1. Reasons
   a. Good Reason
   b. Bad Reason
   c. No Reason

2. Timing
   a. Any time
Employment Contracts

• Does the Company have employment contracts?

• Are they up-to-date? Check:
  ➢ Position
  ➢ Duties
  ➢ Compensation
  ➢ Term
  ➢ Termination Provisions
  ➢ Arbitration Clause
  ➢ Non-competition/No Solicitation Requirements

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Erosion Of The “At-Will” Doctrine

• Anti-Discrimination Laws

• Anti-Retaliation Laws
Discrimination claims filed with the EEOC jumped 15 percent in fiscal 2008 to 95,402. This is the highest level since the agency opened in 1965.

Given current unemployment figures, the EEOC estimates they may have 100,000 claims filed in 2010.
Anti-Discrimination:

- Race
- Color
- National Origin
- Religion
- Gender/Pregnancy
- Age
- Disability
- Veteran Status
- Marital Status
- Sexual Orientation
Anti-Retaliation:

- Jury Duty
- Whistleblower
- FMLA
- Sarbanes-Oxley
- Workers’ Compensation
- Protected Activity
  - Opposition
  - Participations, etc.
Title VII of the Civil Rights Act of 1964

- Prohibits discrimination based upon:
  - Race
  - Color
  - Religion
  - Sex
  - National Origin
Unlawful Discrimination

• Discrimination occurs when a person or group is treated less favorably than a similarly-situated person or group, because of a protected characteristic.

• Discrimination includes harassment.
McDonnell Douglas
Burden Shifting
(411 U.S. 792 (1973))

- Plaintiff must establish a *prima facie* case
- Defendant must offer a legitimate non-discriminatory reason for the adverse employment action
- Plaintiff must present evidence that proffered reason is pre-textual
Sexual Harassment

Two types of sexual harassment:
Quid pro quo and hostile work environment

➢ Quid Pro Quo:
This for that, tangible employment action

➢ A hostile work environment:
Occurs when the conduct is severe or pervasive and affects the employee’s ability to work or creates a work environment that a reasonable person should not be expected to endure
Legal Liability

- An employer is liable for supervisor harassment that results in a tangible employment action.

- An employer is liable for supervisor harassment that results in a hostile environment, unless the employer can establish an affirmative defense.

- An employer will be liable for harassment by co-workers if it knew or should have known of the harassment and failed to take timely and appropriate remedial action.

- An employer is liable for harassment by third parties (for example, vendors or clients) if it knew or should have known of the harassment and failed to take prompt and appropriate remedial action.
Affirmative Defense to Charge of Sexual Harassment

• To avoid vicarious liability, the employer must show:
  ➢ it “exercised reasonable care to prevent and correct promptly any sexually harassing behavior;” and
  ➢ the plaintiff employee “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”

  ➢ Employers who engage in good faith efforts to comply with the law are afforded a “safe harbor” in which they “may take refuge from punitive damages liability”
  ➢ **GOOD FAITH EFFORTS = TRAINING**
First Prong:
• Courts will inquire into an employer’s:
  ➢ Policies
  ➢ Investigations
  ➢ Training

Second Prong:
• Did the employer have a policy with an effective complaint procedure?
• Was the employee aware of it? (i.e., trained?)
• Did the employee fail to use or take advantage of the policy/procedure?
Pregnancy Discrimination Act of 1978

- Amended Title VII
- Prohibits employment discrimination on the basis of “pregnancy, childbirth, or related medical conditions”
- Makes it unlawful to discharge or refuse to promote or hire women due to their pregnancy
Civil Rights Act of 1866

- § 1981
- Prohibits intentional race discrimination in private employment
- Potential application to national origin claims
Immigration Reform and Control Act of 1986

- Prohibits intentional discrimination on the basis of citizenship or national origin

- NOTE: Does not apply to illegal immigrants
Equal Pay Act of 1963

• Prohibits pay differentials based upon sex for work requiring equal skill, effort and responsibility, performed under similar working conditions
• Prohibits discrimination against individuals age 40 or older

• Claims within the protected class are common 45 v. 55
Americans with Disabilities Act

- Prohibits discrimination on the basis of disability, perceived disability or history of disability;
- Requires reasonable accommodations for qualified employees;
- ADAAA effective January 1, 2010;
- Claiming an employee is not disabled is no longer a slam dunk;
- Substantially limited must be given broad meaning;
- Focus on reasonable accommodation;
- Individualized case assessment.
The ADA Rule

• An employer cannot discriminate against:
  ➢ A person with a disability;
  ➢ Who can perform the essential functions of a job;
  ➢ With or without a reasonable accommodation
What Is A Reasonable Accommodation?

