



**Whiteford|Taylor|Preston<sup>LLP</sup>**



# Hot Topics in Nonprofit HR and Employment Law

April 16, 2019

DELAWARE

DISTRICT OF COLUMBIA

KENTUCKY

MARYLAND

MICHIGAN

NEW YORK

PENNSYLVANIA

VIRGINIA



# Speakers

---

- *Moderator:* **Thomas Cluderay**, General Counsel, Yellowstone Forever
- **Eileen Johnson**, CAE, Partner Whiteford, Taylor & Preston, LLP
- **Chevanniese Smith**, Associate General Counsel, American Red Cross
- **Judy Branzelle**, Chief Legal Officer and General Counsel, Goodwill Industries International, Inc.
- **Jennifer Jackman**, Partner, Whiteford, Taylor & Preston, LLP



# Today's Topics

---

- EEO compliance in hiring practices
- Executive compensation
- Remote worker management
- Codes of conduct
- Dealing with difficult employees



# Scenarios

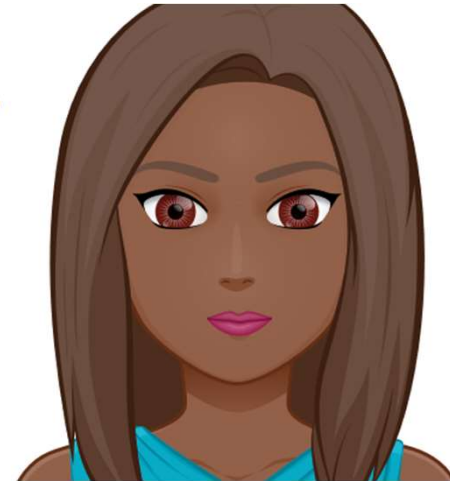
---

## ➤ *Employee – Aisha*

➤ Remote employee

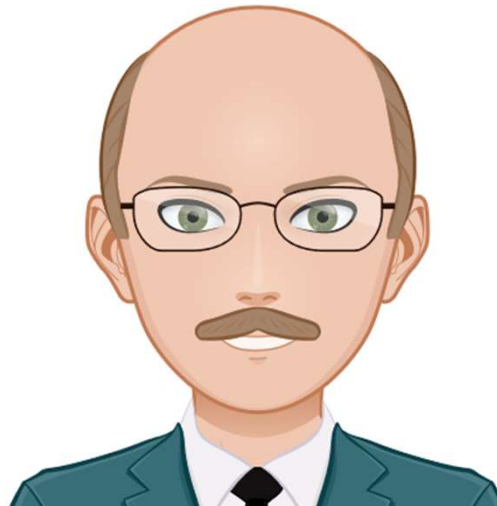
➤ Minority

➤ Age 24 – this is her first real job out of school following internships



## ➤ *Supervisor – Ralph*

➤ Older, white male





Whiteford|Taylor|Preston<sup>LLP</sup>

## *Beginning the Employment Relationship*

Chevanniese Smith, Associate General Counsel  
American Red Cross



# Beginning the Employment Relationship

---

Potential pitfalls at every turn . . .

- Application
- Interviewing process
- Offer
- Drug testing

# Application DON'Ts

---

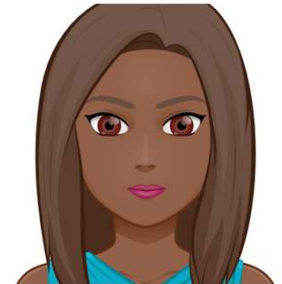
- Not including an at-will disclaimer
- Not including a non-discrimination statement
- Requesting dates in the education section
- Asking about arrests and convictions
- Including a background check acknowledgment
- Not including language about how to seek a reasonable accommodation
- Asking about familial status or citizenship

# Interviewing Process

---

*During the interview, Ralph says to Aisha, “**That’s an interesting name, where is it from?**”*

Polite chatter or improper question?



