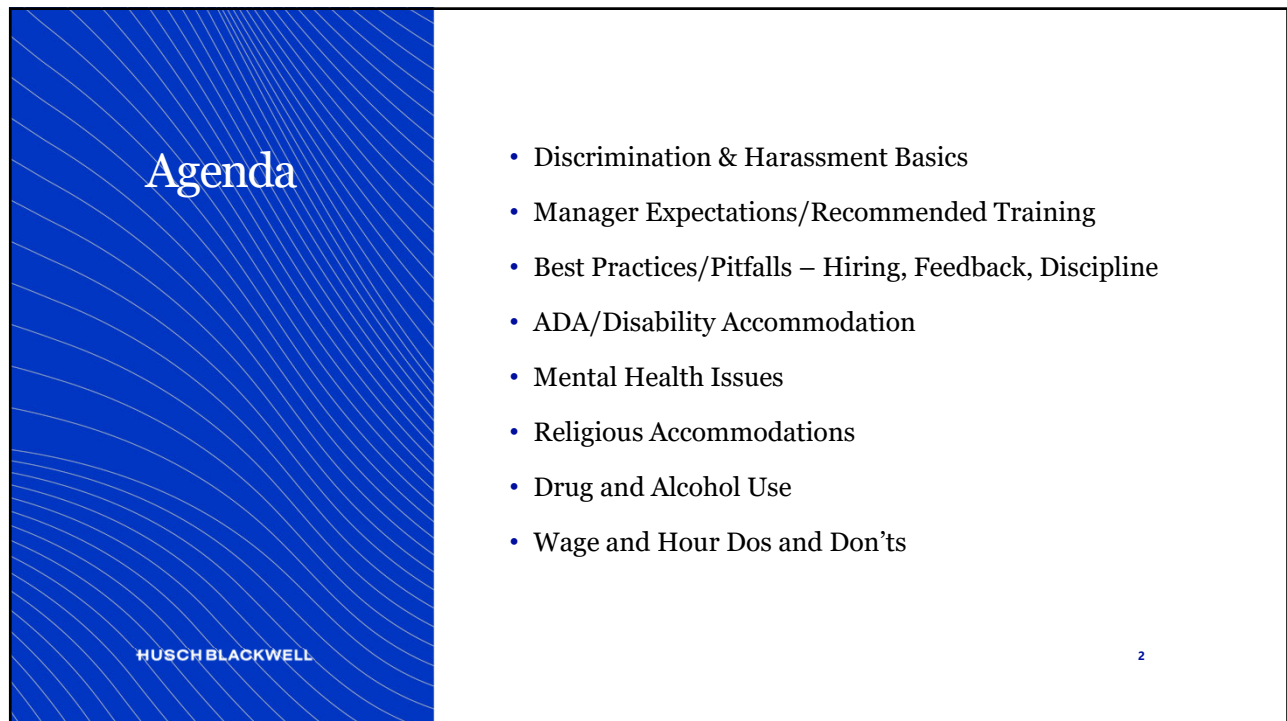


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Discrimination and Harassment

- Title VII of the Civil Rights Act of 1964 (amended in 1991)
- Section 1981
- Age Discrimination in Employment Act (protects employees over 40 years old)
- Americans with Disabilities Act
- Pregnant Workers Fairness Act
- Genetic Information Non-Discrimination Act
- Uniformed Services and Re-employment Rights Act
- Immigration Reform and Control Act
- State laws against Discrimination and Harassment



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Complaint Procedure



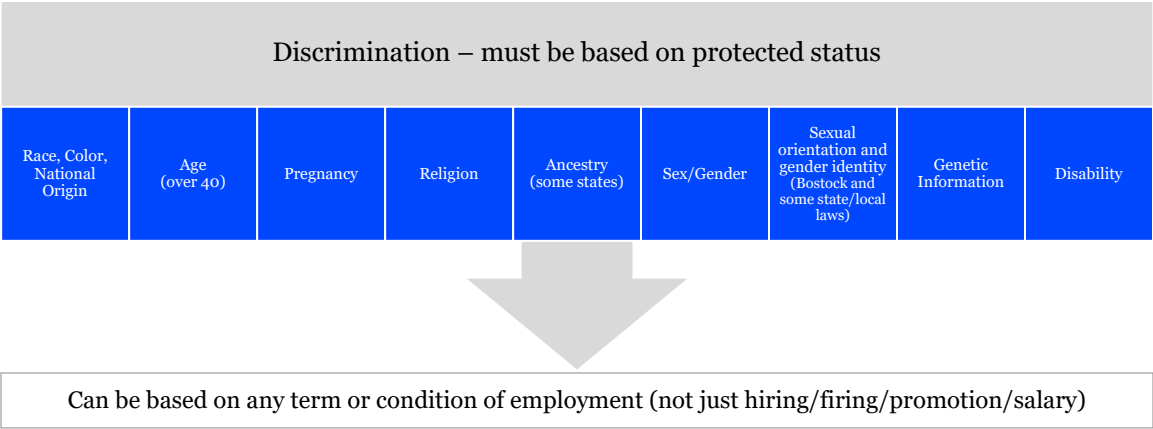
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- All concerns must be reported via one of these channels
- Managers must report all concerns – it’s not the manager’s responsibility to decide if conduct is unlawful or a violation of policy, or to determine whether a report/complaint is valid
- The employer cannot take action unless management/HR knows that there is a concern
 - BUT, if management knows, the employer knows.

