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I. Hiring Issues – Avoiding Legal Landmines Before the Start of Employment

The hiring process can be very frustrating, given the restrictions employment laws have placed on pre-employment inquiries. These restrictions have made it more difficult to obtain information necessary to evaluate the qualifications of prospective employees. Federal and state employment discrimination laws have a profound impact upon the hiring process. Management faces the significant challenge of making informed hiring decisions while avoiding liability for employment discrimination. As restrictive as these laws may be, they do not require employers to abandon their common sense. Employers can make many lawful inquiries during the hiring process that will enable them to elicit vital information to make informed decisions.

The primary methods used to obtain the most qualified employees include advertising, employment applications, pre-employment interviews, and background checks. It is critically important that employers comply with applicable laws during each of these steps in the hiring process. All requests for information during the hiring process must be directed toward a specific purpose, and hiring decisions must be made based on answers provided. Inquiries that do not lead to information enabling an employer to choose qualified personnel should be avoided. In addition, inquiries and hiring practices that disproportionately screen out members of a protected class leave employers susceptible to claims under one or more anti-discrimination laws. Moreover, the Americans with Disabilities Act greatly restrains an employer's ability to make certain pre-employment inquiries. It is within this legal landscape that an employer must endeavor to hire the most qualified employees.

A. Avoiding Liability Through the Use of Proper Hiring Procedures

1. Advertisements

Responsibility for job advertising should be centralized with one individual or group of staff to ensure consistency and lawful wording. Advertisements must be carefully worded to avoid creating even a suggestion of a contractual or other commitment on behalf of the employer. Employers should include an equal employment opportunity statement in their advertisements. Affirmative action employers must ensure that the phrase "EEO/AA Employer" or similar identification is included with the advertisement. Affirmative action employers also are required to develop action-oriented recruitment programs designed to inform women and minorities of employment opportunities. All employers should be mindful of the media in which they seek job applicants and should endeavor to obtain the most qualified applicants regardless of race, sex, age, religion, national origin, handicap or disability.

2. Job Applications

Application forms are often an employer's primary source of information about an applicant and are excellent tools for avoiding lawsuits. The application form can be used to inform applicants of various employer rules or policies and require applicants to acknowledge and agree to numerous points. Important items that should appear on an employment application include:

- a statement regarding at-will employment status;
- an authorization to conduct background checks;
- a release of the employer and others contacted by the employer during background and reference checks;
- an acknowledgment that pre-employment drug and/or alcohol testing and medical examinations will be given (if applicable); and

- a guarantee of the accuracy and completeness of the information provided by the applicant.

All such statements should be in plain English and should be placed over the applicant's signature/dateline for appropriate acknowledgment and execution by the applicant.

Both the Equal Employment Opportunity Commission and the Pennsylvania Human Relations Commission have developed guidelines with respect to questions that an employer may legally ask on a job application. The following are the most common illegal or non-job related questions asked on pre-employment applications and at pre-employment interviews:

- marital status and number of dependents (including Mrs./Miss/Ms. and/or maiden name)
- child care arrangements
- height and weight
- color of eyes/hair
- date of birth
- dates of school attendance
- health history or any other disability related inquiry

Employers also must take care when inquiring about the following matters:

United States Citizenship – Employers may not ask applicants to state whether they are a citizen of the United States or to provide their national origin. Federal law, however, requires employers to verify the legal status and right to work of all new hires. Employers may ask whether an applicant has the legal right to work in the United States. If an employer asks any applicants this question, all applicants should be asked. Employers must explain that verification of the right to work must be submitted after the decision to hire has been made. In order to satisfy the verification requirements, employers must ask all new hires for documents establishing both identity and work authorization.

English Language Skill – While some English skill is probably required for most jobs, fluency or absence of an accent is most likely not relevant. If English language skill is not a requirement of the work to be performed, using it as a criterion may have an effect of unfairly eliminating certain minority groups. Employers must be careful about the consideration which they give to an applicant's English language skill.

Availability for Work on Weekends or Holidays – If the employer needs a workforce on weekends or holidays and desires to ask questions relating to the availability for such work during the application process, the employer should indicate that a reasonable effort is made to accommodate the religious needs of employees. The employer should also be careful not to ask the question in such a way as to elicit a response which indicates the applicant's religion. To the extent that employers do not make accommodations of the employees' work schedules due to religion, they must be able to demonstrate that they are unable to reasonably accommodate a prospective employee's religious observance or practice without actual undue hardship on the conduct of the business. "Undue hardship" is more than a minor financial cost or minor disruption of the employer's work policies or manner of doing business.

Educational Requirements – An applicant's educational background is frequently relied upon by employers when making hiring decisions. This is especially so for management and other high-level positions. Where a certain level of education is significantly related to successful job performance, an employer is justified in considering an applicant's educational background. However, an employer's requirement of a specific level of education may be discriminatory where that requirement serves to disqualify certain minorities and there is no evidence that the requirement is job related. Moreover, employers must not discount education obtained at predominantly minority institutions as inferior to that of other schools. Where

educational achievements are significantly related to successful job performance, employers may request copies of an applicant's transcripts.

Military Service – Questions relevant to experience or training received while in the military, or to determine eligibility for any veteran's preference required by law, are acceptable. Moreover, employers may consider the type of discharge an applicant received from the military. A dishonorable discharge should not, however, be an absolute bar to employment, and if such questions are asked, the applicant should be told that the dishonorable discharge or general discharge is not an absolute bar to employment and that other factors will affect the final decision of whether or not to hire the individual.

Conviction Records – Employers in Pennsylvania may give fair consideration to the relationship between a conviction and the applicant's fitness for a particular job. An employer may not consider an applicant's conviction of a summary offense or any arrest that did not result in a conviction. 18 Pa. C.S. § 9125. Conviction records should be cause for rejection only where the number, nature, and recentness would cause the applicant to be unsuitable for the position.

Employers are encouraged to conduct full background and reference checks when hiring employees. The job application should also ask whether the applicant has ever been convicted of a felony or misdemeanor. The application should make clear that a criminal record does not constitute an automatic bar to employment and is considered only as it relates to the job in question.

3. The Interview Process

An employer should not ask any questions at an interview that cannot be asked on the job application. Employers must be sensitive as to their own conduct during the interview process.

All representatives involved in the interview process should be aware of their obligations under anti-discrimination laws. Any statements indicative of bias may be strong evidence in a subsequent discrimination lawsuit. Comments about an individual's appearance or any jokes or innuendoes of a sexual, racial, or religious nature are entirely improper.

Interviews should be conducted in a consistent and fairly standard manner. It is also imperative that employers keep a record of each interview as it takes place. Each interviewer should be given a standard form to complete during, or immediately after, the interview. Even the most unbiased interviewing techniques can fail if an employer does not document the process.

Open-ended background questions with proper follow-up are very useful. Here are some good examples of effective interview questions:

- Tell me a little about yourself.
- Who was your favorite professor in college/boss? Why?
- What are some of your work successes that you are most proud of?
- For supervisor candidates – Tell me your favorite "success story" involving someone you supervised or mentored.
- What do you like to do in your free time?
- For applicants who live outside of the area – What contact have you had with the area? Have you spent any time here? Why are you interested in working and living in this area?

B. <u>Pre-employment Inquiries Under the American With Disabilities Act</u>

An employer may not conduct a medical examination or make any disability-related inquiries of job applicants until after a conditional offer of employment has been made. 42 U.S.C. §12112(d)(ii)(a). Before making a conditional offer, an employer may inquire as to the ability of the applicants to perform the essential functions of the job with or without a reasonable

accommodation. 42 U.S.C. §12112(d)(ii)(b). If an employer asks whether an applicant can perform an essential function of the job, with or without a reasonable accommodation, the question must be phrased as a "yes or no" question. An employer cannot ask whether a reasonable accommodation is needed in order to perform the essential functions of the job unless the applicant has a known disability.

Set forth below are specific prohibited pre-offer disability-related inquiries according to the EEOC's guidance:

- How many days were you sick last year?
- What prescription drugs are you currently taking?
- Have you ever collected workers' compensation benefits?
- Have you every attended drug rehabilitation or AA?

Employers must also refrain from pre-offer inquiries regarding psychological disabilities and may not ask questions concerning an applicant's history of treatment of mental illness, hospitalization, or the existence of mental or emotional illness or psychiatric disability. Employers also cannot conduct any pre-offer psychological evaluations of applicants. Although an employer may not make disability-related inquiries prior to giving a conditional offer of employment, an employer may ask an applicant about current use of illegal drugs, since current illegal drug use is not considered a disability under the Act.

Once a conditional offer of employment has been made, an employer may conduct medical examinations and inquiries. 42 U.S.C. §12112(d)(3). If the employer does so, all conditional employees in the same job class must be given the same medical examination and/or inquiry. 42 U.S.C. §12112(d)(3)(A). If the initial inquiry discloses that the individual may not be able to perform the essential functions of the job with or without a reasonable

accommodation, the employer can require him/her to submit to further examination by a physician.

If an employer uses the results of these inquiries or examinations to screen out an individual because of disability, the employer must prove that the exclusionary criteria are job-related and consistent with business necessity and cannot be met with reasonable accommodation.

Additionally, the ADA requires the employer to keep all medical information concerning an employee confidential. An employer should keep medical information in a separate, locked filing cabinet apart from the location of the personnel files. Access to these files should be restricted; and they should never be used in making personnel decisions unless a reasonable accommodation is needed. Additional information about recordkeeping requirements is included below in Section V.

C. References and Background Checks

One of the most important ways for an employer to ensure that it hires quality people is to conduct background checks and to contact an applicant's former employers. Applicants should be asked to provide a list of references and a complete employment history, including the name of their supervisors and/or a contact with each employer. An employer must keep any information obtained during the background request in strict confidence. Most employers know, however, that it has been difficult to obtain meaningful information from former employers because of the risk associated with defamation lawsuits.

Pennsylvania law now provides a statutory immunity from liability for disclosures of information regarding former or current employees. Where an employer provides job-related information in response to a request by a prospective employer or a current or former employee,

there is a presumption that the employer's response is made in good faith. With this presumption, such communications will be deemed immune from any civil liability, unless a complaining employee or former employee can prove a lack of good faith.

This new law should create more communication between former and prospective employers; however, it does have limits. The immunity is limited to responsive information about the current or former employee's job performance. There is no protection for disclosures of information pertaining to an employee's off-duty conduct, family life, marital or familial status, or character traits unrelated to job performance.

Additionally, employers often conduct a background check into an applicant's criminal history. This is advisable where the position is one of trust or public safety. In Pennsylvania, an employer's background check of an applicant's criminal history should be limited to avoid information regarding the arrest record of the applicant or any charge not resulting in conviction. In addition, an employer may only consider information concerning a prospective employee's conviction of a felony or misdemeanor which relates to the applicant's suitability for employment in the position for which he has applied. Summary offenses and convictions not related to the ability to perform the job must not be considered.

If an employer considers an applicant's criminal history in the decision not to hire the applicant, it must notify the applicant in writing that it has done so. 18 Pa. C.S. § 1925(c). A wrongful discharge cause of action may exist if an employer refuses to hire an applicant based upon an arrest, a summary offense conviction, or a conviction not related to the applicant's suitability for the position.

Additionally, when an employer uses a third party to obtain a consumer report (e.g., criminal history information or credit information), it must comply with the Fair Credit

Reporting Act ("FCRA"). Specifically, the employer must provide a written disclosure to the applicant and receive a written authorization prior to obtaining such a report. Further, if the employer intends to take any adverse action based, in whole or in part, upon information in a consumer report, it must give the individual a pre-adverse action disclosure that includes a copy of the consumer report and a copy of a summary of rights under the FCRA. Pre-adverse action disclosures must be provided whenever consumer report information is a factor in any adverse action decision. After any adverse action is taken, the District must also provide the individual with an adverse action notice.

II. Effective Workplace Policies – How To Make Your Life Easier

Good and complete employment policies and procedures provide the framework for consistency, ensure legal compliance, set appropriate employee expectations and standards, and serve as a good resource for supervisors and managers. Suffice to say, they are of great importance and require due care in drafting and diligence in application. Our experience shows that having strong policies and procedures that are published and followed can eliminate a fair share of unnecessary employment crises.

It is essential that Districts develop and consistently apply appropriate workplace policies and procedures. Districts should issue an employee handbook or manual informing employees of the applicable policies. It is generally advisable to obtain a signed acknowledgement from each employee, indicating that the handbook has been read and understood. It also is important that the handbook contain an appropriate "at-will" disclaimer, which indicates that the handbook is intended as information concerning the employer's policies and procedures and that nothing contained in the handbook creates an enforceable contract of employment for any specified period of time. Where appropriate, the handbook should state that all employees are employees

at-will and may be terminated at any time and for any reason. Of course, different rules will apply for those Districts with a union-represented workforce.

Most policies and procedures relating to employment matters will differ depending upon the culture of the specific employer. It is important that each District recognize the unique nature of its workforce, its culture, and the history of its relationship with its employees when developing or modifying employment policies. Quite simply, one size does not fit all!

There are, of course, certain provisions that must be included, and others that must be avoided. These materials will cover a few of the most significant policies which should typically be included in an employee handbook or manual, those policies that must be avoided, and a few which should be considered.