Any change in the work environment or in the way things are customarily done that would enable a qualified individual with a disability to enjoy equal employment opportunities.
Accommodations

- Making existing facilities readily accessible to and usable by individuals with disabilities
- Improving facilities or equipment by adding adaptive equipment
- Restructuring a job, such as changing the job’s work schedule or reallocating non-essential job functions
- Transferring or reassigning a disabled employee to a vacant position for which he/she is qualified
- Allowing an employee to enter into a “work-at-home arrangement” if the work can be performed at home
- Providing a part-time work schedule
- Adjusting examinations and training materials
- Providing qualified readers or interpreters
Undue Hardship Under The ADA

- An undue hardship refers to the impact the accommodation has to the operation of the employer’s business in light of the following factors:
  - The accommodation’s cost in connection with the overall financial resources of the employer
  - The overall size and structure of the employer’s workforce
  - The employees affected by the accommodation
  - The effect on other resources and expenses
Family Medical Leave Act

• Requires covered employers to provide employees with up to 12 weeks of unpaid/family medical leave of absence for:
  - serious health condition of employee
  - birth/adopter of child
  - serious health condition of family member
  - qualifying exigencies arising from active military duty
  - (short-notice deployment, military events/activities,
  - child or school, financial, post-deployment) receive
  - 26 weeks of leave in “a single 12 month period”
To be eligible for FMLA leave, employee must have 12 months of service with employer.

- 12 months now measured over 7 years
- Notice requirement changes
  - Employers must post even with no eligible employees (e-posting is okay)
  - Calling in sick is insufficient notice to employer
Obama’s First Bill: The Lilly Ledbetter Fair Pay Act – signed January 29, 2010

It is fitting that with the very first bill I sign - the Lilly Ledbetter Fair Pay Restoration Act - we are upholding one of this nation's first principles: that we are all created equal and each deserve a chance to pursue our own version of happiness.
The Ledbetter Fair Pay Act redefines the "accrual" of a compensation discrimination claim as follows:

For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.
Section 6. This section indicates that the amendments by the act take effect on May 28, 2007 (the day before the *Ledbetter* decision) and apply to all claims of compensation discrimination under the relevant sections of Title VII, ADEA, ADA and the Rehabilitation Act that are pending on or after that date.
Uniqueness of Retaliation Claims

- Can apply to any of the prior claims/protected classes
- Plaintiffs can be very emotional if they feel they were retaliated against in the workplace for exercising a protected right.
- Juries are often comprised of members of the workforce who may identify and sympathize with an aggrieved plaintiff.
- Often an employer prevails on underlying discrimination claims but loses on retaliation claim.
- $$$ – Significant potential liability, including exposure to punitive damages due to emotional nature of claims.
Defending Retaliation Claims

• Timing is almost universally a problem.

• Legal arguments are therefore vital.

• If circumstances dictate, employer argues that as a matter of law the plaintiff was not subject to an adverse action.
Avoiding/Limiting Retaliation Claims

- Institute and disseminate policies identifying prohibited activities, expectations of employee conduct, complaint reporting mechanisms, and assuring prompt investigation
- Enforce the policies consistently
- Listen to employees and take their concerns seriously
- Create mechanisms, such as an ombudsman, open door policy, or suggestion box which allows employees to raise concerns outside of their normal reporting chain
- Always provide feedback
Avoiding/Limiting Retaliation Claims

- Engage in on-going communication with employees about what is and is not acceptable and how to report inappropriate conduct.
- Inform contractors and subcontractors of what is and is not expected of them. Consider giving customers and suppliers access to your hotline.
- Monitor work environment.
- Ensure there is support (legitimate non-retaliatory reasons) for all actions.
- Do not create potential liability or create a claim by allowing the “cover-up” to overshadow the alleged de minimus retaliatory act.
Responding to Governmental Agencies

- Federal, state and local agencies file charges against employers to enforce anti-discrimination laws
- Usually 30 days within which to respond
- Respond with a position statement
- Typically, EEOC does not pay as much attention to “interrogatories”; state/local agencies more so
- Agency may follow up with more document requests or on-site/telephone interviews
- Employee will always receive a “right to sue” letter
- EEOC rarely pursues single plaintiff cases; more interested in systemic discrimination
- Back Pay
- Lost Benefits
- Reinstatement or Front Pay (Judge)
- Non-Pecuniary Compensatory Damages
- Injunctive Relief (Judge)
- Liquidated or Punitive Damages
- Attorneys’ Fees
- Costs
Preparing Good Documentation
Good Documentation