4

4

Discrimination & Harassment



5

Discrimination & Harassment

Harassment – Two types recognized by law

- Quid Pro Quo
 - “This for that”
 - Always involves a supervisor
 - Always sexual in nature
- Hostile work environment
 - Can be based on any protected status
 - Does not always involve a supervisor
 - “Hostile environment” is a buzz phrase



6

Harassment: Hostile Environment

Legal Elements:

- Unwelcome conduct
- Based on protected status
- Severe or pervasive
- Objective and subjective standard

Practical: Most employers prohibit “harassing” conduct (including bullying and other unprofessional conduct) regardless of whether it rises to the level of a legal claim



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Harassment: “Unwelcomeness”

- Intent vs. Impact
- Employee need not object and may even “play along”
- Relationships change – could start off as being consensual, then become unwelcome
- Can apply to “off-duty” or off-premises behavior
- Social media issues




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Harassment: Factors Increasing Risk

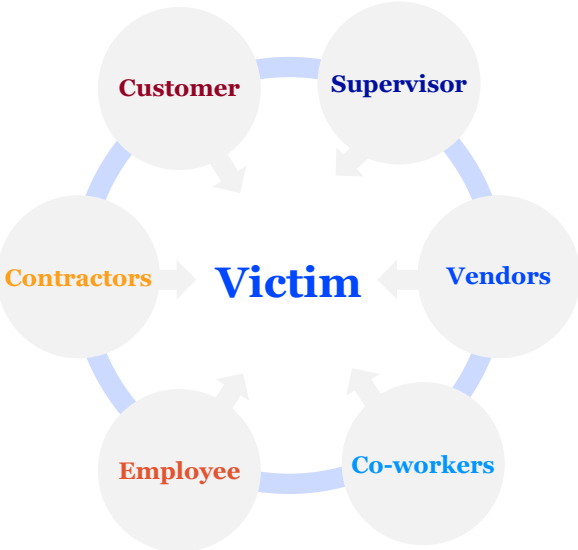
- Homogeneous workforce
- Workplace with cultural or demographic “norms” that some don’t conform to
- Cultural and language differences
- Coarse social discourse – including outside the office
- Power differentials – especially when exercised aggressively
- Isolated or de-centralized workplaces
- Environment where borderline conduct has been allowed to persist



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9

Harassment: Hostile Environment



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10

Anti-Discrimination and Anti-Harassment Policy

Most Employers have policies that include examples of conduct that may constitute sexual harassment:

- Touching or flirtation that is not welcome
- Physical assault/sexual abuse
- Direct or indirect pressure for sexual favors
- Pressure to date someone, or repeated, unwelcome requests for dates
- Jokes, remarks, language or statements that are offensive, sexual and unwelcome
- Physically interfering with someone doing their job or blocking their movement
- Explicit or degrading remarks about someone’s appearance or body
- Making sexual gestures, or suggestive facial expressions, including leering and staring
- Inappropriate visual conduct including any display of obscene or explicit cartoons, gestures, posters, or jokes.

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Anti-Discrimination and Anti-Harassment Policy

Most policies also contain examples of conduct that may constitute harassment based on other protected characteristics:

- Epithets or slurs that relate to a protected characteristic
- Negative stereotyping that relates to a protected characteristic
- Threatening, intimidating or hostile acts that relate to a protected characteristic
- Written or graphic material that denigrates or shows hostility or aversion toward an individual or group because of a protected characteristic, including material that is placed on walls, bulletin boards or elsewhere on Company premises, or circulated in the workplace (or among co-workers outside the workplace).

 Question: What about Confederate flags? In the office? On cars in the parking lot?