A. At-Will Employment Acknowledgment

The first thing that an employee handbook or manual should contain is actually not a policy, but rather a disclaimer to protect the employer against possible mischief caused by the handbook itself. As a general rule, all employment in Pennsylvania is presumed to be "at-will," meaning that either party can terminate the relationship at any time for any reason or even for no reason. A handbook certainly should be drafted to ensure that an employee's "at-will" status is not altered. Thankfully, Pennsylvania does not require much effort to ensure that the handbook does not affect the at-will status.

The best synopsis of Pennsylvania case law addressing employee claims that a handbook limits an employer's ability to terminate the employment relationship is this: If you have a good "disclaimer statement" in your handbook, you should be just fine. Disclaimer language should expressly state that the terms of the handbook are not intended to be a contract for employment, but rather that the handbook is a general statement of District policy. The disclaimer also should

indicate that unless the employee has an express contract for employment stating otherwise, all employees are employed at-will, meaning that either the District or the employee may terminate the employment relationship at any time, for any reason, with or without notice. Finally, the disclaimer should also mention that the District may change the terms of the handbook from time to time.

That said, a handbook that clearly disclaims any intent to modify the at-will employment relationship can still create a legal entitlement to a particular benefit. The Pennsylvania Superior Court has held that even when an employee handbook specifically states that the employment relationship is at-will, the employer's communication in the handbook of certain rights may constitute an offer of a contract for employment on those terms, which the employee may accept by continuing to perform the duties of his/her job. *Bauer v. Pottsville Emergency Medical Services, Inc.*, 758 A.2d 1265 (Pa. Super. 2000). In *Bauer*, the employee handbook stated that employees "working at least 36 hours per week for a period of 90 days" would be treated as full-time employees for purposes of certain benefits. The plaintiff, an emergency medical technician, worked at least 36 hours per week for more than 200 days but was not extended certain paid leave benefits or health insurance. The *Bauer* court found that the handbook might create an implied contract that obligated the employer to provide the promised benefits.

The *Bauer* decision is both disturbing and informative for employers. Courts increasingly are likely to hold an employer to a promise or statement made in a handbook, even if the handbook clearly states that it is not a contract. Although this conclusion may trouble some employers, the solution is simple: do not make a promise or statement in the handbook that you cannot live with. A well-drafted handbook should not create the type of unforeseen consequences suffered by the employer in *Bauer*. To avoid the *Bauer* problem, an employer

simply needs a well-drafted, regularly utilized handbook that accurately states the employer's intentions.

B. Equal Employment Opportunity Policies

After the at-will employment/"not a contract" disclaimer, the first policy in the handbook should be the employer's Equal Employment Opportunity ("EEO") Policy. By stating at the start of the handbook that the employer does not discriminate with respect to any employment decision on the basis of any protected trait, the employer demonstrates that compliance with federal, state, and local employment discrimination laws is a high priority for the organization. We suggest an EEO Policy for Pennsylvania employers modeled upon the following:

> _____ is an equal employment opportunity employer that does not discriminate on the basis of race, color, religion/creed, sex, disability, marital status, age, pregnancy, national origin, ancestry, possession of a General Education Development Certificate as compared to a high school diploma, veteran status, or any other characteristic protected by applicable federal, state, or local laws or ordinances. This commitment applies to, but is not limited to, decisions made with respect to hiring, placement, compensation, benefits, promotions, demotions, transfers, terminations, layoffs, return from layoffs, administration of benefits, and all other terms and conditions of employment. Likewise, employees are responsible for respecting the rights of their co-workers, as we must all work together to insure continued success.

C. Discriminatory Harassment Policies and Training

In order to facilitate a workplace free from discriminatory harassment and to minimize legal liability under federal and state anti-discrimination laws, Districts must develop and communicate policies against discriminatory harassment in the workplace. These policies serve to minimize the frequency of discriminatory harassment. Just as importantly, they also may provide a defense against an employer's legal liability if such harassment does occur.

Under applicable agency principles, an employer will be held liable for co-worker or third-party (i.e., non-supervisor) harassment only if the employer knew or should have known that the harassment was taking place and failed to take prompt remedial measures to bring it to an end. However, the United States Supreme Court has ruled that employers are automatically liable for discriminatory harassment committed by supervisors unless the employer can establish an affirmative defense. The defense requires that the employer prove (1) that it exercised reasonable care to prevent and correct promptly any harassing behavior, and (2) that the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. Under this standard, employers must have an appropriate anti-discrimination policy in place that provides an adequate reporting and investigation procedure. In addition, anti-harassment training must be provided to supervisors, and employers should consider whether to provide such training to all employees.

Discriminatory Harassment policies should:

- Specifically prohibit sexual harassment.
- Also prohibit all other forms of discriminatory harassment.
- Describe the types of conduct that are prohibited.
- Provide an appropriate harassment reporting procedure that allows an employee to choose from a few alternate reporting avenues. Only allow reports to be made to those individuals whom you trust are responsible to take action upon receiving a complaint.
- Indicate that an appropriate investigation will be conducted and that confidentiality will be maintained to the extent possible, but that certain information may need to be disclosed in the course of conducting an adequate investigation.
- Indicate that if a violation is found to have occurred, prompt and appropriate remedial measures will be taken to bring the harassment to an end.
- Indicate that the employer will not tolerate any form of retaliation against any individual for making a report of harassment or participating in an investigation.
- Indicate that if the harassment persists after remedial measures have been taken, the victim must inform management so that appropriate measures can be taken.

The policy should *not*:

- Fail to mention and prohibit discrimination on the basis of race, religion, national origin, age, disability, and/or any other protected trait.
- Allow reports to be made to individuals who cannot be relied upon to act upon the information appropriately.
- Indicate that an investigation will be conducted and action will be taken only if the victim requests.
- Require that a formal and/or written complaint be made in order for the employer to take any investigative and remedial measures.
- Facilitate unnecessary communication of the allegations or the results of the investigation to individuals not involved.

Employers should consider:

- Training all employees, not just supervisors (and update training periodically).
- Distributing the policy to each employee separately on a yearly basis, and having each employee acknowledge receipt of the anti-harassment policy.
- Developing a tracking system for repeated complaints against any one individual.
- Limiting those management individuals responsible for receiving complaints to higher level management, and excluding front line supervisors from the responsibility (front line supervisors must, however, report any harassment which they personally witness).
- Providing a preventative employment screening measure for applicants for supervisory jobs to ensure that past harassers are not hired (the EEOC specifically suggests this).

D. General Guidelines for Conduct

An effective and uniform guidelines for conduct policy is important because it establishes standards for employees and guidelines for supervisors or managers with respect to workplace conduct. An employer's guidelines for conduct policy may be reviewed by administrative agencies in response to employee complaints about adverse employment decisions. Also, the unemployment compensation system is very interested in such a policy in the event that an

employer contends that it discharged an employee for willful misconduct. Thus, it should be carefully drafted and uniformly enforced.

In drafting such a policy, employers should be careful to avoid using the terms "for cause" or "just cause" in discussing discharge. These terms imply that an employee cannot be discharged unless there is some reason. The discharge policy should make it clear that at all times employees remain at-will and can be discharged at any time for any or no reason, with or without notice.

Employers also should maintain flexibility in their discipline policies and procedures. If the policy sets forth a list of conduct that will result in discipline, it should be clear that the list is not exclusive and that the employer retains the right to discipline an employee for conduct not specifically enumerated. If the employer has a progressive discipline policy, it should be clear that the employer retains the right to move to any step in the discipline policy, including termination, at any time, with or without notice.

E. Appropriate Attendance Policies

Employee attendance issues are perhaps the most common source of potential liability under the employment laws. While employers generally have the right to insist upon regular and punctual attendance from employees, attendance policies must be properly drafted and applied in order to avoid violation of the FMLA and ADA. Moreover, consistent enforcement of attendance policies (like any disciplinary action) is necessary to avoid discrimination claims.

Appropriate attendance policies should:

- Clearly and simply define the rules (number of absences allowed, permissible reasons for absence, disciplinary action that will be taken for excessive absenteeism).
- Clearly define a procedure for reporting any absences and the ramifications for not following the reporting procedure.

- Provide a method of appropriate documentation of absences.

- Provide a method of providing management with necessary information to determine whether an absence is protected under the FMLA or whether an accommodation might be needed under the ADA.

- Exclude FMLA protected absences from disciplinary action (this may include single-day absences for a chronic condition or partial-day absences for intermittent leave).

- Always be consistently applied.

Attendance policies must *not*:

- Count all absences, including absences protected under the FMLA.

- Refuse to make any exceptions for individuals with a disability under the ADA.

- Be drafted in a way that allows employee manipulation or abuse (e.g., rigid progressive discipline system).

Employers should consider:

- Developing an appropriate method for documenting absences and determining application of the FMLA and ADA.

- Requiring employees to complete an explanation of absence form on their first day back to work. The form could require information concerning the reason for the absence, whether any medical care was required, whether the employee had experienced the symptoms in the past, etc.

- Requiring all absences to be reported to the appropriate management official responsible for administering FMLA and ADA issues. Employees should be told that they must speak personally to this individual. Information should be obtained from the employee and documented concerning the reason for the leave, the duration of the condition, any medical treatment administered, any anticipated future medical treatment, whether the employee has suffered similar symptoms in the past, etc.

- Implementing an attendance bonus to discourage excessive absenteeism.

F. Electronic Communications Policies

Employee Internet, voicemail and e-mail use raises significant legal and human resources issues. The use of these methods of communication by employees creates significant additional risk of legal liability and may also involve productivity concerns. For these reasons, employers should consider developing an appropriate electronic communications policy. However, employers must be aware that any monitoring or interception of electronic communications must be done in an appropriate manner in order to avoid violation of federal and state wiretap laws or potential liability for invasion of privacy.

An electronic communications policy should:

- Explain that use of the employer's electronic communications systems (e-mail, Internet, etc.) are intended for business use and that the employer provides employee access to these systems in order to enable employees to perform their jobs.

- Prohibit inappropriate use of the systems, such as

    - harassing messages.
    - downloading inappropriate materials.
    - use that overburdens the system or affects the employee's performance.
    - dissemination of confidential or trade secret information.

- Make specific reference to the employer's policy against discriminatory harassment.

- Make clear that employees should treat communications over these systems just like other formal correspondence.

Employers should *not*:

- Monitor or intercept electronic communications without informing employees that this may be done, or obtaining their consent to such activities (certain exceptions may apply).

Employers should consider:

- Setting boundaries for or prohibiting personal use of the systems.

- Monitoring electronic communications after informing employees that this will be done, and obtaining their consent to such monitoring.

- Developing a clear retention/destruction policy with respect to e-mail messages – in the event of litigation the burden and expense of producing stored e-mail messages can be staggering.

G. Drug and Alcohol Policies

Employers are well aware of the obvious dangers to employees and others, both inside and outside the workplace, and to the employer in general from employee use or abuse of drugs and alcohol. Employers, therefore, often are committed to establishing and maintaining an alcohol-free and drug-free workplace. In an effort to attain this goal, Districts may wish to consider implementing and maintaining drug and alcohol policies.

At a minimum, a drug and alcohol policy should expressly prohibit the sale, use, or possession of illegal drugs and alcohol while on duty, on the employer's premises, or in the employer's vehicles. Likewise, the policy also should prohibit an employee from reporting for duty while under the influence of alcohol or illegal drugs and define "under the influence." The policy should also set forth the procedure for employees to follow if they are using prescription or over-the-counter drugs that may adversely affect the employee's physical or mental ability to perform work in a safe and productive manner. Finally, the policy should make clear the consequences of a policy violation (i.e., possible disciplinary action, up to and including termination).

If the employer desires to implement drug testing of applicants and/or employees, the drug and alcohol policy should set forth the particulars of its testing program, including at a minimum the types of tests conducted, the triggering reasons for a test, and the drugs for which the employer tests.

H. Improper Pay Deduction Policy

The 2004 Fair Labor Standards Act ("FLSA") regulations created a "safe harbor" for employers that make an improper deduction from the salary of an employee otherwise exempt from the FLSA's minimum wage and overtime requirements. Under the pre-2004 rules, if an employer made an improper deduction from an exempt employee's salary, the improper deduction could result in the employer losing the exemption not just for the individual employee who suffered the deduction, but also for all other employees in the same job classification, throughout the employer.

Under the 2004 regulations the impact of an improper deduction is far less severe. The exemption would be lost only for employees in the same classification and working for the same manager responsible for the improper deduction. The 2004 regulations also provide that, if the employer has a clearly communicated policy that (1) prohibits improper pay deductions, (2) includes a complaint mechanism, (3) reimburses employees for any improper deductions, and (4) makes a good faith commitment to comply in the future, the employer will not lose the exemption (unless the employer continues to make improper deductions after receiving employee complaints).

The 2004 FLSA regulations create a significant incentive for employers to take advantage of these safe harbor provisions by developing and disseminating to employees a written policy regarding improper docking of pay. This is an opportunity to reduce potential liability in the event of an error in overtime administration. The written policy should be distributed to employees at time of hire, published in the employee handbook, or made available on the employer's intranet website.

