

## Risk Control



## Employment Practices Liability Risk Management Guide

Employment practices lawsuits can be extremely expensive and damaging to any business. Since 1997 the average employment practices claim has increased from \$35,000 to \$200,000. Understanding and complying with employment law helps managers do the right thing and can help minimize an organization's exposure to employment practices liability claims.

### Employment Practices Standards

Preventing employment discrimination from occurring in the workplace means understanding what is expected as an employer and providing employees with resources to enable them to work in a professional environment. Maintaining a professional work environment means having policies and procedures that managers and employees understand and follow. Managers and employees should receive documented training in these policies and procedures — then they can be held accountable if they deviate from any of the established practices.

You will want to focus on loss trends and areas of employment practices claims. Below is a summary of areas that account for a majority of claims.

Wrongful discharge – 39%  
Discrimination – 27%  
Harassment – 16%

To help you control these exposures, we have developed this guide to assist you in implementing the appropriate controls to prevent an employment practices claim and to provide your employees with a fair work environment. This is by no means a complete guide to employment practices. Employment practices have many nuances that require competent legal assistance and management training. One note: when we reference using an attorney's services for employment practices, it is strongly advised that you hire an attorney that specializes in employment law and one that practices within your state. Labor laws can vary depending on state laws and venues.

#### Quick Links

[Employment Laws – State and Federal](#)  
[Hiring](#)  
[Policies and Procedures](#)  
[Performance Management](#)

[Training](#)  
[Retention](#)  
[Drug Testing](#)  
[Documentation](#)

## Employment Practices Liability Risk Management Guide

### Employment Laws – State and Federal

Note: Each state may have independent legal requirements for various subjects raised in this document. Please consult with your legal counsel regarding these laws and potential ramifications.

## Federal Laws Affecting General Employers

### Anti-Discrimination Statutes

#### > Title VII (Civil Rights Act of 1964 and Civil Rights Act of 1991)

Prohibits discrimination based upon:

- Race/color.
- National origin.
- Race/color
- Gender (includes sexual harassment).
- Religion and age.
- Employers with 15+ employees.
- Jurisdiction: EEOC.

#### > Civil Rights Act of 1866

Prohibits discrimination based upon race/color.

- Applies to all employers.
- Jurisdiction: Courts.

#### > Equal Pay Act of 1963

- Requires equal pay for jobs requiring equal skill, etc. (not comparable worth).
- Applies to all employers (except federal government).
- Jurisdiction: EEOC.

#### > Age Discrimination in Employment Act (ADEA) of 1967

- Prohibits discrimination based upon age (over 40) or retaliation.
- Applies to employers with 20+ employees.
- Jurisdiction: EEOC.

#### > American with Disabilities Act (ADA) of 1990

- Protects disabled workers from discrimination.
- Title I applies to all employers with 25+ employees as of 7/27/92; 15+ employees as of 7/27/94.
- Jurisdiction: Dept. of Labor and Dept. of Justice.

#### > Pregnancy Discrimination Act of 1978

- Requires employers to treat pregnancy the same as any other temporary disability or illness.
- Applies to all employers with 15+ employees.
- Jurisdiction: EEOC.

### General Statutes

#### > National Labor Relations Act (NLRA)

- Protects rights of employees who join or do not join unions.
- Not applicable to Idaho public employers.
- Jurisdiction: NLRB.

#### > Fair Labor Standards Act (FLSA) of 1938

- Minimum wage and overtime pay laws.
- Applies to all employers.
- Jurisdiction: Department of Labor.

## Employment Practices Liability Risk Management Guide

### > Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985

- Requires employers sponsoring group health plans to offer employees and their families continuation coverage at group rates.
- Applies to group health plans for employers with 20+ employees.
- Jurisdiction: IRS and federal courts.

### > Employee Polygraph Protection Act of 1988

- Prohibits most employers from subjecting employees or potential employees to polygraph tests.
- Applies to all employers except security service companies or companies that make/distribute controlled substances (except law enforcement).
- Jurisdiction: Department of Labor.

### > Family and Medical Leave Act of 1993

- Requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to eligible employees for incapacity due to pregnancy, prenatal medical care or child birth; to care for the employee's child after birth, or placement for adoption or foster care; to care for the employee's spouse, son or daughter, or parent, who has a serious health condition; for a serious health condition that makes the employee unable to perform the employee's job, or for employees with a spouse, son, daughter, or parent on active duty or call to active duty status in the National Guard or Reserves in support of a contingency operation. .
- Requires employers to include a special leave entitlement that permits eligible employees to take up to 26 weeks of leave to care for a covered service member during a single 12-month period. A covered service member is a current member of the Armed Forces, including a member of the National Guard or Reserves, who has a serious injury or illness incurred in the line of duty on active duty that may render the service member medically unfit to perform his or her duties.
- Applies to employers with 50 or more full-time employees (within 75 miles for aggregation of different work sites) and all public employers.
- Restoration to "equivalent" position is required except for key employees.
- Jurisdiction: Department of Labor/Courts.

