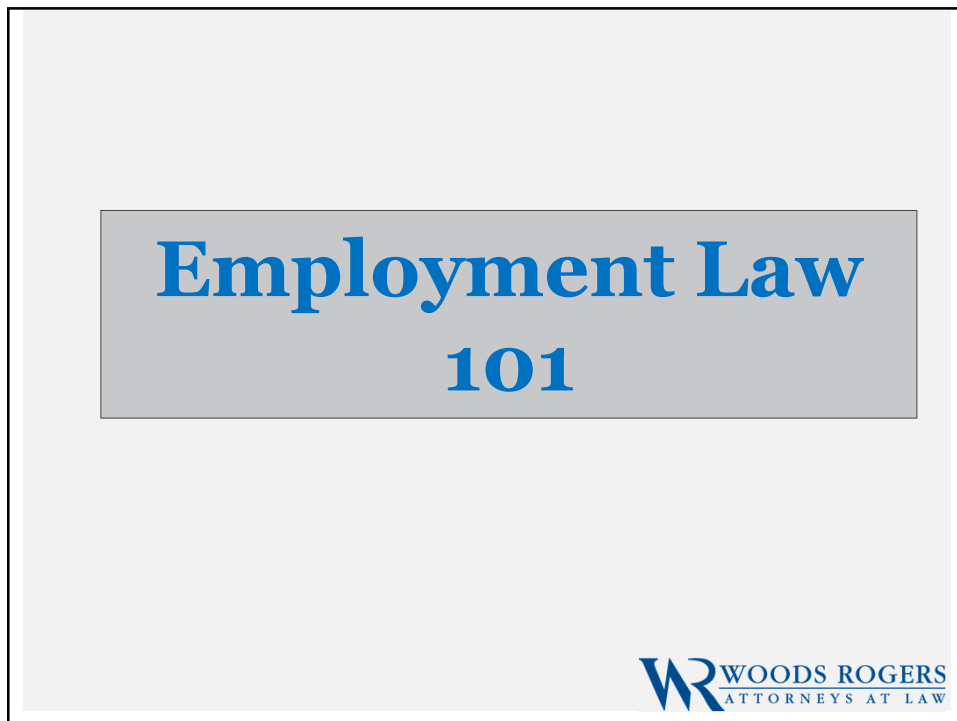


Association of Clerks of the
District Courts of Virginia
April 16, 2018
Employment Law 101

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**Employment Law
101**

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How Federal and State Laws Affect Business Operations

- Pre-employment
- Appraisals and Evaluations
- Reductions
- Discipline
- Leave
- Compensation
- Health and Safety
- Terms and Conditions
- Promotion and Hiring
- Terminations
- Recordkeeping
- Harassment



Federal Law



Title VII of the Civil Rights Act

- **Bars discrimination**
- **Race, color, sex, religion, national origin, or pregnancy**
- **Sexual orientation?**
- **Gender identity?**



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Forms of Discrimination

- **Disparate Treatment**
 - Intentional
- **Disparate Impact**
 - Unintentional
- **Retaliation**
 - Intentional and Punitive
- **Harassment**
 - Intentional/Unintentional
 - Two types

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Americans With Disabilities Act (ADA)

- Pre-employment inquiries and medical examinations
- Discrimination against qualified individuals with disabilities
- “Reasonable accommodations”
- ADAAA expansion



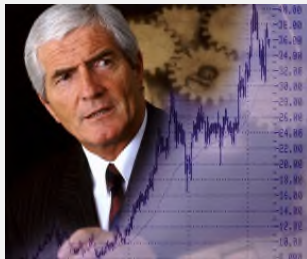
Equal Pay Act (EPA)

Bars gender-based wage bias



Age Discrimination in Employment Act (ADEA)

- Bars discrimination against those 40+
- OWBPA/severance issues



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The Genetic Information Nondiscrimination Act (GINA)