III. The Rules for Employee Compensation – The Wage and Hour Laws

The federal and state wage and hours laws, which include the federal Fair Labor Standards Act ("FLSA"), the Pennsylvania Minimum Wage Act ("MWA"), and the Pennsylvania Wage Payment and Collection Law ("WPCL"), remain one of the most active areas in employment law, with the number of FLSA, MWA, and WPCL claims against employers increasing sharply in recent years. These laws present special concerns for Districts and employers in general, because their requirements are complicated and seemingly nonsensical, with problems often lurking unknown until a dispute with an employee or former employee arises.

In addition to their complicated requirements, other aspects of these laws increase the possibility of trouble. For example, the fee shifting provisions in the FLSA obligate an employer to pay the attorneys' fees for the employee or former employee, if he/she prevails in the action. This fee shifting provision makes wage and hour claims especially attractive for plaintiffs' attorneys. In addition, the FLSA includes a collective action provision, which works like an opt-in class action mechanism, giving plaintiffs and their attorneys greater leverage to litigate or force lucrative settlements. Indeed, courts now see more collective actions brought under the FLSA than class action claims under federal and state employment discrimination laws. For a District, what may appear to be one disgruntled employee (or former employee) fighting over a few minutes a day of compensation quickly can become a very expensive problem, with a potential collective action including numerous employees and former employees and the possibility of paying the employees' attorneys' fees.

With the increase in collective actions and the possibility of significant liability, it is vital that Districts understand the wage and hour rules and how they apply to their workforce.

Although potential liability cannot be completely eliminated, exposure can be greatly reduced through focused compliance efforts. Compliance efforts should begin well before the filing of a claim by an employee or former employee or an audit or investigation by the DOL or Pennsylvanian Department of Labor and Industry. If a District thinks about wage and hour compliance only after a claim, complaint, or investigation, the end result almost certainly will be unfavorable.

These materials provide a general overview of the wage and hour rules, with specific emphasis on the most often misunderstood and misapplied provisions.

A. Overview of State and Federal Wage and Hour Laws

Conservation Districts must comply with a variety of both federal and state wage and hour laws. Many of the federal and state wage and hour laws overlap and have similar requirements, but the differences between the federal and state laws continue to grow. In this section, we will list and briefly describe the principal federal and state wage and hour laws.

1. Fair Labor Standards Act

Originally passed in 1938, the FLSA and its regulations establish federal standards for minimum wages, overtime pay, recordkeeping, and child labor. In the private sector, the FLSA applies to only those employers that are engaged in interstate commerce and have certain minimum gross volumes of business. Regardless of their dollar volume of business, however, the FLSA automatically covers federal, state, and local government agencies. Thus, the FLSA applies to each Conservation District. The FLSA's requirements will be discussed in detail below.

2. The Pennsylvania Minimum Wage Act

The MWA is the state law companion to the FLSA. The MWA also establishes minimum wage, overtime compensation, and recordkeeping requirements. The MWA applies to any individual employed by an employer in the Commonwealth of Pennsylvania.

The MWA was amended in 2006 to provide for a minimum wage greater than the $5.15 per hour currently required by the FLSA. In Pennsylvania, the minimum wage was raised to $6.25 per hour effective January 1, 2007, with the minimum wage rising again to $7.15 per hour effective July 1, 2007. For employers with the equivalent of 10 or less full-time employees, the minimum wage increases to $5.65 per hour effective January 1, 2007, $6.65 per hour effective July 1, 2007, and $7.15 per hour effective July 1, 2008. Under very limited circumstances, the Act does permit reduced rates for certain learners and students (at wages not less than 85% of the minimum wage rate), as well as for certain handicapped workers. In addition, employers may pay employees under 20 years old a training wage of at least $5.15 per hour for their first 60 calendar days of employment, after which the regular minimum wage must be paid.

Most of the MWA's overtime compensation requirements are identical to the requirements of the FLSA. Certain recent changes to the FLSA, however, have not been made to the MWA, including the creation of the computer professional exemption and the 2004 FLSA white collar exemption regulations. For example, an employee may be exempt from the FLSA's overtime compensation requirement as an exempt computer professional. Nevertheless, because the MWA does not contain a computer professional exemption, the employer still may be obligated to pay the employee overtime compensation under state law. We will discuss each of the primary areas where federal and state overtime law differ in the sections that follow.

3. Equal Pay Act

The Equal Pay Act of 1963 ("EPA"), an amendment to the FLSA, requires "equal pay for equal work" for men and women. The EPA prohibits employers from discriminating on the basis of sex in paying wages. Where male and female employees for the same employer and at the same establishment perform work requiring equal skill, effort, and responsibility, and under similar working conditions, it is a violation of the EPA to pay female employees lower wages, unless the wage differential is due to (1) a seniority system; (2) a merit system; (3) a production system which measures earnings by quality or quantity of work; or (4) a differential which is based on a factor other than sex (e.g., shift differential).

4. Pennsylvania Wage Payment and Collection Law

The WPCL is the state statute designed to enforce the payment of agreed upon wages and fringe benefits. The WPCL does not establish an entitlement to wages, but only provides a means to recover wages that are due under the "contract" of employment. In addition, the WPCL (1) establishes deadlines for the payment of wages and fringe benefits that are earned; (2) defines the types of deductions that may be withheld from the wages of employees; (3) requires certain notices to be provided to new hires; (4) regulates payment of wages upon the termination of employment; (5) and contains a comprehensive enforcement scheme. Under the WPCL, "wages" include all earnings, regardless of the method by which they are calculated. Fringe benefits include payments to ERISA plans, severance pay, vacation pay, holiday pay, guaranteed pay, reimbursement for expenses, union dues, and other amounts paid pursuant to an agreement between the employer and employee.

Regular Paydays. Employers in Pennsylvania must pay all non-overtime wages, other than fringe benefits and wage settlements, to employees on "regular" paydays that are designated

in advance by the employer. This payday may be established by a written contract, the standards of the industry, or, if neither of these are applicable, within 15 days from the end of the pay period. Once the payday is established, the employer may not deviate from it without advance notice to employees. However, overtime wages may be considered as wages earned in the next succeeding pay period and may be paid at the same time as wages earned in that latter period.

Payment for fringe benefits, wage supplements, or deducted union dues must be made within 10 days after such funds are required to be paid to the trust fund, employee, or union or within 60 days after a proper claim is filed by the employee in situations where no time for payment is specified.

Under the WPCL, employers must notify new hires as to the amount of wages to be paid and the time and place of payment. Notice of these items may be accomplished individually or through posting in a conspicuous place at the job site.

Wage Deductions. The WPCL and its regulations permit deductions from pay as required by law for the convenience of the employee. The following deductions are permitted under the WPCL:

(a) Contributions to and recovery of overpayments under employee welfare and pension plans subject to the Federal Welfare and Pension Plans Disclosure Act;

(b) Contributions authorized in writing by employees or under a collective bargaining agreement to employee welfare and pension plans not subject to the Federal Welfare and Pension Plans Disclosure Act;

(c) Deductions authorized in writing for the recovery of overpayments to employee welfare and pension plans not subject to the Federal Welfare and Pension Plans Disclosure Act;

(d) Deductions authorized in writing by employees or under a collective bargaining agreement for payments into the following:

(i) Employer operated thrift plans; and

(ii) Stock option or stock purchase plans to buy securities of the employing or an affiliated corporation at market price or less provided such securities are listed on a stock exchange or are marketable over the counter;

(e) Deductions authorized in writing for payments into employee personal savings accounts;

(f) Contributions authorized in writing by the employee for charitable purposes;

(g) Contributions authorized in writing by the employee for local area development activities;

(h) Deductions provided by law;

(i) Labor organization dues, assessments, and initiation fees;

(j) Deductions for repayment to the employer of bona fide loans provided the employee authorizes such deductions in writing;

(k) Deductions for purchases or replacements by the employee from the employer of goods, services, rent, or similar items provided such deductions are authorized by the employee in writing or are authorized in a collective bargaining agreement; and

(l) Such other deductions authorized in writing by employees and as deemed proper by the Department of Labor and Industry.

Termination From Employment. In the event that an employee is separated from employment for any reason prior to the regular payday, the employer must pay any outstanding wages to the employee no later than the next regular payday. Moreover, the employer must make the final payment by certified mail if so requested by the employee.

Non-Waiver Provision. Employees cannot waive their rights under the WPCL in the absence of a bona fide dispute between the employee and the employer over entitlement to wages. The WPCL specifically provides that no provision of the law can be waived by a private agreement.

5. Direct Deposit

The Pennsylvania Electronic Funds Transfer Systems Act permits direct deposit of wages, salaries, and commissions to an employee's account in a bank, credit union, or other financial institution only if an employee has made a written request for this form of wage payment. Any agreement for direct deposit of wages must be reduced to writing, must set forth the terms and conditions under which the fund transfers are to be made, and must explain the method by which the employee may withdraw his/her request for direct deposit. The Act also prohibits the direct transfer of any earnings to an account unless the party authorizing the transfer has received a separate written record of the transfer at or prior to the time it is made.

B. Exemptions under the Fair Labor Standards Act

All employees covered by the FLSA are entitled to one and one-half of their regular hourly rate for all hours worked in excess of 40 in any work week, unless the employer can prove that the employee qualifies for one of the overtime exemptions. Congress established exemptions from the minimum wage and overtime requirements of the FLSA to provide some flexibility for employers when compensating certain types of employees.

When determining whether an employee may properly be classified as exempt from overtime requirements, employers must keep in mind that non-exempt treatment is the "default" status under the FLSA and MWA. To establish an exemption, the employer bears the burden of the proving that the employee qualifies for the exemption. Courts and the Department of Labor interpret the exemptions narrowly, and close calls generally go the employee in a claim for overtime compensation. An employer may treat an employee as non-exempt and pay him/her overtime compensation, even if the employee could qualify for exempt status. The reverse is not

true; an employer may not treat an employee as exempt if the employee does not meet the requirements of any of the exemptions.

The FLSA minimum wage and overtime exemptions are divided into two general categories: industry-specific exemptions and the "white collar" exemptions that apply to any employer, regardless of industry. Because none of the industry-specific exemptions apply to the employees of Conservation Districts, we will spend the remainder of this section discussing the "white collar" exemptions and their application to District employees.

1. White Collar Exemptions

The FLSA contains exemptions to the Act's overtime and minimum wage requirements for "bona fide" executive, professional, and administrative employees, and for certain computer professionals. To meet the requirements of these so called "white collar" exemptions, an employer must prove that the employee (1) is paid on a salary basis and (2) meets the duties test for the exemption at issue.

2. Payment on a Salary Basis

For an employee to be exempt from the FLSA under any of the white collar exemptions, the employee generally must be paid on a "salary basis." This seemingly obvious element of the FLSA has caused substantial confusion. Failure to satisfy the salary basis requirement converts otherwise exempt employees to non-exempt and subjects the employer to potential backpay liability.

Under the FLSA, an employee's receipt of a weekly salary is not necessarily synonymous with payment on a salary basis. Payment on a salary basis requires employers to pay exempt employees a pre-determined sum of money regardless of the quality of work performed or the actual number of hours worked, subject to a few limited exceptions.

For example, an employer may not reduce the salary of an exempt employee for partial-day absences from work, unless the partial-day absence was covered by the FMLA. Thus, if an otherwise exempt manager takes two hours off for a doctor's appointment or a haircut, his/her salary cannot be reduced to reflect that absence. Such an adjustment violates the "salary basis" requirement and may result in a loss of exemption for that employee.

An employer may make deductions from an exempt employee's salary without violating the salary basis rule only in the following limited circumstances:

- Deductions may be made when the employee is absent from work for a day or more for personal reasons, other than sickness or accident (partial-day absences must not result in a deduction).

- Deductions may be made for absences of one day or more caused by sickness or disability if the deduction is in accordance with a "bona fide sickness or disability plan." For example, if an employer has a bona fide sick leave program, and an exempt employee has exhausted all sick days, deductions can be made for additional full day absences from work due to sickness.[1]

- Employees on approved FMLA leave need not be paid for full or partial-day absences.

- An employer is not required to pay the full salary in the employee's initial or terminal week of employment. Instead, the employer may pay a proportionate part of an employee's full salary for the time actually worked in said weeks.

- Deductions may be made unpaid suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules pursuant to a written policy applicable to all employees.

- Deductions may be made for penalties imposed for infractions of "safety rules of major significance."

[1] Note, however, than an employer can still implement partial-day deductions from an employee's leave allowance without jeopardizing salary status so long as the partial-day deductions are not taken out of an employee's pay. For example, if a salaried employee is given ten days of sick leave per year, the employer will not destroy the exemption status merely by docking the sick leave allotment in 15 minutes increments for partial-day absences. In this situation, the employee's pay is not affected, just how much sick leave remains after a partial-day absence.

In addition to these limited permissible deductions, an exempt employee need not be paid for any workweek in which he/she performs no work. To qualify for no pay in a workweek, the employer must ensure that the employee performs no work whatsoever, including work from home such as checking e-mails or calling into the office to check messages. For certain employees, completely prohibiting work in a work week may be practically impossible.

Keep in mind that paying an employee on a salary basis does not, by itself, qualify the employee as exempt. To be exempt, the employee's compensation must meet the salary basis test, and the employee must meet one of the duties test. Paying an employee on a salary basis only gets an employer half-way to meeting an exemption. The duties test is often the more onerous half of the exemption determination.

3. Executive Employees

"Bona fide" executive employees are exempt from the minimum wage and overtime provisions of the FLSA so long as the following requirements are met:

(1) The employee must be paid a salary of at least $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 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.

