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Speakers

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Employment Law

HIRING TO FIRING . . .
AND EVERYTHING IN BETWEEN

Four Essential Principles and Practices for Human Resources Practitioners
First Principle: Nearly all employment is at-will, but that doesn’t guarantee that you can terminate for any reason.

Even in an at-will relationship, employers cannot terminate for unlawful reasons.
First Principle: (Cont.)

- Protected Characteristics
  - Age
  - Race
  - Gender
  - Etc.

- Protected Activity
First Principle: (Cont.)

• Exception – Collective Bargaining Agreement

• Exception – Written Contract

• Exception – Implied or Verbal Contract
**Second Principle**: Document, Document, Document

- Policies / Expectations
- Evaluations
- Write-Ups
**Third Principle:** Consistency, Consistency, Consistency

- No good deed goes unpunished.
- Discrimination and disparate treatment cases often rest on inconsistent treatment.
Fourth Principle: Regular Employee Feedback

• Honest appraisals

• Note specific improvement areas
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SEVEN COMMON JOB APPLICATION MINEFIELDS

First Minefield: Over-Emphasis on Criminal Backgrounds.

Example: “Please check the box if you have ever been charged or convicted of any criminal activity.”
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_First Minefield:_ (Cont.)

(a) Check the Box Employment Exclusion

(b) Ban the Box Movement
   -- Example: Prohibited in Mass.
   -- NELP 2011 Report: “65 Million Need Not Apply”
First Minefield: (Cont.)

(c) 2012 EEOC Guidance

(d) Green Factors:
   -- Nature & Gravity of Offense
   -- Time that Has Passed
   -- Nature of the Job Sought
First Minefield: (Cont.)

But, negligent hiring is a reality.

Example: Service technician burglarizes home in line of duty and had history of burglaries.
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Second Minefield: Suggesting citizenship required for employment.

Example: “Are you a United States Citizen?”

Correct Inquiry: “Are you authorized to work in the United States?”
Third Minefield: Requiring disclosure of past on-the-job injuries or workers’ compensation claims.

(a) Considered interference with protected rights in many jurisdictions.

(b) May reveal ADA-protected disability.
Fourth Minefield: Failing to indicate that employment will be at-will.

Fifth Minefield: Failing to indicate that false information will be grounds for no-hire or termination.
*Sixth Minefield*: Requiring disclosure of actual disability or physical limitations in performing job.

Should only ask “Are you physically and mentally able to perform the essential functions of the job with or without a reasonable accommodation?”
**Seventh Minefield**: Requiring disclosure on application of unnecessary age-related information.

Examples: Years of graduation; date of birth.
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Conducting Background Checks
And Avoiding Résumé Fraud

(a) Be thorough in evaluating and verifying information on a résumé.

(b) Risks of résumé fraud:
   -- Estimated cost of $600 billion annually based on hiring only to later terminate.
(b) Risks of résumé fraud (Cont.):

-- Employee overlooking important oversight event or problem.

-- Cost of hiring and training only to discover need to terminate.

-- Embarrassment to organization.
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(c) Five practices to avoid hiring those who commit résumé fraud:

-- Ask the question: If it looks fishy, it probably is (inconsistencies, long employment breaks, sudden responsibility swings).

-- Does the response make sense: If not, it’s worth independently verifying.
(c) Five practices to avoid hiring those who commit résumé fraud (Cont.):

-- Research the information.

-- Conduct formal background checks.

-- Adopt and consistently follow the screening policy. Don’t make exceptions.
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Conducting Job Interviews

*Example*: $157,000 verdict against employer because a manager asked an applicant during a job interview about medical problems.
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Conducting Job Interviews (Cont.)

• Hiring decisions should be based on objective, measurable, job-related criteria.

• Obvious discriminatory characteristics should never be considered: race, color, religion, sex, sexual orientation, age disability, etc.
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Conducting Job Interviews (Cont.)

**Off-Limits:** Questions regarding an applicant’s race.

But so are questions concerning an applicant’s complexion or skin color, hair, or eyes. Don’t even request a photograph during the interview / evaluation stage.
Conducting Job Interviews (Cont.)

*Off-Limits*: Questions regarding citizenship or nationality.

But so are questions concerning place of birth, ancestry, or similar information. Can ask if the individual is authorized to work in the United States or job-related ability to speak a foreign language.
Off-Limits: Questions regarding religion.

But so are questions concerning an applicant’s observance of religious holidays or holy days. It is okay to ask whether employee would be available to work weekends or nights where job-related.
**Off-Limits:** Questions regarding gender-specific obligations or pregnancy.

But so are questions concerning childbearing intentions, birth control use, marital status, and childcare or family obligations.
**Off-Limits:** Age.

But so are questions concerning birth date, graduation dates, or other dates that tend to reveal age older than 40, unless job-related and consistent with business necessity.
**Off-Limits:** Questions regarding general medical condition and disabilities.