- Train interviewers not to inquire into personal details that seem innocuous but might reveal protected information
- Focus on gathering information needed to determine suitability for the position





## Permissible disability-related inquiries:

---

- Informing the applicant of the employer's attendance or punctuality requirements, and asking if the applicant can comply (with or without reasonable accommodation).
- For **truly** essential functions: asking about the applicant's ability to perform the functions (with or without reasonable accommodation)
- DO NOT ask whether the applicant has a disability that may affect his or her ability to do the job

## Questions about salary history?

---

- Pay Equity and Transparency laws in 8 states limit inquiries into salary history and/or considering salary history when setting compensation
- Salary history will not justify disparities
- Questions about salary EXPECTATIONS are okay.

# Background Checks

---

## What to run?

- Don't seek more information than needed
- Some State restrictions on credit checks

## When to run? Ban the Box restricts:

- Timing on criminal background ***inquiries***
- Timing on asking applicants to ***complete*** background check forms
- Timing of ***running*** criminal background checks

# The Job Offer

---

- Always provide a written offer letter
- Advise if subject to further conditions:
  - Background check, drug screen, employment eligibility
- Specify salary and benefits
- Include at-will statement

# Key Steps in Background Check Process

---

1. Whether and when a background check can be run
2. Disclosure and Authorization/Consent Forms
3. Consideration of Information -- Disqualification/Screening
4. Pre-Adverse Action Letter
5. Reasonable Waiting Period
6. Individualized Assessment
7. Adverse Action Letter

## Ban the Box – States with laws covering private employers

---

- California
- Connecticut
- District of Columbia
- Hawaii
- Illinois
- Minnesota
- New Jersey
- Oregon
- Rhode Island
- Vermont
- Washington

## It's Not Just about the “Box”

---

- Remove questions about criminal background from employment applications
- Limits on ***when*** background checks can be ordered
- Job solicitations and advertisements
- Workplace postings
- Individualized assessments required

# Drug Testing and Legalized Marijuana

---

## ***Why Drug Test?***

- Negligent hiring practices
- Reasonable suspicion
- Safe and Drug-Free Workplace Act

## ***Accommodations needed?***

- States with protections for marijuana use
- Safety first







Whiteford|Taylor|Preston<sup>LLP</sup>

## *Executive Compensation*

Eileen Morgan Johnson, CAE, Partner  
Whiteford, Taylor & Preston, LLP



# Executive Compensation

---

Ralph has been promoted to the Executive Director position.

***How should the Board determine his compensation package?***



# Executive Compensation - Board's Role

---

- Adopt compensation policy
- Hiring – negotiate total compensation package
- Annual adjustments
  - Based on Board evaluation of CEO
  - Tied to goals/benchmarks being met
  - Bonuses should be earned and not routine
  - Discourage bonus based on % of net revenues
- CEO should determine compensation of staff

## Intermediate Sanctions for 501(c)(3) and (c)(4)

---

- Compensation must not exceed value of services
- Total compensation, not just salary
- Rebuttable presumption that compensation is reasonable
  - Must follow IRS regulations to create
  - IRS will not second guess compensation if done correctly
  - Presumption that initial compensation is at fair market value

## 3 Steps for Success

---

1. Board/Committee Decision
2. Compensations on similar positions in area
3. Contemporaneous documentation

# Steps 1 & 2

---

## 1. Board or Board committee decision

- Majority of disinterested directors must approve
- Anyone receiving compensation doesn't vote

## 2. Compensations on similar positions in area

- Similar organizations – budget, no. of employees, geographic locations, activities
- Similar people – education, years of experience in position, special skills or profession

## Step 3

---

### 3. Contemporaneous documentation

- Full description of compensation package
- Cite data/studies used to determine compensation
- Records – votes for and against compensation by name
- See IRS regulations for IRC § 4958



# Working with Committees

---

- Avoid full Board setting compensation
  - Normally Executive Committee or Compensation Committee
- Body that sets goals should review performance
- Full Board should be informed of compensation package
  - How it was determined
  - Why is it reasonable