"Managing" includes duties such as hiring, firing, directing and evaluating employees, setting rates of pay, determining work techniques, and determining appropriate levels of supplies and merchandise. "Two or more employees" means two or more full-time employees or their

equivalent, such as one full-time employee and two part-time employees who all together work 80 hours per week. Employees may not be "shared," however, to meet this requirement (i.e., two supervisors cannot both count the same two employees for the purpose of the exemption). It should also be noted that the executive employee does not actually need to be present at the work site for the entire period of time that the other employees are working in order to supervise them.

Often the issue of most significance when determining whether the executive exemption will apply is the employee's "primary duty." For example, a working supervisor may spend a majority of his/her time engaged in non-supervisory work. Nevertheless, the employee is responsible for managing a division of the employer, has the authority to hire and fire, and directs the work of at least two employees. In the majority of such situations, courts have held that the "primary duty" consists of management as opposed to non-supervisory work.

4. Administrative Employees

The administrative exemption generally is used for employees who lack supervisory duties but serve as assistants to those who do possess traditional measures of supervision. For example, an executive assistant, although he/she does not have the primary duties of managing a business or regularly directing employees in the performance of their job, nevertheless may be exempt from the provisions of the FLSA as an administrative employee.

In order to meet the administrative employee exemption, an employee must:

(1) be paid a salary of at least $455 per week;

(2) perform office or non-manual work directly related to management operations; and

(3) exercise discretion and independent judgment with respect to matters of significance in the performance of these job duties.

Thus, the administrative exemption only will apply where the primary duty is office or non-manual work directly related to management policies or general business operations and requires the exercise of discretion and independent judgment with respect to matters of significance.

Office or non-manual work directly related to management policies or general business operations. The Department of Labor draws a distinction between work that is directly related to management policies or business operations and mere "production work." Although certain work may require the exercise of frequent discretion and independent judgment and may be extremely important to an employer, the administrative exemption will not apply if the work is not directly related to management policies or business operations, as opposed to providing the "product" offered by the employer.

The exercise of discretion and independent judgment with respect to matters of significance. Nearly every employee exercises some degree of discretion and independent judgment in the performance of their daily activities. In order to qualify for the administrative exemption, however, the employee must exercise such discretion and independent judgment with respect to significant management policies or general business operations. An employee performing routine clerical duties is not performing work of substantial importance to the management or operation of the business even though he/she may exercise some measure of discretion in judgment as to the manner in which the employee performs his/her clerical tasks.

It should also be noted that the discretion and independent judgment exercise must be real and substantial. The courts and Department of Labor will look to what the employee actually does, not what duties are listed on a job description, when determining whether this prong of the duties test is met.

5. Professional Employees

"Learned" professional employees are also exempt from the minimum wage and overtime requirements of the FLSA if they meet the following test:

(1) The employee must be paid a salary of at least $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.

As with all white collar exemptions, whether an individual satisfies the requirements of the professional exemption is dependent upon the facts of the given case. It is a misconception to believe that an individual's title or degree is determinative of his/her professional status under the FLSA. For example, salaried registered nurses traditionally are considered exempt as learned professionals. Of course, if a registered nurse serves primarily in a clerical capacity, his/her work duties would not require the possession of an advanced degree or the exercise of discretion and independent judgment. In such a case, the nursing degree would be irrelevant in determining exempt status.

Likewise, the extent to which a position requires post-high school education can be dispositive with respect to the professional exemption. For example, with respect to dental hygienists, the Department of Labor's Wage and Hour Division interpreted the regulations to exempt those hygienists who complete "4 academic years of pre-professional and professional study in an accredited university or college recognized by the Commission on Accreditation of Dental and Dental Auxiliary Educational Programs of the American Dental Association." Wage

& Hour Div. Admin. Op. (Nov. 10, 1975). In a subsequent opinion, the Wage and Hour Division rejected an exemption request for dental hygienists who complete only a two-year course of professional study. Wage & Hour Div. Admin. Op. (Mar. 5, 1976). Again, the Wage and Hour Division stressed that "four academic years of pre-professional and professional study in an accredited university or college" is required for the professional exemption. *Id*. Keep in mind, however, that, as discussed above, a four-year college degree does not automatically guarantee application of the professional exemption

6. Computer-Related Professionals

The Small Business Job Protection Act of 1996 codified prior Department of Labor interpretations and included an exemption for computer-related professionals. To qualify for the computer professional exemption, the following tests must be met:

(1) The employee must be compensated either on a salary or fee basis (as defined in the regulations) 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:

(a) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;

(b) 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;

(c) The design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or

(d) A combination of the aforementioned duties, the performance of which requires the same level of skills.

As noted above, the Pennsylvania Minimum Wage Act and its regulations contains no companion to the federal computer professional exemption. Thus, an otherwise exempt computer professional still may be entitled to overtime compensation under the state law. If an employer has a computer professional that meets the federal exemption, the employer should examine whether the employee also qualifies for another white collar exemption, such as the administrative or professional exemption, that is also recognized by state law. If the employee in question would not qualify for any other exemption, the employer may be liable for unpaid overtime compensation under the state MWA.

7. Highly Compensated Employee Exemption

The 2004 FLSA regulations created an entirely new exemption, the highly compensated employee exemption. To qualify, the employee must perform office or non-manual work and be paid total annual compensation of $100,000 or more (which must include at least $455 per week paid on a salary or fee basis), so long as the employee customarily and regularly performs at least one of the duties of an exempt executive, administrative, or professional employee identified in the exemptions' standard tests. This exemption may cover any highly compensated employee who does not fit cleanly within any of the traditional white collar exemptions.

Unfortunately, the state MWA contains no companion highly compensated employee exemption. Thus, unless the employee also meets one of the other white collar exemptions, the employer may be required to pay the employee overtime compensation, even though he/she qualifies for the FLSA exemption.

8. Independent Contractors

Coverage under both the FLSA and MWA is afforded only to "employees" of a covered employer. The protections of the FLSA and MWA do not apply to true independent contractors.

Rutherfood Food Corp. v. McComb, 331 U.S. 722 (1947). When determining FLSA coverage, courts look to the "economic reality" of the situation rather than traditional common law concepts of employee or independent contractor. To establish that an employment relationship exists, the individual must show that, based upon the totality of the situation, he/she is economically dependent on the alleged employer. Relevant factors in the economic reality analysis include:

- the degree of control exercised by the alleged employer over the work performed;
- the alleged employee's opportunity for profit or loss depending upon his managerial skill;
- the alleged employee's investment in equipment or materials;
- whether the service rendered requires a special skill;
- the degree of permanence of the working relationship;
- whether the service rendered is an integral part of the alleged employer's business.

Donovan v. DialAmerica Mktg., Inc., 757 F.2d 1376 (3d Cir. 1985).

Generally, the FLSA applies a vary narrow definition of independent contractor. Again, close calls generally result in a finding that the individual is an employee, not an independent contractor.

D. Wage and Hour Laws in the Real World – Analyzing Certain Jobs Under the Exemption Tests

Understanding the exemption requirements and other aspects of federal and state wage and hour laws is vital when attempting to properly classify employees as exempt or non-exempt. Nevertheless, applying the exemptions to actual employees and job classifications is the real issue and "where the rubber meets the road."

During the next few minutes, we will analyze some relatively common categories of jobs among the many Conservation Districts and discuss whether the employees in those jobs possibly could be classified as exempt. Of course, the exemption determination will come down to the actual duties performed by the actual employees at the actual Districts in question, and a general discussion cannot definitively determine whether the exemption requirements are met. Nevertheless, the following discussion will help give you the tools necessary when analyzing various positions to determine overtime compensation eligibility.

- **Assistant Manager**

- **Office Manager/Administrative Employees**

- **Engineer**

- **Technician/Specialist**

- **Education Coordinator**

E. Wage and Hour Requirements for Non-Exempt Employees

Unfortunately, determining whether an employee qualifies for an overtime exemption is not the only wage and hour issue employers must address. Even after concluding that an employee is not exempt and entitled to overtime compensation, many pitfalls remain before wage and hour law compliance is achieved. The remainder of this section will address common overtime compensation issues and missteps made by employers.

1. What are "Hours Worked?"

The FLSA and MWA generally require that non-exempt employees receive at least the statutory minimum wage for each hour that the employee is "suffered or permitted to work." "Hours worked" also have great significance in overtime situations, because employees must be paid overtime for all "hours worked" in excess of forty in any given workweek. The mere fact that an employer did not specifically request an employee to work during a particular period

(e.g., during lunch break, at home, etc.) does not necessarily mean that the time worked is not compensable. Wage and hour regulations provide as follows:

> Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift. He may be a pieceworker, he may desire to finish an assigned task or he may wish to correct errors, paste work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time.

29 C.F.R. § 785.11. Work performed away from the job site, including work performed at home, also constitutes "hours worked." 29 C.F.R. § 785.12. Many of the recent court decisions under the FLSA involve situations where an employer "knew or should have known" that its employees were working but did not pay them for this time.

The Department of Labor's Wage and Hour Division has promulgated detailed regulations regarding the types of activities for which an employee must be compensated and those which are non-compensable. As a general matter, an employee always must be compensated for all time spent performing the "principal duties" of his/her job if the employer knows or has reason to believe that work is being performed. It is when employees engage in "incidental" activities, such as travel time, on-call time, and job-related training, that problems most frequently arise.

a. Preliminary and Finishing Activities

The courts have defined hours worked as all the time an employee "is necessarily required to be on the employer's premises, on duty, or at a prescribed workplace" when the time is spent for the benefit of the employer. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). Using this test, courts have established that pre-work and post-work activities are compensable if they are an "integral" and "indispensable" part of the employee's principal

activities. If the pre-work and post-work time is "insubstantial and insignificant," it falls within the de minimis exception and need not be included as hours worked. *E.g., Reich v. Monfort, Inc.*, 144 F.3d 1329 (10th Cir. 1998).

> **Example:** A chemical worker who must change into special protective clothing on the employer's premises prior to beginning his/her job normally should be compensated for this time. On the other hand, if the employer merely provides a dressing room for its employees' convenience, changing time at the beginning and end of the work day generally is not considered compensable.

b. Waiting or On-Call Time

The same general test applies to determine whether waiting or "on-call" time is compensable. One of the most frequently litigated wage and hour issues in the past several years is undoubtedly the compensability of on-call time for non-exempt employees. Many employers realize significant wage savings by placing certain employees on "standby" or "on-call" status. Wage and hour regulations generally do not limit the number of hours that an employer may require an employee to be on call. However, the regulations do specifically limit the restrictions that an employer may place on an employee who is on call. Failure to observe these restrictions may convert otherwise non-compensable "on-call time" into compensable "hours worked."

With respect to on-call time, the regulations provide:

> An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on call." An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call.

29 C.F.R. § 785.17 (emphasis added).

The majority of recent cases regarding on-call time deal with the issue of whether an employee who is "on call" is able to "use his time effectively for his own purposes." Employers

who place employees "on call" must therefore be careful not to place such restrictions on the employees that the on-call time would be deemed compensable hours worked. "[W]here the conditions placed on the employee's activities are so restricted that the employee cannot use the time effectively for personal pursuits, such time spent on call is compensable." *Dinges v. Sacred Heart St. Mary's Hosp., Inc.*, 164 F.3d 1056 (7th Cir. 1999). Factors courts consider when determining whether an employee is free to engage in personal pursuits include:

- required response time;
- use of a pager to ease restrictions;
- ability to trade on-call shifts;
- excessive geographic limitations;
- personal activities in which employees can engage despite the restrictions; and
- frequency of calls.

Ingram v. County of Bucks, 144 F.3d 265 (3d Cir. 1998).

c. Sleeping Time

An employee who is required to be on duty for less than 24 hours is working even though he/she is permitted to sleep or engage in other personal activities when not busy. Where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude regularly scheduled sleeping periods of not more than 8 hours in duration from hours worked, provided adequate sleeping facilities are furnished by the employer, and the employee usually can enjoy an uninterrupted night's sleep. Interruptions to an employee's sleep must be counted as time worked. If interruptions prevent the employee from getting at least five-hours' sleep during the scheduled period, the entire period will be counted as hours worked.

d. Travel Time

The FLSA establishes that, absent a contract or custom to the contrary, ordinary home-to-work and work-to-home travel is not considered worktime and is not compensable. 29 U.S.C. § 254; 29 C.F.R. §§ 785.34-785.35. Conversely, an employee's travel time "as part of his principal activity, such as travel from job site to job site during the workday," is treated as compensable hours worked. 29 C.F.R. § 785.38. The FLSA regulations, therefore, make a distinction between normal daily commuting time, which is generally not compensable, and travel "all in the day's work" during the course of a workday, which is typically compensable.

Travel time spent on special one-day assignments away from work, such as trips to another city, is generally compensable when the trip is taken for the employer's benefit. 29 C.F.R. § 785.37. The FLSA regulations treat travel on one-day trips "as an integral part of the 'principal' activity which the employee was hired to perform on the workday in question." *Id*. In most situations, an employer need not compensate non-exempt employees for all travel time spent on a one-day trip. Typically, an employee will leave his/her home and travel to an airport or train station to take the trip. The regulations treat the time spent commuting to the airport and back as part of the non-compensable "home-to-work" category. *Id*. Thus, even on day trips, an employer generally may deduct from the compensable hours worked the time the employee would have spent commuting from home-to-work and work-to-home on a typical day. Of course, the usual meal time would also be deductible. *Id*.