## Federal Laws Affecting Federal Contractors and Grant Recipients

### > Rehabilitation Act of 1973

- Prohibits discrimination based upon "handicap" status.
- Applies to federal contractors/grantees.
- Jurisdiction: OFCCP (Department of Labor).

### > Vietnam Era Veterans Readjustment Act of 1974

- Prohibits discrimination based upon veteran status. Requires that certain employment advantages be extended to veterans.
- Applies to federal contractors/grantees.
- Jurisdiction: OFCCP.

### > Drug-Free Workplace Act of 1988

- Requires employers to maintain a drug-free workplace and take affirmative steps toward that end (does not mandate drug testing).
- Applies to federal contractors and grantees of awards greater than \$25,000.
- Jurisdiction: Courts.

## Federal Laws Affecting Public Employers

### > Civil Rights Act of 1871 (42 USC 1983)

- Prohibits denial of federal constitutional or statutory right "under color of state law."
- Applies to persons, including cities and counties, acting in public capacity.
- Jurisdiction: State and federal courts.

## Employment Practices Liability Risk Management Guide

### State Laws Affecting Employers

- > **Wage Claim Statute**
  - Contains requirements for paying wages to terminated employees; also deals with employee records.
  - Applies to all employers.
  - Jurisdiction: Department of Labor/Courts.
- > **Minimum Wage Act**
  - Applies to all employers.
  - Jurisdiction: Department of Labor/Courts.
- > **Workers' Compensation Statute**
  - Provides for no-fault compensation of injured employees.
  - Applies to all employers – public employers must use State Fund.
  - Jurisdiction: Industrial Commission.
- > **Employment Security Law**
  - Provides for unemployment compensation.
  - Applies to all employers.
  - Jurisdiction: Department of Employment.
- > **Polygraph Act**
  - Prohibits polygraph testing as a condition of employment.
  - Applies to all employers except law enforcement agencies or government organizations.
  - Jurisdiction: State courts.
- > **Veteran's Hiring Preference**
  - Creates duty to hire veterans if similarly qualified as other applicants.
  - Applies to all governmental employers.
  - Jurisdiction: Courts.
- > **Whistle-Blower Statute**
  - Protects public employees who report waste or illegal conduct.
  - Applies to state and political subdivision.
  - State court action for specific remedy.

## Hiring

A well-defined written selection and hiring process is important. This is designed to minimize the potential for discrimination, or the appearance of discrimination, when filling vacant job positions in an organization. A clear and concise employment process will aid in the selection of the best candidate for the open position and should clearly communicate the basics of that process to internal and external candidates. Either a Human Resources manager or someone in your organization should be designated to coordinate the hiring and selection process and establish a Recruitment, Hiring and Employment Policy.

### Employee Recruitment Process

When hiring, it is important to remember that this is actually a recruiting process. You will want to keep in mind how to attract the best candidates and how to convince them that they should choose your organization as their employer. Creating a consistent employment/hiring process will help you with these components. The process should be comprised of several elements, including, but not limited to:

- > Job descriptions.
- > Posting and advertising the position.
- > The application.

## Employment Practices Liability Risk Management Guide

- > Screening the applicants.
- > The interview process.
- > The conditional job offer.
- > The background investigation.

### Job Descriptions

A written job description is an invaluable tool that serves as a necessary resource for candidate recruitment and selection. It also is used to determine training, safety and performance appraisals. The creation of a job description should not be taken lightly. This is a document that will be used in court to defend or rebuke your employment decisions if they are challenged. The job requirements are a critical, but sometimes overlooked, consideration in the employment recruitment process. Job descriptions must be clear, concise and include the following:

- > The “essential functions” of the job.
- > Knowledge, skills and abilities required for job success.
- > Educational requirements.
- > Experience requirements.
- > Necessary licenses, accreditations and certifications.
- > Physical performance or agility requirements.
- > Tools, devices and aids needed for the job.
- > Environment in which the job is performed.

### Posting and Advertising the Position

The required information needed when applying for an open position should be clearly communicated in the posting or advertisement. The position should be posted internally first, or at least concurrent with the advertisement. The posting/advertisement should include important aspects of the job description, including, but not limited to: experience needed, educational requirements and any physical requirements of the job. You may wonder if you have to advertise. There are many locations throughout the country where you do not have to advertise. You should confirm your requirements with your attorney before making any decisions about whether to advertise. Once you reach this decision, amend your hiring policy to reflect your available options.

### The Application

Job applications are often the first contact you have with potential candidates. This is your opportunity to collect the pertinent information you need to begin screening the applicants. The application should collect information relevant to the job, as well as the job history of the applicant. The application should not collect personal information beyond what is needed to make an employment decision. The application should be anti-discriminatory. Among other things, it also must be:

- > **Age Neutral** – A proper application should not have information that reveals the age of the applicant. If you have positions that are age sensitive (i.e., law enforcement often requires applicants to be at least 18 years old) you can request that the candidate acknowledge that they meet this requirement. Here is an example: “Are you at least 18 years old?”
- > **Race Neutral** – You cannot inquire about an applicant’s ethnicity.
- > **Religiously Silent** – You cannot delve into religious aspects. Should your job require that an employee work on specific holidays or days of the week, you must state this in the job description requirements. You may refer to this issue post-offer.

