage for tipped employees is **\$4.95/hr.**

Effective Date	Non-Tipped Employees	Tipped Employees
July 1, 2017	\$10.00	Greater of Tipped Wage under the FLSA (\$2.13) or Illinois Minimum Wage Law (\$4.95)(Thus, it is \$4.95 for now)
July 1, 2018	\$11.00	Greater of Tipped Wage under the FLSA, Illinois Minimum Wage Law, or Cook County Tipped Employee Rate
July 1, 2019	\$12.00	Greater of Tipped Wage under the FLSA, Illinois Minimum Wage Law, or Prior Year Cook County Tipped Employee Rate + Increase in CPI
July 1, 2020	\$13.00	Greater of Tipped Wage under the FLSA, Illinois Minimum Wage Law, or Prior Year Cook County Tipped Employee Rate + Increase in CPI
July 1, 2021 (and forward)	Increases with CPI*	Greater of Tipped Wage under the FLSA, Illinois Minimum Wage Law, or Prior Year Cook County Tipped Employee Rate + Increase in CPI

Note: The City/County are on different pay scales. By 2020, Cook County will catch up to Chicago.

Note: Employees are entitled to the highest minimum wage set by any applicable federal, state or local law or ordinance. Employers should always confirm which statutes/ordinances would be applicable to it in a given geographical area.

Cook County/City of Chicago Minimum Wage

Covered Employee: One who works at least two (2) hours in any two (2) week period in Cook County/City of Chicago.*

- Work time includes travel time for compensated business activities (traveling, deliveries, sales calls, etc.) within Chicago/Cook County's geographic boundaries.
- Day or temporary laborers, meaning people who contract for employment with a day and temporary labor service agency, are covered by the Ordinances.

*To qualify as a covered employee, the employee must work for an employer with four or more employees (excluding the employer's parent, spouse, child, or other members of his/her immediate family); however all domestic workers are eligible covered employees.

Cook County/City of Chicago Minimum Wage

Covered Employer

1. Employs at least one (1) covered employee*; AND
2. (a) maintains a business facility within the Cook County/City of Chicago's geographic boundaries; and/or
(b) is subject to business license requirements in Chapter 54 of the Code (Cook County) or Title 4 license requirements of the MCC (City of Chicago).

*Note: Under Chicago's and Cook County's Minimum Wage Ordinances, a covered employee is an employee who: (i) who works at least two (2) hours in any two (2) week period in Cook County/City of Chicago; and (ii) does not fall within one of the exemptions under the Ordinances (see Slide 31). Additionally, under Chicago's Minimum Wage rules, a person or entity that employs one or more domestic workers, day laborers, or temporary employees who qualify as covered employees, qualifies as an employer.

Cook County/City of Chicago Minimum Wage

Who is NOT covered by the Minimum Wage Ordinances?

- Employees under the age of 18 (allowed to pay these employees a wage \$0.50 below the state minimum hourly wage).
- Employees age 18 or over, in their first 90 days of employment (allowed to pay these employees a wage \$0.50 below the state minimum hourly wage).
- Disabled employees, pending state approval, so as to provide employment opportunities.

Cook County/City of Chicago Minimum Wage

Who is NOT covered by the Minimum Wage Ordinances?

(cont.)

- Trainees taking part in a program for no more than six months, pending state approval.
- Subsidized temporary youth employment or transitional employment programs.
- Employees who work for employers with fewer than 4 employees (excluding the employer's parent, spouse or child or other members of his immediate family); however all domestic workers are eligible covered employees

Cook County/City of Chicago Minimum Wage

Collective Bargaining Agreements

- The City of Chicago and Cook County Minimum Wage Ordinances may be waived in a bona fide collective bargaining agreement, but only if the waiver is explicit.

Cook County Minimum Wage

Municipalities within Cook County may opt out of the County's minimum wage (and paid sick leave) requirements*:

- More than 100 of Cook County municipalities have opted out of the minimum wage and sick leave ordinances, including: Arlington Heights, Burbank, Burr Ridge, Calumet City, Elk Grove Village, Homewood, Matteson, Mount Prospect, Northlake, Oak Forest, Oak Lawn, Orland Park, Palatine, River Forest, Rolling Meadows, Rosemont, Schaumburg, Tinley Park and Wheeling.

Cook County Minimum Wage

Municipalities within Cook County may opt out of the County's minimum wage (and paid sick leave) requirements*: (cont.)

- The Village of Bedford Park has only opted out of the Paid Sick Leave Ordinance.
- Continue to monitor the above opt-outs, as the status of villages opting out from the Cook County Ordinance is an evolving process and changes from day-to-day.

