Human Resources for the Library Professional

Presented by
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Human Resources for the Library Professional

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### EMPLOYEES' JOB PROTECTION LAWS AND RIGHTS
(Understanding the Rules of Your Governmental Partners)

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<tr>
<th><strong>Government Act and Agency</strong></th>
<th><strong>Basis of Coverage</strong></th>
<th><strong>Type of Employee Protection</strong></th>
<th><strong>Applies To Us</strong></th>
<th><strong>Posters Required</strong></th>
<th><strong>Penalty For Non-Compliance</strong></th>
<th><strong>Statute of Limitations</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Fair Labor Standards Act (DOL)</td>
<td>At least two employees whose work affects goods for commerce. All employees of any business with $500,000 annual gross sales</td>
<td>Minimum Wage ($7.25) Overtime Pay Recording of Hours Child Labor</td>
<td>Yes</td>
<td>• Injunctions • Back Pay • Liquidated Damages • Fines (up to $10,000) • Legal Costs</td>
<td>2 Years 3 Years - willful violations 5 Years - criminal violation</td>
<td></td>
</tr>
<tr>
<td>Equal Pay Act (EEOC)</td>
<td>All employees of a single location</td>
<td>(Recordkeeping Requirements). No wage differential based on sex. Differences OK if based on merit, performance, seniority</td>
<td>Yes (EEOC)</td>
<td>• Back pay including wages theoretically lost • Liquidated Damages • Court may, at its discretion, award double damages • Legal costs • Fines</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Immigration Reform and Control Act (USCIS)</td>
<td>All employers</td>
<td>Employers must verify identity and employment eligibility of hires</td>
<td>Yes</td>
<td>• Injunctions • Civil Penalties Up to $1,000 per I-9 form Up to $2,000 per illegal alien • Criminal Penalties</td>
<td>N/A</td>
<td></td>
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<tr>
<td></td>
<td>Four or more employees</td>
<td>Prohibits discrimination on basis of national origin or citizenship status</td>
<td></td>
<td>• Civil Penalty -- up to $2,000 per discriminatee • Remedial relief/ back pay • Attorney’s fees</td>
<td>180 days DOJ -- 120 days</td>
<td></td>
</tr>
<tr>
<td>Federal and State Laws Unemployment Compensation (State Agencies)</td>
<td>All employers</td>
<td>Compensation for temporary involuntary unemployment</td>
<td>Yes</td>
<td>• Increased state tax based on claims</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>State Laws Workers’ Compensation (State Agencies)</td>
<td>All employers</td>
<td>Compensation for injured workers and occupational diseases. Some states don’t allow termination</td>
<td>Yes</td>
<td>• Reinstatement/back pay, medical costs, disability &amp; death payments, rehabilitation costs, legal fees &amp; costs</td>
<td>Individual state statutes</td>
<td></td>
</tr>
<tr>
<td>Government Act and Agency</td>
<td>Basis of Coverage</td>
<td>Type of Employee Protection</td>
<td>Applies To Us</td>
<td>Posters Required</td>
<td>Penalty for Non-Compliance</td>
<td>Statute of Limitations</td>
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</tbody>
</table>
| Employee Polygraph Protection Act (DOL) | Most private employers | Prohibits use of lie detector tests for applicants and employees | Yes | Yes | • Fines up to $10,000  
• Court actions  
• Private civil actions – up to 3 yrs. after date of violation  
• Legal fees | N/A |
| OSHA - Occupational Safety and Health Act (State and Federal Agencies) | Any person engaged in a business affecting commerce | Prohibits workplace of unsafe and unhealthy conditions (Recordkeeping Requirements) | Yes | Yes | • Fines  
• Close Facilities  
• Imprisonment | N/A |
| National Labor Relations Act (NLRB) | Two employees Interstate Commerce $50,000/year Non-retail $50,000/year Retail Other thresholds | Non-represented employees protected if engaged in:  
Concerted Activity  
Union Activity | No | No |  
• Reinstatement  
• Back Pay  
• Post Notice  
• Recognize Union | 6 Months |
| Civil Rights Act-Title VII (EEOC) (State and Federal Agencies) | 15 or more employees working 20 or more calendar weeks | Prohibits discrimination of race, color, religion, sex, and national origin | Yes | Yes |  
• Reinstatement/Hiring  
• Back Pay/Front Pay  
• Can be class action  
• Legal fees & costs  
• Damages to $300,000 (no limit on race) | 180 Days*  
300 Days in deferral states |
| Pregnancy Discrimination Act (EEOC) | 15 or more employees working 20 or more calendar weeks | (Recordkeeping Requirements) required to consider pregnancy as disability | No | No |  
• Injunctions  
• Reinstatement/Hiring  
• Back pay/Front pay  
• Attorney fees & costs  
• Damages to $300,000 | 180 Days*  
300 days in deferral states |
| ADAAA - Americans with Disabilities Act Amendments Act (EEOC) | Title I  
15 Employees | Prohibits discrimination against a qualified individual with a disability in application, hiring, advancing, training, compensating, discharging, and other terms and conditions | Yes | Yes |  
• Reinstatement/Hiring  
• Back Pay/Front Pay  
• Attorney fees & costs  
• Damages to $300,000 | 180 Days*  
300 days in deferral states |
<table>
<thead>
<tr>
<th>Government Act and Agency</th>
<th>Basis of Coverage</th>
<th>Type of Employee Protection</th>
<th>Applies To Us</th>
<th>Posters Required</th>
<th>Penalty For Non-Compliance</th>
<th>Statute of Limitations</th>
</tr>
</thead>
<tbody>
<tr>
<td>FMLA - Family and Medical Leave Act (DOL)</td>
<td>50 or more employees working 20 or more calendar weeks - current or previous year</td>
<td>12 weeks leave must be granted for care of employee’s child (birth, adoption or foster); or own, spouse’s, child’s, parent’s serious health condition or family member called to active duty or 26 weeks leave to care for an injured or ill service member who is the employee’s spouse, parent, child and relative of whom is “next of kin”</td>
<td>Yes</td>
<td></td>
<td>Reinstatement, Back pay/Damages for monetary loss, Liquidated damages, Attorney's fees &amp; costs</td>
<td>2 years</td>
</tr>
<tr>
<td>ADEA - Age Discrimination in Employment Act (EEOC)</td>
<td>20 or more employees</td>
<td>Prohibits discrimination on basis of age over 40 Abolishes mandatory retirement of employees of any age</td>
<td>Yes</td>
<td></td>
<td>Reinstatement, Back pay/Benefits, Liquidated damages, Attorney's fees &amp; costs</td>
<td>180 Days*</td>
</tr>
<tr>
<td>COBRA - Consolidated Omnibus Budget Reconciliation Act (IRS) (DOL)</td>
<td>20 or more employees during preceding calendar year</td>
<td>Allows for continuation of health care protection for up to 36 months</td>
<td>Notice to employee/ spouse and dependent children</td>
<td></td>
<td>Injunctions, Up to $200/day tax penalty, Up to $500,000 annual, Willful-unlimited, Past/Future Medical Expenses, Compensatory/Punitive Damages, Attorney’s fees &amp; costs</td>
<td>Applicable state statutes</td>
</tr>
<tr>
<td>ERISA - Employee Retirement Income Security Act (DOL)</td>
<td>Any employer engaged in business or in any industry or activity affecting commerce</td>
<td>Eligibility Funding Standards for Managing Information Disclosure</td>
<td>No</td>
<td></td>
<td>Injunctions, Equitable, remedial relief, including removal from office, Up to $10,000 fine, jail</td>
<td>N/A</td>
</tr>
</tbody>
</table>
## EMPLOYEES' JOB PROTECTION LAWS AND RIGHTS
(Understanding the Rules of Your Governmental Partners)

<table>
<thead>
<tr>
<th>GOVERNMENT ACT AND AGENCY</th>
<th>BASIS OF COVERAGE</th>
<th>TYPE OF EMPLOYEE PROTECTION</th>
<th>APPLIES TO US</th>
<th>POSTERS REQUIRED</th>
<th>PENALTY FOR NON-COMPLIANCE</th>
<th>STATUTE OF LIMITATIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>USERRA Uniformed Services Employment and Re-Employment Rights Act (DOL)</td>
<td>All employers</td>
<td>Employment, Re-Employment, Seniority, Health Insurance, Pension Benefits, Non-Discrimination</td>
<td>No</td>
<td></td>
<td>• Injunctions</td>
<td>None</td>
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<tr>
<td></td>
<td></td>
<td>Reasonable Accommodation, Discharge</td>
<td></td>
<td></td>
<td>• Reinstatement</td>
<td></td>
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<td></td>
<td>• Lost Wages, Benefits</td>
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<td></td>
<td>• Equitable Relief</td>
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<td></td>
<td>• Liquidated Damages</td>
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<td></td>
<td></td>
<td></td>
<td>• Attorney’s Fees</td>
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<td></td>
<td></td>
<td></td>
<td>• Legal Costs</td>
<td></td>
</tr>
<tr>
<td>WARN - Worker’s Adjustment and Retraining Notification Act (DOL)</td>
<td>100 or more employees</td>
<td>Layoffs and Closings</td>
<td>Written Notice</td>
<td></td>
<td>• Back pay and benefits</td>
<td>Individual state statutes</td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>• Civil penalty up to $30,000</td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>• Attorney's fees</td>
<td></td>
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<td></td>
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<td></td>
<td>• Fines up to $500 per day</td>
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<tr>
<td>State FEPSs - Fair Employment Practices Laws (State Agencies)</td>
<td>Often extend to smaller employers</td>
<td>Often more comprehensive and more restrictive</td>
<td>Yes</td>
<td></td>
<td>• Injunctive, equitable relief</td>
<td>Individual state statutes</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>• Some states- damages</td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>• Often more than federal</td>
<td></td>
</tr>
<tr>
<td>State Courts</td>
<td>Violation of employment- at-will &quot;wrongful discharge&quot; -- defamation</td>
<td>Violation of public policy, Bad faith dealings, Duration of agreement, either expressed or implied</td>
<td>No</td>
<td></td>
<td>• Equitable relief</td>
<td>Individual state statutes</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>• Unlimited financial recovery</td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td>• Some states-damages</td>
<td></td>
</tr>
<tr>
<td>Fair Pay Act 2009 (EEOC)</td>
<td>15 or more employees</td>
<td>Prohibits discrimination in pay based on race, sex, color, national origin, religion, age, or disability.</td>
<td>No</td>
<td></td>
<td>• Back pay (up to 2 years)</td>
<td>180 days 300 days in deferral states Renewed with each paycheck that is affected by discriminatory practice</td>
</tr>
</tbody>
</table>
### Are You Complying With The Fair Employment Regulations?

<table>
<thead>
<tr>
<th></th>
<th>True</th>
<th>False</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>It's O.K. to keep on file such information as race, sex, etc., on your employees.</td>
<td>☐</td>
</tr>
<tr>
<td>2.</td>
<td>If you are charged with a case of discrimination and the EEOC's investigation finds the charge to be untrue, the EEOC may still find you guilty of another different charge.</td>
<td>☑</td>
</tr>
<tr>
<td>3.</td>
<td>You may use the fact that an applicant has a long arrest record as a reason for not hiring him/her.</td>
<td>☑</td>
</tr>
<tr>
<td>4.</td>
<td>You may require a pregnant woman to take a leave of absence at a specified time before her delivery date.</td>
<td>☑</td>
</tr>
<tr>
<td>5.</td>
<td>It's O.K. to treat pregnancy different than any other short-term disability.</td>
<td>☑</td>
</tr>
<tr>
<td>6.</td>
<td>Even though there are many jobs that women do successfully, you may still refuse to hire women in such &quot;male&quot; jobs as mechanics, salesmen, collection officers, etc.</td>
<td>☑</td>
</tr>
<tr>
<td>7.</td>
<td>The EEOC may take into consideration whether the violation was willful or unintentional when determining financial penalties.</td>
<td>☑</td>
</tr>
<tr>
<td>8.</td>
<td>If an applicant's religious faith requires that he/she be off on a normal workday, you may refuse to hire on that basis alone.</td>
<td>☑</td>
</tr>
<tr>
<td>9.</td>
<td>If employees create an atmosphere where protected employees do not feel they can use the same facilities, i.e. bathrooms, the employer may be found to be discriminating.</td>
<td>☑</td>
</tr>
<tr>
<td>10.</td>
<td>Even if you have a few or no protected employees, it's O.K. to refuse to hire a disabled or ethnic applicant because he/she failed an employment test.</td>
<td>☑</td>
</tr>
</tbody>
</table>
11. Female employees may make less money than male employees who do the same job since male employees usually have a family to support.   

