

ACC NCR In-House Primer: Employment Law Bootcamp

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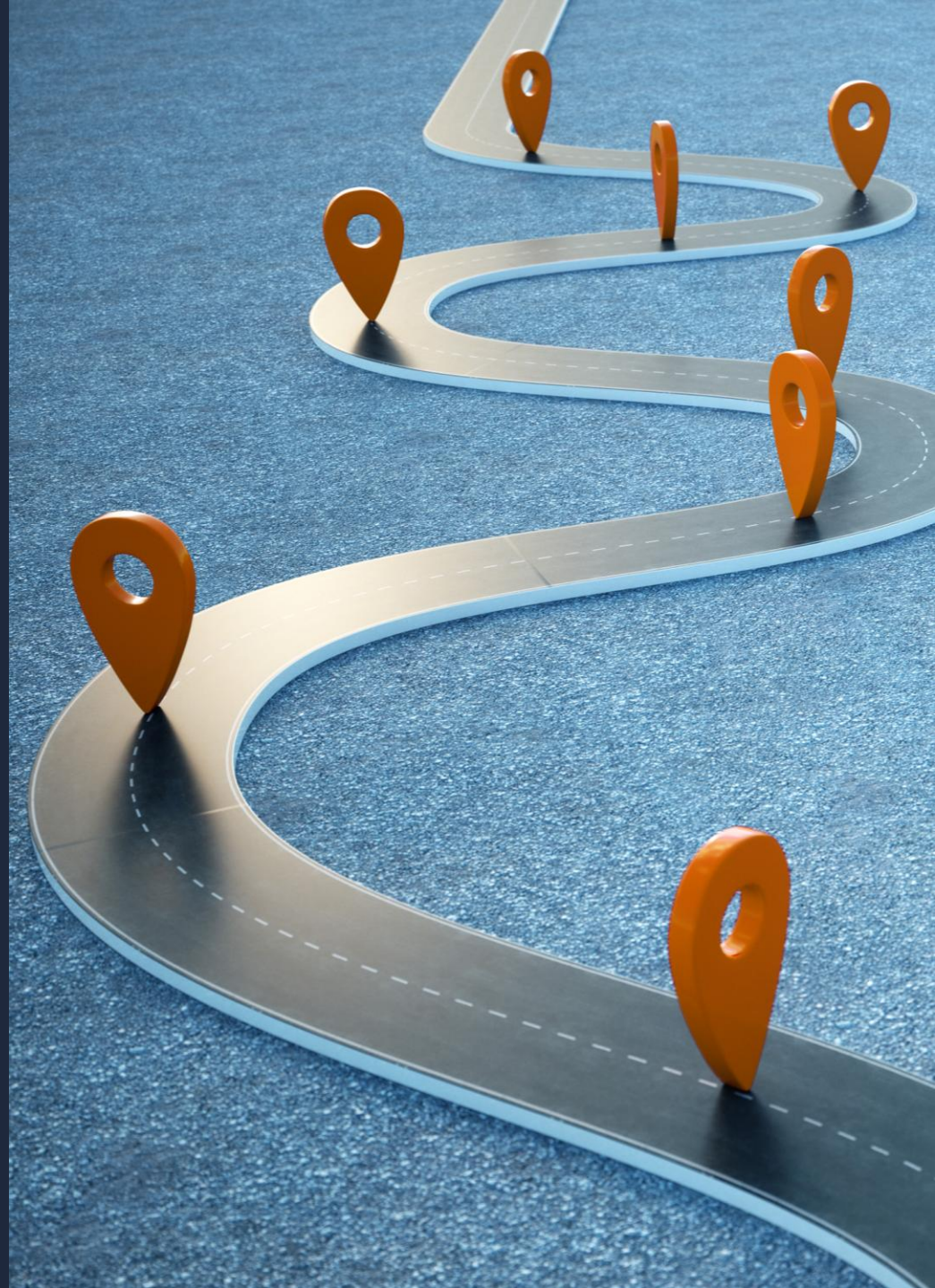
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Road Map

- Employment Law Bootcamp– an overview from hiring to firing and everything in between
 - You will not be an expert after this, but you will get the tools you need to issue spot and send it to the right place
 - Key areas for discussion:
 - Best practices for the three main life cycles of employment
 - Talent recruitment, hiring, and onboarding
 - Managing the workforce
 - Internal investigations and complaints
 - Discipline
 - Leave and accommodation issues
 - Separation/termination



BEST PRACTICES FOR HIRING

Applications, Interviews, Offering the Job

At-Will Employment

“An employment, having no specified term, may be terminated at the will of either on notice to the other”

