



FIVE COMMON MISTAKES – AND HOW TO AVOID MAKING THEM

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5. Not Paying Employees Correctly

Under the Fair Labor Standards Act

- It is the obligation of the employer correctly pay employees.

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Fair Labor Standards Act

Pennsylvania jury ordered Wal-Mart Stores Inc., the world's biggest retailer, to pay at least \$78.5 million for wage and hour violations.



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- **Recently, Pennsylvania's Superior Court upheld the jury verdict - now increased with attorneys fees and interest to \$187.6 million in part for denying employee's meal and rest periods as promised in their employee handbooks. Walmart's violation regarding breaks and meal periods was not statutory but rather contractual.**

On average, employers paid \$4.5 million to settle a wage-and-hour case in 2013.

Family Dollar Stores Inc. v. Morgan et al.
\$35.5M verdict awarded to store managers on claims that they were misclassified as exempt

Dicks Sporting Goods – settlement of \$15M for “off the clock” work and automatic meal and break deductions

Lopez v. Lowe’s HIW, Inc. – \$29.5M settlement of work “off the clock” claims brought by hourly employees



▪ **Kindred Healthcare Inc.**

Paid \$16.5 million to end thousands of California hospital workers’ class action allegations that the hospital giant violated state labor laws by not paying for late hospital shifts and missed meal breaks.



- Harris County Hospital District, doing business as Harris Health System in Houston, Texas agreed to pay more than \$4 million in back wages and liquidated damages to settle a wage-and-hour lawsuit with 4,573 technicians and current and former nurses at 46 locations.

FAIR LABOR STANDARDS ACT

- Make sure employees are properly classified exempt versus non-exempt rather than “hourly” versus “salaried.”
- Cannot just pay someone a “Salary” to avoid overtime, even if they agree to it.

FAIR LABOR STANDARDS ACT

- Must pay non-exempt employees time and one half for every hour over 40 worked in one work week in some states for every hour over 8 worked in one day.
- Even if it was not approved in advance.

Under the Fair Labor Standards Act

- THERE IS NO SUCH THING AS COMP. TIME UNLESS YOU ARE THE GOVERNMENT OR HAVE A UNION CONTRACT!!!

FAIR LABOR STANDARDS ACT

- Cannot allow employees to bank time for later use – except in same week.
- Cannot allow employees to work overtime one week and take it off the next.

FAIR LABOR STANDARDS ACT

- Never ask employees to work off the clock.
- Non-exempt employees must be paid for training if it is required.
- Non-exempt employees must be paid for “volunteering” at company sponsored events or events where they are providing the same service they do for the company.

Ten Common Reasons for Wage and Hour Suits

- Number 10:** Failure to pay for training time.
- Number 9:** Failure to pay “volunteer” time.
- Number 8:** Failure to include bonuses and extra compensation in overtime pay.
- Number 7:** Failure to pay employees for short breaks.
- Number 6:** Docking exempt employees.

Ten Common Reasons for Wage and Hour Suits

- Number 5:** Failure to pay employees who work through lunch.
- Number 4:** Manually adjusting pay.
- Number 3:** Failure to pay employees working off the clock.
- Number 2:** Misclassification of employees as independent contractors .
- Number 1:** Misclassification of employees as exempt employees.

FAIR LABOR STANDARDS ACT

- FLSA suits are easy to turn into class action lawsuits.
- Plaintiffs get their attorneys fees if they win.
- These suits are very difficult to defend – the burden is on the employer.

Hiring the Wrong People - Don't End Up with Monsters!



What is the Job?

- The job posting/advertisement should be written specifically for each position.
- It should require the educational and work experience necessary to be successful.
- It should be placed in the right forum(s).

- Never post a position if you have already decided who will get the job (unless it is an internal candidate and you are federal contractor).
- Never interview someone you would not hire.



- **Background Checks**

- Under federal law, must have a separate form signed by the applicant before conducting such a check.



