

Labor Law and Employment

Presented by

Julie A. Tappendorf

Robert T. McCabe



Ancel Glink, Chicago



Outline of Program

- Part 1 – Hiring & Firing: Reducing Litigation Expenses
- Part 2 – Hot Topics in Employment Law
- Part 3 – My Employees Won't Sue Me...Right?
- Part 4 – Your Employees are on Social Media – What can you do about it?
- Part 5 – Personnel Policies – Tips and Tricks to Reduce the Chances of Litigation
- Part 6 – The Attorney is In – Ask Away



Part 1 – Hiring and Firing; Reducing Litigation Expenses

- This session will deal with developing a productive hiring and firing process while reducing exposure to litigation from legal ramifications of improper steps in the process.
- Participants will learn: (1) the correct steps, procedures, and boundaries in the hiring and firing of employees; (2) the common mistakes in hiring and firing that can lead to costly litigation.

1. No Illegal Hiring Criteria

Know the illegal bases for making hiring decisions:

- Race
- Color
- Religion



Illegal Basis cont'd

- Sex
- National Origin
- Ancestry
- Age
- Marital Status
- Physical or Mental Disability



Illegal Basis cont'd...



- Military Status
- Sexual Orientation
- Unfavorable Discharge from the Military

2. Avoid Discriminatory Searches

Be sensitive to advertising that could result in exclusion of certain groups of candidates

Avoid any language that may discourage an application based upon race, sex (including pregnancy), national origin, age (40 or older), disability or genetic information;

Examples include ads that seek “females”, “recent college graduates”, “only U.S. Citizens”, “young and energetic” applicants or that say things like “great opportunity for a student” or “mature person wanted.”

Always utilize the municipal facilities or website for advertising



3. Avoid illegal or inappropriate application questions

- Your application should contain:
 - Employment at- will statement
 - Accommodation request





- Conviction (not arrest) information
- Certificate of accuracy
- Notice of pre-employment testing
- EEOC statement

It should not contain:

- Request for arrest information
- Request for dates of graduation
- Inquiries about disabilities (except see next slide)



Disability and Race Questions

- Employers can ask about disabilities and race under limited circumstances;
- These questions should only be asked where there is an “opt out”;
- The information still cannot be used as a determinative factor in the hiring decision;
- So why ask about it?

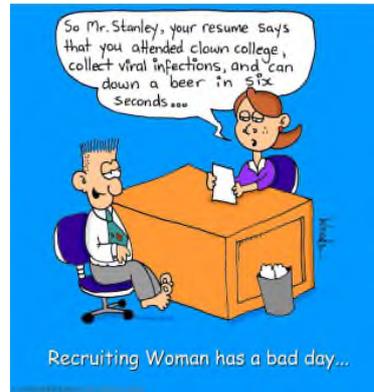
4. Don't ask about disabilities

- Provide a job description which contains all requirements of the position – including physical requirements



5. Don't accept resumes for most positions

- Should you accept a resume if you require completion of a job application? Probably not.
- Your kidding me. Why not?



Problems With Resumes

- Resumes can and often do contain information that you do not want
 - Photos
 - Age information from education history
 - Marital Status
 - Political and Religious Affiliations
 - Job gap information (Ex. 2003-2005 Raise Children)
- Questionnaires are more helpful for screening applicants
 - Skills
 - Experience
 - Licensing/certification

Additional Screening Considerations

- Be consistent when screening applications
 - If you are not going to hire someone, put a reason in the file
 - Did not meet minimum qualifications; lacked experience etc.
 - Avoid problems with screening notes
- Retain documents for at least 1 year
- Secure documents with health or personal information
 - ADA
 - HIPPA

6. Avoid questions that sound discriminatory



- Avoid Interviewing Traps

There are no illegal questions,
only potential land mines

- Avoid all questions which look like they are really about age, marital status, gender etc.
- For example:
 - Do you plan to have children?
 - Do you have children?
 - Where do you attend worship?



- You have an interesting accent.
Where are you from?
- This is strenuous work. You don't have any knee or back issues do you?
- When did you graduate from high school?
- Are you married?