Danger of Hiring for Need

- If you are concerned about an employee when you hire him or her, I can guarantee you will be telling me about those concerns when he or she sues
- Basic rules on hiring:
 - Have clear policies and parameters regarding interviewing, roles in interviewing, social media
 - No *inappropriate questions* that may lead to protected class info
 - No asking for social media passwords
 - Cautions regarding social media
- Document interview and selection process
- Apply job criteria and requirements to selection process
- Written offers outlining details of terms
- Proper new hire documentation

Use of AI in Hiring – Employer Beware

- Litigation risk – disparate impact discrimination liability
- Algorithmic transparency – can you defend or explain your AI-driven hiring decision?
- Data privacy concerns
- Emerging regulatory landscape
 - Spotlight on Maryland: SB0936/HB 1331, if enacted, would require certain disclosures, impact assessments, and other consumer protection provisions that would implicate employment hiring practices

Employment Application/Interview – Prohibited Questions

- Date of birth or high school graduation
- Marital status (*in some states*)
- Disabilities, health conditions, pregnancy or prior workers' compensation claims
- Who has child-care responsibility
- Off-duty lawful conduct (*in some states*)
- Certain criminal history – “Ban the Box” laws- *D.C. prohibits until a conditional offer; Maryland’s prohibits in the application phase*
- Salary history – *D.C.*
- Email address (*in some states including CA*)

Employment Offers

- At-will employment
- No promises of long-term employment
- Be clear regarding bonuses and other potential payouts (e.g., “eligible for up to ___”)
- Job descriptions/reporting chain
- Location/remote work terms
- Reserve ability to revise job duties, supervisor, etc.
- Contingencies: Background check, drug test, I-9 eligibility, required professional licensing, conflict-of-interest review

YOU'VE HIRED YOUR ROCKSTAR, NOW WHAT?

Classification Issues

Classification 101 – Exempt v. Non-Exempt

- Federal / State Laws
 - Follow most restrictive
- FLSA provides an exemption from both minimum wage and overtime pay for certain kinds of employees.
 - Most common exemptions: “White Collar” Exemptions, Executive, Administrative, Learned Professional, Computer Occupations, Outside Sales
- Generally, two tests for exemption: 1) Salary basis test 2) Job duties test
- Salary Thresholds (DOL is currently applying 2019 thresholds)
 - Standard Salary Level: \$684 per week
 - Highly compensated employees: \$107,432

HOW TO DISCIPLINE EMPLOYEES

Evaluations, Counseling, Warnings

Disciplining Employees

Goals of Performance Evaluations

- Provide snapshot of performance – good and bad
- Acknowledge good performance
- Inspire better performance
- Engage in honest dialogue and feedback
- Use as measure for compensation
- Remember that it could be evidence

How to Complete Performance Evaluations

- Look at past evaluations and account for them – are same issues still present?
- Check anecdotal notes in file, including emails
- Get input from other managers as appropriate
- Review entire year's performance
- Do not use leave of absence or any protected activity against employee

Goals of Counseling

- Change behavior
- Increase communication
- Reduce any potential anger
- Foster positive employee morale
- Reward good performance
- Point out and correct problematic conduct

How to Counsel

- No magic form
- Close in time to behavior
- Having talking points beforehand
- Explain problems thoroughly
- Document verbal warnings
- Allow for chance to correct poor performance
- Provide examples, not summaries

Goals of Evaluations

- Provide snapshot of employee performance – good & bad
- Acknowledge good performance
- Inspire better performance
- Engage in honest and needed dialogue
- Possibly – use as measure for compensation

Preparing Employee Evaluations

- Look at past evaluations – ***are same issues still present?***
- Check anecdotal notes in file – including e-mails
- Get input from other managers
- Review entire year's performance
- Be honest!

How to Counsel

- No magic form – *e-mails will do*
- Counsel liberally – *effectively communicate*
- Close in time to behavior
- Be honest, but respectful
- Explain problems thoroughly – *assume a third party will read*
- Document verbal warnings with memo to file
- Allow for chance to correct poor performance
- Provide examples, not just summaries

Example Warnings

Don't Just Say:

“Insubordination”

Do Say:

“In response to your supervisor’s instruction, you threw a wrench on the floor, called him a _____ idiot, then stormed off the floor midway through your shift. This type of disrespectful, abusive, and insubordinate behavior cannot be tolerated by the company.”

How Many Warnings Before We Can Fire?

- No magic number – whatever necessary to address the issue and allow time to correct
- Dependent on length of employment, company's tolerance of the behavior, and how other employees have been treated
- Especially with longer term employee, verbal warnings should proceed written, and provide detailed final written warning, if possible, then mean it!

Discussion Point: *Progressive Discipline Policies?*

MITIGATION OF LEGAL RISK

Addressing Claims of Harassment, Discrimination, and Retaliation

As a Manager, You Have Three Main Duties:

- 1 To prevent discrimination, harassment and retaliation
- 2 To respond appropriately to complaints
- 3 To monitor for retaliation after a complaint is made

The Law

HARASSMENT

“Unwelcome conduct that denigrates or shows hostility or an aversion toward another person on the basis of ... [a] characteristic protected by law.”