Special rules apply to overnight travel for non-exempt employees. Unlike one-day trips, an employer may need not compensate employees for all travel time (minus the home-to-work time) on an overnight trip. Instead, employees must be compensated for all hours actually worked on the trip and all travel time that "cuts across the employee's workday." 29 C.F.R. §

785.39. If the employee typically works from 9 a.m. to 5 p.m., the employee must be compensated for travel time that falls within that time period, even if the travel occurs on a weekend or other day the employee typically does not work. *Id*. If the employee travels outside of his/her normal working hours during a multi-day trip, the employer need not compensate the employee for that time spent traveling if the employee is riding as a passenger in a car, bus, airplane, train, etc. during that time. If the employee is actually driving during the travel outside the normal working hours, the employee must be compensated for the travel time. As with one-day trips, regular meal periods need not be counted.

e. Meetings and Training Programs

Attendance at lectures, meetings, and training programs counts as compensable hours worked unless (1) attendance is outside normal working hours, (2) attendance is voluntary, (3) the lecture, meeting, or training is not directly related to the employee's current job assignment, and (4) no work of value to the employer is performed at the lecture, meeting, or training. 29 C.F.R. §§ 785.27-785.31.

f. Meal Periods and Breaks

Rest periods of 5 to 20 minutes are considered compensable hours worked. 29 C.F.R. § 785.18. Meal periods during which an employee is "completely relieved of duty for the purpose of eating regular meals" do not count toward hours worked. *Id.* § 785.19. Generally, an employee must be given 30 minutes or more and must be completely relieved of his/her duties for a period to qualify as a bona fide meal period. *Id*.

g. Other Hours Worked Issues

Volunteer Activities. Time spent engaging in work for public charitable purposes at the employer's request, or under the employer's direction or control, or while the employee is

required to be on the premises, is working time. However, time spent voluntarily in such activities outside of the employee's normal working hours is not hours worked.

> **Example:** A licensed practical nurse who privately agrees to donate his/her services to care for a sick child outside of his/her normal working hours is not engaged in compensable work even though he/she renders the services at his/her usual workplace. On the other hand, if his/her employer specifically requested that he/she spend some time with several patients during his/her lunch break, the time would be compensable.

Medical Attention. Time spent by employees in waiting for and receiving medical attention is compensable if the following conditions are met:

- medical attention is received during working hours; and
- medical attention is received on the plant premises; or
- the employer directs that medical attention be secured outside of the plant premises.

However, employees need not be paid for time devoted to medical attention if the employee visits a doctor outside of working hours, even if the purpose of the visit is to receive treatment for an injury that was incurred at work. Of course, an employee who chooses to have a work-related injury treated by an outside physician is not entitled to wages for the time spent receiving medical attention.

Vacation, Holidays, Sick Days, And Other Non-Working Time. Contrary to popular belief, no state or federal law requires private-sector employers to provide paid leave. Likewise, if an employer does provide leave (paid or unpaid), time spent by an employee on such leave need not be counted as "hours worked" for purposes of determining whether the employee has worked overtime in any given week.

2. Paying Overtime Compensation under Federal and State Law

The FLSA and MWA generally require that non-exempt employees be paid an overtime rate of not less than one and one-half times their "regular rate" for all "hours worked" over 40 hours in any workweek. For payroll purposes, an employer may begin the workweek on any day of the week and any hour of the day, but must be consistent. Employers may not change the starting time of a workweek to evade the overtime requirements of the FLSA.

As a general rule, an employer must consider each work week separately when calculating overtime earnings. If the employer establishes a two-week pay period, it generally may not average the number of hours worked by an employee in both weeks to determine the employee's overtime compensation.

> **Example:** A District pays its hourly employees every other Monday. An employee works 41 hours during the first work week of the pay period and only 8 hours during the second work week. In calculating the employee's earnings, the employer must recognize the one hour of overtime worked during the first week and pay the employee time and one-half for this hour. This 41st hour may not be rolled into the second week for purposes of avoiding overtime pay.

Unless an employee's "hours worked" exceeds 40 hours in a given work week, overtime is unnecessary.

a. "Regular Rate of Pay" Defined

Although the FLSA does not require employers to pay non-exempt employees on an hourly basis, overtime earnings must be calculated on the basis of an employee's "regular hourly rate of pay." An employee's "regular rate" is determined by dividing the total remuneration for employment in a work week by the total number of hours worked. This regular rate must include all remuneration for employment, including shift differentials, commission payments, and board

and lodging. Thus, an employee's regular rate may differ from his/her stated hourly rate of pay. The regular rate does not include

- payments made by an employer on behalf of an employee to a bona fide profit sharing, thrift, or savings plan;
- irrevocable contributions made by an employer pursuant to a bona fide plan for providing retirement, life, accident, or health insurance;
- pay for time spent on vacation, holiday, illness, layoff, or any other periods when the employee is not at work;
- gifts, Christmas, and special occasion bonuses;
- bonuses paid at the discretion of the employer and not pursuant to any agreement or promise to the employee;
- reimbursements for expenses incurred by an employee while carrying out his/her job;
- "premium pay" in excess of time and one-half the employee's hourly rate for work performed on weekends, holidays and other special occasions. However, if the premium rate is less than time and one-half the employee's hourly rate, the premium must be included in determining the employee's regular rate of pay.

29 U.S.C. § 207(e). Payments in these categories must generally meet a variety of strict requirements set forth in the regulations to qualify for exclusion from the regular rate calculation.

Bonuses. An employer must include non-discretionary bonuses and incentive pay when determining an employee's regular rate. Such bonus payments must be included in the regular rate determination, even if the employee will not receive the bonus until later and even if the regular rate must be retroactively adjusted after the amount of the bonus is determined. In order to qualify for exclusion as a discretionary bonus, the employer must retain complete discretion over the fact and amount of payment. If the employer promises or announces in advance that a bonus will be paid, no such discretion exists.

> Bonuses which are announced to employees to induce them to work more steadily or more rapidly or more efficiently or to

> remain with the firm are regarded as part of the regular rate of pay. Attendance bonuses, individual or group production bonuses, bonuses for quality and accuracy of work, bonuses contingent upon the employee's continuing in employment until the time that payment is to be made and the like are in this category.

29 C.F.R. § 445.211 (c).

> **Example:** (Non-Exempt Hourly Employee/40 Hour Work Week) A District pays its hourly employees at the rate of $10.00 per hour. However, each employee is promised a $5.00 bonus for each week in which he/she has perfect attendance. Because this bonus is not "discretionary," it must be included in the employee's total wage earnings for each week in which it is earned in determining the employee's regular rate of pay. Assuming an employee receives the bonus in a week during which he/she worked 50 hours, his/her "regular rate" would be calculated as follows: $500.00 (straight earnings) + 5.00 (bonus) ÷ 50 hours worked = $10.10. The employee should be paid an overtime premium equaling one-half times his regular rate ($10.10 per hour) for each of his ten overtime hours. The employee's total weekly earnings may be calculated as follows: $500 (straight earnings) + (10 overtime hours x ½ x $10.10 = $50.50) + ($5.00 bonus) = $555.50 total weekly earnings.

Only bonuses that are completely discretionary and not paid pursuant to any prior agreement or arrangement, such as a holiday bonus, may be excluded from the regular rate computation. 29 C.F.R. §§ 778.211-778.212. Discretionary bonuses that are given on a regular basis may appear to be part of the employee's regular pay and pose problems in the event of an employee complaint and/or a Wage and Hour Division investigation. Thus, discretionary bonuses should be used with caution and only given if the employer has a written policy clearly stating that the bonuses are not guaranteed and may be discontinued at any time. 29 C.F.R. § 778.211(b).

Despite the general exclusion of expense reimbursement from the regular rate calculation, per diem payments to non-exempt employees, such as travel and temporary living expenses, must be included in the regular rate if the per diem is not reasonably related to expenses incurred

by the employee. 29 C.F.R. § 778.217. Thus, employers should ensure that non-exempt employees provide documentation when seeking reimbursement for work-related travel and temporary living expenses.

Different Pay Rates. With respect to employees who receive different pay rates for different types of work, the federal wage and hour regulations provide two permissible methods of calculating the regular rate for overtime purposes. The usual method is to use the weighted average of the two rates to determine the regular rate. 29 C.F.R. § 778.115. The other method is to calculate overtime on the basis of the regular rate for the type of work being performed during the overtime hours. 29 C.F.R. § 778.419. Employers may use this second method to calculate the regular rate only by prior agreement with the employee. *Id*.

Premium Pay Credits. The FLSA allows an employer to credit three specific types of extra compensation against any overtime it owes an employee:

- extra compensation at least one and one-half of the employee's regular rate for hours works in excess of daily or weekly standards (for example, premium pay for hours exceeding 8 or 12 in a day or 35 hours in a week); or
- extra compensation at least one and one-half of the employee's regular rate for work on Saturdays, Sundays, holidays, or other "special days"; or
- "clock pattern" premium pay at least one and one-half of the employee's regular rate where extra compensation is paid for work outside the basic workday or work week (for example, premium pay for work performed outside the normal 8 a.m. to 5 p.m. workday).

29 U.S.C. § 207(h)(2); 29 C.F.R. §§ 778.202-778.204.

If an employer provides premium payments in any of the manners described above, these payments need not be included in the "regular rate" for overtime calculation. In addition, the extra compensation can be credited to any overtime owed the employee. Conversely, any premium payment that falls outside the three categories described above must be included in the

employee's regular rate of pay and cannot be credited to any overtime obligations. 29 C.F.R. § 778.204. Thus, premium pay for "undesirable hours" cannot be counted to overtime and must be included in an employee's regular rate.

b. Compensatory Time

One of the most frequently misunderstood wage and hour concepts is "compensatory time." If an employer's pay period is longer than one week, it may be possible to control the amount of overtime wages paid by granting employees time off in lieu of overtime. Under a time-off plan, an employer gives an employee time off in one work week to offset overtime hours worked in a previous work week. However, such plans are only lawful for private employers if three requirements are met: (1) all compensatory time off must be used during the same pay period in which it is accrued; (2) compensatory time off must be granted at a rate of one and one-half times the number of overtime hours worked; and (3) affected employees should be informed of the plan prior to its implementation.

> **Example:** A District pays its non-exempt employees every other week. One employee is paid $10.00 an hour and usually receives $800.00 gross pay at the end of each two week pay period. During the first week of a pay period this employee works 44 hours. In order to avoid additional wage costs due to the four hours of overtime worked, the employer may grant the employee six hours (1 1/2 x 4) compensatory time off with pay during the second work week of the pay period. At the end of the pay period, the employee's earnings are calculated as follows:

First Week Straight Time Earnings:	40 x $10.00 per hour =	$400.00
First Week Overtime Earnings:	4 x $15.00 per hour =	$ 60.00
Second Week Earnings:	34 x $10.00 per hour =	$340.00
	TOTAL	$800.00

Special amendments to the FLSA allow the use of compensatory time off in lieu of overtime compensation for employees of a public agency that is a state, a political subdivision of a state or an interstate governmental agency. Comp time is earned at a rate of at least 1.5 hours

for each hour worked for which overtime otherwise would be paid. In order to employ a comp time system, an agreement or understanding (we suggest a written agreement) must be reached with affected employees or their representative before the work is performed.

Employees involved in public safety, emergency response, or seasonal activities may accrue to a maximum of 480 comp time hours (i.e., 320 straight time hours x 1.5). Others may accrue only to a maximum of 240 hours (i.e., 160 straight time hours x 1.5). Once an employee would exceed these maximums, he/she must either use comp time or receive overtime compensation in lieu of further comp time. Accrued, unused comp time also must be paid upon termination.

F. Wage and Hour Self-Audit

Employers are well advised to conduct a careful review of their wage and hour practices, and in many circumstances a full blown "self-audit" will be appropriate. The scope of the project will depend upon the situation. As with most important employment practices, an employer should consider consulting with its attorney during the self-audit process, as numerous legal questions may arise (application of exemptions, "hours worked," "regular rate," etc.). Typically, employers should consider the following issues during a wage and hour self-audit:

- Are all independent contractors properly qualified?
- Are all exempt employees properly classified?
    - Do the job duties and responsibilities qualify for the exemption?
    - Are exempt employees paid on a salary basis?
- Do the employer's policies improperly call for deduction of pay based upon quality or quantity of work?
- Are all non-exempt employees properly compensated?
    - Does the employer properly account for all hours worked?

- Volunteer activities
- Waiting or on-call time
- Break periods
- Meetings and training
- Travel time
- Unauthorized work

- Is overtime pay properly calculated?

- Is all applicable compensation included in the "regular rate"?

- Are any overtime pay plans properly applied and administered?

- Are all required records kept in the manner and for the length required by law (see Section V below)?

IV. Discipline and Discharge

Employee discipline is an important component of an employer's efforts to maintain a productive and motivated workforce. Appropriate initial discipline often will lead to improved performance or the elimination of unwanted conduct. On other occasions, discharge will be necessary, either in response to egregious misconduct or because prior disciplinary measures did not resolve the problem. In today's legal environment, employers must ensure that the discipline and discharge decisions are supported by legitimate reasons, are implemented fairly and consistently, and can be documented and/or clearly explained.