Waivers/Consent Forms – Signed by Job Applicant

- **It is also wise to require job applicants to sign a form that consents to the inquiry and waives any claims they may have against anyone providing job references. This may make prior employers more inclined to provide such information.**
- **This is also a good response when getting a reference inquiry – to ask for a consent and waiver from the former employee as to any information provided.**

Review Applications/Resumes

- Focus on the job.
- Make easy cuts by eliminating any applicant who does not meet the requirements.
- No exceptions.



Reading a Resume

- Immediately eliminate:
 - Any applicant who did not follow the instructions for applying for the position.
 - Any applicant with typographical errors or misspellings.
 - Any applicant who has held a number of jobs for only a short period of time.

Reading a Resume – Gaps in Employment

- | | |
|-----------------------|-----------------------------------|
| ▪ Too General: | ▪ More Specific: |
| ▪ ABC Corp 1999-2007 | ▪ ABC Corp Feb 1999 – July 2007 |
| ▪ CBS Corp 2008-2012 | ▪ CBS Corp. August 2007 - present |

Verifying a Resume

- | | |
|--|-----------------------------------|
| ▪ ABC Corp 1999-2007 | ▪ ABC Corp Feb 1999 – July 2007 |
| ▪ ABC Corp confirms dates of employment – 4/99 – 5/07 | ▪ CBS Corp. August 2007 - present |
| ▪ CBS Corp 2008-2012 | |
| ▪ CBS confirms 4/08 – 1/12 | |

Reading a Resume – Educational Information

- Too General
- Walden University
- 1998
- More Specific
- University of Kansas, Lawrence Kansas
- BA, Political Science 1998

Verifying a Resume

- Walden University
- 1998
- On-line University only and degrees awarded based largely on life experiences
- University of Kansas, Lawrence Kansas
- BA, Political Science 1998
- Information confirmed

Other Information to Consider

- Has the applicant seemed to take positions beneath his educational level?
- Has the applicant seemed to back slide in responsibility in positions?

When To Start Verifying Information

- Should at least verify dates of employment and positions held (and educational background) prior to interviews – but not of current position held by candidate.
- Do more detailed background checking once a candidate is selected.

Fact Verification Versus Reference

- **Many companies decline to give references, instead only providing certain factual information, usually:**
 - Dates of Employment
 - Positions Held
 - Salary Information (only with written consent)

Fact Verification Versus Reference

- A “reference” provides less concrete factual information such as job performance, opinions on personality traits and eligibility for rehire.
- While few employers provide “references”, much can be learned from fact checking.

Importance of Factual Verification

- **ADP Screening and Selection Services found that 44% of applicants lied about their work histories, 41% lied about their education, and 23% falsified credentials.**
- **The importance of getting the correct factual information cannot be over stated.**

Importance of Factual Verification

- **In the late 1980s, the Port Authority of New York took out want ads soliciting resumes from electricians with experience using Sontag conductors. Nearly a third of the respondents said they had experience using Sontags.**
- **There was no such thing as a Sontag conductor.**

Importance of Factual Verification

- **Notre Dame football coach George O’Leary lost his job in 2001 – days after taking the post – when it was revealed that there were inaccuracies on his resume, including a master’s degree from a non-existent institution.**

Importance of Factual Verification

- **Marilee Jones was dean of admissions at MIT for 28 years, until it was discovered that she had falsified educational information. She resigned.**

Importance of Factual Verification

- **Former RadioShack Corp. CEO David Edmondson resigned after the Fort Worth Star-Telegram reported he made up two degrees he never earned.**

Pre-Screen Interviewees

- **It is a good idea to have Human Resources pre-screen applicants in a short, telephonic or in person interview. Can eliminate applicants:**
 - Who obviously cannot do the job.
 - Whose salary requirements are too high.
 - For obvious issues such as disqualifying language use such as cursing.

Hiring Interview

- Focus on the job and the culture of the company.
- Too many managers want to hire the right “personality” or “fit” for the department. This is a mistake.
- Questions should be focused on what the job entails and experiences the candidate has that qualify them to do the job.

Hiring Interview

- The goal is to get the CANDIDATE talking.
- Prepare those who will be doing the interviewing.
- Each interviewer should have a list of questions that is the same for each candidate and should take notes during the interview. Keep these notes.