**Title VII of the
Civil Rights Act**

**Americans with
Disabilities Act**

**Age
Discrimination
in Employment
Act**

Sexual Harassment (cont'd)

Economic Sexual Harassment

“Quid pro quo” = “This for that”

- Employment benefits are conditioned (implicitly or explicitly) on submission to unwelcome sexual advances or other sex-based conduct
- “Supervisor” misuses his/her powers of making employment decisions to obtain sexual favors

Environmental Sexual Harassment

- Conduct which creates a hostile or offensive work environment
- Conduct which unreasonably interferes with work performance
- Conduct must be of a sexual nature or based upon gender

Sexual Harassment Can Occur Almost Anywhere



“Because of” Harassment

- Hostile comments or behavior directed at someone because of that person’s protected category
- Epithets and slurs
- Disparaging comments (e.g., “you’re too old to do this job”)
- Any negative behavior motivated by a dislike of someone’s gender, race, age, etc.

PITFALLS:

Not limited to sex/gender

Can also be:

- Race
- Age
- Sex/gender
- Sexual Orientation/Transgender
- Disability
- National origin
- Religion
- Marital status
- Use of guide or support animal
- Political affiliation/viewpoint

Harassment Prevention – Investigating

- “The most significant immediate measure an employer can take in response to a sexual harassment complaint is to launch a prompt investigation...”
Swenson v. Potter, 271 F.3d 1184, 1193 (9th Cir. 2001)
- Timeliness is critical
- The duration is dependent on:
 - location
 - number of witnesses
 - complexity of allegations

Harassment Prevention – Investigating

- Who to Interview:
 - Complainant (at least once)
 - Accused (at least once)
 - Third party witnesses
 - As many as necessary but as few as possible
 - Identified eyewitnesses
 - Those similarly or potentially affected
 - Hearsay witnesses
 - Other interested parties



Keeping Confidentiality

- Never promise total anonymity (especially to the complainant because it may be impossible)
- Stress importance to everyone the duty of confidentiality and consequences of breaching
- **Apogee Retail** (NLRB December 2019)- held that an employer's investigative confidentiality rules are lawful during an investigation.
 - For such rules to extend beyond an investigation, an employer must have
 - “one or more legitimate justifications for requiring confidentiality” and they must “outweigh the effect of requiring post-investigation confidentiality on an employee's Section 7 rights.”

Defenses That Fail

- “I didn’t mean anything by it.”
- “Everyone was doing the same kind of things.”
- “It was a joke.”
- “It’s nothing you wouldn’t hear on primetime TV.”
- “That’s how I treat everyone.”
- “I’m just a ‘touchy-feely’ type.”
- “This conduct is perfectly acceptable where I come from.”

Determining Proper Remedy – Options

- No action/status quo
- Apology (written or personally)
- Warning
- Suspension
- Transfer (of accused or complainant)
- Demotion
- Termination

Never punish the complainant (in the absence of extraordinary circumstances)!

Retaliation

You may not punish an employee or discriminate against that person for engaging in “protected activity.”

- Protected activity includes:
- Accusing you or the company of, for example, sexual harassment
- Supporting a coworker’s complaint of harassment or discrimination

PRACTICAL TIPS:

- Don’t change the way you treat someone (e.g., cold shoulder)
- Make sure your actions are (and appear) fair
- Watch what you say
- Never discourage someone from engaging in protected activity

KEY TAKEAWAYS

- Employer must take responsibility for preventing harassment
- Have an anti-harassment policy
- Provide training on anti-harassment
- Promptly investigate and do so in good faith
- No retaliation

Handling Leaves of Absences

- What federal, state or local law might apply?
- Coverage limitations
- What to do if you are covered
- Even if not covered, might be required under other laws (reasonable accommodations)

FMLA

- Employees may take time off:
 - To care for a newborn or newly adopted child;
 - To care for the employee's seriously ill parent, child, spouse or registered domestic partners;
 - Because of the employee's own serious health condition
 - Due to military exigency leave; or
 - To care for the employee's spouse, son, daughter, parent or next of kin of a covered servicemember (26 workweeks)

Can We Force an Employee Onto FMLA?