- Take notes during the interview and keep them in the file
- Some employers actually use scripted interview questions and take notes on the question form – good practice, but be careful of the content of the notes
- Have a defensible method of narrowing the applicant field such as required education and/or required experience



Panel Interviews

Ask the same questions of all applicants

- Again, the script is helpful in these situations
- It can later be used as proof if an employment discrimination charge is filed
- Be careful if the interviewers are making notes on the question forms

How to “score” applicants

- The process should be consistent for all applicants
- If points are to be awarded, they should be based on objective characteristics (knowledge of the field, experience, education etc.)



7. Don't ask about drug use but do conduct pre-employment tests



When to Conduct Pre-Employment Tests

- Test only those to whom a conditional offer is made

Conduct only those tests that are job related:

- A drug screen is always appropriate



A criminal background check is almost always appropriate

- Remember that a decision not to hire based upon a criminal background check can only be made if the candidate has a conviction. Arrests don't count.



Physicals must be related to the specific job duties



8. Don't forget to follow the rules for background checks

The Four Steps to Lawful Background Checks

- Initial disclosure to the applicant in a separate document that a background check will occur
- Written authorization from the candidate



- Notification to the candidate if adverse information is revealed in the report along with a summary of the report and summary of rights to contest findings



- Notice to candidate if employment is denied as a result of information gathered in the background check



9. Don't rely on the Internet

References

- Can you “Google” applicants or review social web sites, and if so, can you make a job decision based on this information?
- We don't recommend making decision based upon information found on the Internet (photo issues, information source etc.)
- Illinois employers cannot require current employees or job applicants to disclose social networking passwords for private accounts – professional accounts maintained or created for the business of the employer are different and employers can require those passwords



10. Don't keep inappropriate information on applicants or current employees

- The Illinois Personnel Records Review Act prohibits an employer from gathering or keeping records on “an employee’s associations, political activities, publications, communications or non-employment activities.” This does not apply to records of union membership or other records submitted by the employee or activities that occur on the employers’ premises or during work hours that interfere with the performance of the employee’s duties or the duties of other employees which constitute criminal conduct or may reasonably harm the employer’s property, operations or business or could result in financial liability to the employer.



- The bottom line is that, while it may be tempting to keep tabs on your employees, it is risky and may result in a lawsuit.
- Include notice on applications that we do not maintain records of employee's associations, political activities, publications, communications or nonemployment activities unless the employee either submits the information in writing or provides the employer with written authorization to gather or collect the information.



11. Termination of Employment: Strategies for Avoiding Litigation

Wrongful termination cases are costly

Financial Costs

- 3 million dollar verdict for employee fired six days after expressing her support of a co-worker who filed a racial and sexual harassment action
- 2 million dollars in damages to two suburban Chicago police officers who spoke out about a fellow officer's cocaine use
- \$400,000 in damages to Alabama pharmacist fired 4 days after his 65th birthday. Another \$400,000 in liquidated damages for willful violation of the ADEA

Damage to the reputation of the employer



12. Know the Law

All employees with the authority to terminate employment should have a basic understanding of legal and illegal reasons for terminating employment

- Legal reasons include but are not limited to such things as performance issues, attendance issues and work rule violations
- Illegal reasons include but are not limited to race, age, religion, sex, sexual orientation, disability



12. Know the Law, cont'd

Supervisors should understand basic legal concepts that will help in avoiding pitfalls, such as

- Discrimination
- Retaliation
- Employment laws that protect employment
 - FMLA
 - USERRA



13. At-Will – What Does This Really Mean?

- Most employees who are not members of a collective bargaining unit are “at-will” employees
- They can be fired for any reason and regardless of whether or not they have done something wrong as long as they are not being terminated for an illegal reason

14. Discrimination



- Race; Age; National Origin; Sex; Sexual Orientation
- In the current economy, terminated employees are raising discrimination claims with greater frequency
- Legitimate work related reasons for termination are key to avoiding liability
- Good documentation is key to defending these claims

Burden Shifting Analysis:

- Plaintiff – Prima Facie Case
- Employer – Legitimate non-discriminatory reason for termination
- Plaintiff – Proof that employer’s reason is pretext

Again, documentation is key here



15. Retaliation

- Don't fire people because they have sued you
- Don't fire employees who are sympathetic to employees who are suing you
- Don't fire witness employees who have provided adverse information or are witnesses in a case against you
- Be careful when terminating employees who have been on workers comp or FMLA
- Retaliation is not just termination of employment. Other examples include changing a schedule, name calling, undesirable assignments etc.
- Issuance of appropriate discipline in the employment setting is not retaliation