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Sexual Orientation and Gender Identity

Trump Administration has dropped lawsuits previously filed by EEOC on behalf of transgender employees

- Says “USA only recognizes two genders”
- Administration has removed Internet references to transgender people on government websites
- Big priority: barring transgender women from women’s sports

Some employees are asserting religious objections to calling employees by preferred names and pronouns

- BUT, the Supreme Court has held that discrimination based on sexual orientation and/or gender identity is unlawful sex discrimination in violation of the Civil Rights Act (Bostock)
- Opinion authored by Trump appointee Neil Gorsuch, joined by Chief Justice Roberts (G.W. Bush appointee)


What to do?

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Real-Life Scenario

- U.S. Rep. Sarah McBride
- First openly transgender member of Congress
- Elected from Delaware in November 2024
- House immediately passed a rule requiring individuals to use the restroom associated with sex assigned at birth
- Some members chairing the proceedings have recognized Rep. McBride as “the gentleman from Delaware, Mr. McBride.”



Concerns?

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Expectations of Managers

- Managers, as representatives of the employer, have an obligation to take all harassment and discrimination complaints or activities seriously and must immediately report all incidents of suspected or reported discrimination or harassment to HR.
- Each manager is responsible for promoting and maintaining a work environment free of prohibited discrimination and harassment.
- Any manager who is aware of a violation of policy by employees or other persons and who fails to initiate suitable corrective action may be subject to discipline.
- Retaliation against a person who brings a claim or cooperates in an investigation is a separate policy/legal violation, will result in discipline.
- Bottom line: Preventing and addressing harassment and discrimination is a JOB DUTY of all managers.

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15

Role of Managers

- Model expected behavior
 - Self awareness
 - Self regulation
- Know the rules and enforce them
- Remember:
 - Legally, a manager is the Employer
 - Managers are best positioned to see a problem
 - Managers are best positioned to address a problem (if appropriate)
- Managers and HR should promote a culture where employees are encouraged to come forward with concerns
- Train managers to use your resources (HR, legal counsel)



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16

Scenario 1

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A project site team goes out to a bar at the end of the day for some social time/bonding. The TV in the bar is showing a news report about immigration. Reacting to the news report, one of the guys says, “I’m so tired of this immigration situation, I wish the Border Patrol would just open fire.” The manager notices that the only Hispanic team member looks uncomfortable.

- ? What are the potential concerns?
- ? What should the manager do?
- ? What should HR do?

17

17

Scenario 2

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Chris is a very gregarious manager and everyone loves him – employees and other business partners alike. New employee Angela, who works for Chris, tells a manager that Chris showed her an inappropriate video on his cell phone.

- ? What are the concerns?
- ? What action should the manager take?
- ? What action should HR take?

18

18

Retaliation

Retaliation is prohibited against anyone who:

- Makes a complaint of discrimination or harassment (internal or external),
- Assists with making such a complaint, and/or
- Cooperates or participates in an investigation of a complaint (including government investigation)
- Engages in many other types of “protected activity”
- If employees believe retaliation is occurring, they should be encouraged to report it just like they would report discrimination or harassment
- Managers should come to HR immediately if they believe an employee thinks the manager is “retaliating” against them.

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19

Retaliation

List of conduct that can constitute retaliation is endless (Muldrow v. City of St. Louis) – “some harm”

A few examples:

- Ignoring an employee
- Undermining an employee’s credibility to others
- Spreading rumors about an employee
- Assigning undesirable work
- Poor performance evaluations
- Demotion, discharge, withholding a pay increase, elimination of position
- Further harassing conduct
- Changing an employee’s office location?
- Sneezing in the general direction of an employee?

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20

Common Mistakes to Avoid

- Ignoring inappropriate behavior and letting “the little stuff” go
- Failing to recognize when an employee has made a complaint
- Making credibility judgments based on reputation
- Failing to act after a manager becomes aware of a problem
- Failing to prevent retaliation (including managers’ failure to recognize their own potential tendency to do so)
- Failing to conduct a thorough and timely investigation

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21

Excuses That Don’t Work

- It didn’t happen at work
- I thought it was consensual
- I didn’t mean to harass anyone
- I was only trying to be funny
- The employee never complained
- I didn’t think anyone else would see that e-mail/Teams message/text
- I have a First Amendment right to free speech

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22

Best Practices: Hiring

- Interview Do's and Don'ts (train your managers):
- Plan in advance
- Use the written job description as your guide
- Focus questions on job requirements
- Consider what skills-based questions to ask
- Think outside the box on candidates but don't forget the job description
- Don't ask questions related to protected status or that are not job-related
- Resist the temptation to Google or search the applicant's social media profiles









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23

23

Best Practices: Feedback

- | | | |
|--|---|---|
|  Communication is key |  Regular check-ins |  Don't wait for the annual review |
|  Think about the investment |  New generation expects it |  Retention! |

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24

24

Best Practices: Feedback



Be professional



Document the issues, but don't manage primarily by email



It's the right thing to do

- Be honest
- Be specific
- Be prompt
- Be open

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25

Best Practices: Discipline

- Were the expectations that were not met made clear?
- Was the employee given a reasonable amount of time to meet the expectations?
- Did the employee know what the consequences could be for failing to meet expectations?
- Was the employee given an opportunity to be heard before a decision was implemented?
- Does the "punishment" fit the "crime"?
- Is similar discipline (or termination) being imposed for other employees engaging in the similar conduct?