* All employers who apply for Cook County property tax incentives, apply for Cook County General Business Licenses, or contract with Cook County must comply with the County's minimum wage requirements, regardless of being located in a municipality that has opted out of the minimum wage requirements. Employers who apply for Cook County property tax incentives must also comply with the Cook County Earned Sick Leave Ordinance.

Posting of Minimum Wage Notice

Posting and Notice

- Employers must post a notice at each facility within the City/County. The posters will be prepared by the City (available online) and County (available online).
 - The Chicago Minimum Wage Poster is available at:
www.cityofchicago.org/MinimumWage.
 - The Cook County Minimum Wage Poster is published by the Executive Director of the Cook County Commission on Human Rights, whose website is located at:
<https://www.cookcountyil.gov/agency/commission-human-rights-0>.
 - Employers in the City must also provide a notice to each covered employee with the first paycheck subject to the July 1, 2017 City of Chicago Minimum Wage Ordinance and to any newly hired employees. Under the Cook County Minimum Wage Ordinance, employers must provide a notice to each covered employee at the beginning of their employment.

Posting of Minimum Wage Notice

Penalties include:

1. Fines of \$500 - \$1,000 per violation per day, enforced by the City's Department of Business Affairs and Consumer Protection and/or the Cook County Commission on Human Rights;
2. Government contractor disqualification;
3. Loss of property tax incentives for five (5) years for Cook County;
4. Denial or revocation of business licenses;
5. Three (3) times the amount of any underpayment, costs, and reasonable attorneys' fees may be recovered in a private action under both the Cook County and the City of Chicago Ordinances.

Status of the U.S. Department of Labor Overtime Rule

- On November 22, 2016, a U.S. District Court Judge in Texas granted an Emergency Motion for Preliminary Injunction and enjoined, nationwide, the implementation and enforcement of the Department of Labor's ("DOL") Overtime Final Rule, which would have doubled the minimum salary threshold under the white-collar exemptions.
- On December 1, 2016, the Department of Justice ("DOJ") filed with the Fifth Circuit, on behalf of the DOL, a notice to appeal the preliminary injunction granted by the Texas court.

Status of the U.S. Department of Labor Overtime Rule

- On February 22, 2017, the Fifth Circuit granted a request by the DOJ for an extension of time of sixty (60) days to file its reply brief, until May 1, 2017. “The additional time was requested on behalf of the Department of Labor ‘to allow incoming leadership personnel adequate time to consider the issues.’”
- On or about April 21, 2017, the Fifth Circuit granted a request by the DOJ for an additional extension of time of sixty (60) days to file its reply brief, until June 30, 2017. The additional 60 days provided Alexander Acosta, the new Secretary of Labor, time to determine what position it would take on the Obama overtime rule.

Status of the U.S. Department of Labor Overtime Rule

- On August 31, 2017, the U.S. District Judge in Texas granted summary judgment for the Plano Chamber of Commerce and the more than 55 business groups, ruling that the DOL overreached its authority in setting the new overtime threshold for salaried employees. Judge Mazzant concluded that the proposed changes to the overtime rule had overstepped Congress' intentions in determining who should be exempt from overtime pay and relied too heavily on salary without proper consideration of job duties.
- The decision is appealable but it is unclear whether the DOL will pursue an appeal.

Part II: How Hospitality Employers Can Minimize Their Risk of Employment Claims

Effective Hiring: Guidelines for Interviewing

- Selecting the right job candidate is an important first step to minimize risks in the employment context.
- Interview guidelines apply to internal transfers/ promotions and when interviewing external candidates.
- Internal candidates:
 - Check internal references.
 - Use caution with giving employee references to other managers, just as you would for former employees.
 - Employees are not eligible if they received a written warning in the last six (6) months, except if there is a recommendation from the employee's current manager. In that case, the hiring manager should consult with the employee's current manager.

Effective Hiring: Preparing for the Interview

- Selecting candidates to interview.
- Planning for the interview process.
 - Know the job!
 - Review the job description
 - Discuss expectations with co-managers
 - Determine the necessary qualifications or skill for the position.
- Your interview notes.

Effective Hiring: Legal Restrictions

- Name
- SSN
- Age
- Religion or Creed
- Race or Color
- Health/Disability
- Workers' Comp./FMLA
- Smoking habits or political affiliations
- Citizenship
- National Origin
- Arrests/Convictions
- Family/Marital Status
- Transportation
- Credit History (with limited exceptions)

Hypothetical

You are hiring for a bellhop job that has a 50-pound lifting requirement. A smaller woman applicant applied, and you're interviewing her. While looking at her, you have doubts that she could lift 50 pounds.

Should you tell her that you doubt a woman built like her can lift 50 pounds? Can you ask her something else – what?