Whiteford|Taylor|Preston<sup>LLP</sup>

---

## *Remote Employee Management*

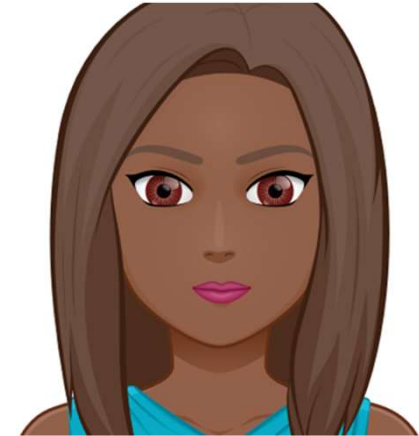
Eileen Morgan Johnson, CAE, Partner  
Whiteford, Taylor & Preston, LLP



## Remote Employee Management Scenario

---

Aisha has been working in the organization's headquarters but her commute is making her consider changing jobs. She asks Ralph if she can work remotely. Aisha is a good employee and Ralph says okay.



***What didn't Ralph think about?***

# Remote Employee Management - Supervision

---

- Challenges in supervising daily work
- Supervisor may need specialized training for remote workers
- Intentional check ins and feed back
- Engaging with co-workers
- Set work schedule and core hours
- Overtime approval for non-exempt employees
- Dependent care required

# Remote Workspace

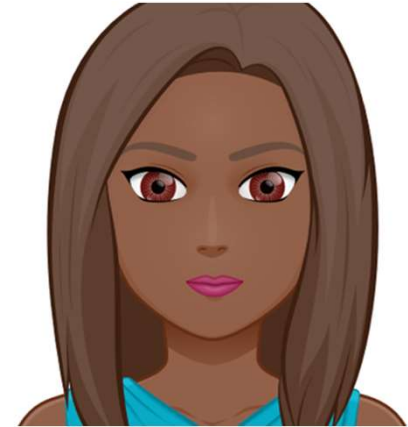
---

- Dedicated work space?
  - Helps with worker's compensation claims
  - Not popular with millennial and generation Z
- Own or employer equipment & supplies
  - Employer equipment – no personal use
  - IT support
  - What supplies are provided by employer?
- Worker's compensation claims for injuries in the work place
- Maintain confidentiality
- Reclaiming files and equipment when employment ends

## Remote Employee Management Scenario

---

Aisha works remotely in the same state as the organization's main office. Her partner has received a fabulous job offer in another state. Aisha tells Ralph that she is planning to relocate. He doesn't want to have to go through the hassle of replacing her, so he says okay.



***What didn't Ralph think about?***

# State Employment Laws

---

## ➤ Popular variations

- Definition of a protected class
- Family and medical leave
- Pregnancy leave
- Other forms of required leave
- Benefits for same-sex partners and common-law spouses
- Vacation/sick pay
- Overtime
- Drug and alcohol testing
- Off-duty conduct
- Access to personnel files
- Required posters
- Wage and hours; final paycheck

# State Employment Laws

---

- Employee handbook may not comply with state law
  - Could make most generous policies apply to all employees

***OR***

- Include a section of the handbook with each applicable state's unique requirements



# State Registrations

---

- Employee withholdings
- Workers compensation insurance compliance and tax issues
- Single employee could meet statutory definition of doing business
- Employer could be required to:
  - Register as a foreign corporation
  - File corporate income taxes
  - Obtain and maintain a local business license
  - Collect sales and use taxes



Whiteford|Taylor|Preston<sup>LLP</sup>

## *Dealing With Difficult Employees*

Jennifer Jackman, Partner  
Whiteford, Taylor & Preston, LLP



## Avoid the Set Up

---

Sadly, Aisha has not become the employee Ralph had thought she would become when he hired her. Her performance and attitude is abysmal. Her attitude in the office is terrible. She has been there for 2 years and Ralph conducted one review about 1 year ago, before her performance declined, and it was a positive review. Aisha complained about a member harassing her 8 months ago.

***Any concerns?***



## Toolkit – What Tools Should Ralph Have Used?

---

- Performance Evaluations
  - Not just a “check the box” process
- Performance Improvement Plan (PIP)
- Progressive Discipline
- DOCUMENTATION!!!