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26

A Word about Tenure

- Tenure is earned via research, teaching, service, other criteria developed and assessed by the institution.
- Tenure provides some protections from job elimination and termination for some reasons and provides academic freedom
- HOWEVER, tenure does not provide faculty with a “get out of jail free card” for:
 - Violations of anti-discrimination/anti-harassment policies
 - Other unlawful conduct
 - Outrageous conduct
- No one is above the law. No one has a license to violate policies, especially those with legal implications.

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27

Bias can be subtle



Bias: “A tendency, inclination, or prejudice towards something or someone. Some biases are helpful and positive...But biases are often based on stereotypes, rather than actual knowledge of an individual or circumstance. Whether positive or negative, such cognitive shortcuts can result in prejudgments that lead to rash decisions or discriminatory practices. [Bias-Psychology Today](#)



Explicit bias: “Attitudes and beliefs about a person or group on a conscious level. Much of the time, these biases and their expression arise as a direct result of perceived threat. When people feel threatened, they draw group boundaries to distinguish themselves from others. [Explicit Bias Explained-The Perception Institute](#)



Implicit bias: A bias or prejudice that is present but not consciously held or recognized.

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28

Bias: Defining Terms (cont'd)

- “Micro-affirmations”: Tiny acts of opening a door to opportunity, gestures of inclusion and caring, acts of listening – a way to counteract unconscious or implicit bias
- Examples:
 - Asking others for their opinions
 - Recognizing achievement of others
 - Using friendly facial expressions and gestures
 - Taking a genuine and professional interest in another person

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29

Scenario 3

At the regular Monday meeting of the team, the newest employee, Meera, who is Asian Indian, is introduced to the group. One team member keeps calling her Myra – even after Meera corrects her. On a few occasions, others laugh because that one employee just can't seem to “get it right.”

- ❓ Is this a problem?
- ❓ How could you change the group dynamic?

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30

30

Scenario 4

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A young woman in accounting is talking to her colleagues and showing off her new engagement ring. The CFO overhears the conversation, comes over to tell her congratulations and gives her a big bear hug.

- ? What are the concerns?
- ? What are potential steps you could take?

31

31

Conclusion

- Everyone has a responsibility to avoid discriminatory, harassing and other inappropriate conduct.
- Ask yourself, and train employees/managers to ask:
 - Does this need to be said or done at all?
 - Could this behavior offend or hurt others?
 - Could this behavior invite inappropriate behavior by others?
 - How would I feel if someone said or did the same thing to my child, parent, sibling, grandparent, grandchild, spouse?
 - Do I treat people equally regardless of race, gender, sexual orientation, nationality, religion, disability, etc?
 - Do I make sexual jokes or talk about sexual situations in work settings or in the presence of work colleagues?
 - Do I ask co-workers about their sex lives?

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32

ADA Basics

Prohibits discrimination based on “Disability”

- Physical or mental impairment which substantially limits one or more major life activities
- A record of having an impairment
- “Regarded as” having an impairment

Requires reasonable accommodation



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33

33

Reasonable Accommodation - Disability

ADA requires reasonable accommodation of qualified individuals unless doing so poses an undue hardship

- Qualified – can do the job with or without reasonable accommodation
- Reasonable accommodation – infinite possibilities – can include modified schedule, extended leave, reassignment to a vacant job
- Undue hardship – action requiring significant difficulty or expense

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34

Conditions That May Constitute a Disability

- Epilepsy (even if controlled by medication)
- HIV infection
- Gender Dysphoria
- Intellectual impairments
- Long COVID
- Obsessive compulsive disorder
- Prior drug addiction
- Alcoholism
- Autism
- Anxiety
- Cancer
- Diabetes
- Depression
- Deafness or blindness
- Dyslexia (even if overcome through education)

Additional information may be found at [Introduction to the Americans with Disabilities Act | ADA.gov](#)