Effective Hiring: Red Flags

- Unexplained gaps in employment (less of a concern given the recession).
- Demotions and/or reductions in pay, without explanation.
- Radical changes in occupation, without explanation.
- Frequent changes in employment.
- Grossly inadequate information concerning previous employers.
- Incomplete information or unsigned application.

High and Low Risk Applicants

High Risk Characteristics

- Anti-social
- Stubborn
- Quick to Complain
- Job Hopper
- Seniority-Minded (i.e., entitlement mentality)
- No Responsibilities Outside of Work

Low Risk Characteristics

- High Achiever
- Cooperative
- Appreciates a Good Manager
- Non-Argumentative
- Appreciates Time Schedules
- Self-Disciplined
- Sociable

Background Checks

Employers who conduct background checks have obligations pursuant to the following laws and administrative guidelines:

- Federal, state and local anti-discrimination statutes and other laws that prohibit employers from asking about arrest and convictions on the employment applications and during interviews.
- The EEOC's guidelines prohibiting exclusion of applicants with criminal convictions.
- Fair Credit Reporting Act (FCRA).

Background Checks – State Laws

The Illinois Human Rights Act prohibits employers from making an inquiry or employment decision based on:

- An arrest record; or
- A criminal record that is expunged, sealed or impounded.

Background Checks

The Illinois Ban-the-Box law prohibits most private employers from inquiring about an applicant's criminal conviction until:

- They have made a decision regarding whether the candidate is qualified for the position, or
- If no interviews are conducted, after making a conditional job offer.

Background Checks – The EEOC: Individualized Assessments

- The EEOC has taken the position that employers violate Title VII when they have a “blanket” prohibition of hiring applicants with criminal convictions.
- Therefore, to comply with federal law, you should complete an individualized assessment of any applicant with an arrest or conviction to determine if the arrest or conviction is job-related.

Background Checks – The EEOC: Individualized Assessments

Individualized Assessment Factors:

1. The nature and gravity of the offense or offenses;
2. The time that has passed since the conviction and/or completion of the sentence;
3. The nature of the job held or sought;
4. The facts or circumstances surrounding the offense or conduct;
5. The number of offenses for which the individual was convicted;

Background Checks – The EEOC: Individualized Assessments

6. Was person young/adolescent age at the time of conviction, or release from prison;
7. Evidence that the individual performed the same type of work, post-conviction, with the same or a different employer, with no known incidents of criminal conduct;
8. Rehabilitation efforts, e.g., education/training; and
9. Employment or character references and any information regarding fitness for the particular position.

Background Checks – The EEOC: Individualized Assessments

Relevant Factors to Consider:

- Amount of on-site supervision;
- Amount of contact with the public, residents or other employees;
- Access to property or cash (if conviction involves theft or destruction of property);
- Prior employment history of candidate in similar position (without incident).

Background Checks: Case-by-Case Consideration

- For records of convictions which have not been expunged or sealed, make the hiring decision or decision to retain on a case-by-case basis considering all of the facts involved.
- Do not use an “across the board” refusal to hire or retain any candidate or employee based on any particular type of offense.

EEOC Background-Check Enforcement Efforts Have Resulted in Substantial Settlements:

- 2012: A Pepsi bottling facility agreed to pay \$3.1 million and offer 300 jobs due to a policy that excluded applicants based on arrests.
- 2015: BMW manufacturing agreed to pay \$1.6 million and offer 90 jobs due to a background check policy with blanket exclusions based on convictions.

Background Checks: The Fair Credit Reporting Act

- If an employer uses a **third-party vendor** to conduct a background check on an applicant or employee, the **employer is required to:**
 - Disclose to the applicant that a consumer report/background check will be performed;
 - Obtain the individual's authorization to proceed with the check; and
 - Provide notice to the individual if it will take adverse action based on information discovered in the report.

Background Checks: The Fair Credit Reporting Act

Step 1: Have each employee sign a Notice of Intent to Obtain and Authorization to Request a Consumer Report.

Step 2: If information in the background check report will be used as a basis for not hiring the individual or for any other adverse employment action, send the following to the employee before making any employment decision:

- A summary of rights under the FCRA;
- The User Disclosure to Consumer of Pending Adverse Action;
- A copy of the background check report.

Background Checks: The Fair Credit Reporting Act

Step 3: We recommend you give employees 5 days from the receipt of the letter to notify you if he/she is rebutting the adverse information.

Step 4: If you decide not to hire the employee or to take other adverse employment action, send the Notice of Adverse Action to the individual.

Background Checks: The Fair Credit Reporting Act

Completing the Paperwork:

Documentation Tips:

- Track the language of the consumer report.
- Be as detailed as possible.
- Identify the conviction.
- State when the conviction occurred.