You also can delve into employment-specific information as follows:

- > **Criminal Record** – You can inquire if an applicant has been convicted of a felony, but you cannot ask if he or she has ever been arrested. For law enforcement, security, financial and jobs that require working with minors, you may look into an applicant’s criminal record post-offer.

## Employment Practices Liability Risk Management Guide

- > **Employment Eligibility** – You may ask applicants if they are eligible to work in the United States, but you cannot ask them if they are from a foreign country. You will ask for verification of employment eligibility post-offer.
- > **Screening Applications** – Screening requires that you contact outside sources as to the employability of the applicant at various stages of your hiring procedure. To do this, you will need written consent from the applicant.

Remember, you can only check areas that affect the applicant's ability to work for you. Once you have made a conditional offer, you can investigate the person's ability to meet your job-specific requirements beyond the basics. A word about consent:

- > **Consent** – This is a significant exposure area for employers during the hiring process. Obtaining the consent from an applicant to perform screening operations or testing is critical. You must receive consent for all of the potential areas of investigation in your application. If you are conducting **any** type of screening or testing of the applicant (which you should be doing) you must obtain the appropriate consent from the applicant to perform each area of investigation. This also must occur before starting the investigation procedures.

Last, but not least, your application needs a falsification statement and acknowledgment. Here is a sample:

*"I certify the information provided in this application is true and complete to the best of my knowledge. I understand withholding pertinent information or submitting false or misleading information on this application, my resume, during interviews or at any other time during the hiring process constitutes valid grounds for disqualification from further consideration for hire or immediate dismissal from employment and loss of all employee benefits and privileges. I further understand and agree that the employer shall not be liable in any respect if my employment is so denied or terminated."*

We would ask that you forward the sample application to your employment law attorney before implementing it.

## Screening the Applicants

Once you have received your applications, you need to screen them. Look back at your job descriptions and eliminate any applicant that does not meet the minimum job requirements. (These should be maintained on file and noted appropriately.) Conduct your review and select your top candidates. You should check the references of your top candidates and confirm that they have signed a consent form. You must now document a summary of the reference checks. It is suggested that you use "quotes" of what the reference stated about the applicant, especially anything derogatory. These also should be maintained in your job file.

## The Interview

Interviews are a critical component of the hiring process and are designed to aid you in your decision to hire. A well-designed interview can help you examine the applicants':

- > **Cognitive Skills**
  - Ability to learn.
  - Analytical thinking.
  - Conceptual thinking.
- > **Communication Skills**
  - Presentation skills.
  - Written communication skills.
- > **Interpersonal Skills**
  - Impact and influencing skills.
  - Interpersonal communication skills.
  - Interpersonal understanding.
  - Negotiation skills.
  - Persuasiveness or "sales" skills.
  - Teamwork and cooperation.

## Employment Practices Liability Risk Management Guide

### > Management and Leadership Skills

- Change leadership.
- Coaching ability.
- Delegation of authority and responsibility.
- Developing others.
- Empowerment of others.
- Follow-up skills.
- Group and team leadership.
- Holding people accountable.
- Visionary leadership.
- Strategic leadership.

### > Personal Traits

- Adaptability.
- Energy.
- Flexibility.
- Initiative.
- Innovation.
- Integrity.
- Quality orientation/Attention to detail.
- Resilience.
- Self-confidence.
- Tenacity.
- Tolerance for stress.

### > Technical Skills

- PC skills.
- Sales and marketing orientation.
- Technical/professional knowledge.

### > Miscellaneous

- Customer service orientation.
- Achievement motivation.
- Motivational fit.
- Organizational awareness.
- Planning.
- Self-development.
- Strategic business sense.
- Resource and utilization management.

This is not a comprehensive list. You should expand upon the questions on the document to fit your needs. We also have included a list of questions you should not ask. Once you have revised your working document, submit it to your legal advisor for approval. It is advised that you create and follow your own list of standard interview questions based on your specific needs. Obviously some questions are not relevant to all jobs, but the core questions should be the same.

One way to get the best out of an interview is to train the interviewer. There are numerous business schools, colleges and professional organizations that provide this training. It is strongly recommended that your personnel charged with conducting interviews be trained. Not only on the law, but on the tools that will help them evaluate the intangibles that lead to good hires. Many people given the role of interviewer are poorly trained in interviewing skills and techniques. "What should I train my interviewers on?" is a frequently asked question. The answer depends on what type of interview you are conducting. There are several different interviewing methods, including:

- > **Individual vs. Panel** – An individual interview consists of one person conducting an interview. A panel interview involves more than one person conducting the interview, each asking questions in turn.