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Not Properly Managing Employee Leaves

Federal Agencies Are Implementing Obama's Mandate Of Change

- "EEOC is reinvigorated" (EEOC Chair)
- "DOL has come back to life" (DOL Secretary)
- "After all, it's the Dept of Labor, not the Dept of Management" (President Obama)
- Record increase in funding
- Record number of charges filed
- Record number of lawsuits, investigations, and settlements

Managing Leave Issues

Why is it so difficult?

- Implicates 3 VERY DIFFERENT Laws,
 - **FMLA**
 - **ADA**
 - **Workers' Compensation**
- All are designed to protect employee, not employer, rights.
- All require a possible spend.
- Gray areas dominate; liability looms large.

Different Laws, Different Purposes

- FMLA– entitles employees to take 12 weeks of leave for birth of a child, care of serious health condition of employee, child, spouse, or parent.
 - NOW, 26 weeks for certain military reasons.
- ADA – no discrimination against qualified individuals based on disability; reasonable accommodations.
- Workers' Compensation – no fault leave and/or payment for work-related injuries/illnesses.

ADA

What is a Disability?

- A physical or mental impairment that substantially limits one or more major life activities;
- Having a record of such an impairment;
- Being regarded as having such an impairment.

ADAAA

- Significantly changed ADA :
 - Overturned Sup Ct decisions that:
 - Required a medical condition to be a really substantial limitation on a really major life activity to be a disability.
 - Required individual to show limitation after considering medication, prosthetics, glasses, etc.

ADAAA

- Criticized the judicial approach to the ADA, which often focused on whether an individual was disabled
- Directed that focus instead should be on whether an accommodation is available and reasonable

ADA and Time Off

- Modifying policies can be a reasonable accommodation, as can be time off from work -- if they don't impose an undue hardship.
- The EEOC is aggressively suing companies that fail to consider leave as an accommodation.
 - \$20 million settlement by Verizon.
- Now that ADAAA lowers the bar for disability, more can request leave.
- Each request must be evaluated individually.
- **This is going to take more time and resources.**

FMLA

- New FMLA Regulations
 - Incorporated new entitlements for military-related leaves:
 - To care for injured service member
 - For non-medical, “exigent” reasons related to family member being on/called to active duty
 - Otherwise, mixed bag for employers
 - Some advantages (access to HCP, certification requirements)
 - Some disadvantages (requires notice to employee of deficiencies in HCP certification)

Family & Medical Leave Act - 101

Family & Medical Leave Act

- Covered employers must provide eligible employees with 12 workweeks of unpaid leave in a 12-month leave period
- Qualifying reasons:
 - Birth or adoption
 - Own serious health condition
 - Family member's serious health condition
- Leave comes with reinstatement rights

Family & Medical Leave Act - 101

- Covered employer
 - 50 or more employees
- Eligible Employees – Regular Employees
 - Employed for at least 12 months (including time through a temporary employment agency)
 - *and*
 - Worked 1,250 hours in previous 12 months
 - *and*
 - Works at a facility where 50 or more employees work within 75-miles

FMLA Qualifying Reason: Serious Health Condition

- Employee or employee's spouse, son daughter or parent:
- Illness, injury, impairment or physical or mental condition that results in an incapacity that involves:
 - Inpatient care in a hospital, hospice or residential medical care facility
 - Continuing treatment by a health care provider

FMLA: Serious Health Condition

- Continuing Treatment
 - Incapacity for 3 or more consecutive days that also involves
 - Treatment 2 or more times by a health care provider, or
 - Treatment by a health care provider 1 time followed by a regimen of continuing supervised treatment

FMLA: Serious Health Condition

- Continuing Treatment:
 - Any incapacity due to pregnancy or for prenatal care
 - Any incapacity due to a chronic, serious health condition
 - At least two visits per year for continuing treatment by a health care provider
 - May be episodic incapacity (rather than a continual period of incapacity) – asthma, diabetes, or epilepsy

FMLA: Serious Health Condition

- NOTE: Incapacity means an inability to work, attend school or perform other regular daily activities due to the condition or treatment.