16. Be Careful When Employees Are Under Contract

- If an employee has a contract (Directors, etc.), it is likely that the contract states that the employee may only be fired for certain reasons
- Termination for unspecified reasons may result in a wrongful termination suit



Collective Bargaining Agreements

- Most provide for termination for “just cause”
- These employees are not at-will and will likely be able to challenge termination of employment through their grievance procedures



17. Reporting Illegal Acts or Failure to Commit Illegal Acts

Whistleblowers

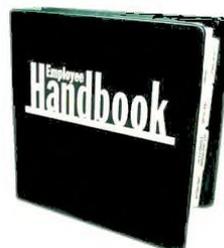
- Cannot retaliate against employees who reasonably believe that they are reporting violations of state or federal law
- “Reasonably believe” makes things difficult on employers

Cannot retaliate against employees who have refused to engage in illegal conduct



18. Follow Your Own Policies

- Believe it or not, many employers fail to follow their own policies
- Be aware of what your policies and procedures say about termination of employment and follow your own procedures



19. Be Careful When Terminating An Employee Who Has Been Receiving Workers' Compensation Benefits

- You can still terminate for misconduct
- Be aware of ADA issues
- Be aware of reasonable accommodation issues



20. Union Activities

- Union organizing is a protected activity
- Cannot terminate employees for union activities/organization
- You may want to, but you can't



21. Document, Document, Document



- Good documentation is all that stands between you and a swearing contest where a jury may have to decide who to believe
- Too often juries side with unemployed workers
- Good documentation can save you here

Part 2 – Hot Topics

- Concealed weapons, medical marijuana and e-cigarettes are three growing areas of concern related to safety and managing your workspace environment. This session will discuss the new laws on carrying guns, legal use of medical marijuana and much more.
- Participants will learn: (1) about these new laws and mandates and (2) how to adapt their operating policies and procedures to respond to the changes in the law dealing with concealed weapons and whether e-cigarettes are covered by the Smoke-Free Illinois Act and how they can be addressed in the workplace.

Medical Marijuana



Compassionate Use of Medical Cannabis Pilot Program Act

- 410 ILCS 130/1
- Effective January 1, 2014
- IDPH/IDFPR/IDOA/IDOR regulations
 - Patient, Dispensary , Cultivation & Tax Rules

Medical Marijuana, cont'd



What's Allowed?

- Possess 2.5 ounces every 2 weeks
- 60 licensed dispensaries in Illinois*
- 22 cultivation sites – 1 in each state police district
- 1% tax on patients
- 7% tax on growers and dispensaries



Medical Marijuana, cont'd



Who can get a card?

- 30 different conditions qualify.



Medical Marijuana, cont'd



- Cancer
- Glaucoma
- HIV
- Aids
- ALS
- MS
- Fibromyalgia
- Lupus
- Residual limb pain
- Tourettes Syndrome
- Hepatitis C



Medical Marijuana, cont'd



What's prohibited?

- Section 30. Limitations and Penalties
 - CDL Regulations prevail
 - May not be used in public place
 - Areas covered by Smoke Free Illinois Act
 - Driving under the Influence
 - Police and Firefighters
 - May not use around persons under 18
 - Can't share medical cannabis with friends
 - Can't sell your medical cannabis to others



Medical Marijuana, cont'd



What can employers do?

- Adopt reasonable rules
- Discipline for creating risk of liability
- Consider when an employee is impaired and unqualified to perform job
- Prohibit the use of medical cannabis in any "public place"

Medical Marijuana, cont'd



What can employers do?

- Prohibit the use of medical cannabis in any municipal vehicle
- Federal law does not recognize the right to consume medical cannabis
- Medical cannabis may not be consumed by CDL holders
- Police officers and firefighters may not use medical cannabis

Medical Marijuana, cont'd



Other issues

- Private businesses can restrict or prohibit the use of medical cannabis on their premises
- Universities, colleges or other institutions of post-secondary education can restrict or prohibit the use of medical cannabis on their property

Medical Marijuana, cont'd



Other issues

- Cultivation centers must have security plans and 24 hours surveillance in place. Security plans must be reviewed and approved by the State Police
- Cultivation centers cannot be within 2500 feet of the property line of any pre-existing public or private pre-school or elementary or secondary school or day care center or an area zoned for residential use