## Employment Practices Liability Risk Management Guide

- > **Phone vs. In Person** – Phone interviews can be beneficial in some situations, such as interviewing an applicant who would be required to travel a long distance to do a face-to-face interview or to conduct preliminary interviews meant to select the top three or four applicants. Phone surveys also can be helpful when screening by determining and discussing non-negotiable issues with the applicant. However, this style does not allow the interviewer to observe eye contact and body language, which are important elements of the interview process.
- > **Structured/Formal vs. Unstructured/Informal** – In a structured or formal interview, the interviewer knows ahead of time what he or she will ask the applicant and typically sticks to the agenda. In an unstructured or informal interview, the interviewer does not have a pre-determined set of questions, but allows the applicants' responses to determine the direction of the interview. Unstructured interviews sometimes do not provide the interviewer with all of the needed information, which may make it difficult to compare applicants fairly or consistently.
- > **Aptitude vs. Psychological** – The aptitude method involves measuring the applicant's knowledge or proficiency of specific job skills. For instance, assessing how many words a minute an applicant can type might be important if typing is an essential function of the job. If the aptitude method is used, use the same test for all applicants. Psychological interviews are more behavior driven and interviewers attempt to "know" the applicants as well as possible. For example, they might ask an applicant about a hobby he or she is passionate about and then pay close attention to the way he or she looks and sounds when answering. They might compare this to the way the applicant looks or sounds when asked about work issues.

There are pros and cons to each interview method. Which works best? It depends on your organization's preferences. Below are some tips to make this process a little easier.

### Interviewing Tips

A range of skills and abilities are needed to conduct a successful interview. Here are some behavioral cues that could help you with your decision:

- > Establish and maintain rapport – Do this by greeting the person in a friendly manner, displaying an interest in the applicant and demonstrating good listening skills.
- > Observe nonverbal behavior – note behavior such as facial expressions, gestures, body positions and other inconsistencies between verbal and nonverbal cues.
- > Ask questions – Plan the questions, ask one question at a time and use open-ended questions.
- > Take notes – Document the qualifications of the applicant and never make any notes that could be construed as discriminatory.
- > Summarize – End the interview with a brief summary and tell the applicant about next steps.

### Inappropriate Questions

Questions you should not ask include:

- > Are you married?
- > Do you have children?
- > Are you a U.S. citizen?
- > Where were you born?
- > How old are you?
- > Do you go to church?
- > Do you have a disability?
- > Have you ever filed a workers compensation claim?

### The Conditional Job Offer

At this point in the process, you have completed your initial screening and your interviews. You even have conducted follow-up interviews. Now you make a "conditional" job offer upon the applicant passing your remaining employment criteria. What criteria? Well, you now ask for, and document, the candidate's permission to speak to his or her



## Employment Practices Liability Risk Management Guide

current employer to verify dates of employment and to receive a reference. We are not out of the woods yet on your exposure to a lawsuit. Your ability to hire your candidate and the specific job may have additional requirements. Here is a list of some common requirements:

- > Age – You can now get a copy of the proof of age, if the job requires it.
- > Eligibility for employment in the United States needs to be established.
- > A valid driver's license may be needed.
  
- > A driving record that meets your pre-established criteria.
- > Drug testing.
- > Medical fitness test that meets the job requirements.
- > Physical abilities test (typically, law enforcement, fire and medical services).
- > A financial background investigation may be needed.
- > Criminal history checks.

To do this, you need:

### Background Investigations

As you can see above, there is still a great deal of work to do. We have made an offer of employment, but we have not legally been able to delve into many critical areas. This is when background screening can provide important information to prevent a bad hiring decision. Please note that it is important to be aware of state and federal standards before using any screening resource. An average background screening typically includes a review of the educational and driving record of the applicant. We should expand upon this by confirming a candidate's employment history and checking additional references and qualifications. The presence of the signed release should be confirmed again. Types of reference/qualification checks include:

- > Educational institutions
- > Technical schools
- > Licensing bureaus
- > Personal references
  - Tip – Ask the candidates' reference for an additional reference*
- > Financial reports – Critical for bonding, or positions that handle money, or are in your financial or accounting department

**A note about minors** – Many seasonal employees are younger than 18 years old. A criminal or financial background check would be useless. So how do you check on the applicant? You can't really, but you can require that minors provide a written letter of reference from their school if they are attending one. This will raise your level of confidence in these employees. Another effective tool for younger seasonal drivers is to adopt a more stringent Motor Vehicle Record policy for this at-risk group if they are to be allowed to drive. It is advised that these candidates should have a driver's record that is completely unblemished. Any moving violation or accident should prevent them from attaining driving privileges while employed at your organization. This also is your opportunity to obtain their working papers if required in your jurisdiction.

Hiring the wrong person can be extremely costly and disruptive to your organization. It is important to check references carefully. Since Sept. 11, 2001, many employers have expanded background checks on current or new hires. Have you? We recommend that you do exhaustive searches. Confirm with your labor attorney to ensure that you are operating within the law. The Fair Credit Reporting Act (FCRA) defines how background investigations may be conducted. The Fair and Accurate Credit Transactions (FACTA) of 2003 provides further preemptions for disclosure of credit scores (subject to certain exceptions for existing California and Colorado statutes). Free credit reports also are preemptively regulated by FACTA (except for existing statutes in Colorado, Georgia, Maine, Massachusetts, New Jersey and Virginia).