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35

Conditions that are not generally a Disability*

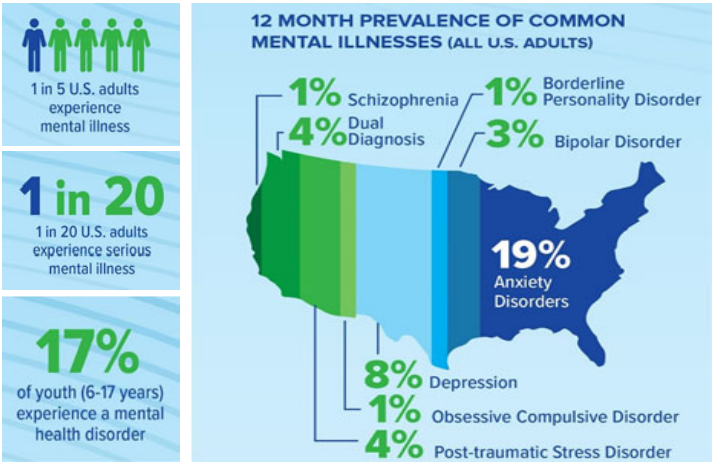
- Minor broken bone
- Minor/non-chronic gastrointestinal disorders
- Pregnancy without other associated complications*
- Compulsive gambling
- Common Cold
- Flu
- “Regular” Covid (as opposed to long Covid)
- Visual impairments corrected by glasses or contacts
- Sprained ankle
- Current use of illegal drugs

*BUT accommodation may still be required under PWFA

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U.S. Mental Health Statistics



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Source: [Mental Health By the Numbers](#) | NAMI: National Alliance on Mental Illness

37

ADA & Mental Health

- Lack of mental health resources continues to affect individuals' work and personal lives
- COVID Pandemic contributed to the increase in mental illness diagnoses
 - Direct health risks related to COVID-19
 - Quarantine and social distancing restrictions
 - Economic and professional disruptions
- Same disability and accommodation rules apply to mental health conditions as to physical health conditions



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Accommodation - Religion

- Title VII prohibits discrimination based on religion and requires accommodation of an individual's "sincerely held religious belief" unless doing so poses an "undue hardship"
- Sincerely held belief – a moral or ethical belief as to what is right and wrong that is sincerely held with the strength of traditional religious views
 - Undue hardship – "substantial increased costs in relation to the conduct of the employer's particular business" (per U.S. Supreme Court)

39

Scenario 5

An employee is hired to work as a groundskeeper for athletic fields, which have practices and games 7 days a week during the academic year. On the first Friday after he is hired, he says he can't work on Saturdays due to his religious observance.

- ❓ Is this a request for accommodation?
- ❓ What are the considerations in making a decision?

40

Reasonable Accommodation

- Virtually no absolute rules
- Individualized analysis is critical
- Interactive dialogue is essential
 - Collaboration to determine disability status and accommodation
 - Triggered by employee request and/or employer knowledge
 - Request does not have to be explicit
- Reasonableness is considered in conjunction with Undue Hardship
- At least with respect to religion, a negative impact on morale of other employees is not by itself an undue hardship

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41

Drug & Alcohol Use

Most employers strive to maintain a drug-free workplace

No working while impaired or under the influence

- Alcohol
- Illegal drugs
- Prescription/over the counter drugs impacting safety

Many states permit employer drug testing; some states restrict

- Pre-employment
- Reasonable suspicion
- Work-related accidents
- Physical altercations
- Incidents involving damage to/on company property

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42

Drug & Alcohol Use

- If you have a problem, ask for help.
- Be on the lookout for signs your employees may have a problem – ask if they need help and are OK.
- An employee who voluntarily acknowledges a drug or alcohol problem and seeks treatment may be entitled to a leave of absence under ADA.
- Moderate use of alcohol at employer events or off-premises gatherings can be allowed as a personal choice.
- BUT, alcohol use is not an excuse for unprofessional behavior.
- Professional behavior is always expected; any discriminatory, harassing or other inappropriate conduct may result in discipline up to and including termination.

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43

Substance Abuse – Warning Signs

- Chronic tardiness/absenteeism
- Erratic behavior
- Sudden change in performance or behavior
- Missing meetings without notice
- Inability/failure to fix issues even after repeated notices/writeups
- Sending odd e-mails/texts at unusual times of day



Train managers to spot these signs, and to CONSULT HR if they believe an employee may have a substance abuse issue

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44

Marijuana in the Workplace

Weed is legal now, right?