12. The following newspaper ad is O.K.: "Young man wanted for clerical work."   

13. John is 60 -- Bill is 38 -- Bill was chosen for promotion over John because he was younger, and therefore could devote more years before he retired. This is O.K.   

14. It's O.K. to terminate or refuse to hire because of a conviction record, even if the conviction was minor or non-job related.   

15. It's O.K. to refuse to hire a transgendered clerk because your Caucasian customers would refuse to do business with you.   

16. You may refuse to hire an unwed mother on that basis alone.   

17. You may discharge a male for refusing to cut his long hair.   

18. If you are found guilty of illegal discrimination, it may be required to reinstate the aggrieved employee with back pay for as much as two years or longer.   

19. If a discrimination charge is filed by an employee, the EEOC only investigates the one employee and does not concern itself with other employees who may be affected.   

20. If the EEOC is investigating you on a charge of illegal discrimination, you may withhold certain documents if they are considered confidential.
Equal Employment Opportunity Legislation

These major federal laws delineate the legal requirements that organizations must meet to comply with equal employment regulations. They are:

1. Title VII of the Civil Rights Act of 1964
2. The Age Discrimination in Employment Act of 1967
3. American’s with Disabilities Amendment Act of 2008
4. Uniformed Services Employment and Re-Employment Rights Act

Title VII of the Civil Rights Act

With some very limited exceptions, Title VII of the Civil Rights Act of 1964 applies to all employers with 15 or more employees. It bans all discrimination in employment because of race, color, religion, sex, or national origin. It covers all terms and conditions of employment and it holds the employer responsible for any discrimination that goes on within the employer's organization. Title VII is administered and enforced by the Equal Employment Opportunity Commission.

The Age Discrimination in Employment Act of 1967

This Act covers the same employees who are covered by Title VII. It bans discrimination because of age against anyone at least 40 years old. It is also enforced by the EEOC.

Americans with Disabilities Act & ADA Amendment Act of 2008

Prohibits discrimination on the basis of disability in employment, public services, and public accommodations. It requires new buses and trains to be accessible to the disabled, and it requires telecommunications companies to operate relay systems that will allow hearing- and speech-impaired Americans to use telephone service.

Uniformed Services Employment and Re-Employment Rights Act

Provides protected leave to workers serving in the Armed Forces for purposes of active duty, training, or to meet other military-related obligations.
Age Discrimination in Employment Act of 1967

The Age Discrimination in Employment Act was passed by Congress in 1967 in order to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; and to help employers and workers find ways of meeting problems arising from the impact of age on employment.

Coverage – Employees, former employees, and applicants for employment become protected by the Age Discrimination in Employment Act upon reaching age 40. Under the ADEA, it is unlawful for an employer with 20 or more employees to engage in discrimination on the basis of age for those employees who are at least 40 years of age.

Prohibited Activities – There are a variety of different employment practices which the employer should be aware or result in a finding of a violation of the ADEA. These include specifically the following:

1. The employer’s failure or refusal to hire any individual because of such individual’s age;

2. The employer’s termination of any individual because of such individual’s age;

3. The employer’s otherwise discriminating against any individual with respect to his or her compensation, terms, conditions, or privileges of employment, because of such individual’s age;

4. The employer’s use of job requirements which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his or her status as an employee, because of such individual’s age;

5. The employer’s discrimination against any individual because such individual has opposed any practice made unlawful by the ADEA or because such individual has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under the ADEA; and

6. The employer’s printing or publishing, or causing to be printed or published, any notice or advertisement relating to employment indicating any preference, limitation, specification, or discrimination based on age.
The Americans with Disabilities Act of 1990 &
The ADA Amendment Act of 2008

Introduction

The Americans with Disabilities Act of 1990 (ADA) was passed overwhelmingly by Congress and supported and signed by President Bush. It is widely acknowledged to be the most sweeping civil rights legislation in more than 25 years. Final implementing regulations were issued by the Equal Employment Opportunity Commission and the Department of Justice in July 1991.

The law covers an estimated 43 million Americans - one in six - making it the largest single group (other than women) protected by non-discrimination laws. Further, individuals with disabilities are much more aware of their rights under the law than other protected group members (including women) and are determined to pursue them.

Amended ADA - On September 25, 2008, the President signed the Americans with Disabilities Act Amendments Act of 2008 (ADAAA). Employers with 15 or more employees are required to comply with this federal law. The Act makes important changes to the definition of the term “disability” by rejecting the holdings in several Supreme Court decisions and portions of the EEOC’s ADA regulations. The Act expands the protections of the original ADA to include more individuals with less severe impairments. Many experts believe this will result in an increased number of claims of discrimination filed under the ADA. The Act is effective as of January 1, 2009.

Purpose

The basic purpose of ADA and ADAAA is to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities, and to bring persons with disabilities into the economic and social mainstream of American life, and also, to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.

The removal of such barriers -- physical and attitudinal -- is at the heart of the Americans with Disabilities Act.

To be defined as a disability under the ADA, impairment must meet one (1) of the following criteria:
### Criteria 1 – Physical or mental impairment that affects a major life activity

<table>
<thead>
<tr>
<th>Physical Or Mental Impairment</th>
<th>Major Life Activities</th>
</tr>
</thead>
<tbody>
<tr>
<td>Physiological disorder, contagious disease, cosmetic disfigurement, or anatomical loss in one or more system:</td>
<td>Mental or psychological disorder including:</td>
</tr>
<tr>
<td>• Neurological</td>
<td>• Mental retardation</td>
</tr>
<tr>
<td>• Musculoskeletal</td>
<td>• Organic brain syndrome</td>
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<tr>
<td>• Respiratory</td>
<td>• Emotional or mental illness</td>
</tr>
<tr>
<td>• Cardiovascular</td>
<td>• Specific learning disabilities</td>
</tr>
<tr>
<td>• Reproductive</td>
<td>• Caring for oneself</td>
</tr>
<tr>
<td>• Digestive</td>
<td>• Performing manual tasks</td>
</tr>
<tr>
<td>• Genito-urinary</td>
<td>• Seeing</td>
</tr>
<tr>
<td>• Hemic</td>
<td>• Hearing</td>
</tr>
<tr>
<td>• Lymphatic</td>
<td>• Eating</td>
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<tr>
<td>• Skin</td>
<td>• Sleeping</td>
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<tr>
<td>• Endocrine</td>
<td>• Walking</td>
</tr>
<tr>
<td>• AIDS/HIV</td>
<td>• Standing</td>
</tr>
<tr>
<td>• Substance abuse (does not include current, illegal user)</td>
<td>• Lifting</td>
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<tr>
<td></td>
<td>• Bending</td>
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<td>• Speaking</td>
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<td>• Breathing</td>
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<td>• Learning</td>
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<td>• Reading</td>
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<td>• Concentrating</td>
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<td>• Thinking</td>
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<td>• Communicating</td>
</tr>
<tr>
<td></td>
<td>• Working</td>
</tr>
<tr>
<td></td>
<td>• Major bodily functions*</td>
</tr>
</tbody>
</table>

* The ADAAA adds a new major life activity category – “major bodily functions”, which includes, but is not limited to:

- Functions of the immune system
- Cell growth
- Digestive, bladder, and bowel functions
- Neurological and brain functions
- Respiratory and circulatory functions
- Endocrine functions
- Reproductive functions

### Criteria 2 – Record of impairment

The individual has a record or history of impairment or a record of having been misclassified as having impairment.
Criteria 3 – Regarded as impaired

The individual has an impairment not limiting a major life activity, but treated as disabled by the employer or no impairment, but treated as disabled by the employer.

Broad Coverage

The ADAAA states that “the definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted under the terms of the Act.” It is clear that the changes in this Act will benefit employees by making it more likely that they will qualify for reasonable accommodations and the ADA’s protections.

Furthermore, the ADAAA states that the intent of these changes is that employers stop engaging in “extensive analysis” to determine what constitutes a disability under the law, and focus instead on complying with their obligation not to discriminate and to provide reasonable accommodations to individuals who are otherwise qualified to do a job.

What to Do

In light of the ADAAA, we recommend that you take the following action:

- Review job descriptions to ensure that elements of the job listed as essential functions are truly job-related and consistent with business necessity.

- Update policies and procedures to reflect the changes made by the ADAAA.

- Ensure there is a formalized process in place for addressing requests for reasonable accommodations.

- Educate supervisors and managers about the ADAAA changes.

- Advise supervisors and managers to consult with Human Resources (or SESCO) whenever an employee requests an accommodation. Stress that they don’t immediately refuse the request or retaliate in any way against the individual for making the request.

- Reconsider past accommodation requests from current employees who were denied accommodation because it was determined that the employee’s impairment did not satisfy the ADA’s definition of a disability.

- When in a position to take adverse action against an employee with a medical condition, be sure to have well-drafted documentation of the legitimate, non-discriminatory reason for the action.
Fact Sheet for Businesses: Pregnancy Discrimination

This document explains the requirements of the Pregnancy Discrimination Act (PDA), as well as the requirements of Title I of the Americans with Disabilities Act (ADA) as it applies to women with pregnancy-related disabilities. The PDA and ADA apply to employers with 15 or more employees.

Basic PDA Requirements

The PDA requires that a covered employer treat women affected by pregnancy, childbirth, or related medical conditions in the same manner as other applicants or employees who are similar in their ability or inability to work. The PDA covers all aspects of employment, including firing, hiring, promotions, and fringe benefits (such as leave and health insurance benefits). Pregnant workers are protected from discrimination based on current pregnancy, past pregnancy, and potential pregnancy.

- **Current pregnancy.** Under the PDA, an employer cannot fire, refuse to hire, demote, or take any other adverse action against a woman if pregnancy, childbirth, or a related medical condition was a motivating factor in the adverse employment action. **This is true even if the employer believes it is acting in the employee's best interest.**

- **Past Pregnancy.** An employer may not discriminate against an employee or applicant based on a past pregnancy or pregnancy-related medical condition or childbirth. For example, an employer may not fire a woman because of pregnancy during or at the end of her maternity leave.

- **Potential Pregnancy.** An employer may not discriminate based on an employee's intention or potential to become pregnant. For example, an employer may not exclude a woman from a job involving processing certain chemicals out of concern that exposure would be harmful to a fetus if the employee became pregnant. Concerns about risks to a pregnant employee or her fetus will **rarely, if ever,** justify sex-specific job restrictions for a woman of childbearing capacity.

- **Medical Condition Related to Pregnancy or Childbirth.** An employer may not discriminate against an employee because of a medical condition related to pregnancy and must treat the employee the same as others who are similar in their ability or inability to work but are not affected by pregnancy, childbirth, or related medical conditions. For example, under the PDA, since lactation is a medical condition related to pregnancy, an employer **may not discriminate against an employee because of her breastfeeding schedule.** (For information about a provision of the Patient Protection and Affordable Care Act that provides
additional protections for breastfeeding employees, see the section on "Other Federal Laws Protecting Pregnant Workers" below).