## Employment Practices Liability Risk Management Guide

### Testing Potential Employees

Testing a candidate's fitness for employment is your final tool toward attempting to ensure a positive employee-employer relationship. One advised test is for all potential employees to be tested for drugs. This may not be possible due to your state law or union contracts. If permissible, you should test potential employees. Numerous studies have shown that this is a beneficial tool.

### Pre-Employment Drug Testing

Drug testing can be a complicated task. You most likely will need professional assistance in this arena. A professional can give you a cost-benefit analysis and advise you on testing and methodology. It is advised that you meet with a regional occupational medical provider. You should establish a contract beforehand and consult with them to determine what will be tested. They will provide you with options based on the region, cost and additional services you need. As part of this process, your labor attorney should be involved from the beginning.

### Medical Exams

Pre-employment testing helps ensure that you have a pool of employees physically capable of completing your designated tasks. This tool can, and should, reduce your workers compensation costs by a significant amount. Again, you need to consult with your regional occupational medical services provider. Your exam must meet pre-established relevant criteria. Is there a valid reason for requiring that your receptionist is capable of picking up a 40-pound container? Well, maybe. If your receptionist is responsible for mail and delivering packages up to 40 pounds, then it is appropriate. If not, then you are putting your business at risk. Again, it is advised that you ask a regional occupational medical provider to assist you. You will need to establish a testing contract beforehand and use their recommendations for testing. They will provide you with options based on the region, cost and additional services you may need. As part of this process, your labor attorney should be involved from the beginning.

### Polygraphs

In many states, polygraphs are not permitted. But in some states, law enforcement and other candidates are asked to submit to polygraphs. You will need to check with your labor attorney.

### Dealing with Disabilities

Once you make an offer of employment, you may inquire if the applicant can perform the job functions without any accommodations. If the applicant says he or she cannot, you may inquire as to the need for accommodation. Should you be presented with a request for an accommodation, you should fully explore the need with the candidate. Keep good notes on the discussion. Do not say you can or cannot provide an accommodation without first getting legal support. You should strive to conduct this discussion in a positive tone. You also should get a reply back to the candidate as soon as possible.

### Documentation

Since state document retention varies, we cannot give you a specific answer to the question of "How long do I keep this documentation?" We advise that you retain all of your employment documentation for at least 10 years, even if a shorter period is permitted by law. Having stated this advisement, you should still obtain advice on this topic from your legal advisor.

## Policies and Procedures

### Management Policies And Procedures

Supervisors and managers deal with a variety of employee issues and need to do so in a fair and uniform manner. Policies contained in the employee handbook must be supported and enforced by management. Failure to universally and consistently enforce your policies and procedures can, and will, increase your level of exposure to risk. In

## Employment Practices Liability Risk Management Guide

In addition, policies such as interviews, performance appraisal reviews, leave of absence requests, promotions, lateral job changes, incident reports, oral confirmation letters, disciplinary notices, final written reprimands, exit interviews, family medical leave act, discipline and time off issues, will support and guide management decisions.

Management should receive copies of, and be trained in, policies and procedures for your organization. The copies of the policies and procedures should be used as an on the job reference for day-to-day decisions. It is critical that the policies and procedures be applied consistently to avoid employee misunderstandings and legal claims. Legal counsel should review and approve any new or updated policies.

### Employee Handbook

Employee handbooks clarify the basic expectations that employers have of employees and provide general information relating to benefits. They are useful communication tools when applied consistently and fairly. Handbooks are detrimental only when they are outdated and not used consistently. A representative of a complainant will often look to your documented and undocumented policies and practices with an eye toward their application involving similar circumstances. In those events, they may form and solidify a basis for employment-related claims. Each employee should receive and sign for the employee handbook, as well as any additional updates.

The legal issues relating to handbooks are essentially the same as those relating to policies and procedures in general. Handbooks in their entirety have been held by courts to constitute contracts with employees. This is why they are so important. Legal counsel should be consulted when handbooks are developed, implemented and revised to ensure that they result in a net benefit, rather than a detriment, to the employer.