FMLA Litigation

- Common claims
 - Denied Leave
 - Failure to reinstate employee to same or equivalent position following leave
 - Retaliation based on use/attempted use of protected leave
 - “Interference” Claims: allege treatment interfered – even if it did not prevent – the employee’s exercise of FMLA rights

Possible Approaches For Managing Intermittent Leave

- ***Insist On Advance, 30-Day Notice***
- ***Insist On Complete Initial Certification***
- ***Consider Second Opinion Where Reasonable Basis To Question Certification***

Possible Approaches For Managing Intermittent Leave

Adopt and Insist That Employees Follow Usual and Customary Notice Requirements

- Employer may require employees to comply with its usual and customary notice requirements for requesting foreseeable leave
 - and delay or deny leave if the employee fails to comply
 - Provided that the employee's failure is not justified by unusual circumstances.
 - And, for unforeseeable leave, cannot require in a medical emergency.

Possible Approaches For Managing Intermittent Leave

Adopt and Insist That Employees Report Periodically While On Leaves Of All Types

- Must design policy that is reasonable
- Probably not reasonable if specific return date provided
- Weekly reporting would be too much

Possible Approaches For Managing Intermittent Leave

Monitor Use Of Leave, Evaluate Whether It Has Changed For Possible Recertification

- Employer can require employees to recertify if the circumstances change significantly
 - Certification says 1-2 days a month, employee is taking 3-4
 - Incidents were sporadic, now clustered around end of rotations

Possible Approaches For Managing Intermittent Leave

Require Recertification Every 6 Months

- Employer can require employees to recertify every 6 months
 - Regardless of length specified in original certification

Possible Approaches For Managing Intermittent Leave

- *Consider Surveillance Where Reasonable Basis To Believe Abuse*
- *Terminate Employees Where Proof*
 - That Leave Is Being Used For Purpose Inconsistent With Certification
 - That Employee has lied about condition

HIGH DEGREE OF RISK!

An Employee Is Abusing Leave

- You suspect an employee is abusing FMLA/ADA leave by:
 - Forging doctors notes
 - Getting doctors opinions that are unsupported by the employee's medical condition
 - Lying about her medical condition

- Calculate FMLA leave using a "rolling" 12 month period.



- Require employees use all paid leave prior to taking unpaid FMLA.

- Require medical certifications to be returned within 15 days.

- Actually read the form returned by the employee. If it does not have sufficient information, require the doctor to provide the detail needed.
- Ask questions, in writing, such as why the condition only seems to present itself on Friday afternoons and Mondays.

- Verify the forms with the medical provider, preferably via fax. Make sure the medical provider actually signed the form and that the treatment was rendered on the date indicated on the form.

- Require employees to provide reasonable notice (30 days) for foreseeable FMLA leave.

- Require that employees schedule medical appointments around the business needs.



- **Have a policy prohibiting employees from working second jobs while on leave.**

- Obtain second opinions where appropriate and if needed, third opinions.

FAILING TO ACCOMMODATE DISABILITIES



AMERICANS WITH DISABILITIES ACT

- Protects qualified individuals with a disability from discrimination based on their disability
 - Is there a disability?
 - Is the person a qualified individual?
 - Is a reasonable accommodation required?

AMERICANS WITH DISABILITIES ACT

- What is a disability?
 - A condition that substantially limits a major life activity
 - A history of such a condition
 - Being perceived as having such a condition

AMERICANS WITH DISABILITIES ACT

■ What about alcoholism?



- Alcoholics are protected under the ADA, but:
 - may not use alcohol at work
 - must adhere to the same standards of performance and behavior required of other employees

AMERICANS WITH DISABILITIES ACT

- Carpal Tunnel??
- Mental Disabilities?
 - Stress
- Back Injuries?
- Epstein- Barr??



AMERICANS WITH DISABILITIES ACT

- What is a reasonable accommodation?
 - Undue hardship
 - Consider the size



AMERICANS WITH DISABILITIES ACT

- Interactive Process
 - Light Duty?
 - Modified Schedule?
 - Leave of Absence?



Big Bucks

- After a three-day trial, a jury returned an \$8 million verdict in a lawsuit alleging that EchoStar Communications Corp. (EchoStar) violated the Americans with Disabilities Act of 1990 (ADA) when it refused to provide a reasonable accommodation to Dale Alton, a qualified blind employee.