Harassment

It is unlawful to harass a woman because of pregnancy, childbirth, or a related medical condition. Harassment is illegal when it is so frequent or severe that it creates a hostile or offensive environment, or when it results in an adverse employment decision (such as the victim being fired or demoted).

Workers with Caregiving Responsibilities

Discrimination against a worker with caregiving responsibilities violates Title VII if it is based on sex, and violates the ADA if it is based on a family member's disability. For example, an employer violates Title VII by treating a female employee with young children less favorably than a male employee with young children when deciding on work opportunities, based on a belief that the mother should focus more on the children than on her career. In addition, an employer violates the ADA where it takes an adverse action, such as refusing to hire or denying promotion, against a mother of a newborn with a disability over concerns that she would take off a lot of time for the child's care or that the child's medical condition would impose high health care costs.

Benefits of Employment

An employer must provide the same benefits of employment to women affected by pregnancy, childbirth, or related medical conditions that it provides to other persons who are similar in their ability or inability to work.

- **Light Duty Policies.** An employer has to treat women affected by pregnancy, childbirth, or related medical conditions the same as other employees who are similar in their ability or inability to work with respect to light duty, alternative assignments, disability leave, or unpaid leave.
  - An employer that provides light duty to other employees cannot justify denying it to a pregnant worker just because it would be more expensive or less convenient to do so.
  - Even if a light duty policy does not specifically exclude pregnant workers, it may still violate the PDA if it imposes significant burdens on pregnant employees for which there is not a sufficiently strong justification. For example, providing light duty to a large percentage of non-pregnant employees with limitations while denying light duty to a large percentage of pregnant employees may be difficult to justify.

- **Leave.** While an employer may not compel an employee to take leave because she is pregnant as long as she is able to perform her job, it must allow women with physical limitations resulting from pregnancy to take leave on the same terms and conditions (e.g.,
provide them with the same amount of leave) as others who are similar in their ability or inability to work.

- An employer:
  - may not single out an employee's pregnancy-related condition for medical clearance procedures that are not required of employees who are similar in their ability or inability to work,
  - may not remove a pregnant employee from her job because of pregnancy as long as she is able to perform her job, and
  - must allow her to return to work following recovery from a pregnancy-related condition to the same extent that employees on sick and disability leave for other reasons are allowed to return.

- If the pregnant employee used leave under the Family and Medical Leave Act, the employer must restore the employee to the employee's original job or to an equivalent job with equivalent pay, benefits, and other terms and conditions of employment. (For information about the Family and Medical Leave Act, see the section on "Other Federal Laws Protecting Pregnant Workers" below.)

- Title I of the ADA may require an employer to provide leave beyond that which it usually allows its employees to take, as a reasonable accommodation for an employee with a pregnancy-related impairment that is a disability.

- **Medical Benefits.** The PDA requires employers who offer health insurance to include coverage of pregnancy, childbirth, and related medical conditions. An employer must provide the same terms and conditions for pregnancy-related benefits as it provides for benefits relating to other medical conditions.

**The Americans with Disabilities Act**

Although pregnancy itself is not a disability, pregnant workers may have impairments related to their pregnancies that qualify as disabilities under the ADA. Amendments to the ADA made in 2008 make it much easier than it used to be to show that an impairment is a disability. A number of pregnancy-related impairments are likely to be disabilities, even though they are temporary, such as pregnancy-related carpal tunnel syndrome, gestational diabetes, pregnancy-related sciatica, and preeclampsia.

An employer may not discriminate against an individual whose pregnancy-related impairment is a disability under the ADA and must provide an individual with a reasonable accommodation if needed because of a pregnancy-related disability, unless the accommodation would result in significant difficulty or expense ("undue hardship").
Examples of reasonable accommodations that may be necessary for a pregnancy-related disability include:

- Redistributing **marginal** or nonessential functions (for example, occasional lifting) that a pregnant worker cannot perform, or altering how an essential or marginal function is performed;

- **Modifying workplace policies** by allowing a pregnant worker more frequent breaks or allowing her to keep a water bottle at a workstation even though the employer generally prohibits employees from keeping drinks at their workstations;

- **Modifying a work schedule** so that someone who experiences severe morning sickness can arrive later than her usual start time and leave later to make up the time;

- Allowing a pregnant worker placed on bed rest to **telework where feasible**;

- **Granting leave** in addition to what an employer would normally provide under a sick leave policy;

- **Purchasing or modifying equipment**, such as a stool for a pregnant employee who needs to sit while performing job tasks typically performed while standing; and

- **Temporarily reassigning** an employee to a **light duty**

**Other Federal Laws Affecting Pregnant Workers**

The Family and Medical Leave Act (FMLA) allows eligible employees of employers with **50 or more employees** to take up to **12 workweeks** of leave for, among other things, the birth and care of the employee's newborn child and for the employee's own serious health condition. The Department of Labor enforces the FMLA. For more information about the FMLA see [http://www.dol.gov/whd](http://www.dol.gov/whd).

Section 4207 of the Patient Protection and Affordable Care Act amended the Fair Labor Standards Act to require employers to provide "reasonable break time" for hourly employees to express breast milk until the child's first birthday. Employers are required to provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk." **Employers with fewer than 50 employees** are not subject to this requirement if it "would impose an undue hardship by causing significant difficulty or expense when considered in relation to the size, nature, or structure of the employer's business." DOL has published a Fact Sheet providing general information on the break time requirement for nursing mothers. The Fact Sheet can be found at [http://www.dol.gov/whd/regs/compliance/whdfs73.htm](http://www.dol.gov/whd/regs/compliance/whdfs73.htm).
U.S. Department of Labor Proposes New White Collar Exemption Salary Requirements

Rule applies to all employers regardless of size

On June 30th, the Department of Labor’s Wage & Hour Division (WHD) announced its long-awaited proposal to amend the Fair Labor Standards Act (FLSA) Regulations and, in particular, the regulations governing the “white collar” exemption for executive, administrative, and professional employees. The DOL’s Notice of Proposed Rulemaking (NPRM) essentially describes how the Administration intends to shrink the pool of employees who qualify for exempt status under the Fair Labor Standards Act. The intention is to have more employees receive overtime compensation when the fact may be a reduction in working hours in an effort to control expenses.

What Changes Are in the Proposed FLSA Regulations - Higher Salaries

The primary rule change basically doubles the salary threshold for the executive, administrative, and professional exemptions from $455 a week currently to $921 a week (with a plan to increase that number to $970 a week in the final version of the regulation). This minimum salary requirement will also be indexed to the Bureau of Labor statics and as such will be adjusted (up) on an annual basis. This is important as for the first time in the FLSA’s history, the salary requirements will be indexed to this BLS data and updated annually, automatically.

Related changes in the regulations include increasing the annual compensation threshold for exempt highly compensated employees from the present level of $100,000 to a proposed $122,148, as well as raising the exemption threshold for the motion picture producing industry from the present $695 a week to a proposed $1,404 a week for employees compensated on a day-rate basis. In addition, the NPRM proposes an increased salary level for exempt employees in American Samoa of $774 per week ($40,248 a year).

What Does Not Change in the Proposed FLSA Regulations

Everything else stays the same…for now. The new salary levels still do not apply to outside sales employees, hourly - nonexempt employees, partially exempt employees and commissioned employees. The rule changes only effects exempt employees whose guaranteed salary level falls below the new requirements of $921.00 to $970.00 per week pending the final regulations.
**What the Proposed FLSA Regulations Mean for Employers**

Nothing changes today, but the future impact will be far reaching. Keep in mind that these are just proposed regulations. After publication in the Federal Register, the DOL estimates that the Final Rule resulting from the NPRM will not be released until mid-2016, since the DOL plans to “rely on data from the first quarter of 2016” in setting the salary level.

The proposed regulations are subject to a 60-day public comment period. Now is the time for any employer or trade association dissatisfied with the proposed regulatory text, or concerned about changes the Department is weighing for inclusion in a Final Rule, to submit comments. The Department has put the regulated public on notice: it is considering sweeping changes to the regulations not described specifically in the proposed regulatory text, such as altering the duties tests for exempt status. Employers may not have another opportunity to comment on the content of a Final Rule.

Ultimately, the biggest impact, according to the NPRM, may be on educational and health services, with substantial impacts on wholesale/retail trade, professional and business services, and the leisure and hospitality industries. Because of the differences in standards of living, businesses in the South and in rural areas will feel the salary level increase most acutely. However, at $50,440, the proposed salary level exceeds even the highest state thresholds in California and New York.

**What Employers Need to do Now**

Do not wait, start planning now for the future impact on operations and finances. **Planning now will help avoid abrupt impacts next year. Employers should work with SESCO as wage and hour experts to complete a preliminary assessment of all positions they currently treat as exempt to determine whether they would be impacted by the proposed changes and whether any potential duties test changes could similarly impact things.** In addition to determining the exemption classification and possible impact of the new rules, other measures and planning will include:

- Review staffing and scheduling, i.e. reduce hours of work to 40 of those affected and maintain the same salaried pay plan
- Move affected individuals to an hourly rate and pay overtime. This may include depressing the hourly rate so that the new pay plan (hourly plus overtime) yields the same annual earnings as before
- Reduce/adjust benefits
- Challenge annual bonuses or other compensation that’s provided
- Delay future compensation increases to absorb the additional cost, and tie all increase into productivity/merit opportunities.
• Move the affected employees to the Fluctuating Workweek Method of Payment- a great pay plan for employer and employee alike, that allows a guaranteed salary pay plan with 1/2 time over 40 hours worked (vs. 1.5 or 150% overtime) as on a straight hourly rate.

Therefore, there are options for employers as the reality is compensation is an employer’s largest, single controllable cost. Partnering with someone like SESCO can help explore these options vs. just increasing salaries or overtime costs.

**EEOC Declares that Title VII Covers Discrimination based on an Individual’s Sexual Orientation**

On July 15, 2015, the United States Equal Employment Opportunity Commission (EEOC) officially declared that it now considers Title VII’s prohibition on sex discrimination to apply to discrimination based on sexual orientation. As a result of this decision, the EEOC has posted on its homepage a link to the document entitled, *What You Should Know - The EEOC and the Enforcement Protections for LGBT Workers*.

The recent ruling stems from a 2012 decision in which the EEOC concluded that discrimination against an individual because the individual is transgender (also known as gender identity discrimination) constitutes sex discrimination in violation of Title VII. The EEOC reasoned that this type of discrimination was based on sex stereotyping premised on non-conforming gender conduct (e.g., a male wearing dresses and make up). The United States Court of Appeals for the Sixth Circuit (the federal court of appeals governing Michigan) made similar rulings in 2004 and 2005.

Still, the 2015 ruling significantly expands the 2012 decision as evidenced by the EEOC’s 2012 Strategic Enforcement Plan, which stopped well short of declaring that Title VII prohibited discrimination based on sexual orientation. Instead, when discussing its enforcement issues on emerging issues, the EEOC simply stated that it “recognize[d] that elements of the following issues are emerging and developing . . . coverage of lesbian, gay, bisexual and transgender individuals under Title VII’s sex discrimination provisions, as they may apply.”

The EEOC’s new reasoning is that sexual orientation discrimination is inseparable from and inescapably linked to sex as it is premised on “sex-based preferences, assumptions, expectations, stereotypes, or norms.” In determining the sexual orientation discrimination is sex discrimination, the EEOC relied on the following:
• Sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee’s sex, i.e. a lesbian employee can allege that her employer took an adverse action against her that the employer would not have taken had she been male;

• Sexual orientation discrimination is sex discrimination because it is associational discrimination on the basis of sex, i.e. discrimination based on the sex of the person the employee associates with; and

• Sexual orientation is sex discrimination because it involves discrimination based on gender stereotypes, i.e. the employee was treated adversely because he/she was viewed – based on appearance, mannerisms, or conduct – as insufficiently “masculine” or “feminine” or treated adversely because of the employer’s motivation to enforce heterosexually defined gender norms.