A. The Legal Risks Associated With Discipline And Discharge

1. Wrongful discharge in violation of public policy.

   a) Retaliation for filing a Workers' Compensation claim. *Shick v. Shirey*, 716 A.2d 1231 (Pa. 1998).

   b) Retaliation for filing an unemployment compensation claim. *Highhouse v. Avery Transp.*, 660 A.2d 1374 (Pa. Super. 1995).

   c) Discharge for attending or participating in jury duty. *Reuther v. Fowler and Williams, Inc.*, 386 A.2d 119 (Pa. 1978).

d) Termination for refusal to take a polygraph or lie detector test. *Kroen v. Bedway Sec. Agency, Inc.*, 633 A.2d 628 (Pa. 1993).

e) Discharge for filing a complaint under the Wage Payment and Collection Law. *Fialla-Bertani v. Pennysaver Publications of Pa., Inc.*, 45 Pa. D. & C.4th 122 (Allegheny Cty. 2000).

f) Violation of personal privacy. *Borse v. Pierce Goods Shop, Inc.*, 963 F.2d 611 (3d Cir. 1992).

g) Breach of express or implied contract.

(1) Additional consideration for employment.

(2) Handbook provisions creating a reasonable expectation of employment for a specified duration.

2. Unlawful discrimination under the Pennsylvania Human Relations Act.

3. Unlawful discrimination under Title VII of the Civil Rights Act of 1964.

4. Unlawful discrimination under the Age Discrimination in Employment Act.

5. Unlawful discrimination under the Americans with Disabilities Act.

6. Unlawful termination under the Family and Medical Leave Act.

a) Interference with FMLA rights.

b) Retaliation for exercising FMLA rights.

7. Retaliation under the FLSA, OSHA, etc.

8. Unlawful termination under military leave laws.

9. Unlawful termination under volunteer fire personnel statute.

10. Unlawful termination under Pennsylvania Whistleblower Law by an employer receiving public funds.

Regardless of the precise nature of a claim challenging discipline or a discharge, the employer will be called upon to explain and support the reasons for the discipline, and the

employee will typically try to prove his or her case by either showing that those reasons are a "pretext" for discrimination, or by offering other evidence of unlawful motives.

B. <u>The Legal Framework</u>

Over 20 years ago, the United States Supreme Court recognized that employers had evolved to the point that there was rarely an admission or "smoking gun" evidence of unlawful employment discrimination. To enable plaintiffs to prove that an underlying unlawful motive existed, in the absence of such direct evidence, the United States Supreme Court established a "burden-shifting" analysis in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under *McDonnell Douglas*, the Plaintiff must first produce evidence sufficient to establish a *prima facie* case. Typically a *prima facie* case is established by merely showing (1) that the plaintiff is in a protected class, (2) that an adverse employment action was taken, (3) that the plaintiff was qualified for the job, and (4) that others outside of the protected class were not adversely affected. This test is flexible; for example, in age discrimination cases, the fourth prong of the test is satisfied by showing that "substantially younger" employees were not adversely affected.

Once a *prima facie* case is made, the defendant must then articulate (but not specifically prove) a legitimate, non-discriminatory reason for the adverse employment action. After the employer meets this burden, a plaintiff must submit evidence from which a jury could reasonably either (1) disbelieve the employer's articulated reasons, or (2) believe that an invidious discriminatory reason was more likely than not a determinative cause of the employer's actions.

> To discredit the employer's proffered reasons, however, the Plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent. Rather, the non-moving Plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a

> reasonable fact finder could rationally find them 'unworthy of credence,' and hence infer 'that the employer did not act for [the asserted] non-discriminatory reasons. While this standard places a difficult burden on the Plaintiff, it arises from an inherent tension between the goal of all discrimination law and our society's commitment to free decision making by the private sector in economic affairs.

Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994).

1. The Primary Methods of Proving Pretext

a. More favorable treatment of similarly situated employees outside of the protected class under similar circumstances.

Examples:

- Evidence that similarly situated employees outside of the protected class committed the same disciplinary infractions in the past, but were not terminated.

- Evidence that others outside of the protected class had a similar pattern of absences/lateness, but were not terminated.

- Evidence that similarly situated employees outside of the protected class had similar performance problems, but were not terminated.

Note, in these cases, the employer proves that the employee actually committed the disciplinary infraction or was not performing acceptably, but the employee wins anyway because the jury is permitted to infer that the employer treated the plaintiff more harshly than others outside of the protected class.

b. Conflicting reasons for the adverse employment action.

Examples:

- Providing the employee with a "kinder, gentler" reason for termination at the time of discharge and then, later, during an investigation or litigation, relying upon the real reasons.

- Any inconsistent statements made during the termination meeting, unemployment compensation hearings, or later agency investigations.

- Different employer officials providing different reasons for the termination.

c. Inconsistent policies or evidence.

Examples:

- Terminating an employee for "poor performance" shortly after the employee received a "satisfactory" performance evaluation.

- Terminating an employee for policy violations where the policy is so unclear that it is questionable whether the plaintiff committed a violation.

    - In these cases, clarification of the policy through the progressive disciplinary process may be helpful.

- Other evidence of discrimination.

    Examples:

    - Statement made by decision-makers indicating discriminatory animus may be direct evidence of discrimination.

C. Best Practices in a Discipline or Discharge Situation

1. Things To Consider: Disciplinary Infractions

1. Has the infraction been clearly established or admitted?

2. If not, has the employer conducted a thorough investigation and concluded that the infraction did indeed occur?

3. If the employee was terminated for a rule violation, is the rule clear and was it known to the employee?

    - If not, is the standard of conduct obvious (e.g., no fighting)?

4. Is the investigation well documented?

5. Is the disciplinary action to be taken consistent with the action taken in response to prior incidents of a similar nature?

    - If not, is there a clear explanation for the deviation from prior practice?

6. Has the employee had the opportunity to provide an explanation, and can the employer articulate why that explanation is not sufficient?

7. If the offense is not egregious, have prior warnings been given, and was the employee previously aware that additional infractions would result in termination (this is especially important in attendance cases or situations involving repeated minor infractions)?

8. How will the decision be communicated to the employee?

9. If in an union environment: will the employer be able to prove "just cause"? Has the employee been provided "due process"?

10. Is there any other reason to believe that the decision might be motivated by discriminatory reasons, or that the basis for the decision could be challenged?

2. Things to Consider: Discharge for Poor Performance

1. Were the performance issues made known to the employee?

2. Are the prior performance appraisals consistent with the position now being taken by the employer?

3. Do the prior performance appraisals provide objective examples of poor performance?

4. Was the employee given the opportunity to comment upon or contest the prior adverse performance appraisals?

5. Was the employee placed on a performance improvement plan and given an opportunity to correct the deficiencies after they were made known?

6. Is there objective evidence that the employee has failed to correct the performance deficiencies?

7. Is there corroborating evidence of poor performance, as opposed to the subjective beliefs of a single supervisor?

    a) If the discharge is based upon the subjective beliefs of a single supervisor, is there any reason to believe that that supervisor has discriminatory animus?

8. If the performance deficiencies are capable of objective measurement, are there other employees who have performed worse and are not being

terminated?

9. Is termination consistent with the District's handling of prior circumstances involving poor performance of other employees?

10. Has the employer been given the opportunity to explain his/her side of the story before termination?

11. Did the employee ask for assistance to improve that was denied, such as additional training or alternative procedures?

12. Does adequate documentation exist?

3. Things To Consider: Conducting Termination Meetings

1. Be prepared to communicate the discharge decisions succinctly and accurately.

    a) It is typically advisable to provide some information to the employee in a tactful manner regarding the reasons for the discharge. The reasons should typically be confirmed in a termination letter, and any oral communication of the reasons must be consistent with the letter.

2. Typically, two people should conduct the termination meeting, but the meeting should be conducted in a non-threatening way. It may be advisable to allow both management participants to have a role in the termination meeting so that it does not appear as if one of the individuals is simply there for security or to intimidate the employee.

3. Always communicate discharge decisions in a confidential manner. Unnecessary disclosures of the reasons for discharge (or other discipline) could lead to defamation claims.

4. Avoid a debate regarding the merits of the termination.

5. Take care of the logistics:

    a) Try to conduct the termination in a way that requires the employee's contact with other employees immediately following the termination meeting to be minimal.

    b) Ensure that the employee understands what property must be returned to the District upon termination.

c) Arrange for final payment of wages and how benefits will be handled upon termination.

d) Provide the employee with an opportunity to express any concerns or comments that he/she has following termination. This is often best done in a subsequent exit interview.

D. Managing absences under the ADA/FMLA

Improperly managing absences is another example of how employers can create significant liability in discipline and discharge situations. Not only are employers required to consistently apply their internal attendance policies and collective bargaining agreements, but they have to understand their obligations under applicable laws, including the Family and Medical Leave Act ("FMLA") and the Americans With Disabilities Act ("ADA").

Applying internal policies without giving consideration to whether there are any legal obligations could change a routine termination for violation of an attendance policy into a termination in violation of the law. Nevertheless, being armed with the necessary knowledge to effectively manage employee absences will go a long way in preventing employer liability. This discussion is designed to give you the practical information you need to recognize when a potential issue under the FMLA and/or ADA may arise, and arm you with the right tools to take appropriate action in specific situations.

1. FMLA Eligibility and Basic Rights

The FMLA requires that covered employers provide eligible employees up to 12 weeks of unpaid leave for a qualifying reason. With very limited exceptions, an employee on FMLA leave must be returned to work in an equivalent position upon expiration of the leave, and health insurance benefits must be maintained while the employee is on FMLA leave. Essentially, the FMLA provides unpaid job protection with health insurance for eligible employees who must take a leave of absence from work for a qualifying reason.

Employers must be aware of when and how the FMLA applies. In order for an employee to be entitled to FMLA leave, the following conditions must be met:

- The FMLA must apply to the employer;
- The individual requesting leave must be an "eligible employee"; and
- The leave of absence must be needed for a qualifying reason.

Covered Employers. The FMLA applies to employers who employ 50 or more employees in each working day during each of 20 or more calendar work weeks in the current or preceding calendar year. 29 U.S.C. § 2611(4). All employees on the employer's payroll will be considered employed each working day of the calendar week, including part-time and temporary employees and any employees on paid or unpaid leave. 29 C.F.R. § 825.105.

With respect to Districts, all public agencies are considered covered employers under the FMLA, regardless of the number of employees. For smaller Districts not part of the county government system, however, they likely will be "covered employers" without any "covered employees," because even if the District is a covered employer, any employee must work at a work site that employs 50 or more employees within a 75-mile radius to be eligible for FMLA rights. 29 C.F.R. § 825.108(d).

Eligible Employees. In order to be considered an eligible employee under the FMLA, an individual must have been employed for at least 12 months by the employer and must have worked at least 1,250 hours during the 12-month period immediately prior to the date on which the leave is to begin. The employee also must be employed at a work site at which the employer has at least 50 employees within a 75-mile radius. Accordingly, an employer may be covered by the FMLA, but its employees at remote sites may not be eligible to take leave.

Qualifying Reasons For FMLA Leave. If an employee meets the coverage requirements set forth above, he/she is eligible for a total of 12 weeks of unpaid leave in any 12-month period for:

(1) the birth or placement for adoption of a child with the employee;

(2) to care for an immediate family member (*i.e.*, husband, wife, father, mother, minor or disabled child) with a serious health condition; or

(3) for the employee's own "serious health condition," which renders the employee unable to perform one or more of the essential functions of the job.

The definition of "serious health condition" raises the most significant coverage issues under the FMLA. If the employee, or the immediate family member, does not have a condition that constitutes a "serious health condition," then the employee is not entitled to FMLA leave as a result of that condition.

"Serious health condition" is a physical or mental illness, injury, impairment, or condition involving either in-patient care (i.e., an overnight hospital stay) or continuing treatment by a health care provider.

"Continuing treatment by a health care provider" is defined as follows:

(1) A period of "incapacity" (i.e., inability to work, attend school, or perform regular daily activities) of more than three calendar days that also involves either two or more treatments by a health care provider or one treatment by a health care provider that will result in a regimen of continuing treatment; or

(2) Any period of incapacity due to pregnancy or prenatal care; or

(3) Any period of incapacity for a chronic serious health condition; or

(4) Any period of permanent or long-term incapacity from a condition for which treatment may not be effective (e.g., Alzheimer's, stroke, terminal stages of a disease); or

(5) Any period of absence in order to receive multiple treatments for a condition that likely would result in a period of incapacity of more than three

calendar days in the absence of medical intervention (e.g., chemotherapy, radiation, physical therapy, dialysis).

If the employer determines that the employee is an "eligible employee" and that the absence may be for a qualifying reason, the employer should immediately (i.e., within two business days) designate (or preliminarily designate) the time off from work as FMLA leave and send the employee a written notice of rights and responsibilities under the FMLA.

2. ADA Eligibility and Basic Rights

The ADA prohibits discrimination against any qualified individual with a disability. In addition, the ADA imposes an affirmative obligation upon employers to provide a reasonable accommodation in order to allow a qualified individual with a disability to perform the essential functions of the job. Once again, the ADA compliance process begins with the determination as to the scope of coverage under the statute.