Concealed Carry



Firearm Concealed Carry Act

- 430 ILCS 66/1
- Effective January 1, 2014
- Status of ISP regulations



Concealed Carry, cont'd



Concealed Carry Licenses

- The Illinois State Police were given a deadline to review applications for a license to carry a concealed firearm
- Deadline changes depending on form of application

Concealed Carry, cont'd



Prohibited areas

- Any building or portion of a building under the control of a local government
- Playgrounds & parks, except you can't prohibit carrying on bike path or trails when only a portion of it runs through the park

Concealed Carry, cont'd



- The Illinois State Police (ISP) has enacted rules on required signage for prohibited areas



Concealed Carry, cont'd



Local Policies

- The Act preempts local governments (home rule too) from regulating or prohibiting handgun possession by licensees outside of prohibited areas
- Check your local codes – you may have regulations on the books that conflict with the new law

Concealed Carry, cont'd



Personnel Policies

- Illinois' concealed carry law, like those in other states, is silent on a municipal employer's right to prohibit guns in the workplace
- Challenges to employer policies have been unsuccessful in other states

Concealed Carry + Medical Marijuana?



- They don't mix, according to IDPH's proposed medical marijuana rules

Part 3 – My Employees Won't Sue Me...Right?

- This session will include a discussion of wage and hour issues, sexual harassment, retaliation, discrimination, and other potential litigation claims an employee might file or bring against a municipal employer.
- Participants will learn: (1) what legal steps to take in reducing risk for litigation from your own employees and (2) how to defend those claims when they are filed or brought against the municipal employer.

Wage and Hour Issues

- On the rise
- Administrative Office of the United States Courts, employees filed 7,008 wage and hour lawsuits in the 12-month period ending March 2011
- In 2000, employees filed 1,854 such suits



Wage and Hour Issues, cont'd

- Plaintiffs' attorneys like these cases
- Facts are usually straightforward
- They can receive attorneys' fees
- Liquidated damages are an issue



Wage and Hour Issues, cont'd

On the Phone; On the iPad; On the clock?



- If non-exempt employees are answering phone calls, e-mails or texts, they are on the clock
- Exceptions
 - De minimis time – What is it?
 - Rounding
 - “Waiting to be engaged” v. “engaged to wait” – Can the employee use his or her personal time or not?

Wage and Hour Issues, cont'd

- Honestly, don't rely on the exceptions and make requests of your non-exempt staff that occur after hours only when absolutely necessary
- Establish clear work rules that provide that non-exempt employees must:
 - Get supervisor's approval if they are going to work overtime
 - If non-exempt employees work overtime, pay them

Wage and Hour Issues, cont'd

- Clearly advise employees that they are not to check work e-mail, texts, etc. when not working (You can even block employees from accessing work e-mail if need be
- Or, make it clear that if non-exempt employees are expected to check their work e-mail, texts, voicemails at times other than regularly scheduled hours, they must report the time and you must pay them for it



Wage and Hour Issues, cont'd

- Telecommuting
 - This applies to non-exempt employees
 - Hours must still be recorded and reported accurately
 - Computer log on/log off records
 - Phone records of work time
 - Employment laws such as requirements regarding breaks and lunch periods must still be adhered to
 - Overtime must still be paid when applicable
 - Must pay close attention to telecommuting employees



EEOC GUIDANCE REGARDING CRIMINAL CONVICTIONS

EEOC Guidance

- Out in April 2012
- Bright line rules – “Those with felony convictions need not apply” – are out
- Three part test should be employed
 - Consider the nature and gravity of the offense
 - Consider how much time has passed since the conviction and employment decision
 - Consider the nature of the job sought

EEOC Guidance, cont'd

- Individually assess each applicant using the above criteria
- Don't ask about convictions unless they are relevant to the job sought
- Consider when, during the employment process, the above assessment should occur

EEOC Guidance, cont'd

- Keep very accurate records of your assessment process and maintain them for each candidate to which they apply – We recommend developing a uniform protocol and following it for each candidate
- Don't ask about convictions on the job application



NLRB AT-WILL EMPLOYMENT ISSUES



NLRB v. American Red Cross (February 1, 2012)

- Red Cross had at-will policy that required employees to sign an acknowledgment which stated, “I further agree that the at-will employment relationship cannot be amended, modified or altered in any way”
- Held that this language violated Section 7 rights