The EEOC’s new position on sexual orientation discrimination has been rejected previously by the United States Court of Appeals for the Sixth Circuit. Therefore, it is uncertain whether the courts will ultimately agree with the EEOC’s position. One thing is certain; significant litigation will ensue relying upon the EEOC’s pronouncement.

Many employers’ internal EEO policies already prohibit, on a voluntary basis, discrimination based on sexual orientation. For other employers, care should be taken into considering what, if any, changes to internal policies should be made.

Wage-Hour Regulations and Practices

Summary

Employers must pay each employee covered by the FLSA (a) at least the statutory hourly minimum wage for all hours worked, and (b) one-and-one-half times the employee’s regular rate of pay for all hours worked over the statutory maximum for a week.

• **Minimum Wage** -- The statutory minimum wage for all covered employees is $7.25 an hour, effective July 24, 2009. The minimum wage for “tipped employees” (those who regularly receive more than $30 a month in tips) is $2.13 an hour, plus tips.

Employers cannot make deductions from an employee’s pay that would leave the employee with less than the federal minimum wage except for (a) the reasonable cost (not any amount attributable to profit) of providing lodging, meals, and other facilities customarily furnished to an employee; (b) federal, state, and local taxes; (c) court-ordered payments; and (d) payments to an employee’s assignees.
• **Subminimum Wage** -- A subminimum wage of $4.25 an hour is permitted for persons who are under age 20 and in their first 90 days of employment. Employers are prohibited from displacing any current employee to hire a worker at the subminimum wage.

• **Hours of Work** -- The statutory maximum workweek is 40 hours. Covered employees must receive overtime pay for all hours worked beyond 40 in a single week. Although minimum wages and overtime are computed on a workweek basis, an employer does not have to pay employees weekly.

• **Overtime** -- Overtime is paid at one-and-one-half times the regular rate for any hours worked beyond 40 in a workweek. A workweek is any period of seven consecutive days; it can begin at any hour of any day. Except for hospital staff and certain other jobs, employees’ work hours cannot be averaged over two or more weeks to minimize overtime pay.

• **Child Labor** -- The FLSA prohibits employing “oppressive” child labor in commerce, the production of goods for commerce. It also bars commercial shipment of goods produced in an establishment that has employed “oppressive” child labor during the 30 days before shipment.

“Oppressive” child labor generally is defined as work by children under the minimum age for employment in a particular industry. Sixteen years is the minimum age of employment in nonagricultural occupations not designated hazardous by the Secretary of Labor. Eighteen years is the minimum age for hazardous nonagricultural occupations. Employers can prevent violations of the FLSA’s child labor provisions by obtaining certificates of age for any minors employed.

**Wage-Hour Exemptions**

All employees of any employer must:

- Record hours worked on a daily basis,
- Receive minimum wage, and

Receive overtime for hours worked in excess of 40 hours per week, UNLESS OTHERWISE EXEMPT.

Total exemption from the FLSA’s minimum wage and overtime provisions is provided for white-collar workers – executive, administrative, professional, and outside sales employees in all industries. An employer that contends an employee comes under one of the white-collar exemptions must bear the burden of proving the exemption. The Wage-Hour Division may interview exempt employees to determine if they are, in fact, exempt.
The Administrator of the Wage-Hour Division defines these exempt jobs. For each category of white-collar employees, these exemption tests set forth certain primary job duties as exempt, and establish minimum salary requirements that must be met for an employer to treat workers as exempt employees.

- **Primary Job Duties** – An employee’s job title or classification has no bearing on whether the employee meets the exemption tests. Instead, these tests look solely at actual job duties performed by an individual. Trainees for exempt positions, however, are not covered by the exemption.

Employees who perform a combination of exempt duties for executive, administrative, professional, and outside sales jobs may qualify for exemption. Thus, for example, an employee whose primary duty involves a combination of exempt administrative and exempt executive work may qualify for exemption. In other words, work that is exempt under one section will not defeat the exemption under any other section.

- **Salary or Fee Requirements** – To be exempt, executive employees must be paid on a salary basis; that is, each pay period, on a weekly or less frequent basis, an employee must regularly receive a predetermined amount not subject to reduction because of variations in the quality or quantity of the work performed.

The administrative and professional exemptions are met if an employee is paid on either a fee or a salary basis. Payment on a fee basis is an agreed sum for a single job, regardless of the time required for its completion. Payment based on the number of hours or days worked, and not on the accomplishment of a given single task, is not considered payment on a fee basis. There is no salary test for outside sales reps.

**The "Executive" Salary Classification Tests**

To qualify for the “Executive” employee exemption, all of the following tests must be met:

1. The employee must be compensated on a salary basis at a rate not less than $455 per week;

2. The employee’s primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;

3. The employee must customarily and regularly direct the work of at least two (2) or more other full-time employees or their equivalent; and

4. The employee must have the authority to hire or fire other employees, or the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.
“Primary duty” means the principal, main, major or most important duty that the employee performs. Determination of an employee’s primary duty must be based on all the facts, with the major emphasis on the character of the employee’s job as a whole.

Generally, “management” includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production of sales records for use in supervision or control; appraising employees’ productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

The "Administrative" Salary Classification Tests

To qualify for the “Administrative” employee exemption, all of the following tests must be met:

1. The employee must be compensated on a salary or fee basis at a rate not less than $455 per week;

2. The employee’s primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and

3. The employee’s primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

“Primary duty” means the principal, main, major or most important duty that the employee performs. Determination of an employee’s primary duty must be based on all the facts, with the major emphasis on the character of the employee’s job as a whole.

To meet the “directly related to management or general business operations” requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example from working on a manufacturing production line or selling a product in a retail or service establishment. Work “directly related to management or general business operations” includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, Internet and database administration; legal and regulatory compliance; and similar activities.
The "Learned Professional" Salary Classification Tests

To qualify for the “Learned Professional” employee exemption, all of the following tests must be met:

1. The employee must be compensated on a salary or fee basis at a rate not less than $455 per week;

2. The employee’s primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;

3. The advanced knowledge must be in a field of science or learning; and

4. The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

“Work requiring advanced knowledge” means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment. Professional work is therefore distinguished from work involving routine mental, manual, mechanical or physical work. A professional employee generally uses the advanced knowledge to analyze, interpret, or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level.

The learned professional exemption is restricted to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best evidence of meeting this requirement is having the appropriate academic degree. However, the word “customarily” means the exemption may be available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. This exemption does not apply to occupations in which most employees acquire their skill by experience rather than by advanced specialized intellectual instruction.

The “Creative Professional” Salary Classification Tests

To qualify for the “Creative Professional” employee exemption, all of the following tests must be met:

1. The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;

2. The employee’s primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.
The “Computer Employee” Salary Classification Tests

To qualify for the “Computer Employee” exemption, all of the following tests must be met:

1. The employee must be compensated either on a salary or fee basis at a rate not less than $455 per week or, if compensated on an hourly basis, at a rate not less than $27.63 an hour.

2. The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;

3. The employee’s primary duty must consist of:

   - The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
   - The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
   - The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
   - A combination of the aforementioned duties, the performance of which requires the same level of skills.

The "Outside Sales" Salary Classification Tests

The Wage-Hour Division defines the classification of “Outside Salesperson” as any employee primarily hired in the capacity of an outside sales representative and who performs the following job duties and responsibilities on a regular, recurring basis:

Employed for the purpose of and who is customarily away from the place or places of business in making sales or obtaining orders or contracts for services, or for the use of facilities for which a consideration is paid by the customer.

It is the general enforcement policy of the Wage-Hour Division that so-called “house salespeople” who are engaged primarily in taking orders by telephone on a daily basis are not eligible for the “outside salesman” salary classification free from the minimum wage and overtime requirements. There is no minimum salary required for personnel meeting the “outside salesperson” accounting tests.

Drivers who deliver products and also sell such products may qualify as exempt outside sales employees only if the employee has a primary duty of making sales. Several factors should be considered in determining whether a driver has a primary duty of making sales, including a
comparison of the driver’s duties with those of other employees engaged as drivers and as salespersons, the presence or absence of customary or contractual arrangements concerning amounts of products to be delivered, whether or not the driver has a selling or solicitor’s license when required by law, the description of the employee’s occupation in collective bargaining agreements, and other factors set forth in the regulation.

**Wage-Hour Requirements**

**Determining and Paying for Hours Worked**

The Federal Wage-Hour Division requires that each employee, not specifically exempt, who is engaged in interstate commerce or in the production of goods for commerce, receive a minimum hourly wage of at least $5.15 per hour. The Wage-Hour Division also requires that no employee can be employed for more than forty (40) hours per week without receiving at least time and one-half his regular rate of pay for the overtime hours (unless specifically exempt). The amount of money an employee should receive cannot be determined without knowing the number of hours worked.

**General Meaning of Hours Worked**

As a general rule, hours worked include (1) all time during which an employee is required to be on your premises, on duty or at a prescribed workplace, and (2) all time during which an employee is suffered or permitted to work, whether or not he is required to do so. Thus, working time which is to be paid for includes all time spent during the workweek in physical or mental exertion, whether burdensome or not and whether controlled or required by you. Working time will include time spent by the employee on a voluntary basis even if you were not aware of it.

**Time Clocks Not Required**

In accordance with federal Wage-Hour guidelines, employers are required to keep accurate records of hours worked by employees but there is no requirement to use time clocks or timecards as a means for doing so. However, if an employer does use a time clock, early or late punching by employees who voluntarily come in early or remain late may be ignored if the employees do not work before or after their regular hours.

**Voluntary Overtime**

It should be remembered that overtime performed voluntarily by an employee must be included in computing total hours worked. For example, an employee may voluntarily continue to work at the end of his scheduled workday. The reason for working additional overtime is immaterial. If it is known or the supervisor has reason to believe the employee is continuing to work, the time is working time. This rule also applies to work performed away from the premises or the job site or even at home. If you know or have reason to believe that work is being performed, you must count such time as hours worked for the employee.
Homework

Any work performed at home by any employee should be counted as time worked. This is true whether or not you require the work to be done at the employee's home. Such homework should be paid at the employee's regular rate and the hours should be added to the timecard the following day. Here we recommend the employee place the total number of hours on the timecard for the homework. Then, both the employee and the supervisor should place their initials by this written-in entry or hours worked. This will normally apply to office clerical employees who are accustomed to taking work home.

No Averaging of Weeks

In accordance with federal Wage-Hour requirements, an employee may not average hours worked in more than one (1) workweek. Each workweek must be treated as a separate unit in computing pay. *(The only exception is the 8 and 80 option for healthcare institutions.)*

Waiting Time

Some employees may spend time waiting for work, waiting to record their time on timesheets, waiting to get paychecks. Whether such waiting time is to be counted as hours worked depends on the facts in such case. If the waiting time takes place during the regular workday, this waiting time may be hours worked. If the waiting time takes place outside the regular workday, that is preliminary or postliminary to the employee's principal activities, it is not hours worked unless specifically made so by a contract custom, or practice.

If an employee is required to report to work at a certain time and then told to wait until you actually put the employee to work, you should start paying the employee for the time he/she actually reports to work. The reason for this is that you have engaged him/her to wait and the employee cannot use any of that time for his or her personal use.

Waiting While on Duty

A secretary who reads a novel while waiting for dictation, a messenger who works a crossword puzzle while waiting assignments or a stock clerk who plays checkers while waiting on delivery men are still working during their periods of inactivity.

The rule also applies to employees who work away from your premises. For example, a transport driver is working while waiting for your vehicle to be loaded. This time is work time even though the employee is allowed to leave the premises or the job site during such periods of inactivity. The periods during which such waiting time occurs are unpredictable. They are usually of short duration. In either event, the employee is unable to use the time effectively for their own purposes. It belongs to and is controlled normally by the employer. In all such cases, waiting time is an integral part of the job.
Stand-By Time

Employees who are required to stand by their posts, ready for duty (whether during lunch periods, during equipment breakdowns, or during temporary facility shutdowns) must be paid for the time.