# Why Should You Evaluate?

---

- Helps improve job performance before it is too late
- Documents bad performance in case it does not improve
- Reinforces **GOOD** job performance
- Improves communication



# Hint for Easy But Accurate Evaluations

---

- Create Performance Logs – Email subfolder
- What you **SHOULD** include in logs:
  - Examples of incomplete tasks or deadlines missed
  - Assessment of quality of work
  - Positive contributions
  - Instances of tardiness and absences or failure to work
  - Disciplinary communications and actions taken

# Best Practices for Performance Evaluations

---

- Conduct at least annually
- Be specific
- Use examples
- Be honest
- Review position description
- Review for evaluation inflation

What **NOT** to include:

- Opinions of career success
- Unsubstantiated complaints or rumors about the employee
- Any reference to any protected factor or health
- Theories about the reason(s) for poor performance

## Performance Improvement Plan (PIP) Contents

---

- Document the specific performance issues
  - Examples, dates, descriptions
- Expected Performance/Conduct
- Consequences of Failure to Improve
- Plan of Action
- Timing
- Signatures



# PIP Process

---

- HR Involvement
- Employee Engagement
  - Meet with employee
- Follow Through
  - Do not cancel meetings
- Conclusion
  - Successful or Not?

# Documentation – Best Tool for Difficult Employees

---

- Create record of issues – no he said, she said
- Helps memory issues
- Useful in the event of EEOC charge/lawsuit
- What to Document?
  - Missed deadlines
  - Errors (save copy)
  - Insubordination (details)
  - Excessive tardiness/absences (with dates)
  - Counseling sessions (email to self)
  - Positive Events



# Discipline

---

- Know your discipline policy
  - Is it progressive?
    - Verbal warning
    - Written warning
    - Suspension
    - Termination
- Follow it
- Consistently apply rules

# When the Difficult Employee is the Boss

---

- Ralph seems to have a “type” of employee he likes to hire. Pretty, young women, right out of college. There is a revolving door of employees he hires who usually leave after about a year. You have seen some of these women crying in the office. Aisha is the latest hire and she walked by your office crying. You asked her if everything is OK and she said “no, but can I talk to you as a friend?” What do you do?

## When the Difficult Employee is the Boss (cont'd)

---

- Certainly you advised Aisha that you are general counsel and unfortunately, cannot wear the “friend” hat but you were able to encourage her to talk to you. During the communication, she advised you that Ralph has been telling her sexually explicit jokes, closes the door whenever she comes in the office, looks down her shirt, and requires her to go to happy hour at least once a week. At yesterday’s happy hour, he kissed her.
- You report to Ralph. ***What do you do?***

# Investigating the Boss

---

- The fact that Ralph is your boss does not change the fact that an investigation needs to occur
- The question is – who will investigate?
- How do you protect Aisha and yourself?
  - Engage the Board
  - Outside investigator
  - Leave with pay pending investigation

# Minimizing Risk in Terminations

---

- Forget about the harassment – Ralph has been a model supervisor. Aisha is back to being a problem employee. Ralph has some documentation, albeit spotty, of performance issues. Aisha did complain about the harassment by the board member a couple of months ago. Ralph does not want to wait to get more documentation and says he has a great idea – “let’s just tell her that her position is eliminated!”

***Problem solved?***

## Minimizing Risk in Terminations (cont'd)

---

- At-will – what does it really mean?
- The “position elimination” excuse
- Honesty is the best policy
- Documentation!



# Severance Agreements

---

- Can be successful
- Can aid in transitioning to new employment
- If written properly, can have a clean end with a release
- Not always the solution
- Employee can reject it – risk still exists and now you terminated



Whiteford|Taylor|Preston<sup>LLP</sup>®

---

## *Code of Conduct*

Judy Branzelle, Chief Legal Officer  
Goodwill Industries International Inc.