Example: The report contains the following negative information: Felony conviction on 1/20/2013 involving narcotics; misdemeanor conviction on 2/3/2012 involving theft of property.

Note: Save the documents you relied on in making an employment decision.

The Fair Credit Reporting Act: Penalties

The FCRA provides statutory damages up to **\$1,000 PER VIOLATION**, the potential for punitive damages, and the recovery of attorneys' fees:

- Pitt v. K-Mart Corp., Case No. 11-CV-00697 (E.D. Va. May 2013): **\$3 million** to resolve a class action settlement – Plaintiffs alleged that K-Mart willfully failed to comply with the FCRA's disclosure and authorization requirements prior to obtaining consumer reports and prior to taking adverse actions against the class.
- Singleton v. Domino's Pizza, LLC, Case No. 11-CV-01823 (D. Md. Oct 2, 2013): **\$2.5 million** to resolve a class action – Plaintiffs alleged that the consent form Domino's used for procuring a consumer report violated the FCRA and that Domino's took adverse actions against applicants without providing the required notices prior to the adverse action being taken.

Hypothetical

You are interviewing applicants for a concierge position at the hotel's front desk. When you interview candidates, you make notations on their resumes so that when you go back weeks later to hire, you remember who was who. Sometimes you write the candidate's eye color and outfit color, sometimes you write more subjective information, like "cute" or "tall blond." Sometimes you write the candidate's skin color as a memory device.

What actions here are a good idea vs. a bad idea? Why?

Hypothetical

You are interviewing applicants for a bartender position. Bob Bartender has a fantastic résumé – he’s worked at a number of the area’s best hotels, is highly accredited, and has even worked as a bartender for celebrity clients. You notice Bob only stays at jobs for a year or two typically. You ask him why, and he is vague and says that his last job in particular “screwed him over.”

What follow-up questions might you want to ask Bob in order to determine if you want to hire him?

Hypothetical

You are hiring for a housekeeping supervisor who (during her interview) tells you she can't work Sundays. You like her so, after the interview, you debate going onto her Facebook or Twitter page to see if she's religious and whether that's why she can't work on Sundays.

Are you doing something "illegal"? Is this plan a good idea? What should you do?

Legal Basics

Employment At-Will

- Either party may terminate the employment relationship at any time with or without notice for any **legal** reason.
- Practically, you should always have a legitimate business reason, supported by facts or documents.
- Note: Many hotels are unionized. If there is a collective bargaining agreement, an employer must have just cause in order to terminate an employee.

Relevant Laws

- Prohibit discrimination and retaliation in employment actions.

Your Goals

- Make your employees as productive as possible.
- Correct any performance problems as soon as they arise.
- Maintain a pleasant work environment.

Discipline and Termination: Best Practices

Discipline generally has three steps:

1. Verbal warning (with written documentation);
2. Written warning and/or suspension; and
3. Termination.

Discipline/Termination Best Practices: Investigation Steps

- Investigate the violation.
- Inform the employee of the violation, and give him/her an opportunity to defend.
- Before reaching a conclusion, do your homework.
 - Reviewing the applicable policies, procedures, collective bargaining agreement, etc.
 - Review the employee's past record of discipline or performance review.
 - Gather any other information/data that supports your conclusion.
- Data will keep the investigation and any resulting Corrective Action objective.

Evidence vs. Suspicion

- If at all possible, there should be objective and substantial evidence of a violation.
- Suspicions, unsupported allegations and generalities may not withstand challenge.
- Sometimes you will only have a suspicion, but it should be a reasonable one, based in fact or other evidence.

Assessing the Risks of Discharge

Factor 1: Is there a sufficiently documented basis?

- Are there prior warnings/counseling and prior evaluations?
- Is the documentation internally consistent?
- Do you always need progressive discipline?

Hypothetical

You are a General Manager. Suzie Supervisor comes to you and says she wants to terminate Ted Tardy for repeated attendance issues. You ask Suzie to bring you the time-punches and the prior discipline for Ted. The time-punches reveal some late arrivals (ten to fifteen minutes here and there), and Suzie tells you that she hasn't written up Ted before.

Should you authorize this termination? What advice should you give Suzie Supervisor?

Assessing the Risks of Discharge

Factor 2: Have we followed our policies, procedures and past practices?

- Do we have a triggering event:
- Do you have all the facts? (completing your investigation)
- Has the associate been confronted?
- Have we applied the relevant rules, and is the penalty appropriate?
- What have we done in other cases?
 - Disparate treatment problem.
 - Correcting a bad past practice.

Note: If there is a collective bargaining agreement, you must have just cause in order to terminate an employee

Hypothetical

Emily Employee is on FMLA to take care of her terminally ill mother. Callie Coworker tells you she saw Emily out partying at a bar the other night and Emily told her that she and her mother were going to Mexico at the end of the month. You suspect Emily has abused the hotel's FMLA policy.