But so are questions concerning work-related injuries or workers’ compensation claims, use of prescription medications, and past drug or alcohol addictions.
The Independent Contractor Trap

Employees vs. Independent Contractors

(a) Independent contractors are often less expensive for employers.

(b) Renewed collaborative efforts by DOL and IRS to investigate.
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The Independent Contractor Trap (Cont.)

c) Don’t employer’s get to decide? The simple answer is “no.”

d) The title given by an employer is relatively insignificant.

e) Economic realities of relationship.
(f) Test is designed to decide who exercises the greater control. If it is the entity, then it likely is an employment relationship.
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The Independent Contractor Trap (Cont.)

(g) Common Factors:

-- Set schedule (work days / hours)
-- Handbooks / policies
-- Required uniform / appearance
-- Open-ended relationship
-- Specific process expectations
-- Provision of tools of business
-- Evaluations
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The Independent Contractor Trap (Cont.)

The Domino Effect

-- Overtime or minimum wage pay problems.
-- Potential employment termination or discrimination claims.
-- Tax assessments / penalties.
-- Unemployment compensation eligibility / assessments.
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Pay Classifications and Overtime Issues

(a) Must pay minimum wage.

(b) Must pay overtime – under the FLSA, must pay one and one-half the hourly rate to non-exempt employees who work over 40 in week.

(c) Unless employee exempt.
Pay Classifications (Cont.)

Exemptions

-- Salary basis is not enough.
-- Must qualify under specific exemption.
-- White Collar Exemptions.
-- Does this mean that someone who wears a “white collar” or who works in an office position is automatically exempt?
Pay Classifications (Cont.)
White Collar Exemptions (Cont.)
-- Executive Exemption
-- Administrative Exemption
-- Professional Exemption
-- Computer Professional Exemption
-- Outside Sales Exemption
-- Highly Compensated Employees (100k)
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Pay Classifications (Cont.)

Time Clock Violations

1) Employees encouraged to work off the clock.
2) Employees allowed to work off the clock.
3) Employees asked to estimate time worked, instead of formal tracking.
4) Failure to keep records.
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Pay and Natural Disasters

(a) Still must pay employees who are working during natural disasters.

(b) Be cautious of “volunteer” work by employees on behalf of company.

(c) But no pay requirement for non-exempt employees if they don’t work.
(d) But generally must pay normal salary for exempt employees.

-- But can require use of leave pay for whole days not worked.

-- Can deduct for whole day absences if exempt employee has own transportation issues and open for business.
Pay and Natural Disasters (Cont.)

(e) On-Call Pay
-- Must provide if employee is on-call.
-- Must pay for waiting time (for instance, if waiting for power to be restored).
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Intelligent Terminations
Top 10 Comments Not to Make on Termination Notices

(10) “You are the weakest link, goodbye.”

(9) “I would go hunting with him sometime.”

(8) “Works well when under constant supervision and cornered like a rat in a trap.”
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Intelligent Terminations (Cont.)

(7) “I would not allow him to breed.”

(6) “She doesn’t have ulcers, but she’s a carrier.”

(5) “When he opens his mouth, it seems that it is only to change feet.”
(4) “She has reached rock bottom and has started to dig.”

(3) “Some drink from the fountain of knowledge; he only gargled.”

(2) “She has delusions of adequacy.”
Intelligent Terminations

The Number 1 comment that you should not make on employee termination notices:

“He is depriving a village somewhere of an idiot.”
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Intelligent Terminations

Remember that Employees have Numerous Legal Protections from Termination

-- Title VII / ADEA / ADA
-- Contractual Rights
-- Wrongful Termination
-- FMLA / Other Leave Rights
-- Whistleblower / Retaliation Protections
-- Collective Bargaining Agreement
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Intelligent Terminations

(a) Documentation.
(b) Consistency.
(c) Second-Tier Review / Approval.
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Whistleblower / Retaliation Claims

(a) Many statutes have protections against retaliation or for whistleblowers.

(b) Examples:

-- Title VII, ADA, ADEA
-- FLSA
-- NLRA
-- Sarbanes-Oxley
-- OSHA
-- Dodd-Frank Act
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Whistleblower / Retaliation Claims

Why Claims are Challenging for Employers

(a) Anyone potentially qualifies – just requires protected activity.

(b) Employee doesn’t need to be right, just reasonable in his or her belief in most circumstances.
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Whistleblower / Retaliation Claims

Why Claims are Challenging for Employers

(c) Even verbal complaints often qualify – which may lead to credibility challenges.

(d) Employee griping may be construed as “protected activity.”
Whistleblower / Retaliation Claims

Why Claims are Challenging for Employers

(e) Claims are often embarrassing or may lead to negative public attention.

(f) Damages, where violations found, are often very high.
Cultures

• Motivation & Engagement
• Innovation
• Merit
What exactly is “Culture”?

Organization culture is the combination of tangible and intangible elements that reflect the underlying beliefs and attitudes of the organization as a whole.