NLRB v. American Red Cross (February 1, 2012), cont'd

- The reason for this was that it was determined that this language would lead employees to believe that they could not change at-will status, no matter what
- Can do nothing, including unionizing or engaging in collective bargaining, that would change their at-will status
- Chills employees' interests in exercising Section 7 rights

Advice Memos From the NLRB Provide Additional Guidance

- SWH Corporation – Lawful at-will policy language (October 2012)

*The relationship between you and Mimi's Café is referred to as "employment at-will." This means that employment can be terminated at any time for any reason, with or without cause, with or without notice by you or the company. No **representative** of the Company has authority to enter into any agreement contrary to the foregoing "employment at-will" relationship. Nothing contained in this handbook creates an express or implied contract of employment."*

Advice Memos From the NLRB Provide Additional Guidance, cont'd

- The difference in this language and the language in American Red Cross is the use of the term "representative"
- The language leaves open the possibility that someone, just not a "representative", has the authority to change the at-will status and, therefore there is no Section 7 violation

Advice Memos From the NLRB Provide Additional Guidance, cont'd

- Rocha Transportation – Another example of lawful at-will policy language (October 2012)

*Employment with Rocha Transportation is at-will. Employment at-will may be terminated with or without cause and with or without notice at any time by the employee or the Company. Nothing in this Handbook or in any document or statement shall limit the right to terminate employment at-will. No manager, supervisor, or employee of Rocha Transportation has any authority to enter into an agreement for employment for any specified period of time or to make an agreement for employment other than at-will. **Only the president of the Company has the authority to make any such agreement and then only in writing.***

Advice Memos From the NLRB Provide Additional Guidance, cont'd

- This policy, unlike the one in American Red Cross, gives someone the authority to modify the at-will policy and therefore does not violate Section 7



FMLA SERVICEMEMBER PROVISIONS



FMLA Twelve (12) Month Periods

- 12 weeks in 12 month period for qualified employees for childbirth, serious health condition, family member serious health condition
- 26 weeks in 12 month period for the care of a covered service member
- What if employee invokes leave for a covered service member after taking general FMLA leave?



FLMA, cont'd

- Any general FMLA leave used under 12 week entitlement prior to leave being invoked for service member does not count toward the “single 12-month period” for 26 week service member entitlement
- So if service member-related FMLA leave comes after general FMLA leave, it is possible that an employee could be on leave for 38 consecutive weeks



ADA “DIRECT THREAT” CASES

Disability as a Safety Issue

- If an employee's disability poses a safety risk to the employee and others, there are several options
- Can the dangerous task be reassigned?
- Can the employee be reassigned to another job that does not involve the danger?



Disability as a Safety Issue, cont'd

- If the employee cannot be reassigned and therefore poses a “direct threat” to himself or others, then the employer would likely be justified in terminating the employee
- Direct threat is defined by the ADA as “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”

Disability as a Safety Issue, cont'd

- A decision that an employee poses a direct threat should be based on medical or other objective evidence, not opinion or speculation
- Wurzel v. Whirlpool – if no accommodation allows an employee to perform the job safely, then employer does not have to wait for a serious injury to conclude that a worker poses a direct threat and removing the worker from his job

Disability as a Safety Issue, cont'd



- In Wurzel, employee, a forklift driver, had heart condition that resulted in a variety of medical conditions including dizziness – not unreasonable to remove forklift driver from position when he suffers from bouts of dizziness

Part 4 – Your Employees are on Social Media – What can you do about it?

- Municipal employees are Facebooking, Tweeting, and posting on Pinterest in increasing numbers both at work and at home. This session will discuss issues related to employer monitoring of employee social media use, the legality of placing restrictions on employee use of social media and the type of activities that can be subject to discipline.
- Participants will: (1) learn how to lawfully discipline employees for excessive and inappropriate social media use; (2) be provided with tips for drafting and enforcing a social media policy and training employees on social media use.