Meal Periods

Bona fide meal periods are not work time. (Bona fide meal periods do not include coffee breaks or time for snacks; these are rest periods of short duration and must be counted as "hours worked.")

The employee must completely be relieved from duty for the purposes of eating regular meals. Ordinarily, 30 minutes or more is long enough for a bona fide meal period. An employee is not relieved if he/she is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his/her desk or a truck driver who is required to drive a vehicle while eating, is working while eating. Under such circumstances, it is recommended that there be no deduction made for the meal period because such time would have to be paid for as hours worked.

It is not necessary that an employee be permitted to leave the premises if he/she is otherwise completely freed from duty during the meal period for at least 30 full minutes.

Permitting employees to forego punching time clocks during lunch periods does not require the lunch periods be counted as hours worked -- if the employees are relieved of all duties and if the lunch period occurs at a regularly-appointed time.

Sleeping Time

The Wage-Hour Division has two general policies on compensability of time spent by employees in sleeping, one for employees on duty less than 24 hours and another for those who work around the clock.

Less Than 24 Hours Duty -- If an employee's tour of duty is less than 24 hours, the Wage-Hour Division considers periods during which he/she is permitted to sleep as compensable working time.

Round-the-Clock Duty -- When an employee's tour of duty is 24 hours or longer, the Wage-Hour Division's enforcement policy allows up to eight (8) hours of sleeping time to be excluded from compensable working time if -- (1) an expressed or implied agreement excluding sleeping time exists; (2) adequate sleeping facilities for an uninterrupted night's sleep are furnished; (3) at least five (5) hours sleep is possible during the scheduled sleeping period; and (4) interruptions to perform duties are considered working time. In addition, appropriate time may be deducted for meal periods, provided they are of a 30-minute duration or longer.
General Guides on Pay Requirements for Incidental Activities

The following outline is a general guide on whether or not employees are to be paid for time spent on activities incidental to their principal duties -- Generally, time spent by employees on incidental activities which are a part of their principal duties is compensable, regardless of when the activities are performed (whether during the workday, before the workday begins or after the workday ends), and regardless of any contrary contract, custom, or practice.

Show-Up, Call-In or Reporting Time

Under contracts guaranteeing employees pay for a minimum number of hours when they report to work, only the time actually worked generally need be counted as hours worked under federal Wage-Hour guidelines. However, if the employee is required to wait 10 or 15 minutes before being advised that no work is available, the 10 or 15 minutes are compensable working time.

Call-Back or Call-Out Time

Time not worked by an employee under guaranteed pay for a minimum number of hours, when he/she is called back to work after his/her regular workday, can be excluded from hours worked. However, time spent in traveling to a customer's premises, as well as time devoted to regular work while there, is compensable working time.

On-Call Time

Whether or not the time an employee is on call need be counted as part of his/her compensable working time depends on his/her freedom while on call. If he/she must remain on the employer's premises or so near thereto that he/she cannot use the time as he/she pleases, this would be compensable time. If on the other hand the employee is free to come and go, even though he/she must leave a telephone number where they may be reached, the time can be excluded from hours worked.

Travel From Home to Work

An employee who travels from home before his regular workday and returns to his/her home at the end of the workday is engaged in ordinary home-to-work travel which is a normal incident of employment. This is true whether he/she works at a fixed location or at different job sites. Normal time from home to work is not work time.

Home-to-Work in Emergency Situations

There may be instances when travel from home to work is work time. For example, if an employee who has gone home after completing his/her day's work is subsequently called out at night to perform a service or emergency work, all time spent on such travel is working time. Under such circumstances, the employee should record his/her total time spent from the time...
he/she receives the telephone call at home until the time he/she returns home after performing the emergency or service work.

Travel Time

The guidelines which apply in determining whether or not time spent in travel is working time depend upon the kind of travel involved.

It is the position of the Wage-Hour Division that an employee who is required by their employer to drive an automobile or a truck for the transportation of other employees to or from work at any time is working while traveling. It makes no difference whether the vehicle is the employee's own car, the employer's car, a rented car, or a truck.

Travel During Workday

Traveling by an employee from job site to job site during a workday is compensable work -- so is traveling to an out-lying job at the end of the scheduled workday. However, if the employee goes directly home from the job instead of returning to the employer's premises, the trip home is not compensable home-to-work travel.

Lectures, Meetings, and Training Programs

Attendance at lectures, meetings, training programs, and similar activities need not be counted as working time if all of the following four (4) criteria are met:

1. Attendance is outside employee's regular working hours.

2. Attendance is voluntary (it is not voluntary if required by the employer or if the employee is led to believe that non-attendance will prejudice working conditions or employment standing)/

3. Employee does no productive work while attending.

4. Program, lecture, or meeting is not directly related to the employee's job (it is directly related to the job if it aids in handling the present job better as distinguished from teaching another job or a new or additional skill).

Fractional Hours Worked

Employees must be paid for all time worked including fractional parts of an hour. Federal Wage-Hour guidelines require that all time actually worked by employees must be counted as time worked; arbitrary formulas or estimates are not permissible in determining compensable working time. There is one exception to the rule -- a practice of recording the employee's starting and stopping time to the nearest five (5) minutes, the nearest tenth of an hour or the nearest
quarter of an hour will be accepted if it is shown that, over a period of time, the averages result in
the employees getting paid for all the time actually worked.

The most common practice and one that is readily accepted by the Federal Wage-Hour Division
is the use of the 7/8 minute rule. Under this procedure, the employee's time record is rounded off
to the nearest quarter of an hour -- determined by whether he/she works the major portion of that
quarter hour.

Accordingly, if an employee records an arrival time at 8:07 a.m., this would be considered 8:00
a.m. If the person arrived at 8:08 a.m., the adjusted starting time for compensation purposes
would be 8:15 a.m.

This practice, likewise, would apply to department times. However, normally deducted lunch
breaks of thirty (30) minutes or longer would be computed right to the minute.

**Determining Existence of Separate or Joint Employment**

A *separate employment* relationship will exist where the employers are not affiliated with one
another and each independently hires the employee.

**Example:** An employee works as a truck driver for a trucking concern. After hours, he
drives the truck for another company. He obtains both jobs himself, and the firms
are in no way related to one another. A separate employment relationship exists
between the employee an each employer.

*Joint employment* exists when two or more employers, acting together, hire an employee or
make arrangements for the interchange of employees or receive mutual benefits from an
employee's service because of some close association in the employment.

**Example 1:** Two employers used a common source to hire a watchman to guard both their
properties. The watchman worked part-time for one employer and part-time for
the other, and sometimes worked for both at the same time. A joint relationship
existed.

**Example 2:** An insurance company and a furniture store were located in the same building. The
President of one company was a partner in the other and established policies
for both. The same General Manager was in charge of hiring and directing the
work for both companies. Some employees were paid jointly by both employers
and others separately. In the case of employees working for both companies, their
time was awarded to these employees for all hours worked on both jobs in excess
of forty (40) hours a week since the two companies were actually joint employers.
Holidays and Vacations

Employers are not required by the Federal Wage-Hour Division to pay for unworked holidays, but union or employment agreements may provide otherwise. If an employee does not work on a holiday, the day is not counted as time worked in figuring whether the employee has worked over forty (40) hours for overtime pay purposes. Only the hours actually worked have been counted even if the employee is paid for the unworked holiday.

Some employers not only give employees a day's pay for an unworked holiday, but also credit the employees with hours of work just as if they had worked the holiday, so that their employees will not lose overtime pay during weeks in which a holiday occurs. This means that the employee will be paid overtime during such a week even though he may have actually worked less than forty (40) hours.

Deductions from Wages

Whether or not deductions can be made from wages depends somewhat on what the deduction represents, and upon whether it cuts into the statutorily required wages, i.e., minimum wage for all hours worked and appropriate overtime.

Where wage deductions for contributions on the part of the employees to pension, health, and welfare plans cut into statutory minimum and overtime pay, employers are permitted to make such deductions for the benefit of third parties only if the employees voluntarily agree and if neither the employer or anyone acting in his behalf derives any profit or benefit from the transaction.

If the payroll deduction is for the benefit of the employee, i.e., to cover purchase of tires, parts, etc., such deductions are allowed where the employee provides written authorization. The deduction for such purchases may bring the employee below minimum wage only to the extent of the employer's actual cost of the item. Any profit to the employer cannot affect the federal requirement for minimum wages.

In order to avoid having to make weekly calculations and adjust deductions, you may wish to require that employees pay cash for their purchases or provide the employee with a cash advance which could subsequently be deducted from earnings at the full amount advanced, even if the resulting pay was below minimum wage.

In any event, we would suggest caution against deductions from employees' paychecks, other than those legally required, i.e., federal taxes, Social Security, etc., even where prior written authorization is obtained where the resulting earnings bring the employee below minimum wage.

The cost of furnishing items which are primarily for the benefit of the employer, e.g., tools to perform the duties of the job, may not be credited against statutory wage obligations. In accordance with federal regulations, such deductions could only be made to the extent where the employees' earnings were not brought below minimum wage obligations.
**Uniforms**

It is the position of the Wage-Hour Division that if uniforms are required by an employer or if a majority of the employees in a particular department do wear uniforms, it is then considered to be of benefit to the employer. Accordingly, any deductions for these uniforms which bring the employee's regular hourly rate below the current minimum wage will be considered a violation.

Increases in an employee's wages to offset the cost of uniforms should equal one (1) hour at the current minimum wage for furnishing and a like amount for maintenance of uniforms. In other words, an allowance of 15¢ per hour ($5.85 ÷ 40 hours) must be made should an employee furnish a uniform and a like amount of 15¢ if the employee is expected to launder the uniform. The adjusted minimum wage or these examples would be $6.00 or $6.15 per hour.

**Caution:** If you furnish an employee a uniform at no cost to the employee but the employee is required to launder non-wash and wear clothing, even if it is a shirt or a smock, the 15¢ per hour increase must be added for maintenance. Also if the employee is a part-time person, he/she must receive no less than 1/5 of the minimum wage for each day worked to cover maintenance and a like amount if furnishing a uniform is required.

A modification of the previous position has been taken by the Wage-Hour Division concerning reimbursement for uniform maintenance. The Division is now holding that no measurable costs are incurred in the maintenance of "wash-and-wear" uniforms which could be laundered with other personal garments. Consequently, you would not be required to pay a uniform maintenance reimbursement for such wash-and-wear garments, providing that there is no unnecessary requirements for daily cleaning.

**Discretionary Bonuses**

Discretionary bonuses paid to employees can be excluded from overtime compensation requirements set forth by the Wage-Hour Division provided both the fact that the payment to be made and the amount of the payment are determined according to the following conditions:

1. At the sole discretion of the employer at or near the end of the period, and
2. Not subject to any prior contract, agreement or promise, causing the employee to expect such a bonus regularly.

Discretionary bonuses cannot be used for the purpose of meeting the minimum wage requirements on any employee. Unlike Christmas gifts and profit-sharing bonuses, a discretionary bonus may be based on the hours worked by the employees, their production or efficiency, provided the above two requirements are properly met.

Under the accounting requirements of the Wage-Hour Division, you must retain your discretion both to the fact of the payment to be made and the amount of the payment until a short time before the payment is actually computed and paid to the employee. There must not be any prior
contract, agreement, or promise made by you which would cause the employee to expect this payment on a regular basis. The Federal Wage-Hour Administrator has given us two examples of bonuses which failed to meet the above requirements and which eventually required an employer to pay overtime compensation on the money.