=*

Papering The File
Uses and Impacts of Documents

- **If good**
  - Ensures clear communication
  - Make better decisions
  - Creates a record for evaluating future conduct
  - Establishes bases for discipline
  - Discourages challenge and expedites resolution
  - Makes you a better witness

- **If bad**
  - Limits flexibility
  - Hurts credibility
  - Creates claims
  - May say something that you did not intend
The Basic Rules

• Be truthful and accurate
• Review the document
• Have someone else review it
• Destroy drafts
• Contemporaneous is best
• “As you know” - it’s better than nothing
Disciplinary Warnings

Dual Purpose

✓ Corrective

✓ Legal
EFFECTIVE TERMINATION PROCEDURES
a) Were any representations made to the person that they were not employed as an “at-will” employee? What were the representations?

b) Was the employee specifically advised that the employment relationship could be terminated at any time and for any reason? Was a “disclaimer” ever signed?
General Considerations – All Discharges

c) Did the person give up other employment opportunities by accepting his or her present position?

d) Is there a written offer of employment, a letter confirming the terms of the employment, or a contract of employment?

e) What is the employee’s tenure? If the person is a long-term individual (e.g., ten or more years), does the employer “owe” him or her some special consideration?
f) Will the termination of the employee prevent the partial or full vesting of benefits [e.g., pension, 401(k)] in the immediate foreseeable future?

g) What is the effect of the termination upon the morale of the department, location, or division?

h) What is the effect of the termination on other business-related matters?
i) Is this the type of termination that might induce some colleagues to seek out a union?

j) Was the individual participating in “concerted activity” within the meaning of the National Labor Relations Act?

k) Did the employee’s legally protected status (such as race, color, creed, sex, national origin, age) arguably have anything to do with the decision and/or will it appear that recent employment decisions are adversely affecting a protected class?
l) Has the employer taken into account any necessary requested reasonable accommodation for the person’s religion or disability?

m) Has a thorough investigation been conducted so that the decision is based upon facts and not perception, hearsay or speculation?

n) Has the employee been given the opportunity to relate his or her side of the story?
<table>
<thead>
<tr>
<th>Question</th>
<th>Description</th>
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<tbody>
<tr>
<td>o)</td>
<td>Are there extenuating circumstances or other mitigating factors which justify a lesser penalty?</td>
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<tr>
<td>p)</td>
<td>Is the decision timely?</td>
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<tr>
<td>q)</td>
<td>Should you suspend the employee, pending further investigation?</td>
</tr>
<tr>
<td>r)</td>
<td>Is this action consistent with prior incidents of a similar nature?</td>
</tr>
<tr>
<td>s)</td>
<td>If the answer to any of these questions makes the decision to terminate suspect, who else should be consulted within the employer’s organization?</td>
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Considerations For Disciplinary Discharges

a) Was the violated rule known to the employee? Was the rule published? Was the practice consistent with the rule?

b) Are the disciplinary steps that have been taken outlined in a progressive discipline policy (i.e., oral, written, final, written)?

c) Did the employee have an opportunity to take constructive action?
d) Are the witnesses credible?

e) Was the information regarding the infraction obtained lawfully (e.g., drug or alcohol test, private investigator, search)?

f) Is the documentation in order?

g) Does the employee’s overall documented record support the decision (e.g., employee just received congratulatory letter and merit raise for outstanding performance)?

h) Is this action consistent with prior incidents of a similar nature?
Considerations For Performance Discharges

a) Do the evaluations support the decision?

b) Was the employee not only told of deficiencies but also advised **how** to improve and **when** he or she needed to meet expectations?
c) Was the employee denied requested assistance (e.g., refusal to provide training)?

d) Is the articulated reason for discharge the real reason?

e) Is the deficiency capable of objective measurement, or are the criticisms at least specific (e.g., “bad attitude” v. “employee refused to assist patient or colleague”)?
f) Does the employee’s overall documented record support the decision (e.g., employee just received a merit raise)?

g) Was the employee ever told that his or her failure to improve would result in termination?

h) Is this action consistent with prior incidents of a similar nature?
Thorough Investigation

- Collect facts and documents
- Interview others
- Opportunity to respond
- Be sure employee aware of policies or expectations
- Afford opportunity to change
- Consider mitigating factors
- Treatment of others in similar situations
Prior to Discharge

- Document everything
  - Be conscious of what written
- Read relevant policies
- Conduct through investigation
- Allow emotions to cool
- Consider suspension before discharge
- Get second opinion
Alternatives

- Voluntary resignation
- Separation agreement/release
- Demotion
- Transfer/reassignment
- Final written warning
Discharge Procedure

- Decision maker present
- Human Resources present
- Be fair but firm
- Be honest
- Be factual
- Do not apologize, but can acknowledge emotions
Severance Agreements

• Many employers ask departing employees to sign release forms waiving their right to bring any employment-related legal action against the employer.