Employer Coverage. The ADA applies to all employers with 15 or more employees.[2]

Employee Coverage. All "qualified individuals with a disability" who work for a covered employer are entitled to protection under the ADA. "Disability" is defined by the ADA as (1) a physical or mental impairment that substantially limits one or more major life activities, (2) having a record of such impairment, or (3) being regarded as having such an impairment.

Major life activities include the important day-to-day elements of life and have been held to include caring for oneself, walking, seeing, hearing, speaking, breathing, learning, interacting with others, performing manual tasks, and working. 29 C.F.R. § 1630.2(i).

A "substantial limitation" of a major life activity occurs when a person is:

(i) unable to perform a major life activity that the average person in the general population can perform; or

[2] The Pennsylvania Human Relations Act, which imposes obligations similar to the ADA, applies to all employers with four or more employees.

(ii) significantly restricted as to the condition, manner, or duration under which an individual can perform a major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1). The determination of whether an individual has a substantial limitation of a major life activity must be made with reference to the effect of prescription drugs or other mitigating measures. In order to establish a substantial limitation of the major life activity of working, a plaintiff must show that he/she is unable to perform a broad class of jobs as compared to others with similar skills, training, and ability.

Basic Rights. The leave entitlement under the FMLA is straightforward: An eligible employee is entitled to up to 12 weeks of unpaid leave in any 12 month period.[3] However, the leave of absence issue becomes complicated under the ADA. If the employee suffers from a disability under the ADA, a leave of absence, in excess of 12 weeks or for FMLA-eligible employees or in general for non-FMLA-eligible employees, may be required as a reasonable accommodation. In fact, the EEOC has taken the position that an indefinite or extended leave of absence may be a required reasonable accommodation under many circumstances, unless the employer can establish an undue hardship. The EEOC takes the following position in its *Guidance on Reasonable Accommodation and Undue Hardship*:

> Under the ADA, an employee who needs leave related to his/her disability is entitled to such leave if there is no other effective accommodation and the leave will not cause undue hardship. An employer must allow the individual to use any accrued paid leave first, but if that is insufficient to cover the entire period, then the employer should grant unpaid leave. An employer must continue an employee's health insurance benefits during his/her leave period only if it does so for other employees in similar leave status. As for the employee's position, the ADA requires that the employer hold it open while the employee is on leave unless it can show that doing so causes undue hardship. When the employee is ready to

[3] If feasible, employers should use a rolling 12-month period. Regardless of the period selected, an employers must communicate this method to employees in its FMLA Policy.

> return to work, the employer must allow the individual to return to the same position (assuming that there was no undue hardship in holding it open) if the employee is still qualified (*i.e.*, if the employee can perform the essential functions of the position with or without reasonable accommodation).
>
> If it is an undue hardship under the ADA to hold open an employee's position during a period of leave, or an employee is no longer qualified to return to his/her original position, then the employer must reassign the employee (absent undue hardship) to a vacant position for which he/she is qualified.

EEOC Guidance on Reasonable Accommodation and Undue Hardship, Question 21. The Guidance specifically requires employers to modify their no-fault attendance policies to accommodate individuals with a disability, and it disapproves of any *per se* limitations on the amount of extended leave to which an employee might be entitled, even if the employee is unable to provide a fixed date of return.

The EEOC's position that an extended leave of absence must be offered as a reasonable accommodation (absent undue hardship) is in conflict with many judicial decisions on the issue. Many courts have held that attendance is an essential function of nearly every job. Not surprisingly, showing up for work is an important part of actually working.

3. Applying the ADA and the FMLA to Scenarios Involving the Absent Employee

After the 12 Weeks Have Expired

> Martha requested and received approval for FMLA leave due to a diagnosis of "anxiety." Just prior to the expiration of her 12-week FMLA leave, Martha submits a doctor's note requesting an additional leave of absence for up to three months due to her condition. The doctor's note states that he is hopeful that Martha will be able to return to work within the three-month period. During her time off, other employees in her department have been able to pick up most of her workload.
>
> At the end of Martha's 12 week FMLA leave, the District immediately terminates her position. Martha's request for accommodation in the form of additional leave is denied. Martha

has no other accrued paid leave that she could use for her additional time off.

This scenario highlights the interplay between the ADA and the FMLA. An employee's medical condition may qualify as "serious" for purposes of granting FMLA leave, but also may constitute a "disability" under the ADA requiring the employer to engage in the interactive process of accommodating the employee. As the EEOC Guidance points out, an extended leave may be a reasonable accommodation under certain circumstances. In considering whether the District acted correctly in terminating Martha, consider the following factors:

1. Was the request for additional leave of definite duration?
2. Was there an undue hardship for the District in providing additional leave?
3. Is it reasonably likely that Martha would have been able to return to work at some point?
4. Were other employees permitted to take extended leaves of absence?

Extended leave of absence situations thus should be handled on a case-by-case basis. An employer no longer can simply apply a blanket rule that employees will be terminated if unable to return to work after the expiration of the 12-week FMLA leave entitlement; some consideration of the ADA's applicability is required. Instead, employers should request information from the employee on leave as to when the employee will be able to return and what restrictions will apply upon his/her return to work. If an extended leave is requested for a fairly definite period of time, the request should be granted unless the employer can prove undue hardship. On the other hand, if an employee (or the employee's physician) is unable to indicate when, or if, the employee will be able to return to work, then the employer can be more comfortable in terminating employment. Under such circumstances, the employer may wish to express a willingness to rehire the employee if he/she is able to return to work in the future.

The Never-Ending Leave Of Absence

> Julie has been with the District for about three years. She began suffering from a neurological condition, which caused her to miss lengthy periods of work and prevented her from accomplishing a substantial portion of her duties. The District initially allowed FMLA leave, then granted an additional three months of extended leave. When she returned to work, the District created another position to accommodate her. Then, after about a week of work, she advised that she needed another leave of absence. This went on for a few months. Julie would work a few weeks and then request another leave of absence. The District needs someone to perform her new duties – that is why she was assigned there.

A prior accommodation (e.g., leave of absence or creation of a new position) do not make that accommodation automatically reasonable. Even after FMLA leave has expired, an employer may have additional ADA obligations. Often an additional unpaid leave of absence for a reasonable duration will constitute a reasonable accommodation under the ADA, unless the employer can show undue hardship. However, this requirement has its limits and courts are reluctant to require open-ended extended leave.

Most courts have held that in most jobs the inability to regularly report to work means the employee is not otherwise qualified to perform the essential functions of the job, since attendance is an essential function of most jobs. The employer should, nevertheless, document support for the undue hardship determination before terminating the employee.

The Habitually Absent Employee

> Norman, a long-time employee, was admitted to a treatment center for depression. He failed to inform his supervisor that he had been admitted for treatment or that he would be absent from work. Norman was issued a final warning when he failed to report to work for the fifth time in the calendar year.
>
> Norman remained in treatment for several more days, all of which counted as one "occurrence." Upon his release, he telephoned his supervisor to inform him that he would be reporting to work the following day. Only then did Norman inform the District that he

> had been receiving treatment for depression and the facility provided documentation. Norman then says he will probably miss more time intermittently and implies that some of his earlier occurrences were related to depression.

Where the need for FMLA leave is unforeseeable, an employee must give notice as soon as practicable under the facts and circumstances of the particular case. "It is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances." 29 C.F.R. §825.303(a). The issue here is whether the employee could have given notice. Even if the employer is on notice of a potentially FMLA-qualifying event, some courts have held that employers can enforce reasonable call-in provisions in their attendance policy. The FMLA regulations provide "an employer may ... require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave." 29 C.F.R. §825.302(d).

V. Recordkeeping and Postings – Mundane, But Mandatory

Many different employment laws impose recordkeeping and posting requirements on employers. Making sense of (and complying with) these various and often overlapping rules can be a challenge for even the most organized employers. This section will present suggested guidelines for an employment recordkeeping and posting that combine legal requirements with "best practices" that, though not necessarily mandatory, are recommended from both an operations and legal perspective.

A. Personnel Files

1. Records to be Created and Maintained in Personnel Files

Each employer must create and maintain a personnel file for each employee who works at the location. This includes both hourly and salaried employees, and all management employees. The following documents should be included in the personnel file:

- Employment Application
- Employee information/status change documents
- Acknowledgment of receipt and understanding of Employee Handbook
- All attendance records
- All formal disciplinary documentation and records of counseling
- Any written agreements or authorizations
- Employee performance evaluations
- Any safety training records
- Records of job-related education, seminars, or training and job-related test results
- Records of property assigned to the employee, such as computers, pagers, cellular phones, and credit cards, and any documents the employee signs related to those items
- Any other documents relating to employee performance or conduct

2. Confidentiality and Employee's Right to Access the Personnel Files.

Pennsylvania law provides for employee access to personnel file information. Any employee requesting access to any information in their personnel file should be asked to complete a written request. After the request is submitted, the following procedures should be followed to enable the employee, or an authorized representative, to review the personnel file:

1. Schedule the review for a reasonable time outside of the employee's normal working hours. A manager or supervisor must be present during the review. Ample time must be allowed for the employee to complete the review.
2. No personnel file may be removed from the premises under any circumstances. The review should take place in the presence of a manager or a supervisor.
3. The employee must be permitted to review the entire personnel file and is permitted to take notes. However, the employee does not have the right to copy any information from the file.

4. Typically, the right to review the personnel file is limited to information in the personnel file itself.

5. The employee may prepare a written statement to be added to the personnel file explaining, supplementing, or contesting any information contained in the file.

B. Employee Medical Files

1. Information that Must Be Maintained in the Medical File

Under the Americans With Disabilities Act and parallel state laws, any medical information possessed by employers concerning employees is confidential. All information that in any way relates to an employee's medical condition must be kept in a separate file. No manager, supervisor, or other individual with decision-making authority over the employee can be permitted access to the medical file, except when necessary for legitimate business reasons. Medical information includes any document that relates or refers to an individual's physical or mental impairment or health, including but not limited to the following:

- All doctor's notes or excuses
- Any other information received from an employee's doctor
- All FMLA paperwork
- Workers' compensation claim forms and other documentation referencing physical or mental conditions
- Results of any medical examination
- Any medical questionnaires
- Information concerning prescription drug use
- All documents relating to any request for accommodation or the reasonable accommodation process
- Information relating to any claim for disability benefits

- Any information relating to any health insurance claim
- Information referencing alcohol use or past drug addiction (current illegal drug use not included)
- Any documents containing drug and alcohol testing information

Employees should be permitted access to their confidential medical file upon request. Access to medical information must be provided within 15 days, and the employee is legally entitled to a copy of the documents in his medical file.

C. Payroll and Benefits Records

State and federal laws contain extensive requirements concerning payroll and benefits information that must be created and maintained. As a general rule, this information may be maintained in either paper or electronic form. The following information must be created and maintained:

1. Payroll Information

- Employee's name, address, and zip code
- Payroll authorization forms, including tax withholding forms
- Direct deposit authorization
- Regular hourly rate of pay or salary
- Total wages paid during each pay period and date of payment
- Time cards or any other documents reflecting hours worked
- Records of any bonuses or additional payments made
- Records of any deductions from wages or salary
- Child labor documents

a. For Non-Exempt Employees Only

- Employee's regular hourly rate of pay

- Hours worked each work day, and total hours worked each work week
- Total daily or weekly straight time earnings or wages exclusive of premium overtime compensation
- Total premium paid for overtime hours. This amount excludes the straight time earnings for overtime hours.

2. Benefits Information

The following information concerning benefits must be maintained in the payroll/benefits file.

- All enrollment forms or other information
- All benefit applications or claims (except medical information)
- Any and all correspondence with the employee or the plan administrator
- All information relating to a change in benefits status
- Any and all reports or summaries of benefits provided to the employee
- All COBRA forms
- All benefit summary data, including summary of contributions, years of service, benefits accrued or other information needed to implement the plan

In addition to the information set forth above, which will be maintained in the individual employee's payroll/benefits file, the District must maintain the following employee benefit plan documents.

- All plan documents relating to any pension, profit sharing, or other retirement plan
- Summaries and plan descriptions of any pension, profit sharing, or other retirement plan
- All health insurance plans and summary plan descriptions
- All life insurance plans and summary plan descriptions

- Any other health or welfare plan and/or summary plan description
- Any vouchers, worksheets, receipts, and/or resolutions relating to any employee benefit plan
- All documents relating to any claim denial

D. Safety Files

The following information (if applicable) must be maintained in the safety file:

- All safety committee meeting minutes and other documents presented to or created by the safety committee
- All purchase orders for personal protective equipment (e.g., safety glasses, safety shoes, hard hats, gloves, or other safety equipment)
- Certification of personal protective equipment hazard assessment and training records
- Fire extinguisher test records
- Occupational noise surveys and other noise exposure measurements
- Audiometric test results, sign-in sheets for audiometric testing, and training records
- Any applicable respiratory protection program
- Any applicable respiratory fit testing forms and training documentation
- All hoists/belt/crane inspections
- Ladder inspection records
- Emergency response plan
- Evacuation plan
- Emergency response training records
- Any employee hazardous substance exposure records (maintained in confidential medical file)
- CPR certification records

- Confined space program
- Control of hazardous energy (lockout/tagout) procedures
- Confined space permits and training records
- Lockout/Tagout training and inspection records
- Forklift training records
- HAZMAT training records

In addition to the general safety file, separate files should be maintained for the following:

- OSHA 300 log, including workers' compensation log, workers' compensation summary reports, and other OSHA form 301 supporting data
- Material safety data sheets must be available for use and inspection by employees at prominent locations within the plant

E. <u>Recruitment Records</u>

A separate recruiting file should be created and maintained with respect to each individual position. The following information should be included in the recruiting file:

- All advertisements and postings for the position
- All cover letters, resumes, applications, or correspondence received from any individual interested in the position
- All information concerning recruiting sources utilized and/or outreach efforts
- All interview notes and all completed interview guides
- Any offer letters and conditional offers

F. I-9 File

All completed I-9 forms and I-9 verification information should be kept together, separate from the general personnel files, organized by year, with all I-9 forms and verification information for employees hired in a specific calendar year in a separate folder.