### Discrimination

Employment discrimination is a significant legal risk for employers. If the proper controls are lacking, the risk is magnified. Blanket perceptions have an adverse impact on employment discrimination. To obtain timely resources dealing with this issue, visit [www.eeoc.gov](http://www.eeoc.gov). Employment discrimination can be prevented by applying the appropriate procedures and training managers and supervisors in methods to prevent discrimination in the workplace. In addition to hiring, promotion and performance appraisal policies, the Society of Human Resource Management Diversity's Committee identified several other general areas where discrimination may occur. These practices should be closely monitored to identify any exposures that may lead to noncompliance with Equal Employment Opportunity standards. The following table is a chart of vulnerabilities:

### Discrimination Vulnerabilities

<p><b>Age</b></p> <p>Hiring, promotion practices Early retirement programs Layoff decisions</p>	<p><b>Race</b></p> <p>Hiring, promotion practices Racial slurs and harassment Pre-employment testing Racial stereotyping</p>
<p><b>Disability</b></p> <p>Pre-employment testing ADA accommodation procedures AIDS discrimination</p>	<p><b>Religion</b></p> <p>Scheduling conflicts Dress codes</p>
<p><b>National origin</b></p> <p>Ethnic slurs and harassment Requirements for English proficiency Policies related to illegal aliens under IRCA</p>	<p><b>Gender</b></p> <p>Hiring, promotion practices Benefit coverage and sick leave Policies for pregnancy Sexual stereotyping Sexual slurs and harassment</p>

## Employment Practices Liability Risk Management Guide

### Workplace and Sexual Harassment

Harassment in the workplace, whether it is discriminatory harassment or sexual harassment, is another area of significant risk for employers. Often these cases carry with them a diminished public perception of an organization. The damage wrought is not only monetary; it is clearly demonstrated in a denigration of your organization's image. This exposure to risk can be mitigated with appropriate controls. These controls include, but are not limited to: documentation, written and enforced policies, training and good management practices. What is harassment? According to federal and state laws, illegal harassment is inappropriate behavior at individuals in "protected classes." Federal protected classes include age, race, color, religion, sex, national origin, disability and veteran status. Federal protected classes apply to all states; however, each state may have even broader protected classes.

Harassment includes verbal or physical conduct that degrades, belittles or shows hostility to an individual and:

- > Has the purpose of creating an intimidating, hostile or offensive working environment; or
- > Has the purpose or effect of unreasonably interfering with a person's work performance, or
- > Otherwise adversely affects an individual's employment opportunities. Harassing conduct includes, but is not limited to, verbal abuse, intimidation, bullying, slurs or negative stereotyping, demeaning jokes, written or graphic material that degrades or shows hostility toward an individual or a group.

The Equal Employment Opportunity Commission (EEOC) enforces federal laws prohibiting work-related harassment. The EEOC has defined sexual harassment as unwelcome advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when:

1. Submission to such conduct may be implicitly or explicitly a term or condition of employment; or
2. Submission to, or rejection of, sexual advances is used as a basis for employment decisions; or
3. Such conduct interferes with an employee's work performance or creates an intimidating, hostile or offensive work environment.

To assess your program, you need to compare your controls to the most significant case for establishing an affirmative defense against workplace harassment for public entities, *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2278 (1998). This case established the precedent for the defenses for public agencies. If your program can favorably compare to the following, you will have a good case for the creation of an affirmative defense. Your business must have:

- > A written policy prohibiting sexual harassment that has been distributed and additionally communicated to your staff through training on the policy. (Ideally the receipt of this policy by your employees also should be documented.) In addition, detailed training should be given to your supervisors in recognizing and discouraging harassment in the workplace.
- > Established guidelines on how to report sexual harassment. The guidelines should present employees with several avenues to report complaints.
- > The contact person(s) to file or report complaints must be CLEARLY DEFINED IN THE POLICY.
- > All complaints must be investigated – and investigated adequately. You should not "brush it under the carpet." These investigations must be handled professionally and timely.
- > If substantiated, appropriate discipline needs to be applied.

### Performance Management

Performance management provides an opportunity for the manager and employee to discuss work goals and objectives. A significant part of performance management is the development of performance standards. The performance standards then need to be communicated to employees so they understand what performance is expected of them. Performance standards can be communicated to employees in a variety of ways, including:

- > Orientations.
- > Employee handbooks.
- > Department meetings.
- > Newsletters.
- > One-to-one meetings.

## Employment Practices Liability Risk Management Guide

### Performance Appraisals

These appraisals are designed to review the performance standards and are intended to provide employees with feedback and assistance on meeting your established standards. The other benefits of establishing performance appraisals are:

- > To give managers an opportunity to provide employees with feedback and counseling.
- > Performance appraisals assist in creating an environment where managers are treating employees fairly in allocating rewards and opportunities.
- > Done properly, they should assist employees in achieving their career aspirations.
- > If your appraisals are forward looking, they should aid in the identification of developmental opportunities designed to assist the employee in meeting and exceeding performance standards.

One of the largest complaints about performance reviews is that they are not always completed. And when they are, they are not objective or are redundant. Most employees want to know their performance rating. If you are conducting performance reviews for the previously mentioned reasons, poor performance, discipline or even termination, it should not come as a surprise to an employee. From a legal perspective, performance appraisals need to be documented. The documentation should provide the support for promotions, discipline or termination. Good documentation can make the difference between winning and losing a lawsuit.