- Employers are not required to allow on-site medical marijuana use, possession or “impairment” while at work
- Workplace safety is always a valid justification for an employment decision
- Performance expectations are valid justification for an employment decision
- Marijuana still technically illegal under federal law, but not being enforced strictly with respect to personal use, especially in states where it’s legal in some form
- Rules can be complicated in states where marijuana is legal for medical and/or recreational purposes

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45

45

Wage and Hour Dos and Don'ts

- FLSA Basics
- FLSA Overtime Exemptions
 - Higher Ed Applications
- Common Pitfalls
- Wage and Hour Audits
 - DOL
 - Internal
- Bonus Practice Pointers



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46

FLSA Basics

- Two wage/hour claims under FLSA
 - Failure to pay minimum wage (\$7.25)
 - Failure to pay overtime (1.5x regular rate)
- Every wage/hour suit under the FLSA is related to one of these claims
- Seems simple, but can be messed up in many ways, almost always accidentally
- Purpose of overtime law?

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47

47

FLSA Basics

- Basic premise: Every worker in the USA is entitled to minimum wage and overtime...
- UNLESS there is an exemption that applies
- Congress creates exemptions
- DOL “defines and delineates” the exemptions in regulations

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48

48

Damages Available Under FLSA

- Unpaid wages (minimum wage, OT)
- Liquidated Damages
 - Equal to the unpaid wages owed
 - Nearly always available
- Two or three-year statute of limitations
- Collective actions are common
- Attorney fees are available in both individual and collective actions

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49

49

State Wage and Hour Laws

- States and localities are allowed to have laws that provide employees with greater rights than the FLSA
 - Higher minimum wage
 - Different overtime requirements – daily/weekly
 - Meal and rest breaks
 - More stringent requirements for overtime exemptions
- State and local laws that are more favorable to the employee than FLSA generally must be followed

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50

50



51

Back to Basics...

- Every worker in the USA is entitled to minimum wage and overtime...
- UNLESS there is an exemption that applies
- Most commonly used exemptions are referred to as “white collar” exemptions – executive, administrative, professional
 - DOL Fact Sheet #17A
- Other exemptions exist – inside and outside sales, computer professional, agricultural

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52

FLSA White-Collar Exemption Requirements: A Refresher

Salary basis test	Employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed
Salary level test	The amount of salary paid must meet a minimum specified in the regulations
Duties test	Primary duties must involve executive, administrative, or professional duties, as defined in regulations

53

DOL Issues White-Collar Exemption Final Rule (Eff. 07/01/2024)

- 04/23/2024 US DOL issued Final OT rule
 - Approximately 4 million workers would have been impacted during first year
 - Would have increased salary threshold from \$35,568/year
 - \$43,888/year starting July 2024
 - \$58,656/year starting January 2025
 - Automatic increases every three years based on inflation
 - Also increased salary threshold for highly compensated employee exemption
 - Employers largely made changes to comply with phase 1 in July 2024
 - November 2024 – federal court threw out the entire rule nationwide
 - Trump Administration unlikely to appeal or attempt more increase

54

What To Do Now?

Can you revert to the prior salary threshold?

For now, yes – but make sure you comply with any applicable state laws

Can you re-re-classify people back to exempt?

Again, yes, but be sure to comply with any applicable state laws

You should always be reviewing exempt/non-exempt status of employees to make sure there is a basis to claim any exemption

Reminder: Some states have their own, higher minimum salary levels for their white-collar exemptions

Note: In a helpful development for employers, the Supreme Court in a 9-0 decision in January 2025 made it a bit easier for employers to prove that their use of exemptions is proper (“preponderance” standard of evidence instead of “clear and convincing” evidence)

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55

55

Higher Ed Exemption Issues

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56

56

Educational Administrative Exemption

- FLSA regulations provide special rules for educational administrators.
- To be exempt, an educational administrator:
 - Must be compensated either on a salary or fee basis at a rate not less than \$684 per week or on a salary basis which is at least equal to the entry salary for teachers (i.e., faculty members) at the institution; and
 - Must be “performing administrative functions directly related to academic instruction or training at the institution.”
- “Performing administrative functions directly related to academic instruction or training”
 - Work related to the academic operations and functions in a school rather than to administration along the lines of general business operations. Such academic administrative functions include operations directly in the field of education. Jobs relating to areas outside the educational field are not within the definition of academic administration. 29 C.F.R. § 541.204(c).

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Educational Administrative Exemption (cont.)

Employees engaged in academic administrative functions include:

- Department heads in institutions of higher education responsible for the administration of the subject matter departments
- Academic counselors who administer school testing programs, assist students with academic problems and advise students concerning degree requirements
- Other employees with similar responsibilities
- Assistants responsible for administration of such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program

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58

Educational Administrative Exemption – Counselors/Advisors

Most commonly, this exemption is considered when an institution is analyzing various counselor/advisor positions.