Example: An employer announced to employees in January of the intention to pay them a bonus in June. By promising the bonus, the employer abandoned discretion as to the fact of the payment. It would not be excluded from the regular rate for overtime purposes as a discretionary bonus.

Example: An employer promises salespersons that they would receive a monthly bonus of 1% of sales, whenever the financial condition of the organization warranted such payments. By specifying the percentage, the employer had given up discretion of the amount of the bonus. Though the employer still retained the discretion as to whether that amount would actually be paid, the bonus had to be included in the regular rate for overtime purposes in any month it was paid.

Employees cannot expect a bonus regularly based upon any prior contract, agreement, or promise. Under the federal Wage-Hour accounting requirements, a bonus payment made under a prior "contract, agreement or promise" which would cause the employee to expect a bonus regularly, cannot be excluded from overtime compensation as a discretionary bonus. The Federal Wage-Hour Administrator in Washington has stated that bonuses promised to employees upon hiring or which are included in collective bargaining contracts, cannot be considered discretionary.

Should the occasion arise where you would elect to give bonuses to employees, we would naturally want to document your position as to the discretionary nature of this bonus. Should you ever elect to distribute bonuses, we recommend minutes be placed in your corporation books for the benefit of future Wage-Hour investigations.

<table>
<thead>
<tr>
<th>Minutes on Discretionary Bonus for Year 20____</th>
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<tr>
<td>A motion was passed by ________________________, duly seconded by ____, and unanimously carried to pay the following employees in the employment of (employer) on __<strong><strong>, 20</strong></strong>, a discretionary bonus. It is to be specifically understood by the officers of this corporation and its employees that this bonus is not to be construed as establishing the precedent but is based solely on the earnings of the corporation for this year only. This discretionary bonus is to have no bearing whatsoever on the future relationship of the employees to their jobs or their future wages to be received.</td>
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33
We further recommend the following statement be attached to each discretionary bonus check to be given to the employee:

Dear ___________

In sincere appreciation of you as an employee, and coupled with another good business year, the Board of Directors at the request of your President has seen fit to vote this discretionary bonus for the year 20____. This discretionary bonus is not to be construed as wages, the result of any prior promise, contract, or agreement.

Thank you for your continued loyalty and good work.

Sincerely yours,

(NAME OF ORGANIZATION)

__________________________________

(Appropriate Signature)

Acknowledged by: __________________________

Date: _______________________________
Performance Management

Practically everyone complains about managing performance. Employees dislike performance appraisals because they feel powerless in the process. They also feel like they are getting a “report card” which may be based on arbitrary, confusing, and biased factors such as race, gender, and issues out of their control.

Supervisors dislike performance appraisals because they know that they may be forced to make decisions about an employee’s performance, and then, after communicating sometimes upsetting news to the employee, they must face him or her every day thereafter.

So why bother with performance management if neither the employee nor the supervisor likes the process?

Performance management establishes a method of managing work groups that allows supervisors/managers to set clear expectations with measurable standards with all employees regarding their job responsibilities. It also supports and provides on-going monitoring, coaching, and feedback to employees regarding their performance. Formal performance evaluations are based on the extent to which the employee meets the specified expectations. Managers use the results of the process to make decisions regarding selection, placement, training, compensation, and promotion.

Who is responsible for managing performance?
# Why Manage Performance?

As a team, list the reasons and purposes for managing performance.

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<tr>
<th>FOLLOWER (EMPLOYEE)</th>
<th>LEADER (EMPLOYER)</th>
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Performance Appraisals

Why Conduct Performance Appraisals?

There are at least four (4) important purposes for performance appraisals:

1. **To recognize past performance and to improve future performance.** A performance appraisal can be used as a time for praise and a time for plans to improve. This process allows the employee and the supervisor to analyze past performance and set goals for the desired levels of future performance.

2. **To support a fair and equitable compensation system.** Well-managed dealerships tie compensation directly to performance. An accurate performance appraisal system allows the performance to be measured against goals to ensure fair compensation.

3. **To provide frank and constructive feedback to employees.** Employees want to know how they have done in the past and how they are doing now. They want coaching on ways to improve for future performance.

4. **Create a record of past performance.** The appraisal process should create a written record of performance problems. Written performance appraisals provide the dealership with a legitimate basis for making personnel decisions. If an employee is fired, effective performance appraisals are often the most persuasive proof that an employee was justifiably terminated for poor performance.

Benefits of an Effective Performance Appraisal System

**Benefits to the Employee**

If conducted properly, a performance appraisal system can offer several benefits to the employee including:

- Clearly defined and understood goals and expectations of performance.
- The importance of the employee’s contribution to the success of the department and dealership.
- The understanding of how performance impacts compensation.
- Clear understanding of how to improve.
- Clear understanding of current performance (whether good or needing improvement).
- General ideas of “how am I doing.”
- Understanding of consequences of poor performance (i.e., discipline, termination).
- Confidence and trust in leader.
**Benefits to the Employer**

In addition to offering several benefits to the employee, an effective performance appraisal system offers benefits to the employer, including:

- Supporting documentation and practices for defending against discrimination claims.
- Satisfied and motivated employees.
- More productive and committed employees.
- Enhanced employee/employer relationship.

With these benefits in mind, it is obvious the performance appraisal system can be a win-win situation if properly implemented and followed. This is one very important area of human resources worthy of attention from top management. By investing the time and resources needed to develop and follow an effective system, the investment will surely pay off threefold in the long run.

**Identifying Performance Problems**

If coaching is the best way to improve performance, put a (C) in the remedy column.

<table>
<thead>
<tr>
<th>Performance Problem</th>
<th>Remedy</th>
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<td>Makes spelling errors.</td>
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<td>Is often absent on Fridays.</td>
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<td>Makes mistakes in entering orders.</td>
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<td>Has an excessive scrap rate.</td>
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<td>Speaks too rapidly.</td>
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<td>Does not bend knees when lifting.</td>
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<td>Does not wear safety shoes.</td>
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<td>Does not punch holes accurately.</td>
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<td>Puts too much solder on connections.</td>
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<td>Keeps a messy workstation.</td>
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Coachable Performance Problems

Here is a list of statements about performance problems. Is it coachable? If it is, how would you coach it?

1. Joan types with great accuracy but is below average in speed. □ Yes □ No

2. Alan is generally a good salesperson, but he is not as good at closing a sale as he should be. □ Yes □ No

3. The reason Ellie has so many jams on her line is that she feeds stoppers in at too fast a rate. □ Yes □ No

4. Jimmy would be a better order-taker if he memorized more product codes. □ Yes □ No

5. Ray's output would increase significantly if he coordinated his hand movements on the machine. □ Yes □ No

Steps in the Performance Appraisal Program

Probably the most crucial part of the entire appraisal process is the interview with the employee in which the appraisal is discussed. If handled well, the interview can lead to better understanding between employee and supervisor. Ideally, any problem will be identified and the employee will come to understand what is required in order to improve performance. If the interview is not conducted properly, the entire appraisal will have little value. In fact, the employee may feel resentment rather than a desire to improve. If you keep the following points in mind, you will increase the likelihood the interview will result in meaningful communication.
**Step 1: Preparation and Planning**

- **Set a meeting date.** Notify the employee in advance of the meeting. By doing this, you give the employee time to analyze his/her own performance, any hurdles that may be interfering with good performance, and to determine personal performance goals for the future. Remember during the meeting to allow the employee to express his/her ideas in these areas and express any concerns he/she may have. In short, facilitate a two-way discussion and listen.

  Be sure to schedule ample time for the performance appraisal discussion. If you appear to be rushed, the employee may feel unimportant and unwilling to participate in the feedback discussion. It is also a good idea to arrange for a quiet location and not to allow for any interruptions during the meeting, for you will want to give the employee your full attention.

- **Assemble data and prepare documentation.** Before the meeting, you should review the job description, any additional responsibilities the individual has, personal notes on the individual’s performance since the last review, and any progress or fall-backs the employee has experienced since the last review. By examining this material beforehand, you will be more likely to focus on the performance by using facts, and avoid the temptation of merely giving a “gut reaction” to the person’s performance. Performance facts include specific behaviors or past performances in a situational context. Try to outline the consequences of this behavior -- how did it affect the department, the dealership, the customer? Finally, give your analysis -- was this a good behavior and why, or was this a behavior that needs to be corrected, why, and how?

**Step 2: The Review Session**

- **Open the discussion.** Set a friendly tone to put the employee at ease, but avoid getting bogged down in chit-chat. You will want to restate the purpose of the meeting and express your goals – i.e., “We are here today because it is time for your annual performance review. My goal for this session is to offer you constructive feedback on your performance, and to get insight from you as to any ways in which I can assist you to improve both your job performance and your individual job satisfaction.”

- **Obtain the employee’s perspective.** At the beginning of the meeting, you will want to obtain the employee’s view of his/her performance and present any objective results the employee has realized. During this time, you should actively listen and ask open-ended questions to facilitate discussion in order to gain an appreciation of the employee’s perspective.

- **Sharing your appraisal.** Once you have listened to the employee’s examination of his/her performance, you will want to review your assessment of the employee’s performance based upon the job description and any additional documentation regarding the requirements of the job. Give constructive feedback to the employee by focusing on the behavior or performance and recognizing accomplishments and pitfalls.
• **Summarizing results of your joint analysis.** Always remember to give praise for work well done. This offers encouragement to the employee and builds confidence. Point out areas of improvement in performance you discussed, and review points on which you agree and disagree.

• **Jointly developing a plan of action.** Identify and discuss the employee’s needs in terms of ways to improve performance, career development, and changing job requirements. Develop an action plan by communicating your performance expectations of the employee, identifying any additional resources the employee may need to meet your expectations and how to get them, and setting a timeframe for an early progress review.

• **Addressing the issue of pay.** Often any pay increases are based upon the results of a performance review. During this time, it is a good idea to review the dealership’s compensation philosophy practice and the pay opportunity for the employee’s position. Express your recommendation or decision regarding the employee’s increase/no change in pay. However, allow the employee to express any ideas or concerns they may have on this issue in order to facilitate understanding as to why the employee either received an increase or not.

• **Asking for feedback.** Often, this is the hardest phase for many managers/supervisors to do. Soliciting feedback on your performance from an employee takes confidence, strength, and a commitment to personal growth. However, many employees are not accustomed to giving feedback to a supervisor, so you should express a sincere desire to understand how your leadership or behavior affects the employee’s job performance. Listen carefully to the feedback and avoid defensive responses. You will want to commit to change where appropriate, and thank the employee for his/her honesty and encourage him/her to offer feedback freely at any point during the year.

• **Concluding the discussion.** Finally, you should summarize the entire discussion, focusing on the main points. End the meeting on a positive note by reinforcing praise and expressing confidence in the employee.

**Step 3: Follow-up**

The performance review should not end at the conclusion of the meeting. Instead, as a leader you should follow-up to make sure the employee is continuing the good performance and working to better the problem areas. By offering continuous feedback, your employees will always know where they stand and be more motivated to improve.


Performance Evaluation Tips For Supervisors

- **Be honest and fair in evaluating all employees.** Be certain that you as the supervisor have reviewed all of your employees in an objective and consistent manner as individuals and relative to other employees in the group. The purpose of performance evaluations is to take a realistic snapshot of the employee's performance. Don't say the employee is improving if (s)he is not performing well.

- **Be consistent in your approach.** Don't create a situation where it appears that you create excuses for one employee while holding another employee accountable. Define your criteria for each level of ranking and use the same criteria for every employee. Don't set separate criteria for certain employees.

- **Give your comments.** A ranking or number used to rank an employee's performance is useless without a written comment. Comments are required for any ranking that is less than "3 or meets expectations" and also for the highest ranking of "5 or exceeds expectations." Comments may confirm achievements or be constructive depending on the nature of the ranking.

- **Make your comments consistent with the rankings.** Don't give someone a "meets expectations" ranking if your comment describes a substandard performance.