• In return for signing the release, employees typically receive consideration such as additional severance benefits or payments beyond their entitlement.
Requirements For All Releases

• Certain elements should appear in any employee release form:
  
  ➢ consideration,
  ➢ a release clause, and
  ➢ a statement of non-coercion

• Don’t forget the OWBPA waiver
Requirements For All Releases

- Benefits to which the employee is entitled by employer policy and practice, by law (such as unemployment insurance benefits), or by contract (such as supplemental benefits required under a collective bargaining agreement), cannot be offered as consideration;

- Different rules for RIFs; much higher stakes
Fair Labor Standards Act

- The Fair Labor Standards Act was adopted in 1938 to establish federal wage and hour standards for covered employees.
- Addresses standards for:
  - Minimum wage
  - Equal pay
  - Overtime
  - Child labor
  - Coverage
  - A particular employer has to be “engaged in commerce or the production of goods for commerce.”
Fair Labor Standards Act

• Requires minimum rates of pay and overtime premiums for non-exempt employees
  ➢ Federal minimum wage is currently $7.25/hour on 7/24/09)

• Opt-In Collective Actions § 216(b)

• Anti-retaliation provision
General Requirement For Minimum Wage And Overtime

• Unless specifically exempted, employees covered by the Act must receive at least the minimum wage and in addition must receive overtime pay of time-and-one-half their regular rate of pay for all hours worked in excess of forty in a workweek.

• The regular rate of pay is determined on an hourly basis by calculating all compensation paid to an employee in a work week then dividing that amount by the actual number of hours worked in that work week.
Regular rate of pay includes...

- Commissions;
- Nondiscretionary bonuses;
  - If bonus is deferred over a period of time longer than a workweek, the employer may disregard the bonus in computing the regular rate of pay until the amount of the bonus can be ascertained, at which time the bonus must be apportioned back over the period of time.
- Profit sharing payments;
- Gain sharing;
- Shift differentials;
- On-call pay;
- “Combat” pay (extra pay for undesirable assignments);
- Weekend premiums (under certain circumstances)
Exemption Requirements

To qualify as an “Exempt employee,” the employee must meet 2 requirements:

1) salary basis test; and
2) Have duties that are categorized as executive, administrative, professional, computer or outside sales under the FLSA and applicable state law
Employers continue to face expensive collective and class actions under federal/state wage and hour laws:

- Class-wide claims for 2-3 years of unpaid wages or overtime plus
- Liquidated damages, state law penalties, attorneys’ fees and costs, and interest

FLSA collective actions exceed the total actions filed under the other federal employment laws combined.

The federal Wage-Hour Division estimates 72% of employers violate the FLSA in some substantive manner.
The Proliferation of Class Actions

- Wage and hour collective and class actions have tripled since 1997
- Explosion of litigation in Florida
- 63% of all collective actions were filed in Florida
- Most growth is at the state court level (California, Florida, Illinois, New Jersey, New York and Texas)
- Industry “waves”
Primary Risk Areas

1. Misclassification
   - Challenges to exempt status
   - Challenges to status as independent contractor

2. Compensable Hours of Work
   - “Off the clock” work
     - Changing/preparatory time
     - Travel time
     - Mandatory meetings
Primary Risk Areas

3. Meal and Rest Breaks
   • Failure to provide
   • Failure to provide in a timely manner

4. Technical compliance issues
   • Itemized wage statements and proper pay checks
   • Timeliness of payment
   • Inappropriate deductions from wages
E-Discovery Issues

• All e-mail is discoverable. All of it.

• E-mails are taken out of context.

• Short cuts in documentation can come back to haunt you.

• Jokes and unintended comments can and will be used against you.

• Inconsistencies will be used to bolster the other side’s case.

• Cost of defense, the sheer volume of emails.

• Litigation holds.

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Thank you for attending!
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