What should you do?

Assessing the Risks of Discharge

Factor No. 3: Is there a timing problem?

Hypothetical

Rory Reservationist is in charge of supervising the employees who handle telephone and online reservations. She has historically been a poor performer, but the hotel has not issued her discipline or otherwise documented her performance issues, in part because her mother is the Mayor of the suburb in which the hotel is located. Rory files an EEOC charge after the hotel doesn't give her a promotion for which she applied. You're furious and decide you want to document all of the poor performance issues she's had historically.

Any issues with this plan?

Assessing the Risks of Discharge

Factor No. 4: Is there a protected category involved or any protected behavior?

- Race, sex, national origin, sexual orientation, disability, etc.
- Filed workers' compensation claim recently
- Took an FMLA, ADA or pregnancy leave
- Complained of harassment/discrimination/retaliation recently

Assessing the Risks of Discharge

Factor No. 5: Are there risks in not discharging?

Hypothetical

Hank Hottemper has been on FMLA leave recently and, prior to that, had two workers' compensation issues. He's a Hispanic male over the age of forty. On his third day back from leave, a guest steps on the floor that Hank just spent an hour waxing. Hank gets in the guest's face and curses at him.

What are some of the issues with giving Hank discipline now? What are the issues with not giving Hank discipline? Ultimately, what should you do?

Assessing the Risks of Discharge

You Cannot Assess The Risk Yourself!

Termination Policies

- HR approves all discharges, demotions, reductions in force, or other involuntary terminations.
- You preliminarily assess the risks – but HR must approve any decisions.

Termination Policies

- Checklist helps weigh risks and ensure you are doing the right thing.
- Tell HR risks from checklist.
- What to send HR.
 - All prior warnings
 - All other backup (e-mails, statements, notes, etc.)
 - Results of investigation/employee's side

Drafting the Termination Memo

Why Do I Need One?

HR Must Review!

Effective Documentation

- Memorializes the incident or incidents at issue – if it is not written down, it did not happen.
- Aids in more effective communication with the employee.
- Provides a greater likelihood of rehabilitating the employee.
- Leads to smoother, more defensible discharges.
- Provides better exhibits for the attorneys and could, depending on the circumstances, mean the difference between winning and losing a lawsuit.
- Some documentation is almost always better than none!

Effective Documentation

- Documentation provides you with a record to assist your memory in the event your decision is ever challenged.
- Documentation forces you to organize and present your facts and thoughts in an organized way.
- People from whom you gather information may be more careful in their assertions if they know what they tell you is being documented in some way.

Effective Documentation: Key Standards

- Based on Specific Observable Behavior (SOB)
- Covers the entire review period (in the case of Performance Evaluations)
- Accurate
- No surprises
- Measurable goals
- No unsupported conclusions
- Consistent with all other reviews

Effective Documentation

- Remember, the need for documentation can arise in a number of situations:
- Complaints from co-workers
- Complaints from vendors or other companies
- Policy or procedure violations
- A job well done
- Can you think of others?

Effective Documentation: Recordkeeping

- Should I just keep notes on employees who I think will sue the Company?
 - No!
- Do I have to write it down every time I verbally counsel someone?
 - Ideally, yes.
- What do I do with disciplinary documentation?
 - Give the employee a copy of the document.
 - Give a copy to Human Resources (who will place it into the appropriate employee's personnel file).
 - Managers should not keep any employee disciplinary or performance records that Human Resources does not also have.
 - If you keep your own copies, have a system to easily locate and retain your notes.

Effective Documentation: Recordkeeping

Human Resources:

- Will keep employees' personnel files secure.
- Will not maintain multiple files for an employee, except for:
 - Medical records.
 - I-9 Forms.
 - Personnel Record Review Act considerations.
 - “Every employer shall, upon an employee's request ...permit the employee to inspect any personnel documents which are, have been or are intended to be used in determining that employee's qualifications for employment, promotion, transfer, additional compensation, discharge or other disciplinary action, except as provided in Section 10.”

Effective Documentation

- Generally: You want to tell a story to the reader of what happened without making assumptions or judgments. Let the reader make the judgment.
 - Caveat: It is okay to provide the reader with information he/she may need to make a credibility determination (i.e. in order to decide which person to believe).
- Specifically: Documentation should include the **where, when, what, who, how and why** of the story. You should only include the facts and objective standards necessary to tell the story.
 - Ask yourself: Could someone outside the Company understand the issue?

Effective Documentation

- Do not include statements that may have a gender, race, religion, age or other protected characteristic connotation.
- Avoid throwing in the “kitchen sink.”