Employment Issues

- The law is not settled
- Employers walk a tightrope in using and enforcing electronic information



Employee Monitoring

If employers monitor employee usage:

- Balance employer interest and employee privacy rights
- Provide notice to employees

Privacy Settings and Tools			
Who can see my stuff?	Who can see your future posts?	Friends of Friends	Edit
	Review all your posts and things you're tagged in		Use Activity Log
	Limit the audience for posts you've shared with friends of friends or Public?		Limit Past Posts
Who can look me up?	Who can look you up using the email address or phone number you provided?	Friends	Edit
	Do you want other search engines to link to your timeline?	Off	Edit



Social Media Passwords

- Legislation has been introduced in Congress, but no federal law exists
- A dozen states have enacted legislation to protect employee privacy
- Illinois has a password law



Employees Behaving Badly – Ex. 1

“I wish I could get fired some days, it would be easier to be at home than to have to go through this.”



Sometimes, wishes do come true.

Employees Behaving Badly – Ex. 2

A dispatcher posts a screenshot of a patient call, including name, personal information, and description of the gynecological emergency.

Employees Behaving Badly – Ex. 3

A local school administrator presented a photo of a student in a bikini, posing in front of a sign advertising alcohol beverages, at a district wide seminar on Internet safety.

<Nope, not posting the picture here>

Employees Behaving Badly – Ex. 4



Need I say more?

Employees Behaving Badly – Ex. 5+

So many more...[insert your example here]



Employee Usage

Employers can discipline for:

- Excessive use of social media at work
- Disclosure of confidential information
- Making false statements about employer

Protected vs. not protected activities:

- Protected concerted activities among co-workers - protected
- Individual gripes and personal attacks – not protected

Importance of a Social Media Policy

Social media policies are important to:

- Govern the administration and monitoring of site content;
- Set ground rules for public input and comments; and
- Establish policies for employee use of social media

Elements of a Policy, cont'd

Purpose

- The policy should state the purpose of the policy to obtain or convey information that is useful to, or will further the goals of, the government.

Approval and Administration

- An administrator should be appointed to oversee and supervise the social media sites of the government.
- The administrator should be trained on the policy and his or her responsibilities.

Elements of a Policy, cont'd

Comment Policy

- The policy should identify the type of content that is not permitted on the site and that is subject to removal.

Compliance with Laws

- The policy should contain language concerning compliance with applicable federal, state, and local laws, regulations, and policies, including FOIA, OMA and records retention.

5. Employee Usage Policy

- The policy should establish clear guidelines and boundaries for employee social media activities.
- Communicate whether social media use at work will be banned or allowed within reasonable time frames.
- Caution employees that they have no expectation of privacy on employer equipment.

Employee Usage Policy, cont'd

- Inform employees of the possibility of monitoring.
- Require disclaimers if identified as employees.
- Prohibit use of government trademarks without consent.
- Protect confidential and sensitive government information.
- Require a signed acknowledgment of the policy.
- Train employees.

Part 5 – Personnel Policies: Tips & Tricks to Reduce the Chances of Litigation

- This session will provide guidelines for updating personnel policy manuals with proper language and procedures to reduce litigation issues, clear up work issues and allow for better accountability of employee performance.
- Participants will learn: (1) tips and tricks in getting their personnel policy manual up to speed with correct procedures and updates to reduce exposure to litigation; (2) how to deal with union and labor problems with a well-written personnel policy manual.

Purpose of Policy Manuals

- Guideline, not contract
- Sets forth management's expectations of employees and what employees reasonably can expect on the job
- It is not definitive or all-encompassing
- Do not assume:
 - If it is not in the manual, it does not exist; or
 - If it doesn't say you can do it, then you can't do it



Purpose, cont'd

- Manual must have disclaimer
- Not a contract
- Can be amended at any time with or without notice
- Should have acknowledgement form for employee signature, acknowledging receipt, *not* that employee has read it



Purpose, cont'd

- Be careful about disclaiming intent to create contract, then including contract-like provisions in Manual



- When is a cow not a cow?
- Example: if Manual contains *quid pro quo*, such as conditioning benefit on attaining a certain objective, then employee may have contractual right to benefit upon attaining objective.