- **Be realistic.** Don't inflate ratings. Inflation of ratings only inflates an employee's expectations.

- **Rate the employee's performance, not the employee's "attitude."** Keep your comments job related and based on the employee's ability to perform his/her job. Avoid phrases like "bad attitude," "he's not a team player," and other subjective type comments. Explain the behavior that is a result of the "attitude."

- **Set goals with the employee.** Don't just criticize a deficient performer; set goals for follow up and for improvement or development. Work together to create a plan of action to help the employee in deficient areas and to establish goals for the coming year. Set a follow up period and be sure to reevaluate the employee at the appropriate time.

- **A performance evaluation should motivate an employee to want to improve.** The employee should feel excited about the challenges and his/her ability to meet them. If employees hear only about their failures and weaknesses, they'll start to believe they can't succeed. If employees get support and encouragement from their supervisor, they'll gain the desire and confidence to keep trying. When the supervisors' suggestions for improvement bring results – and recognition –employees are even more likely to listen to future suggestions.

- **There should be no surprises.** The evaluation should be a review of the past year's performance. Through previous counseling and other communications, the employee should
be aware of any concerns you might have about their job performance. The annual evaluation should not be the first time the employee learns of your concerns.

- **One tool that may be used is to ask the employee to review his or her own performance and expectations for the future by preparing a self-appraisal.** They may complete the same evaluation form that the supervisor uses or may draft a memo or list reviewing performance strengths and weaknesses and future goals. Having the employee go through the same exercise may make it easier for him or her to understand the value of the evaluation process.

### Ten Most Common Appraisal Errors of Performance Appraisals

1. Gut feeling (subjectiveness)
2. Lack of follow-up
3. Improper preparation; poor documentation
4. Biases:
   - Similar to me Positive leniency – want to give everyone high scores
   - Negative leniency – want to give everyone low scores
   - Halo effect – the employee is a "saint" so must have high scores
   - Attribution – tending to see poor performance more within control of the individual and superior performance as more of an influence of external factors
   - Stereotyping Contrast effect – contrasting one employee's accomplishments against another
   - Unfair comparison – comparing one employee against another
   - First impression
   - Central tendency (forced bell curve) – expecting in any group that there will be some poor employees and some great employees
5. Recency effect: over – emphasis on recent performance
6. Inadequately defined and/or misunderstood standards/goals
7. Lacking truth
8. Poor interviewer (poor environment, poor use of time, domineering, poor listener, etc.)
9. Conducting an "annual" review (as opposed to the ongoing review)

10. Negative approach – catching them doing something wrong (as opposed to the One Minute Manager Approach of catching them doing something right)

**Handling Employee Behaviors**

- **If the employee becomes defensive or makes excuses:**
  - Listen to what the employee has to say and paraphrase back. Remain neutral. Maintain eye-contact.
  - Don't solve the problem.
  - Ask for specifics with open-ended questions.
  - Try to determine the cause:
    - "Tell me more." "How did you reach that conclusion?"
    - Ask how the employee will resolve the problem.

- **If the employee becomes angry:**
  - Stay calm and centered. Maintain eye-contact.
  - Listen to what the employee has to say and paraphrase back.
  - Let the employee "run down" for as long as s/he needs until the employee can listen to you.
  - Avoid arguments.
  - Bring discussion and focus back to performance and standards.
  - Say the employee's name, and ask open-ended questions.

- **If the employee is unresponsive or withdraws:**
  - Be patient and friendly.
  - Show concern.
  - Stay silent, and wait for the employee to say something.
  - Ask open-ended questions.
  - Note that the employee is unresponsive.
  - Encourage the employee that you want to hear his or her input, and this input is important to you.
Supervisor's Checklist for a Performance Appraisal Interview

Probably the most crucial part of the entire appraisal process is the interview with the employee in which the appraisal is discussed. If handled well, the interview can lead to better understanding between employee and supervisor. Ideally, any problem will be identified and the employee will come to understand what is required in order to improve performance. If the interview is not conducted properly, the entire appraisal will have little value. In fact, the employee may feel resentment rather than a desire to improve. If you keep the following points in mind, you will increase the likelihood that the interview will result in meaningful communication.

**DO’S:**

**Preparation:**
- Review performance plans and accomplishments.
- Note areas in which goals have not been met.
- Complete appraisal form.
- Prepare ideas for further development.

**Timing:**
- Give the employee advance notice of the time of the interview.
- Schedule enough time for a meaningful exchange to take place.

**Location:**
- Arrange for a quiet location.
- Be sure that you have privacy and avoid interruptions.

**Conducting The Interview:**
- Begin with a few minutes of casual conversation to help relax the employee.
- Proceed to discuss all aspects of the job; go over each accountability separately. Although you must point out both strengths and weaknesses, it will probably be more effective to discuss positive aspects of performance first.
- Try to avoid appraisals that are completely negative.
- Focus on performances rather than personality.
- Be constructive, rather than destructive. If there are weaknesses, point them out, but emphasize what can be done to rectify the situation.
- Focus on ONE key area of responsibility where improvement is mutually agreed to be desirable. Establish a **Development Plan** with the assistance of the employee to improve this area of responsibility.
- Welcome **any** questions or complaints that the employee may have.
Summary:

✓ Briefly review the important points of the appraisal.
✓ Carefully restate the details of any proposed sources of action that you have recommended.
✓ Be sure that the employee has had sufficient opportunity to say everything that he/she intended.
✓ At the end of the interview, allow the employee to read the written appraisal and fill out the employee comments section.
✓ The form must be signed by the employee to verify that he/she has read it.

Follow-Up:

✓ Periodically check the employee’s activities to determine whether or not goals discussed at the interview are being obtained.
✓ Offer assistance in achieving objectives.
A Positive Approach to Discipline

Positive discipline is a process designed to solve performance problems and encourage good performance. Unlike most traditional discipline systems, positive discipline minimizes the use of punishment to correct poor performance and misbehavior. Instead, it concentrates on dealing with the employee as an adult. The focus is on communicating an expectation of change and improvement rather than on communicating an expectation of future problems and eventual termination.

Richard C. Grote
Positive Discipline
Discipline Awareness

Put a check (✔) on each of the appropriate lines.

1. Because each employee is different a manager should apply different discipline.
   
   _____ Agree    _____ Disagree

2. It’s important to follow up on all disciplinary actions.
   
   _____ Agree    _____ Disagree

3. A manager’s discipline should set an example for the entire department.
   
   _____ Agree    _____ Disagree

4. Punishment for a rule infraction is the most effective discipline.
   
   _____ Agree    _____ Disagree

5. Most discipline problems develop because the employee has a poor attitude.
   
   _____ Agree    _____ Disagree

6. All disciplinary measures should be noted in the employee’s file.
   
   _____ Agree    _____ Disagree

7. If a manager tries to deal with every minor rule infraction or problem, he/she will have little time for everything else that needs to be done.
   
   _____ Agree    _____ Disagree

8. The purpose of discipline is to let the employee know that there are negative consequences to breaking the rules.
   
   _____ Agree    _____ Disagree

9. Serious discipline problems should be discussed by the manager and the employee in private or with a witness.
   
   _____ Agree    _____ Disagree

10. The objective of discipline is to prevent the recurrence of a problem.
    
    _____ Agree    _____ Disagree

©Vital Learning
Consequences of Ineffective Disciplinary Action and Termination

- Definition of disciplinary action: To teach people the proper way of doing things.
- Goal of disciplinary action: To obtain a smooth flowing organization where things are accomplished.
- Manager's Responsibility in Disciplinary Action: To ensure the definition and goals are met, bringing in Human Resources as necessary.

### Progressive Discipline System

<table>
<thead>
<tr>
<th>Step</th>
</tr>
</thead>
<tbody>
<tr>
<td>Establish a Policy/Rule</td>
</tr>
<tr>
<td>Communicate the Rule</td>
</tr>
<tr>
<td>When Necessary, Enforce</td>
</tr>
<tr>
<td>Verbal Correction</td>
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<tr>
<td>Written Correction</td>
</tr>
<tr>
<td>Final Warning -- Written</td>
</tr>
<tr>
<td>Suspension With or Without Pay</td>
</tr>
<tr>
<td>Termination</td>
</tr>
</tbody>
</table>
A Positive Approach to Discipline

A part of the authority you must exercise in your position as supervisor is the often-unpleasant task of discipline. Discipline is a process of teaching through which desirable attitudes and habits are demonstrated, encouraged, and reinforced until learners have internalized them and accepted personal responsibility for maintaining them in daily activities. It is not exclusively punishment or reprimand as too many supervisors commonly regard it.

A positive approach to discipline is always the best approach. Discipline includes the training and motivation programs that a supervisor plans and conducts. Enforcing established rules and regulations is also part of discipline. Good discipline helps to improve employees' productivity by making them aware of the importance of their position and work in the overall organization. Any sort of punishment that must be a part of the discipline system should be a means to an end - and that end, the goal of the punishment, should always be organization . . . not personal.

As a supervisor, you can easily misuse your authority by delivering an angry public reprimand or discharging a worker on the spot when some infraction of rules occurs. Such action vents hostility, displays power, bolsters the supervisor's ego, and, perhaps, removes an irritating source of frustration. Consciously, you may rationalize that you are correcting a bad situation, but you may only be dealing with it impulsively and emotionally because you feel unable to handle it in a logical and professional manner.

Such emotional disciplinary action destroys the morale of a department or an organization and rarely produces the desired result. The supervisor's proper goals are constructive problem-solving and achievement of organizational goals, not venting personal emotions.

Discipline is the responsibility of the supervisor. You must discard any idea that enforcing company regulations will hurt your relations with subordinates. On the contrary, avoiding discipline projects an impression of weakness and is a sure way to lose your employees' respect and water down your authority.

Characteristics of Good Discipline

- **Fairness** – Be fair, firm, and consistent.

- **Absence of Emotion** – Separate yourself. Concentrate on the behavior, not the person.

- **Timeliness** – As close to occurrence of violation as possible.

- **Absence of Surprise** – Help the employee understand why the behavior is unacceptable.

- **Preventiveness** – Help the employee understand what is desirable behavior.
• **Absence of Blame** -- Direct remarks toward what is right and not who is right.

• **Adequate Documentation** – Make sure you document everything. You can never have enough documentation.

## Skill Points Record

### Skill Points

**Skill Point 1** - State the performance problem

**Skill Point 2** - Ask the team member for their point of view

**Skill Point 3** - Ask the team member for a solution

**Skill Point 4** - Agree on a plan

**Skill Point 5** - Give the oral or written warning and set up a time for review

## How to Conduct a Disciplinary Interview

If an employee knows he has made a mistake and has learned by it, your words may only increase his embarrassment and serve no purpose. However, where a rule has been broken or misconduct has taken place, correction or discipline is in order. The following steps are recommended to correct an employee properly:

**Don't talk about the problem standing up** -- Sitting down reduces the chances of either person getting angry.

**Sit opposite the employee but not behind the desk** -- This softens the atmosphere of confrontation.

**Don't start with an accusation** -- Win the confidence of the employee by describing the problem as one that both have to work at solving.

**Don't start with chitchat** -- Your aim is to gather information by encouraging the employee to talk.

**Don't deliver a sermon or make any wild promises** -- Try to influence by developing an emotional bond through honest discussion.
Avoid prejudging the problem from your point of view alone -- Consider enlisting the help of an impartial third person to keep the situation from becoming too emotionally charged.

Never criticize, correct, or reprimand employee in the presence of others -- Discipline and correction is a private matter. You should find a quiet place where you can sit down and discuss the problem or mistake calmly, coolly, and objectively.

Never try to correct or reprimand an employee when tensions are high -- Always do so when matters have calmed down.

Listen -- Listen quietly to your employee's point of view of what happened. He may see the situation more clearly than you do. Even if he has a distorted view, let him get it off his chest. You need to understand his point of view if you hope to work with him intelligently.