Effective Documentation

What is Wrong with These Statements?

1. The fact that Sue cannot work on Saturdays due to religious commitments causes scheduling difficulties.
2. Jim is really slowing down. Jim cannot keep up with other managers. [Jim is over 40; other managers are under 40.]
3. Because of Sally's responsibility to care for her mother, she has not demonstrated a commitment to the Company.

Effective Documentation

What is Wrong with These Statements?

4. I cannot evaluate Bill's attendance because he has been taking so many FMLA leaves.
5. Taco is never on time. [Taco's actual name is Jose, but he calls himself Taco, as do other co-workers. Jose is Hispanic.]
6. This young lady just doesn't get it.

Performance Reviews

- Periodic evaluations are an important part of the employment relationship. This is an opportunity to let employees know how they are doing and how their performance may be improved. It is also a time for the Company to receive input from the employee concerning any job difficulties or concerns the employee may have.
- An employee should be evaluated periodically. Some of the factors that may be considered in the review include but are not limited to: attendance, dependability, safety, adaptability, job attitude, job performance, work quality, work efficiency and housekeeping.

Effective Documentation in Performance Evaluations

- The absence of accurate and complete performance evaluations may lead to low morale, low productivity, heightened employee interest in a union and a lack of understanding of the Company's expectations.
- There is a danger in having both a "great" or even "good" performance evaluation and numerous disciplinary documents for a single employee within the same review period.
- Remember, employees are more receptive to well-written evaluations that include the "good" and "bad."

Effective Documentation in Performance Evaluations

- Standards for drafting accurate and complete evaluations:
- Record only specific, objective behavior. All comments should be fact-based.
- Be sure the evaluation covers the entire review period. Look back at positive and negative documentation for the employee that occurred during the review period.
- Ensure that there are no surprises on the evaluation. If there are problems or issues included in the evaluation, they should have been previously discussed with the employee.
- Provide the employee with objective, measurable goals.
- Review the evaluations completed for employees in similar jobs to ensure consistency.

Effective Documentation for Discipline and Discharge

- Do not use disciplinary forms for investigative notes, scratch paper, or for any other purpose other than their intended use.
- List any previous discipline.
- Include a basic statement of specifically what occurred and when. Do not judge or give an opinion as to what occurred.
- Provide a statement as to what rule, policy, or performance expectation the conduct violated. List all rules, policy and/or performance expectations that apply and attach copies if possible.

Effective Documentation for Discipline and Discharge

- State how the employee must correct the problem and the timeframe for correcting.
- If possible, have the employee commit in writing to following work rules, policies, procedures, and expectations.
- Include a statement of the consequences of a continued deficiency.
- Sign and have the employee sign the document.

What if the Employee Refuses to Sign the Disciplinary Notice?

- If possible, determine the reason for refusal.
- Explain that signing only acknowledges receipt of warning, not agreement with discipline.
- Record everything said to employee.
- Note on the document if the employee has refused to sign and date it.

What if the Employee Wants to Provide a Written Rebuttal?

- Permit the employee to do so.
- If rebuttal raises issues of discrimination, harassment or retaliation - investigate.
- Retain a copy of the rebuttal as you would the disciplinary document itself.
- Follow up with documentation of what was done to investigate and resolve any claims raised in rebuttal.

What if I Waited a Week or Two Before I Documented an Employee?

- Should I still issue a disciplinary notice?
- If at all possible, do not wait to issue disciplinary notices.
- If there is a delay, explain the delay and provide any reasons.

Recent EEOC Settlements and Case Law

Notable EEOC Settlements

EEOC v. Texas Roadhouse and Texas Roadhouse Mgmt. Corp.: Company will pay \$12 million to settle a class age discrimination lawsuit. The EEOC charged that the class of applicants had been denied front-of-the-house positions such as servers, hosts, server assistants and bartenders because of their age, 40 years and older. The case had resulted in a hung jury after nearly a 4-week trial in early 2017 and settled prior to a scheduled retrial. The EEOC alleged that only 1.9% of Defendants' front-of-the-house employees were in the protected age group and that since at least January 1, 2007, Defendants had instructed managers to hire job applicants not in the protected age group. The EEOC also alleged that all of the images in Defendants' training and employment manuals were of young individuals and that older unsuccessful applicants were told that "there are younger people here who can grow with the company," "you seem old to be applying for this job" and "we think you are a little too old to work here...we like younger people." (March 2017)