FAILING TO ACCOMMODATE RELIGIOUS REQUESTS



Where does this arise?

- Requests for Saturdays, Sundays or weekends off
- Requests for time off during the day
- Requests for relief from the dress code

What is a Religious Practice?

EEOC definition:

Practices or beliefs to include "moral or ethical beliefs as to what is right or wrong which are sincerely held with the strength of traditional religious views."

What is a Religious Practice?

An employer may not question the truth, validity or reasonableness of an individual's religious beliefs – as long as they are sincerely held by the individual.

The employer must attempt to provide an accommodation.

The Duty to Provide Reasonable Accommodation

The duty to provide reasonable accommodation arises if an employee notifies the employer that there is a conflict between his or her religious beliefs and a job requirement.

Reasonable Accommodation

Title VII requires:

That an employer offer a reasonable accommodation of the employee's religious beliefs unless it would present an undue hardship.

Reasonable Accommodation

The employer need not accept a particular alternative posed by the employee nor need it show that each alternative posed by the employee would result in undue hardship.

Reasonable Accommodation

An employer must:

Generally speaking, an employer must at least propose a reasonable accommodation

An employer must ensure that it has considered **all alternatives before concluding that no accommodation is possible**

It is safer to at least attempt accommodation before relying on the undue hardship defense

Reasonable Accommodation

Title VII does not require employers to adopt the specific accommodation requested by an employee.

The Supreme Court has said that if more than one possibility will solve the religious conflict, then the **employer can choose one.**

Reasonable Accommodation

Examples of Alternatives for Religious Accommodation

Voluntary swaps

The employer may be able to resolve a religious conflict involving work scheduling by arranging for a voluntary swap of schedules.

Reasonable Accommodation

Examples of Alternatives for Religious Accommodation

Flexible scheduling

Examples:

- flexible arrival and departure times
- flexible work breaks
- permitting employees to make up time lost due to observance of religious practices

Reasonable Accommodation

Examples of Alternatives for Religious Accommodation

Lateral transfer or change of assignment

If the employee cannot be accommodated within his or her present job, the employer may consider allowing the employee to transfer to another comparable job within the company.

Undue Hardship

- A showing of undue hardship **cannot be based on pure speculation.**

For example, if a Jewish employee requests leave in order to observe Yom Kippur, the employer may not deny leave on the grounds that if all its Jewish employees were to take leave for Yom Kippur, the employer would be understaffed on that day and would suffer undue hardship.

- **If that assumption actually comes to pass**, and other employees request the same accommodation, **this will be taken into account** in determining whether the employer would suffer undue hardship.

Undue Hardship

- Paying additional wages or hiring more employees at higher salaries has been found to constitute an undue hardship
- Undue hardship can also include operational and productivity burdens where the cost is more than *de minimus*

Undue Hardship

- Religious beliefs that require certain types of dress or grooming commonly raise accommodation issues
- Where the religious belief raises genuine safety concerns, the proposed accommodation may be found to be an undue hardship

Undue Hardship

- Mere inconvenience to the employer which can be avoided or mitigated will not constitute an undue hardship.
- Other employees being mad is not an undue hardship.
- If we let one person do it, we do not have to allow others to do it as well.

How HR and Management will respond to an employee's request for an accommodation based on a religious belief

Explore all options for accommodations.

Determine the costs of the possible accommodation.

Document all of our efforts in considering possible accommodations for the employee, along with the costs involved and our rationale for determining that a possible accommodation would impose an undue hardship.

Useful Phrases

A transfer employee or outside applicant informs you during the interview that she is Jewish and cannot rotate weekends during the Sabbath

"Thank you for telling me. If you are selected as the most qualified candidate for the position we will work with you to explore possible accommodations" – THEN CALL HR!

Useful Phrases

A current employee in a busy department says he must pray 5 times a day

"Thank you for telling me. I will contact HR and we will all work together to explore possible accommodations" – THEN CALL HR!

- **What about employees who proselytize during work?**



- **What about managers hosting Bible studies, etc. outside of work?**