Types of Manual Provisions

- Required provisions – either required by law or by necessity
- Strongly suggested provisions
- Elective provisions – many these are standard, but nonetheless are elective



Examples of Policies

- At-Will Policy
- Anti-Discrimination Policies
- Compensation Policies
- Benefits Policies
- Work Schedules
- Overtime Policy
- Drug and Alcohol Policy
- Leave Policies
- Standards of Conduct
- Safety and Security Policies
- Technology, Computers, Internet
- Social Media Policy
- Disciplinary Policy



Illinois Personnel Policy Manuals

- Tend to be lengthy, all-inclusive
- Include all three types of provisions – required, strongly suggested, elective
- Often contain appendices, with very detailed policies



Concerns Raised by Detailed Personnel Manuals

- Do employees read them?
- Do important provisions get lost?
- How do you make sure they are current?
 - New laws
 - Administrative interpretations of existing laws
 - Court cases
 - Regular review is strongly recommended

Equal Employment Opportunity

Equal Employment Opportunity statement required to be contracts



Sexual harassment policy must be published or posted

- Must contain information as to how individual with complaint can file charge with IDHR
- Most districts extend harassment protection to all types of harassment

Classification of Employees

All employees, except those with written contracts, are *at will*.

Employees during *Introductory* (not probationary) period

FLSA classifications:

- Define exempt employees properly
- Include specific reference to executive, administrative, professional employees



Classification of Employees, cont'd.

FLSA Classifications, continued

- All hourly employees are by definition non-exempt
- But just because employee is salaried does not make him/her exempt
- You should have your labor and employment attorney review your classifications regularly
- Failure to review these policies can be costly



ACA Complications

- Full-time and Part-time employees
- Used as criterion for benefit eligibility
- Under ACA, employees of large employers who work an average of 130 hours per month are full-time for insurance purposes, as of January 1, 2015.

Personnel Files

- Must be kept separate from medical files.
- Subject to review by employees under Illinois Personnel Record Review Act.
- Now subject to disclosure except for “private information” under FOIA.

Alcohol And Drug Abuse Policy

- Application pre-hire and to current employees
- Reasonable suspicion testing
- Random testing
- Specified situation testing, such as post-accident or upon job change



Alcohol And Drug Abuse Policy, cont'd

Tip: Revise policy to include medical marijuana.

- Must meet statutory qualifications for use
- Must notify employer if using
- Employer may prevent possession or use on District property
- Employee may be relieved if impaired
- Employee not relieved of consequences if accident or misbehavior due to marijuana use
- Police and fire excluded
- CDL holders excluded



Payroll Policies

Have separate section of Manual to deal with this matter.

- Specify payroll periods
- Policy regarding deductions (pay attention to Wage Payment & Collection Act)
- Work schedules, meal periods, break periods (pay attention to FLSA and One Day Rest in Seven law)

Payroll Policies, cont'd

- Need clear policy regarding obligation to record time, especially for non-exempt employees
- Under FLSA, employer is primarily responsible for ensuring proper recording of time – if you don't have good time records, you can't prove that employee was not entitled to overtime or pay in wage and hour actions...very costly
- Time record should clearly mark start time, meal times, quitting times

FMLA and VESSA

- Employees need to know procedures for applying for and taking FMLA
- Some provisions of FMLA are elective with employer; Manual must specify election.
 - For example, paid time off may run concurrently with FMLA, and method of calculating 12-month period for taking leave must be specified (if not, it's calendar year)



Military Leave

- Some manuals refer only to federal law – USERRA
- In fact, three state laws also govern military leave, and some have more liberal allowances and benefits than USERRA. In such cases, more liberal state law governs
- Recent changes in law regarding qualified exigency leave for military personnel must be considered (usually under FMLA provisions)



Dual Jobs

- Some governments use employees for more than one job
- In most cases, time worked on both jobs must be aggregated for FLSA purposes
- Possible FLSA liability for unpaid or underpaid overtime if aggregate time exceeds 40 hours in a week
- Tip: no dual jobs unless approved by manager/administrator



Weapons Policy

- Concealed Carry law
- District can ban weapons by employees (other than licensed police officers) anywhere on employer's property
- Outside of working time, employees must be allowed same weapons privileges as general public



Internet, Cell Phone, Voice Mail Policies

- No right of privacy when using government equipment
- All voice mail and e-mail messages are accessible to government
- For government cell phones, government has right of access to all communications, including text messages
- Government equipment cannot be used for any unlawful purpose

Social Media Policy



Social media regulation presents 1st Amendment problems

- Right to regulate is greater when government equipment is used;
- Right to regulate is less if comment is about a matter of public interest, rather than personal

Social media policy should be carefully drafted to allow reasonable regulation without violating free speech rights