Share the blame if necessary -- Accept your part of the responsibility for the mistake. Perhaps you didn't give your employee adequate training or preparation. Or maybe you didn't forewarn him that this type of problem or situation might arise. Your becoming a "center" with him helps ease the load and assures him that he is not alone.

Discuss the problem rather than the employee -- Be concerned with correcting the mistake because it is a mistake. Don't focus on the person or his personality. To all of us, our person and personality are usually sacred ground.

Deal with "why" as well as "how" -- Many supervisors tell employees what they are doing wrong, but not why they should do something another way. Explain your recommendations fully. Make certain that you and the employee are shooting at the same target with the same kind of gun.

Find a better way -- A correction or disciplinary interview is not a success unless there is agreement on a better way. No one likes to be told flatly that he is doing something wrong. He will dislike it even more if he is left up in the air with no solution to his problem. Through free give-and-take, try to settle on an approach that you both agree will be better.

Finish your correcting and disciplinary interview on a high note -- End on a note of optimism and confidence. Don't let your employee feel you have less confidence in him because the problem arose.

**Tips for Preparing Written Correction Notices**

- Show the important facts.

- State whether the improper conduct violates an established company rule.
• Refer to any prior verbal warnings, corrections, counseling, or cautioning.

• State that this written correction gives the employee an opportunity to correct his improper conduct or action in the future.

• Identify specific steps to be taken and/or improvements to be achieved by the employee.

• Identify specific action the manager will take to assist the employee.

• Identify a timeframe in which improvement should be made; set a follow-up date for discussion.

• Obtain the employee's signature acknowledging receipt of the written correction notice.

• Give a copy of the written correction to the employee in private and file a copy in the employee's personnel file.

• Follow your organization's guidelines for dealing with employee behavior/performance deficiencies; obtain assistance from appropriate management and human resources personnel.

Notes for Job Specific Practice – Team Member

Use this form to describe your job-specific situation that you will practice in the workshop. Write clearly and legibly; this form will also be used by the participant who will be your team member in this activity.

1. What is the work environment? (office area, assembly line, etc.)

   _____________________________________________________________
   _____________________________________________________________

2. What is the team member’s job?

   _____________________________________________________________
   _____________________________________________________________

3. What is the team member’s work history?

   _____________________________________________________________
   _____________________________________________________________
4. How has the team member typically responded to past disciplinary discussions? (cooperative, hostile, apathetic, apologetic, etc.)

5. What is the disciplinary action? (Keep it simple.)

6. What might be the team member’s view of the situation?

7. What solution(s) might the team member propose?
Observer’s Form

Use this form to record your observations of the team leader’s application of the Essential Skills and the Skill Points during the practice session.

**Essential Skills**

Maintained or Enhanced Team Member Self-Esteem .......................................................... □

Focused on Behavior ........................................................................................................... □

Encouraged Team Member Participation ............................................................................. □

Created a Climate of Open Communication ...................................................................... □

Designed Clear, Concise Messages .................................................................................... □

Managed Nonverbal Behaviors Effectively ......................................................................... □

Listening: Reflected □  Probed □  Supported □  Advised □

Provided feedback □

**Use of Specific Skill Points:**

<table>
<thead>
<tr>
<th>Skill Point</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Stated performance problem</td>
<td>□</td>
<td>□</td>
</tr>
<tr>
<td>2. Asked team member’s view</td>
<td>□</td>
<td>□</td>
</tr>
<tr>
<td>3. Asked Team member for a solution</td>
<td>□</td>
<td>□</td>
</tr>
<tr>
<td>4. Agreed on plan</td>
<td>□</td>
<td>□</td>
</tr>
<tr>
<td>5. Gave team member verbal or written warning and set up time for review</td>
<td>□</td>
<td>□</td>
</tr>
</tbody>
</table>
Discipline Meeting Worksheet

1. Meeting objectives: ____________________________________________________________
   ____________________________________________________________
   ____________________________________________________________
   ____________________________________________________________

2. State performance problem. (Skill Point 1) _________________________________
   ____________________________________________________________
   a. Problem Summary: ____________________________________________
   ____________________________________________________________
   ____________________________________________________________
   ____________________________________________________________
   b. Describe the facts (dates, times, places, individuals involved). __________
   ____________________________________________________________
   ____________________________________________________________
   ____________________________________________________________
   c. Describe the applicable standards of performance, work habits, or rules on conduct. ___
   ____________________________________________________________
   ____________________________________________________________
   d. Explain the good business reason for the rules or standards. ________________
   ____________________________________________________________
   ____________________________________________________________
   ____________________________________________________________
   e. Describe team member’s prior work record with the organization. ______________
   ____________________________________________________________
   ____________________________________________________________
   ____________________________________________________________
3. Ask team member’s view. (Skill Point 2) ____________________________________________
   a. Is team member aware of the rules or standards?
      Yes ____  No ____
   b. If yes, how do you know?
      ____________________________________________
   c. If no, what steps will you take to acquaint the team member with the rules or standards?
      ____________________________________________
4. Ask team member for solution. (Skill Point 3) ____________________________________________
   a. Solutions you think the team member might suggest:
      ____________________________________________
   b. Management action(s) taken in similar cases:
      ____________________________________________
5. Agree on plan. (Skill Point 4) ____________________________________________
   a. Your proposed action for this case:
      ____________________________________________
      ____________________________________________
   b. Consequences of team member’s continuing the infraction:
      ____________________________________________
      ____________________________________________
6. Give team member oral or written warning and set up review. (Skill Point 5)
   ____________________________________________
   _____ Informal oral warning  _____ Written warning
   _____ Formal oral warning  _____ Suspension
   _____ Termination
You're Fired!

Since the beginning of our industrial society, the power behind these words has gone largely unquestioned. With always unlimited authority to discharge, employers could terminate an employee for "good cause," "bad cause," or "no cause at all."

However, society has sought to improve upon injustices in the workplace. A host of state and federal laws, coupled with influence from the courts, have vastly altered the reasons for which an employee may be terminated. The following are major government laws, agencies, or courts that can "challenge your right to fire."

- National Labor Relations Act of 1935
- Fair Labor Standards Act (Wage-Hour Law) 1938
- Equal Pay Act of 1963
- Title VII, Civil Rights Act 1964
- Occupational Safety & Health Act 1970
- Pregnancy Discrimination Act 1978
- Consolidated Omnibus Budget Reconciliation Act 1986
- Immigration Reform and Control Act 1986
- Office of Federal Contract Compliance
- State Employment Agencies
- State Law -- Workmen's Compensation Protection
- State Law -- Challenging Employment-at-Will Doctrine

The list seems endless and uncontrollable. Fortunately, as of this writing, American employers still retain the right to terminate an employee on the basis of "poor performance." If employer counseling and training are proven, coupled with the fact that the employee is made aware of the consequences of failure to adhere to prescribed standards, and absent any other violation of an employee's right, then a "clean" or "faultless" termination is readily attainable.
To Minimize Wrongful Discharges Involving Challenges to the Employment-At-Will Doctrine

The following procedures are recommended as steps that employers can take to help minimize their liability in case of wrongful discharge and/or discrimination claims:

- Review recruiting materials, advertisements, employment applications and brochures, to avoid using words creating an implied "permanent" employment.

- Train personnel staff to avoid pre-hire interview procedures which overstate job security or advancement opportunities.

- Review employee handbooks and personnel policy manuals often to ensure that policies reflect actual practice.

- Use language in all handbooks and manuals that clearly states employment is on an "at-will" basis.

- Refine employee evaluation systems to ensure honest and accurate appraisals of employee performance.

- Utilize progressive disciplinary procedures to warn employees of unsatisfactory performance and to provide them with an opportunity to correct deficiencies.

- Prepare written reasons for an employee's termination. After thoroughly discussing and explaining them, provide the employee the opportunity to review, comment, and sign the termination notice.

- Avoid spur-of-the-moment terminations when emotions are running high by requiring at least one other supervisor or the personnel manager to participate in and/or review each discharge.

- Be consistent in applying disciplinary and termination procedures. Avoid disparate treatment of employees in similar circumstances by appointing one senior officer to review all terminations.

- Make sure the exit interview deals with any and all questions the employee may have.
Termination-For-Cause Checklist

When an employee continues to pay no attention to rules and disciplinary action, where an offense is repeated, or misconduct is serious enough for discharge on the first offense, decisive action must be taken. To help guide you through this area, we suggest you stop and review very carefully the following checklist, before any employee is ever terminated. For your employees are your company's most valuable assets. Ask yourself these questions, before you discharge an employee:

1. Is the company policy, which has been violated, a reasonable one?
2. Has the company policy or rule been properly communicated to the employee?
3. Have I been objective and treated this employee the same as another would be treated for the same offense?
4. Have I accumulated all of the facts accurately?
5. If it is a repeated offense, has the employee been properly reprimanded in the past and have written corrections been issued?
6. Is the employee guilty by his/her own actions or by association with another employee?
7. Am I taking action against the employee because he/she has "challenged my authority"?
8. Does the punishment fit the offense?
9. Have I considered the employee's past disciplinary record and his length of service?
10. Was the employee's guilt supported by direct objective evidence, as opposed to just suspicion?
11. Has a top management official reviewed the facts and approved the discharge?
12. Should I try for a "voluntary resignation" instead of firing the individual?
13. Will the termination be a surprise to the employee? If yes, repeat discipline process.
14. Should I suspend employee first, to review all facts?

Remember, this recommended checklist is not very helpful after a discharge. If there is any question about facts or reasons for discharge, suspend the employee instead of firing, during an investigation of the facts.
Rules to Fire By

Your Objective: To end the employment relationship in a respectful, professional manner. This may be a difficult meeting for you, but it is most likely a major life event for the employee.

Rule One – An employee should never be surprised at being fired. If need be, err on the side of painstaking deliberation rather than excessive haste.

Rule Two – Never fire someone in anger. Management should be satisfied that (a) training has been complete and clearly understood, (b) employee performance is unsatisfactory with very little chance of improvement, and (c) the employee can't be salvaged or transferred to another job or department.

Rule Three – Meet with the employee, recap that there have been prior warnings. Indicate that the problems have continued, and the company is considering terminating their employment. Ask the employee if there is anything the company should consider before making a final decision (this assures you have all the facts, and may also diminish the likelihood you will be “surprised” by subsequent EEOC charges or lawsuits).

Rule Four – After the employee has provided input, adjourn briefly to consider their input.

Rule Five – If you decide to proceed with termination of employment, reconvene and let the employee know your decision. The entire process should be brief, but not so quick the employee feels they were denied the opportunity to speak.

Rule Six – Avoid terminating employment on Friday afternoons or the day before holidays. This enables your former employee the opportunity to immediately begin a job search instead of dwelling on the events.

Rule Seven – If the employee has personal effects at their work station, offer to collect them and bring to the employee while they wait. During this time they can get a briefing on how termination affects their benefits and final pay. Provide a contact name for future questions.

A possible script for informing the employee of your decision:

“Thanks for waiting while we reviewed your case one last time. We recapped all the facts, including your input, and we have decided that we are going to (let you go, terminate your employment) today. I know this isn’t what you wanted to hear, but we believe this decision is best for the company. (It may be appropriate to briefly pause at this point, or you may want to continue.) We do want to thank you for your time with us, and we wish you success in the future.”
If All Else Fails . . . Termination

Before terminating an employee, ask the "magic question."

Effective Strategies for Conducting the Termination Meeting

- Conduct meeting in a professional, respectful manner.
- Explain termination because of deficiency areas.
- Indicate terminate date and plan transition.
- Describe separation provisions.
- Express confidence and end on an encouraging note.

Typical Transition Phases of the Terminated Employee

Phase 1: Disbelief and shock
Phase 2: Self-pity
Phase 3: Hostility
Phase 4: Objectivity