- Prohibits health insurers/health plan administrators from requesting genetic information
- Prohibits employers from using genetic information



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2016 EEOC Charge Data

- Retaliation: 42,018 (46% of all charges)*
- Race: 32,309 (35%)
- Disability: 28,073 (31%)
- Sex: 26,934 (29%)
- Age: 20,857 (23%)
- Nat'l Origin: 9,840 (11%)
- Religion: 3,825 (4%)
- Color: 3,102 (3%)
- Equal Pay: 1,075 (1%)
- Genetics: 238 (.3%)

Source: EEOC.gov

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Notable Trends: FY '95 to '16

CHARGE	FY 1995	FY 2016
Total Charges	87,529	91,503
Retaliation- All Statutes	20 %	45%
Disability	23 %	31%
National Origin	8.0 %	11%
Religion	2 %	4%
Color	1 %	3%

Source: EEOC.gov

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LGBT Charge Filings

FY 2013 - FY 2016

	FY 2013	FY 2014	FY 2015	FY 2016
Receipts	808	1,100	1,412	1,768

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Uniformed Services Employment and Reemployment Rights Act (USERRA)

- **Regulates military leaves of absence**
- **Prohibits discrimination/retaliation on basis of military service**
- **Provides reemployment rights**



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Family & Medical Leave Act (FMLA)

- 12 weeks of job-protected leave
- Birth of a son or daughter
- Employee's serious health condition
- To care for family members with serious health condition
- Covered servicemember leave
- Qualifying exigency leave



EMPLOYMENT RETIREMENT AND INCOME SECURITY ACT (ERISA)

- Establishes rules regarding benefit plans
 - health plans
 - disability plans
 - retirement plans
- Prohibits discrimination



Fair Labor Standards Act (FLSA)

- Minimum wage
- Overtime compensation
- Child labor prohibition
- Breaks for nursing mothers
- Exemptions
 - Executive, Administrative, Professional



OCCUPATIONAL SAFETY AND HEALTH ACT (OSHA)

- Establishes rules on workplace safety
- Numerous industrial standards
- “General duty” clause



NATIONAL LABOR RELATIONS ACT (NLRA)

- Establishes right to engage in protected concerted activity
- Establishes rules regarding union recognition
- Establishes rules regarding collective bargaining



State Law



"Employment At Will" and "Right to Work"



Common Law Claims

- Defamation
- Wrongful discharge in violation of public policy
- Intentional infliction of emotional distress
- Assault and battery



State Statutes

- Wage payment
- Workers' compensation
- Unemployment
- Grievance procedure
- VDA
- VHRA
- Jury Duty
- Garnishments





Fair Labor Standards Act (“FLSA”) for Public Sector Employers

Association of Clerks of the District
Courts of Virginia
April 16, 2018



Speakers



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Fair Labor Standards Act

- Federal Minimum Wage
 - Beware - some states are higher
- Overtime for “non-exempt” EEs
- Child Labor
- Certain jobs “exempt” from overtime



What is the Minimum Wage?

- Fair Minimum Wage Act of 2007:
- Prior to July 24, 2007: \$5.15
- July 24, 2007 to July 23, 2008: \$5.85
- July 24, 2008 to July 23, 2009: \$6.55
- Work on or after **July 24, 2009: \$7.25**



What is Overtime?

1½ times . . .
the *regular rate of pay* . . .
for all *hours worked* . . .
over 40 hours . . .
in a *workweek* . . .

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“Regular Rate of Pay”

- Cannot be less than minimum wage
- Includes all remuneration for workweek
- Piece-rate, salary, commissions must be converted to average hourly rate
- Payments not part of regular rate:
 - Expenses
 - Saturday, Sunday and holiday premiums
 - Discretionary bonuses and gifts
 - Vacation, holiday, sick/personal not worked

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“Hours Worked”

- Work not requested/authorized but “suffered or permitted” compensable
 - E.g., EE voluntarily works after shift to finish task. Reason is immaterial
- Importance of OT approval policies

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When Is Time Really Work?