Social Media Policy, cont'd

Biggest problem is when employees use social media to criticize public officials

- Pressure to regulate or retaliate;
- Whether regulation is possible depends on:
 - Use of district equipment to make comment
 - Whether comment made on district time
 - Whether comment contains racial or ethnic slurs, threats, harassing comments, profanity, etc

Romantic Policy

- Used to discourage supervisor/subordinate relationships, even consensual
- Also used to try to avoid embarrassment to government if extra-marital relationships become public
- You can't prohibit dating, but you can transfer if necessary

Employee Benefits

Listing some benefits in detail is good, as information for employees:

- Tuition reimbursement
- Employee assistance
- Flexible spending accounts
- Deferred compensation programs

Employee Benefits, cont'd

Insurance is different:

- Subject to change, especially in light of ACA
- Don't lock yourself in if at all possible
- More difficult with unions



Statutory Benefits or Regulations

Elective provisions – general references in Manual are usually sufficient, if that:

- Social security and Medicare
- Pension benefits (IMRF)
- Unemployment compensation
- Workers' compensation
- Child labor laws



Paid and Unpaid Time Off

- Holidays, vacations, personal leave
- Sick leave
 - Accrual; use; abuse; extent to which unused days are compensated upon termination or retirement
- Funeral leave – should specify categories of relatives or significant others whose deaths qualify employee for leave
- Jury duty
 - Useful to specify whether employee is paid for jury leave days and whether employee must turn in jury service fee to district if paid for day



Other Policies Mandated or Recommended

- Political Activities policy – mirror state statute
- Identity Theft policy – required by law
- Solicitation and Distribution policy – may be needed if union organization, but must be administered non-discriminatorily

Part 6 – The Attorney is In. Ask Away

- This session will be an interactive session, presented in a quiz-show format. The speakers will pose common and not-so-common questions about personnel matters or present a scenario a municipality might encounter in a personnel situation, and discuss the appropriate answer or response with the attendees.



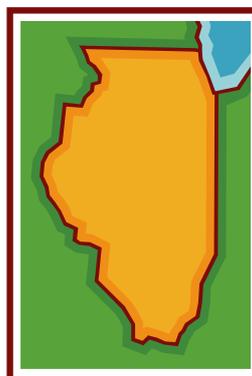
True or False?

Employees are entitled to at least one half hour lunch break each day



Answer: False

- Under Illinois law, employees are entitled to a 20 minute unpaid break after 5 hours of work



True or False?

If an employee gets a half hour lunch break but works through it, he or she is entitled to overtime?



Answer: Not necessarily

- Employees are entitled to overtime after working 40 hours in a week
- This does not include hours for which they are scheduled but don't work



True or False?

The employer can't discipline me because I posted some pictures of me looking really drunk on my Facebook page



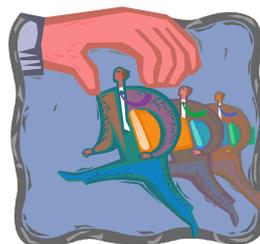
Answer:

- It depends on your job and whether you are identified as a government employee



True or False?

Speaking of Facebook, the government can't base hiring decisions on information they read on the internet



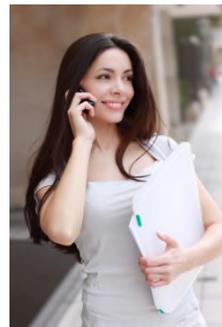
Answer: False

- Not illegal to research candidates on the internet
- Employers just can't use information to make illegal decisions (such as race or gender based decisions)



True or False?

If I use my own cell phone for government business, the employer can't access my text messages



Answer: False

- If the government reimburses you for even a portion of your phone, it may have access to your texts.
- Quon v. Arch Wireless case



True or False

Employers cannot regulate interoffice romantic relationships



Answer: True...

- ...except for supervisor/subordinate relationships
- Many governments have a policy
- Some require a “love contract”



Stump the Chumps – Your turn to ask us questions



WAUBONSEE
COMMUNITY COLLEGE

145

About your Facilitators

Julie A. Tappendorf
jtappendorf@ancelglink.com

Robert T. McCabe
rmccabe@ancelglink.com

Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer
(312) 782-7606
www.ancelglink.com

- Visit Julie's blogs:
- Municipal Minute, <http://municipalminute.ancelglink.com>
- Strategically Social, <http://strategicallysocial.blogspot.com>



WAUBONSEE
COMMUNITY COLLEGE

146