### Employee Discipline

Disciplining an employee can be a legal exposure if not done properly. An effective disciplinary program can reduce your loss exposure and increase the level of safety in the employee's environment. Focus on the job performance and safety at all times. If problems are encountered, you must provide the employee with timely communication on performance and safety problems. When considering discipline, it is important to clearly document the steps your organization has taken prior to issuing any disciplinary actions. A meeting should take place with Human Resources and/or legal counsel before providing written communication relating to discipline. The organization's policy relating to discipline should be carefully followed and, as much as possible, leave the employee with an impression of fair treatment.

When reasonable efforts fail to correct the performance problems, then discipline or termination may be appropriate. If termination is being considered, a termination meeting should be held to review pre-termination documentation and efforts offered by the organization. Develop a termination letter using legal advice before the termination letter is distributed. Discipline should be progressive in the majority of instances; however, immediate termination or suspension may be appropriate if illegal, dangerous or potential violence is an issue. For progressive discipline, the standard steps are:

1. Verbal counseling.
2. Documented verbal – Usually if three attempts have been made, verbal counseling needs to be documented.
3. Written counseling.
4. Suspension, docking of pay, demotion or other tangible loss.
5. Termination.

You will note that there is a distinct lack of the word "warning." In general, words with negative connotations are not embraced by arbitrators, judges or juries in many parts of the country. You should consult with a labor specialist in your region for appropriate verbiage.

### Tips for lowering exposure to wrongful termination claims

1. Discuss ideas with your employment law attorney beforehand in order to build the best policy guidelines in this difficult area.
2. Employees should be given the opportunity to avail themselves of personnel policies created for their benefit.
3. Establish clear, written behavior standards. Every employee must know infractions can lead to discipline and/or discharge.

## Employment Practices Liability Risk Management Guide

4. Use a progressive disciplinary system, including counseling, the right to be heard, and possible suspension if the infraction is not egregious.
5. Before taking action, review the employee's personnel file. Play the devil's advocate and ask yourself if it would appear as "fair dealing" to a regulatory official, jury or labor arbitrator, or as compared to your employee practices.
6. Investigate the facts of the current incident completely before acting. Give the employee an opportunity to explain his or her side of the issue.
7. Be consistent and treat like cases alike. Discuss documentation methods with your supervisor.
8. If firing seems to be the only reasonable alternative and you sense trouble, involve your employment attorney at the earliest opportunity.
9. Conduct discharge interviews and exit procedures in a sensitive, humane and considerate manner.
10. Restrict reasons for discharge to those with a clear business need to know.
11. Adopt a policy of confirming information when you are asked for references.
12. Conduct exit interviews upon all resignations or discharges.
13. Consider pursuing all unjustified unemployment insurance claims.
14. Obtain the employee's signature on an "at will" agreement on occasion of significant transactions in the employee's history, where employment status is being redefined.

### Employee Dispute Resolution

The employee being disciplined has certain "property" rights to his or her continued employment. To adequately ensure the reception of these rights, your business must establish and maintain an appeal for the discipline imposed. A system for allowing employees to pursue these rights needs to be established and published in the employee manual. Used properly, this may protect you and your employee from the unscrupulous behavior of a manager. Many harassment cases start as disciplinary actions taken by a spurned aggressor. To protect yourself, you must allow this avenue to exist.

### Retention and Failure to Discipline Unfit Employees

Retention of unfit employees or failure to discipline employees may be more damaging than the risk often associated with termination/discipline. No one likes to discipline or terminate employees. This often leads to keeping employees you shouldn't or keeping them longer than you should. For the protection of your organization and the citizens you serve, it is your responsibility to deal with problem employees, quickly and justly.

### Co-Worker Communication

Employees in the work environment may request information about their co-worker who is no longer working or has been "relocated." Often it is quite obvious that an employee failed the random drug test when "he or she was here before the test and now are gone." This is the same whether it is discipline or termination. Information shared or disclosed must be on a "need to know" basis only. Generally, the less said about the circumstances the better. But be concise, honest and do not personalize any comments. Maintain professional comments to prevent future employment claims.

### Follow-Up Documentation

An important rule of thumb is to document everything leading up to an employee's termination or discipline. Performance evaluations documenting performance issues should be on file, as well as any documentation of specific violations. Final termination interviews, as well as exit interviews, should be documented and kept in the employee's termination file. Careful documentation of the entire termination process will be a key item in the defense of any potential lawsuits.

Certain follow-up communications may be required by law, including COBRA documentation and documentation relating to other employee benefits. The organization should have a clearly defined policy regarding what information may be released to those requesting information regarding terminated employees.

## Training

### Employee Training

New employees should be provided with initial training on the organization's goals, safety programs and policies. The objective of an orientation program is to provide an overview of the job procedures so the employee gains a feeling of belonging, and to educate them on the principles of safety your organization espouses. A good training program will provide employees with the tools for success and the tools for operating safely. The level of orientation training has been shown to have a direct positive effect on employee retention and turnover in the first year. Once established, a continual and adequate training program should be provided in order to ensure that employees are able to maintain and develop the necessary skills required for their positions. As with all employee issues, all training should be documented.