Notable EEOC Settlements

EEOC v. Texas Roadhouse and Ultra Steak, Inc.: Company will pay \$1.4 million to settle a class sexual harassment lawsuit. The EEOC charged the Company with victimizing a group of female employees as young as 17 years old by subjecting them to sexual harassment and then retaliating against them for complaining. The manager of the restaurant harassed women and teen girls working in server, hostess and other front-of-the-house positions. The harassment included unwelcome touching, humiliating remarks about their and other females' bodies and sexuality and pressure for sexual favors in exchange for employment benefits or as a condition of avoiding adverse employment action. (September 2016)

Notable EEOC Settlements

EEOC v. Carolina Creek: A Huntsville, Texas business offering summer camping and retreats will pay \$70,000 to settle a pregnancy and disability discrimination lawsuit. In its lawsuit, the EEOC charged that the Company violated federal anti-discrimination laws when it demoted Korrie L. Reed after learning she had a pregnancy-related complication. Shortly after starting as a camp registrar, Reed learned she was pregnant and shortly thereafter, developed gestational diabetes. Reed never requested a job reassignment and although she did not indicate she was unable to perform her job duties, the Company's Executive Director removed Reed, claiming that the registrar job was too demanding for Reed because of her pregnancy and related medical condition. Reed was fired after she told the Executive Director that she believed her demotion was illegal. (May 2017)

Notable EEOC Settlements

EEOC v. Ramnarain II, LLC d/b/a HospitalityStaff: Orlando, FL company that staffs Central Florida's hospitality industry will pay \$30,000 to settle a religious discrimination lawsuit. The EEOC alleged that HospitalityStaff violated Title VII's prohibition against religious discrimination when it required Courtnay B. Joseph, a Rastafarian, to cut his dreadlocks to comply with its client's grooming standards in order to keep his position at an Orlando-area hotel, without providing a reasonable accommodation. Joseph was terminated when he refused to cut his dreadlocks. Under the terms of the consent decree, HospitalityStaff will also implement an accommodation policy. (June 2017)

Notable EEOC Settlements

EEOC v. Sleneem Enterprises, LLC: A Tim Hortons Café and Bake Shop franchise based in Michigan will pay \$22,500 to settle a religious accommodation lawsuit. The EEOC alleged that Sleneem violated federal law when it fired Amanda Corley after she requested a religious accommodation. In November 2015, Corley requested that she be permitted to wear a skirt instead of pants, in accordance with her Pentecostal Apostolic religious beliefs. Corley was fired when she attempted to present a letter from her pastor, explaining her need to wear a skirt. (September 2017)

Notable EEOC Settlements

EEOC v. Capital Restaurant Concepts, Ltd. d/b/a Paolo's – GT LLC: A restaurant in Washington, D.C.'s Georgetown neighborhood will pay \$50,000 and provide significant equitable relief to settle a sexual orientation harassment lawsuit. In its lawsuit, the EEOC charged that Alejandro Hernandez, an 18-year old gay male employee who worked as a server, was routinely subjected to unwelcome harassing and offensive behavior that included the use of homophobic epithets and taunting of his sexuality. The remarks included asking him about sexual scenarios with women that might "turn" him "straight." Hernandez reported the harassment to Paolo's management, but, in response to his complaints, he was accused of being "too sensitive." Paolo's is prohibited from engaging in sex discrimination or retaliation in the future and it will also revise and distribute to employees a complaint procedure and anti-harassment policy and lastly, will train supervisors and employees on the revised policies and workplace harassment issues. (July 2017)

Notable Cases

Boyer-Liberto v. Fontainebleu Corp. et al., 786 F.3d 264 (4th Cir. 2015). Boyer-Liberto (black) worked as a cocktail waitress at Fontainebleu Hotel in Ocean City, MD. She reported to management that a restaurant manager (white) had twice called her a “porch monkey” and threatened her with termination. Soon thereafter, Boyer-Liberto was fired by owner Dr. Leonard P. Berger. Boyer-Liberto sued her former Employer alleging hostile work environment and retaliation. The district court awarded summary judgment to the defendants. The Fourth Circuit reversed the grant of summary judgment to the defendants. The Court held that: 1) a genuine issue of material fact existed as to whether the White supervisor’s use of a slur towards Boyer-Liberto on two occasions was severe conduct; 2) an employee is protected from retaliation for opposing an isolated incident of harassment when she reasonably believes that a hostile work

Notable Cases

(Boyer-Liberto – cont.) environment is in progress (overruling prior precedent that this was not protected activity which could support a retaliation claim); 3) a genuine issue of material fact existed as to whether the employee reasonably believed there was a hostile work environment in progress. The question in an isolated incident case is whether the harassment is physically threatening or humiliating. Here, a reasonable jury could find that this was humiliating.