- Cannot force an employee to take a FMLA leave
- Use of vacation and sick leave under FMLA
 - Employer may require employee to use vacation or paid time off
 - Employer may require employee to use sick leave if the leave is for employee's own serious health condition
- Employer must continue to pay its portion of employee health insurance during leave

Leave under State or Local Law

Leave Type / Provision	Maryland	Virginia	Washington, D.C.
Paid Family & Medical Leave	<p>No state PFML yet; covered employers must comply with federal FMLA. Flexible Leave Act – employees may use accrued paid leave for immediate family member.</p> <p>Montgomery County requires paid sick leave.</p>	<p>No state PFML yet; relies on federal FMLA and private employer policies.</p> <p>However, HB2531 requires Virginia Employment Commission to establish paid family and medical leave beginning January 1, 2028.</p>	<p>Universal Paid Leave (UPL) provides up to 12 weeks for family, medical, or parental leave and 2 weeks of qualifying prenatal care funded by employer payroll tax.</p>
Parental Leave	<p>Maryland Parental Leave Act: Employers with 15–49 employees must provide up to 6 weeks unpaid leave for birth/adoption.</p>	<p>No separate parental leave law yet; covered under FMLA.</p>	<p>UPL covers parental bonding leave; also protected under D.C. Family and Medical Leave Act (16+ employees).</p>
Sick Leave	<p>Healthy Working Families Act: 15+ employees must provide up to 40 hours paid sick/safe leave per year.</p>	<p>No state law</p>	<p>Accrued Paid Sick and Safe Leave: Applies to most D.C. employers. Employers with 100 or more employees: 1 hour per 37 hours worked (max 56 hours).</p>

Other Leave Laws

- Alcohol and Drug Rehabilitation Leave
- U.S. Military Leave
- School Visitation Leave
- Jury Duty/Witness Leave
- Victims of Crime Leave
- Domestic Violence/Victims of Assault Leave
- Organ Donor
- Volunteer Firefighter Laws
- Voting laws
- Personal Leave
- Bereavement Leave
- ADA/PWFA Accommodations

ADA

- Americans with Disabilities Act is federal law prohibiting (among other things) discrimination by employers on the basis of disability.
- Every aspect of employment protected: recruitment, pay, hiring, firing, promotion, job assignments, training, leave, layoff, benefits, terminations, etc.
- Disability must be based on a substantial limitation of a major life activity.
- **Who is Protected? *EVERYONE***

Pregnant Workers Fairness Act (PWFA)

- Requires reasonable accommodations for known limitations related to pregnancy, childbirth, or related medical conditions—even if the employee isn't “disabled” under the ADA.
- Applies to employers with 15+ employees.
- Cannot require an employee to take leave if another reasonable accommodation can be provided.

The Interactive Process

- An employer is required to engage in a good faith interactive process to determine an appropriate reasonable accommodation
- Who can/should participate in interactive process discussions?
 - Employer (usually HR or manager)
 - Employee/applicant
 - Employee's representative (if necessary, because of the disability or other circumstances)
- How to recognize an accommodation request:
 - Employee indicates they are having a problem related to a medical condition or pregnancy
 - Not required to use any magic words – need not mention the ADA, PWFA, or use the phrase “reasonable accommodation”

Interactive Process



Step 1: Does a disability exist? Is an accommodation needed?

Gather medical information (confidential).

What part of the employee's job is impacted?



Step 2: Brainstorm all possible accommodations.

Ask employee, ask HCP, seek out other resource. (www.askjan.org)



Step 3: Assess reasonableness of possible accommodations.

Is it feasible? What would it cost? Document process.



Step 4: Select and implement accommodation.

Document nature and duration of accommodation.



Step 5: Monitor effectiveness of accommodation.

Check in with employee/supervisor.

Modify as necessary and repeat process if not working.



What is a Reasonable Accommodation?

- Some alteration (of policy, duty, schedule, workspace, etc.) so that a person with a disability can perform the essential functions of their job.

Key Takeaways for Success

- Think creatively about solutions
- The “interactive process” requires interaction
- Employer decision and control
- Try, evaluate, adjust
- Keep documents regarding accommodation requests, including medical documents, separate from personnel files



TERMINATING EMPLOYEES

Completing the Termination

Pre-Termination Internal Review

- *HR and legal – any issues of concern?*
- *Review file to make sure termination consistent with documentation*
- **NO SNEAK ATTACKS** – *does the employee know this is coming?*
- *Are other options preferable – demotion, transfer, part-time?*

Termination Meeting

- Plan the approach in order to reduce the anger
 - *Location*
 - *Timing*
 - *Messenger*
- Are there security issues?
- Final paycheck

Post-Termination Issues

- Watch post-termination references
 - *Only HR*
 - *Only neutral, if possible*
- Watch EDD responses – don't contradict reason for termination
- Involve employment counsel at first sign of trouble

Tendering an Employment Claim to EPLI

- Avoid settlement offers/commitments without coordinating with the carrier
- Notify carrier promptly and timely
- Check policy's notice requirements
- Obtain written confirmation of coverage and review any reservation of rights
- Review your policy for endorsements or add-ons to close gaps

Thank You



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