# Why Have a Code of Conduct?

---

- Serves as a framework to define what a company's culture is, and what the company's values and beliefs are
- Informs how a company expects its employees, partners, vendors and other stakeholders to interact
- Helps build employee loyalty and engagement
- Helps mitigate risk in the event the Code is violated

# What Should be in the Code of Conduct?

---

- Message from the CEO
- Mission, Vision, Values – how does the Code connect?
- What is the expectation of employees and other stakeholders
  - Ethical workplace environment; conducting business; conflicts of interest; integrity/harassment
  - Protection of assets; intellectual property, confidential and proprietary information
  - Non-discrimination; compliance with laws; diversity; safety; substance abuse
- How will they know how to make the correct decision?
- Where should concerns be reported? (NO RETALIATION)
- What will be done about violators – establish a process?
- FAQs/Examples



# Attributes of a Meaningful Code of Conduct

---

- Written simply in short sentences, easy to understand words or phrases, and tailored to the company's operations

***“Sometimes it’s ok to accept gifts depending on the situation” vs “No employee may accept a gift over \$50.”***

- Is it appealing/attractive – in color and reasonable length? Would you want to read it?
- Does it help to clarify how the company expects stakeholders to act?

# OK – We Have One – Done? No!

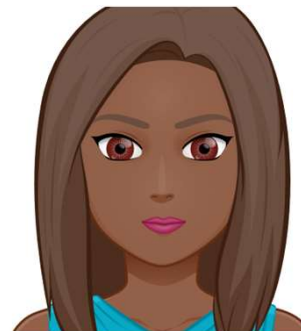
---

- Created with employee engagement
- What does roll out look like – training? Who does it apply to?
- Has it been integrated into the culture of the organization OR collecting dust?
- Is there leadership commitment and accountability?
- Can the public see it so it builds company reputation and integrity?
- Does it live and breathe? Continual training of new and current employees?

# SCENARIO

---

- Aisha now works for Sunny's Sunshine Senior Center. She routinely cares for a sweet old lady whose family lives across the country. The family is so appreciative of the help Aisha provides to their loved one, and they know how hard she works. They all chipped in to buy her tickets to see the Rolling Stones who are doing a special concert in Aisha's town. Aisha LOVES the Rolling Stones.
- ***Should she accept the tickets? What does the Code say? Can she accept gifts so long as they are not over a certain dollar amount?***



# Mitigating Risk at Offsite Events

---

- Train employees/stakeholders on expected conduct at events
- Zero toleration for harassment or disrespect of participants
- Expectation regarding alcohol- 2 drink limit (tickets)
- Who should concerns be reported to?
- Make Code of Conduct part of vendor contracts



# Vicarious Liability

---

- An employer may be held vicariously liable for torts committed by its employee within “the scope of employment.” *Mary M. v. City of Los Angeles*, 54 Cal. 3d 202, 208 (Cal. 1991).
- “Employee social and recreational activity on the company premises, endorsed with the express or implied permission of the employer, falls within the course of employment if the activity was conceivably of some benefit to the employer or otherwise was a customary incident of the employment relationship.” *McCarty v. Workmen’s Comp. Appeals Bd.*, 12 Cal.3d 677, 681-82 (Cal. 1974).

# Dram Shop Laws

---

Aisha attends a company sponsored summer picnic. It's a hot day, she didn't eat much, and margaritas were flowing. Her supervisor noticed that she seemed drunk, but didn't want to confront her at a picnic meant for employee fun. After her 4<sup>th</sup> drink, Aisha decided to leave the picnic and drive home. Unfortunately, she slammed into an oncoming car, causing the driver injury. Can the driver sue her company?

**YES**, if the state has enacted dram shop laws.

**MITIGATE:** No alcohol; Limit 2 drink tickets



# Q & A

*Please Note: This presentation is not intended to be a substitute for legal advice. Always seek experienced legal counsel to address risks based on your organization's own unique circumstances.*



# Contact Information

---

Eileen Morgan Johnson  
703-280-9271  
[emjohnson@wtplaw.com](mailto:emjohnson@wtplaw.com)

Jennifer Jackman  
202-659-6794  
[jjackman@wtplaw.com](mailto:jjackman@wtplaw.com)

Thomas Cluderay  
704-953-2954  
[tcluderay@yellowstone.org](mailto:tcluderay@yellowstone.org)

Chevanniese Smith  
202-303-4936  
[chevanniese.smith@redcross.org](mailto:chevanniese.smith@redcross.org)

Judy Branzelle  
240-333-5205  
[judy.branzelle@goodwill.org](mailto:judy.branzelle@goodwill.org)