Notable Cases

Atkins, et al. v. LQ Mgmt., LLC d/b/a La Quinta Inn & Suites, 138 F. Supp.3d 961 (M.D. Tenn. 2015): Former head housekeeper Glenda Atkins and four former housekeeping employees filed a lawsuit against their former employer alleging they were discriminated against because of their race (black). The Plaintiffs alleged that the General Manager (white) made untoward and/or racist comments and/or actions often, sometimes as frequently as every other day. They alleged that the GM's comments ran the gamut from stating that President Obama "needed to go back to Africa"; that he (GM) needed to get "some lighter color" in the hotel; and that housekeepers would not come to work on welfare day, to more personal comments which included telling several of the Plaintiffs that they passed their Certified Nursing Assistant test because they must have copied off a white person and stating to one Plaintiff that her hair extensions were

Notable Cases

(Atkins – cont.) “horse hair” and that white women did not have to use horse hair because they “have natural human hair.” The Court ruled in favor of the Plaintiffs, even though some of the Plaintiffs failed to follow the proper procedure in complaining about the alleged harassment. The Court found that La Quinta’s harassment policy was too narrowly drafted because it required that the harassed employee speak to the manager – here, the manager was the harasser. The Court stated that an effective anti-harassment policy: 1) requires supervisors to report incidents or harassments; 2) permits both informal and formal harassment complaints to be made; 3) provides for a mechanism for bypassing the harassing supervisor when making

Notable Cases

(Atkins – cont.) a complaint; and 4) provides for training regarding the harassment policy. Atkins was awarded \$20,000 and the other Plaintiffs were awarded \$17,500, \$10,000, \$7,500 and \$2,500 (the amount was based on length of employment) and each was awarded attorney fees

Notable Cases

Pelesky v. Rivers Casino and Holdings Acquisition Co., L.P., 2015 WL 12757000 (W.D. Pa. 2015). In 2010, Allyson Pelesky started working as a cocktail waitress at Defendant's casino. Pelesky filed a lawsuit alleging a hostile work environment. She claimed that one of the Casino's customers placed a casino chip down her bra, making contact with her breast in the process. Pelesky reported the alleged assault to her supervisor and ultimately, she was interviewed by the State Police. She refrained from pressing charges because she was satisfied that the Casino was going to ban the offending customer from the casino for life. Several weeks after the incident occurred, the Casino lifted the lifetime ban and allowed the offender back on the property. The Casino did not advise Pelesky that the ban had been lifted – she learned of the lifting of the ban only when she came into contact with the customer while engaged in the course and scope of her

Notable Cases

(Pelesky – cont.) employment as a cocktail waitress. Pelesky felt publicly ridiculed and she alleged that the Casino violated its' own zero tolerance policy for sexual harassment by lifting the ban. The Casino stated that it believed a 40-day ban was sufficient for the alleged offense. In February 2015, the Court agreed with Pelesky stating that she had enough facts to proceed with her claim. In August 2015, a jury awarded Pelesky \$1,149,000 (\$999,999 in punitive damages and \$150,000 in compensatory damages).

Preventive Measures

Preventive Measures

- Take time to talk with employees, regardless of time pressures -- supervisors should know personal facts about all employees, such as hobbies, kids' names, etc.
- Be responsive to employee concerns and problems -- always answer questions, even if it takes time to research or evaluate.
- Be proactive. Check in with employees to see if they are happy at work and if you can help them with anything.
- When responses are negative, give the employee a logical, clear explanation of why their requests/desires cannot be accommodated -- don't let the employee feel his/her interests or concerns are not important.

Preventive Measures

- Do not tolerate malcontents or poor performance.
- But make all criticism constructive and make sure to give positive feedback whenever appropriate.
- Regular management communication concerning information about the Company, new developments, etc., makes employees feel as if they are part of the team.
- Make sure all employees know the rules, and are given fair warning and counseling when they are in trouble, so they are not surprised when serious disciplinary action occurs.
- Maintain consistency when evaluating performance and administering discipline. Allow employees to respond before making final disciplinary decisions.

Preventive Measures

- Be familiar with your Company's Anti-Discrimination and Anti-Harassment policies.
- Set an example for workplace conduct.
- Be observant of the conduct of employees and act!
- Resolve unrelated problems as early as possible (before anyone complains)
- Deal with the persistent offender.
- Protect employees from retaliation.

Preventive Measures

- Make sure your employment-related policies and job descriptions are legally compliant and drafted in a practical and effective way.
- Make sure your supervisors and managers are trained on your company's policies and that they understand the company's expectations and their obligations.
- Conduct prompt and thorough investigations before taking disciplinary or termination measures.

Preventive Measures

- Make sure that potentially sensitive discipline or termination decisions are vetted through Human Resources, in-house counsel and/or outside counsel.
- Prepare effective documentation memorializing the company's decisions.
- The manner in which employment actions are communicated to employees is very important in protecting the company.

Questions?

THANK YOU!