### Management and Supervisory Training

Often employee training is not aimed at managers and supervisors. Like any other employee, management needs to be provided with the tools needed for success. A training program for managers and supervisors should be developed to provide them with tools and resources to allow them to deal effectively with each other and the employees in their charge. Managers should not only be aware of their legal requirements when dealing with employees, they also need to know how to effectively manage their employees to create a safe and healthy work environment.

Training programs for managers and supervisors should initially focus on the basics like recruiting, interviewing, selection, training, performance appraisals, discipline, coaching, communicating, motivating and documentation. Once basic management training is completed, leadership skills should be developed and nurtured. Since changes and culture development comes from top management and is relayed through middle management, it is important that all training has the support of top management.

## Retention

### Employee Retention

It is important to address the issue of employee retention due to the high cost of turnover. Employee turnover can be costly, adding hundreds of thousands of dollars to an organization's overall expenses. Direct dollar costs include cost of recruiting, cost of training and productivity losses. In addition to direct dollar losses, there is the loss of knowledge to an organization, disruption of service and the relationships that are developed between employees and outside customers. Increased turnover can become a vicious cycle, creating even more turnover due to the negative effects of employee terminations. To increase retention, refer to the following:

#### **Create a respectful work environment**

An atmosphere of respect should be fostered in the workplace, one where harassment is not tolerated and employees need not be fearful of reprisal for voicing their concerns on any particular issue. First line of management is the key to successfully maintaining an atmosphere conducive to retaining good employees. More often than not, the reason a person leaves a position is because of a poor relationship with his or her immediate supervisor. Supervisor training in areas of harassment prevention and good management practices is helpful in maintaining a respectful work environment.

#### **Recognize and reward performance**

Good job performance should be rewarded and this can be accomplished in many ways, ranging from simple recognition of a job well done by an employee's supervisor to formal pay incentive programs and other financially based rewards. Safety incentive programs also play an important part in retaining good employees. If reward

## Employment Practices Liability Risk Management Guide

systems are in place for good safety practices, employees will know that management takes safety issues seriously. Reward and recognition for years of service is another area that will encourage good employees to stay.

### Drug Testing

Post-employment drug testing can be a complicated task. Dependent upon your state and your employer status (a governmental versus a non-governmental entity) and drug testing protocols will be different. Drug testing as governmental entity involves several constitutional issues not confronted federally by private sector employers. Below are the two advised protocols that should be used:

#### Governmental Entity Process:

There are four types of drug testing scenarios a public entity needs to be aware of:

- > Pre-employment (discussed earlier).
- > For cause.
- > Post accident.
- > Random.

#### For Cause

For cause testing requires drug and alcohol awareness training. There are many agencies that can provide this training. You cannot just have someone be tested – there has to be a cause. This only can be determined with the training. Many Commercial Driver's License (CDL) programs have adopted these practices, and outside of driving issues, it is rarely used.

#### Post Accident

In order to conduct post-accident training, the procedure must exist in a policy adopted by your city/county. There can be no exceptions to this policy. This is not permissible in many states, so check with your attorney.

#### Random Drug Testing

In order to conduct random drug testing, the employees being tested must be in safety or security sensitive positions. Here is where job descriptions are critical.

#### Non-Governmental Entity

There are four types of drug testing scenarios you need to be aware of:

- > Pre-employment (discussed earlier).
- > For cause.
- > Post accident.
- > Random.

#### For Cause

For cause testing requires drug and alcohol awareness training. There are many agencies that can provide this training. You cannot just have someone tested. There has to be a cause. This only can be determined with the training. Many CDL programs have adopted these practices and, outside of driving issues, it is rarely used.

#### Post Accident

In order to conduct post-accident training, the procedure must exist in a policy adopted by your city/county. There can be no exceptions to this policy. In many states this is not permissible, so check with your attorney.



Employment Practices Liability Risk Management Guide

Random Drug Testing

Random drug testing for non-governmental entities varies greatly from state to state. We recommend that the only way to be sure that you can test an individual or employee class is to get a qualified legal opinion from a labor attorney practicing in your state. For example, in some states you can randomly drug test for nicotine, in others you can only test employees for illicit drugs in safety sensitive employee classes. This is a powerful tool, so you need to ensure that you are using it properly.

Conclusion

Done properly drug testing can be beneficial. Done inappropriately, it can cost you. You may need professional assistance in this arena. It is advised that you meet with a regional occupational medical provider. You should establish a contract beforehand and determine the testing factors. They will provide you with options based on the region, cost and additional service you need. As part of this process, your labor attorney should be involved from the beginning.

Documentation

You should retain all of your employment documentation indefinitely. As a governmental entity, document retention is dependent on each state’s laws and minimum requirements. That being said, we never strive to meet a minimum. Retain your records based on your entity’s legal advice.

For more information, visit our Web site at [travelers.com/riskcontrol](http://travelers.com/riskcontrol), contact your Risk Control consultant or email [Ask-Risk-Control@travelers.com](mailto:Ask-Risk-Control@travelers.com).



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