- A school's academic counselors qualified for the educational administrative exemption "because their primary duty involved work such as administering the school's testing programs, assisting students with academic problems, advising students concerning degree requirements, and performing functions directly related to the school's educational functions."
- Enrollment counselors who engaged in general outreach and recruitment efforts to encourage students to apply to the school did not qualify for the educational administrative exemption because their work was not sufficiently related to the school's academic operations.

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59

Teaching Exemption

- "[A]ny employee with a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in an educational establishment...." 29 C.F.R. § 541.303(a).
 - Exempt teachers include but are not limited to: regular academic teachers; teachers of skilled and semi-skilled trades and occupations; aircraft flight instructors; and vocal or instrumental music instructors.
 - No minimum compensation requirement
- Includes institutions of higher education

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60

Teaching Exemption (cont.)

- Those faculty members who are engaged as teachers but also spend a considerable amount of their time in extracurricular activities such as coaching athletic teams or acting as moderators or advisors in such areas as drama, speech, debate or journalism are still engaged in teaching.
 - Such activities are a recognized part of the school’s responsibility in contributing to the educational development of the student. 29 C.F.R. § 541.303(b).

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61

Coaches



Two ways a coach can be exempt

- Teaching exemption
 - The teacher exemption can cover athletic coaches when their primary duties include teaching and instructing student-athletes about various aspects of their sports.

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62

Coaches (cont.)



Consider how time is spent:

- Coaching at practice
- Coaching at games
- Working individually with student-athletes (i.e., extra practice time)
- In team meetings
- In coaching staff meetings
- Analyzing game film
- Preparing scouting reports
- *In recruiting activities*
- *Engaged in fundraising activities for the team or athletic department*
- *Doing miscellaneous projects (e.g., filling water bottles, setting up the field for the game, helping with laundry, etc.)*
- *Performing job duties unrelated to coaching or teaching*

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63

Coaches (cont.)



Athletic trainers

FLSA regulations state that:

- Athletic trainers who have successfully completed four academic years of pre-professional and professional study in a specialized curriculum accredited by the Commission on Accreditation of Allied Health Education Programs and who are certified by the Board of Certification of the National Athletic Trainers Association Board of Certification generally meet the duties requirements for the learned professional exemption. 29 C.F.R. § 541.301(e)(8).

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64

Students

- According to the DOL, “[a]n employment relationship will generally exist when a student receives compensation and his or her duties are not part of an overall education program.”
 - For example, students who work at food service counters, sell programs or usher at events, or wash dishes in dining halls and anticipate some compensation (for example, money or meals) are generally considered employees entitled to minimum wage and overtime compensation.
- There are different rules for Graduate Teaching Assistants, Research Assistants and Student Residential Assistants

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Students – Graduate Teaching Assistants

Graduate Teaching Assistants

- Graduate teaching assistants whose primary duty is teaching are exempt under the FLSA. Because they qualify for the teacher exemption, they are not subject to the minimum salary test.
- May be paid a stipend or other compensation
 - School does not have to track time or pay minimum wage or overtime.
- Employee, but exempt from the FLSA

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66

Students – Research Assistants

- Research Assistants and Student Residential Assistants are not employees under the FLSA, if they meet certain criteria
- Research Assistants
 - Generally, an educational relationship exists when a graduate or undergraduate student performs research under a faculty member's supervision while obtaining a degree.
 - Under these circumstances, the DOL would not assert that an employment relationship exists with either the school or any grantor funding the student's research.
 - This is true even though the student may receive a stipend or other compensation for performing the research.
 - The educational relationship, in essence, overrides the indicia of employment, such as payment for services rendered.

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Students - Student Residential Assistants

Student Residential Assistants

- Students enrolled in bona fide educational programs who are residential assistants and receive reduced room or board charges or tuition credits are not generally considered employees under the FLSA.
- Not entitled to minimum wages and overtime under the FLSA.

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68

Volunteers

- Individuals may volunteer time to religious, charitable, civic, humanitarian, or similar nonprofit organizations as a public service and not be covered by the FLSA.
 - May not volunteer in commercial activities run by a non-profit organization, such as a gift shop.
- Must volunteer freely and without contemplation or receipt of compensation.
- Generally part-time and do not displace regular employed workers or perform work that would otherwise be performed by regular employees.
- Paid employees of a non-profit organization cannot volunteer to provide the same type of services to their non-profit organization that they are employed to provide.