…and culture dictates behavior.
10 Things Bosses Say Behind Closed Doors

7. Does Culture Matter?

Answer: Yes, it shapes competitiveness, innovation, ethics, group chemistry and everything else that drives a team.
Motivation

• It’s not always about the money
• People love doing meaningful work
• BIG Difference between Satisfied and Engaged Employees
Engaged Employees:
- Advocate
- Always offer ideas
- Support Colleagues
- Delight and amaze customers
- Have a high sense of ownership
Engagement

What drives Engagement?

1) Management/Leadership

2) A system for getting the right person in the right position
   - A Talent Management System
   - Career Paths
   - Continued Growth
Appreciation:
1) Feeds Engagement
2) Facilitates Recruitment & Retention of Better Employees
3) Reduces High Turnover & Absenteeism
Appreciation

How to Show It:
1) Offer Flextime & Tele-Commuting
2) Share Company Information
3) Involve in Decision-Making
Practice continuous innovation…
To not only excel but to survive
Innovation

Elements of an innovation climate:

• Involvement in decision making
• Idea time
• Support for new ideas & learning
• Openness in exchanging viewpoints
• Healthy embrace of risk
• Trust
Engaged employees are three times more creative and innovative than non-engaged employees.
A culture of merit is a high-performance workplace where people expect to get, and where they receive, precisely what they earn and deserve. Nothing more, and nothing less.
Key traits:

• **Earn**: to acquire through merit
• **Deserve**: to be worth of or to qualify for
• **Responsible**: to be the primary cause of something
Antitheses traits:

- Entitlement: a claim to something you feel you are owed
- Mediocre: Average, ordinary
- Excuse: a plea offered to excuse a fault or failure
How to build a merit culture:

- Go in front and show the way
- Give fast, honest feedback on results
- Hold yourself to a higher standard
Culture Infectors:

- A decline in civility
- The rise of entitlements
- Normalized immorality
- Scapegoating of successful people
Recognition

Be a Cheerleader

• W O R K
• You must work hard everyday!
• Make that sale!!!!!! Don’t look tired!!!!
• For if you do you might get FIRED!!!
Some reports show incorporating some facet of recognition into workplace:

- 90% - Better motivate employees
- 84% - Increase performance
- 69% - Better achieve their personal goals
- 60% - Achieve their job goals
Recognition

What does Recognition look like?

• A Powerful act – Thank You!
• Catch your employees doing something RIGHT!
• Ask employees what motivates them
• Formal Programs – Monthly, Annual, Special (Super Star, Branch Competitions)
Recognition

Why don’t managers do it?

• Don’t know how to best recognize employees
• Don’t think it is an important part of job
• Don’t have time to recognize employees
• Worry I might leave someone out
• Assume recognition is not appreciated
• AGE
Why do managers do it?

• Personal responsibility
• They have been recognized for recognition
• Role models
• Age
Recognition

Recognition starts with YOU!

• Don’t hit that SNOOZE button
  – Cheating yourself
  – Cheating your company
  – Cheating employee

• Begin making the change
  – 21 days to create a habit?
  – Just get started!
Be a Cheerleader

• WORK
• You must work hard everyday!
• Master customer service and cars
• And you’ll earn performance stars!!!
Coaching

- “One of the most distracting traits a leader can have today is arrogance.” (Blanchard, 1995)

- “Good coaches are not consumed by their own importance.” (Blanchard, 1995)
Coaching

Continuous Coaching Made Easy
Three (3) Steps to Coaching
(Source: The Practical Coach)

1. Never Let Great Work Go Unnoticed
   “When you see it, say it.”
   - For every negative comment, most people need seven (7) positive comments.
   - A paycheck isn’t enough anymore... workers want and need to hear when they’ve done something well.
Coaching

Continuous Coaching Made Easy
Three (3) Steps to Coaching
(Training Source: The Practical Coach)

2. Never Let Poor Work Go Unnoticed
   “Make it private and positive.”

- Put (discussions) in a framework of development instead of evaluation. When employees realize that your purpose is to help them rather than judge them, the conversation has an entirely different tone.
Continuous Coaching Made Easy
Three (3) Steps to Coaching
(Training Source: The Practical Coach)

3. Never Let Them Go Down a Dead-end Road
(Use the Two-minute Challenge)
Coaching

The Steps to the Two-minute Challenge
(Training Source: The Practical Coach)

- State what you observed
- Wait for a response
- Remind them of the goal
- Ask for a specific solution
- Agree together
Continuous Motivation Made Easy
(Training Source: Continuous Motivation)

Positive Works Better Than Negative

1. Catch your employee doing something right
2. Be specific with your praise
3. Reward quickly
What is the # 1 Motivator?
(Training Source: Continuous Motivation)

A Simple “Thank You!”

A simple “thank you” is the # 1 motivator... and it is the easiest one to give.
Please give us your business card if you want a copy of this presentation!