G. Manager Desk Files

Every manager and supervisor is encouraged to keep a confidential manager's desk file or notebook. The desk file is intended to serve as informal documentation of certain events. This file is a District file and may be subject to access by management officials under certain circumstances. This file should be kept in a location that is not accessible to other employees. Information which should be kept in the manager's file includes:

- Notes of employee observations and critical incidents that will later be used to conduct performance evaluations
- Any informal employee complaints (other than complaints alleging discriminatory harassment)
- Any notes of discussions with any employee concerning any performance, or conduct related issues
- All records of information received relating to any performance or conduct issues

H. Record Retention Guidelines

1. Personnel File Information

- Basic employee information, including job application for employees hired, employee personal information record, orientation checklist, all acknowledgments of receipt and understanding, any written agreements or authorizations, and the job profile must remain in the personnel file throughout employment. Upon termination of the employment relationship, the entire personnel file, as it existed on the date of termination, must be maintained for a period of six (6) years.
- Attendance records – three (3) years. Any attendance records more than three years old should be removed from the personnel file.

- Employee performance appraisals and evaluations – six (6) years. Any employee evaluations more than six years old should be removed from the personnel file and destroyed.

- Formal disciplinary documentation and records of counseling – six (6) years.

- Miscellaneous additional documents – three (3) years.

As stated above, following termination of employment for any reason, the complete personnel file as it existed on the date of termination must be retained for a period of six (6) years. Terminated employee personnel files should be maintained in a different location from active employee personnel files.

2. Employee Medical Files

As a general rule, all employee medical records must be maintained for the duration of the employee's employment plus 30 years.

3. Payroll and Benefits Records

- All payroll records must be maintained for a period of four (4) years.

- All benefit enrollment forms, applications, claims, change in status documents, or other correspondence – duration of employment plus seven (7) years.

- All plan documents and/or summary plan descriptions – permanent.

4. Safety Records

- Safety Committee meeting minutes and other documents presented to or created by the Safety Committee – three (3) years.

- Purchase orders for personal protective equipment – while equipment is in use plus one (1) year.

- Certification of personal protective equipment hazard assessment –until updated assessment is performed.

- Fire extinguisher test records – until extinguisher is retested or out of service.

- Occupational noise surveys and other noise exposure measurements – two (2) years.

- Audiometric test results and sign-in sheets for audiometric testing – duration of employment for individual tested.

- Respiratory protection programs (if applicable) – until updated program is implemented.

- Respiratory fit testing and training documentation (if applicable) – training must be performed each year. You should always have two years of training records. Fit testing records should be maintained for two (2) years. Any physical examination records associated with fit tests must be maintained for duration of employment plus ten (10) years. Any industrial hygiene surveys or results of air monitoring – thirty (30) years.

- Hoist/belt/crane inspections – at least until next inspection and no less than two (2) years.

- Ladder inspection documents – at least until next inspection and no less than two (2) years.

- Emergency response plan and evacuation plan – active plan and previous plan.

- Emergency response training records – must retain proof that each current employee has received training under the emergency action plan. Always keep the most recent training records.

- Employee exposure records – duration of employment plus thirty (30) years in confidential medical file.

- Permit required confined space program – current program and previous program.

- Confined space permits and training records – current plus previous.

- Control of hazardous energy (lockout/tagout) procedures – current plus previous plan.

- Lockout/tagout training and inspection records – current plus previous.

- Forklift training records – current plus previous.

- OSHA 300 log and supporting data – five (5) years.

- MSDs – all current MSDs must be maintained and available. Once a substance is outdated, the forms need not be retained but a record of the identity of the substance, when and where it was used, must be maintained for thirty (30) years.

- Safety inspection records – two (2) years.

5. Recruitment Records

- The entire recruitment file, including advertisements, postings, cover letters, resumes, applications, correspondence, recruiting sources, interview notes and interview guides must be maintained for two (2) years after the position is filled.

6. I-9 File

All I-9 forms must be retained for three (3) years after the date of hire or one (1) year after the date of termination, whichever is later.

7. Manager's Desk Files

Complete manager's desk files must be maintained for a period of four (4) years. Supervisors and managers should annually update their desk file by discarding information more than four (4) years old.

NOTE: In the event that any administrative claim or legal action is initiated, all records relating to that matter must be maintained pending final resolution. When purging files, managers must be aware of any pending litigation so that no records are inadvertently destroyed.

I. Requests for Job References for Former Employees

All requests for job references for former employees should be directed to an appropriate District representative. The District representative must indicate that the District does not provide information relating to the job performance or ability of former employees without a

release and authorization signed by the employee. Only the employee's dates of employment, position held, and rate of pay should be provided unless the employee has provided a written release allowing the disclosure of additional information.

J. Required Postings

Federal and state laws require Districts to post certain notices to employees at prominent locations in the workplace. All of the following notices must be posted on a District bulletin board. The notices must be fully legible and may not be covered with any other material.

- The District's FMLA policy
- The District's Policy against Discriminatory Harassment
- Federal "Five in One" Employment Law poster, which includes the following posters:
    - Family and Medical Leave Act;
    - Fair Labor Standards Act;
    - Job Safety & Health Protection (OSHA);
    - Equal Employment Opportunity Act; and
    - Employee Polygraph Protection Act.
- Employment Provisions of the Pennsylvania Human Relations Act posting
- State Unemployment Compensation Law posting
- State Workers' Compensation Law posting
- State Minimum Wage Law posting (NOTE that poster has changed in 2007 to reflect changes to minimum wage)
- State Equal Pay Law posting

In addition, if a District employs any minors, the state Child Labor Law notices must be posted.

VI. The Sunshine Act and District Meetings

A. Sunshine Act Basics

The Sunshine Act ("Act") provides that:

> the right of the public to be present at all meetings of agencies and to witness the deliberation, policy formulation and decisionmaking of agencies is vital to the enhancement and proper functioning of the democratic process and that secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society.

65 Pa. C.S. § 702(a). The Act's requirements apply to any "agency" in Pennsylvania, which is defined to include, among other things, "[t]he body, and all committees thereof authorized by the body to take official action or render advice on matters of agency business, of all the following: ... any board, council, authority or commission of the Commonwealth or of any political subdivision of the Commonwealth or any State, municipal, township or school authority ...." Id. § 703. Conservation Districts fall within the Act's expansive definition of "agency."

The Act's principal requirements relate to open meetings. Specifically, "[o]fficial action and deliberations by a quorum of the members of an agency shall take place at a meeting open to the public unless closed under section 707 (relating to exceptions to open meetings), 708 (relating to executive sessions) or 712 (relating to General Assembly meetings covered)." 65 Pa. C.S. § 704. "Official action" is defined under the Act as:

(1) Recommendations made by an agency pursuant to statute, ordinance or executive order.

(2) The establishment of policy by an agency.

(3) The decisions on agency business made by an agency.

(4) The vote taken by any agency on any motion, proposal, resolution, rule, regulation, ordinance, report or order.

Id. § 703. "Meeting" is defined under the Act as "[a]ny prearranged gathering of an agency which is attended or participated in by a quorum of the members of an agency held for the purpose of deliberating agency business or taking official action." Id.

As part of the open meeting requirement, "[i]n all meetings of agencies, the vote of each member who actually votes on any resolution, rule, order, regulation, ordinance or the setting of official policy must be publicly cast and, in the case of roll call votes, recorded." 65 Pa. C.S. § 705. Likewise, written minutes must be recorded and maintained from all open agency meetings. These minutes must include:

(1) The date, time and place of the meeting.

(2) The names of members present.

(3) The substance of all official actions and a record by individual member of the roll call votes taken.

(4) The names of all citizens who appeared officially and the subject of their testimony.

Id. § 706.

The two primary exceptions to the Act's open meeting requirements for agencies are for "conferences" and "executive sessions." Conferences are defined under the Act as "[a]ny training program or seminar, or any session arranged by State or Federal agencies for local agencies, organized and conducted for the sole purpose of providing information to agency members on matters directly related to their official responsibilities." 65 Pa. C.S. § 703. An agency may participate in such a conference that need not be open to the public, but cannot conduct any agency business at said conference. Id. § 707.

Agencies are permitted to have executive sessions closed to the public for the following purposes:

- to discuss personnel matters, including hiring, promoting, disciplining or dismissing of employees
- to hold information, strategy, or negotiations related to collective bargaining agreements or arbitrations
- to consider the purchase/lease of real estate
- to consult with an attorney regarding litigation
- to discuss agency business that would lead to disclosure of confidential information including investigations of possible violations of law and quasi judicial deliberation

65 Pa. C.S. § 708(a). Even though executive sessions may be closed to the public, any official action based upon discussions held in an executive session must be taken at an open meeting. Id. § 708(c).

The Act also has provisions requiring public notice of all meetings and the opportunity for public comments at meetings. "Public notice" means (1) the publication of the place, date, and time of the meeting in a newspaper of general circulation in the area covered by the agency and (2) the posting of the notice in a prominent location in the principal office of the agency. Every agency must give public notice of its first regular meeting of the calendar or fiscal year at least three days before the meeting. This notice should include the schedule of the remaining regular meetings for the year. Public notice of each special meeting or rescheduled regular meeting must be given at least 24 hours in advance. See 65 Pa. C.S. § 709.

An agency also must provide a reasonable opportunity at each advertised regular meeting and advertised special meeting for residents or taxpayers to comment on matters of concern, official action, or deliberation that are or may be before the board or council before taking official action. The agency may accept all public comment at the beginning of the meeting, if it so desires. If the agency determines that there is not sufficient time at a meeting for residents or

taxpayers to comment, it may defer the comment period to the next regular meeting or to a special meeting occurring in advance of the next regular meeting. See 65 Pa. C.S. § 710.1(a).

The ramifications of violating the Act's requirements can be severe. First, any official action taken at a non-open meeting that did not meet the Act's requirements may be declared invalid by a court. In addition, if a person proves that an agency violated the Act "willingly" or with "wanton disregard," the court must award all or part of the attorney's fees and costs to the prevailing party. If the court finds that the person's legal challenge was frivolous or brought with no substantial justification, it must award all or part of the attorney's fees and costs to the agency.

B. Additional Questions and Answers About the Act and District Meetings

1. Must a public comment period be held if no members of the public are present at the meeting?

Yes. If no visitors are present, it is suggested that the Board still offer a public comment period and record so in the minutes.

2. Must an executive session be advertised in a newspaper of general circulation?

No.

3. Does the Act require tape recordings of meetings?

No, but District policy may require the tapes to be kept for a certain period of time.

4. May a Board prohibit the use of recording devices by the press or members of the public during public meetings?

No, but a Board may make reasonable rules governing the use of recording devices.

5. Can the Board have an executive session at any time other than the official meeting?

Yes, so long as the executive session and the reason for it are announced at a public meeting either prior to or after the executive session is held.

6. Must a Board take minutes of executive sessions?

No. (This is not advisable because minutes become public records.)

7. Can a Board use a secret ballot to vote?

No, the Act requires votes to be cast publicly.

8. When do District meeting minutes become an official record?

When officially accepted or adopted at a public meeting.

9. Are Board Chairs allowed to vote?

Of course they are. Most of the time, a Chair's vote is unnecessary because close votes are rare. However, the Chair has the right to vote unless stated otherwise in the constitution or bylaws. The Chair's vote can reaffirm the votes of his/her colleagues. Most people know that a Chair's vote can be used to break a tie, but a Chair may also vote to make a tie. The vote to make a tie is simply an informal method of postponing action on an item that will allow the Board more time to reach a decision.

10. Does the Sunshine Act require that a District advertise its Retreat?

As a sub-unit of state government, a Conservation District must adhere to Sunshine Act requirements when conducting its business. The Act defines a "meeting" as any prearranged gathering of an agency attended by a quorum of its members held for the purpose of deliberating agency business or taking official action. "Deliberation" means the discussion of agency business held for the purpose of making a decision.

If the discussions at the retreat will be solely for the purpose of updating the directors on current District programs and discussing how those programs may be run differently, then you would not have to worry about "sunshining" the retreat. However, if the information presented leads into deliberations that result in policy decisions or decisions to modify previous decisions by the Board, you would be in violation of the Sunshine Act. It might be better to take the precaution of sunshining your District Retreat. The cost of a simple advertisement in the newspaper and posting the information at the District office would be much less than any potential fines incurred by violating the Act. It would also be advisable to include time for public input on the retreat agenda, similar to what you should do at your District board meetings.