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69

Common Wage and Hour Mistakes/Pitfalls

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70

70

Allowing “Off the Clock” Work

- Non-exempt (hourly) employees cannot “volunteer” to work off the clock
- Employers must track and maintain records of non-exempt workers’ time
- Big issue when employee is treated as exempt but then later claims should have been treated as hourly non-exempt
- Can lead to both minimum wage and (more commonly) overtime claims
- If no records, burden is on employer to show hours (not) worked – employee’s testimony is often key

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71

71

Osborn v. JAB Management – Jan. 2025

- Terminated employee, classified as exempt, normally worked 8:00 a.m. to 5:00 remotely
- Claimed she should have been classified as non-exempt, and that she worked 10 hours per weekday, 55 hours per week (incl. weekends)
- No time entry because classified as exempt
- Trial judge granted summary judgment for the employer - Osborn failed to prove her “amount and extent of work as a matter of just and reasonable inference”

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72

Osborn v. JAB Management – Jan. 2025

- 7th Circuit Court of Appeals agreed, affirming summary judgment for employer
- Osborn : “I figure I work at least 10 hours a day and on the weekends, it was pretty easy to come up with that, a norm.”
- What did she do? “Customer issues, the database, the reports, it’s very labor intensive.”
- She said other coworkers could testify as to her amount of work, but she did not offer their sworn testimony.
- 7th Circuit said this evidence was “too vague and conclusory” to allow a jury to find that Osborn was entitled to overtime pay at all.

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73

Applying Exemptions

- Most common mistake on exemptions is failing to apply the job duties test correctly
- Each exemption requires certain job duties
- Must apply test based on actual duties
 - Titles and job descriptions not dispositive
 - Different employees with same job title and job description could have a different result
- Many, many employers are doing something wrong here with respect to exemptions

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What is Included in the “Regular Rate”?

- Nondiscretionary bonuses must be included in the “regular rate of pay” for purposes of calculating overtime
- Any bonuses based on calculable metrics are non-discretionary
 - Attendance
 - Measurable performance standards
 - Safety (free from accidents)
- Only bonuses that are truly discretionary may be excluded – holiday bonus, performance bonuses that the company may choose not to award, etc.

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Tip Credit

- Tipped employees may be paid a lower minimum wage (\$2.13/hour) if done correctly
- Notice must be given in writing
- Tips must be tracked; employee must be paid full minimum wage including tips
 - If not, employer must “true up” the difference
- Managers may not share in tips
- Danger in having employees perform too much “non-tipped work”
- Note: Some states do not allow the tip credit, or require a higher tipped minimum wage than the federally allowed \$2.13

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What is “Compensable Time”?



Minimum wage and overtime are due based on “all hours worked”



Common issues:

- Waiting Time – security screenings
- Donning and Doffing
- Travel time
 - Often depends when the travel is occurring and why
 - Regulations are very detailed

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Employee vs. Independent Contractor

- DOL test often goes back and forth based on control of presidency
- Biden admin – made it more difficult for companies to treat workers as independent contractors
- Trump admin has signaled shift back to more employer-friendly standard (more people can be treated as independent contractors)
- Who controls the details of the work?
- Does the worker have multiple clients?
- Employees must be paid minimum wage and overtime; independent contractors do not have these rights
- Note: Adjunct faculty generally should be treated as employees, but likely qualify for the teaching exemption

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Wage and Hour Audits

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DOL Audits

- DOL conducts wage and hour audits
 - Random/industry based
 - Complaint driven
- Employer receives a notice
 - DOL will be visiting the business at a certain date – wants records, interviews
 - Recommendation: DO NOT try to handle this without counsel
 - 70-80% of employers are doing something wrong, almost always by accident
- Counsel can help identify issues, and usually get the DOL visit postponed briefly to gather records, identify interviewees
- Under Trump, anticipate a more compliance-oriented DOL, rather than enforcement focus with lawsuits, fines, press releases
 - Opinion letters are resuming as of June 2, 2025
 - Fewer wage and hour investigators, but higher ed may be in crosshairs

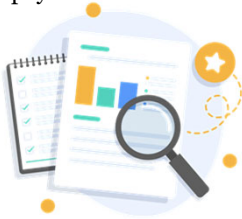
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Internal/Counsel Audits

- Helps preempt problems with DOL
- Cost on front end could avoid penalties, liquidated damages, admin headache
- Analyze job descriptions, but also make sure job duties are consistent with them
- Make sure accurate time records exist
- Make sure bonuses are appropriately included in workers’ “regular rate of pay”



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Bonus Practice Pointers

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Other FLSA/WHD Enforcement

- Child Labor violations
 - Major point of emphasis – to this point, has been asked about by DOL regularly in W&H investigations
 - Pay attention to scheduling requirements and hazardous occupations (“HO”s) for all workers under age 18
 - Mandatory fines if violations are found
- PUMP Act (lactation rights) and FMLA are also enforced by Wage and Hour Division
- Be prepared for DOL to ask questions and investigate compliance with these statutes during any audit/compliance visit - *current posters*

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Questions?

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84

84