- Waiting Time
- On-call Time
- Rest Periods
- Meal Time
- Sleeping Time
- Training Time
- Travel Time
- Starting/Quitting Time

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“Workweek”

- Fixed period of 168 hours -- seven consecutive 24-hour periods
- Established by policy
- Different workweeks may be established for different groups



A Word or Two About Child Labor ...

- Protect rights of those under 18
- Limitations on hours of work
- Limitations on types of work
- Again, state laws may vary



“White Collar” Exemptions

- Executive
- Administrative
- Professional
- Outside Sales capacity
- Computer-Related Occupations



Three Tests for Exemption

- Salary Level
- Salary Basis
- Job Duties



Minimum Salary Level: \$455 (For Now!!)

- For most, minimum is \$455 per week
 - Biweekly: \$910.00
 - Semimonthly: \$985.83
 - Monthly: \$1,971.66
 - Annual: \$23,660.00

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Salary Basis Test

- Predetermined compensation
- Not reduced due to quality/quantity
- Full salary when *any* work performed
- Need not be paid for week no work performed

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Deductions From Salary

- May not deduct for absences occasioned by employer or operating requirements
- If employee ready, willing and able to work, may not deduct for time work not available



Effect of Improper Deductions

- Loss of exemption:
 - During period improper deductions made
 - For employees in same classifications
 - Working for same managers



Permitted Salary Deductions Seven Exceptions to “No Docking” Rule

1. Full-day absence for personal reasons, other than sickness or disability
2. Full-day absence due to sickness if under wage replacement policy
3. Offset of jury/witness fees or military pay
4. Penalties for violating major safety rules
5. Full-day disciplinary suspensions
6. First/last weeks of employment
7. Unpaid FMLA



Payroll Practices That Do Not Violate the Salary Basis Test

- Deductions from leave accounts
- Requiring employees to track hours
- Requiring a set schedule
- Implementing schedule changes



Special “Public Accountability” Rules for Public Employer Docking

- EE not disqualified from exemption where principles of public accountability require pay to be reduced or EE placed on leave w/o pay for *absences for personal reasons or b/c of illness/injury of less than one workday* when:
 - Permission for leave not sought or has been denied;
 - Accrued leave exhausted
 - EE chooses to use leave without pay
- Deductions for absences due to budget-required furlough shall not disqualify EE from salary basis except in workweek in which furlough occurs and for which EE’s pay is reduced.

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Additional Compensation

- Employer may provide compensation beyond salary:
 - Commissions
 - Bonuses
 - Pay based on work beyond normal workweek

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White Collar Exemptions

- Focus on most common exemptions
 - Executive
 - Administrative
 - Professional
 - Outside Sales
 - Computer Professional
- There are numerous duty-specific exemptions (motor carrier, e.g.)



Executive Exempt Employees

- Primary duty is management
- Directs work of two or more FTEs
- Need not be ultimate decision-maker
- Recommendations given particular weight



Management

- Interviewing, selecting, training
- Setting/adjusting pay and hours
- Maintaining production/sales records
- Evaluating employee performance
- Handling employee complaints
- Discipline
- Planning and apportioning work



Administrative Exempt Employees

- Primary duty is non-manual work related to general business operations
- Discretion and independent judgment
- Matters of significance



General Business Operations

- Tax
- Finance
- Accounting
- Budgeting
- Auditing
- Insurance
- Quality Control
- Purchasing
- Procurement
- Advertising
- Marketing
- Research
- Safety and Health
- Human Resources
- Employee Benefits
- Labor Relations
- PR/Gov't Relations
- Compliance
- Computer Network, Internet and Database Administration



Discretion and Independent Judgment

- Formulate, interpret or implement policies
- Work affects operations to substantial degree/significant financial impact
- Waive/deviate from policies
- Negotiate on significant matters
- Consultation/expert advice to management
- Long/short-term planning
- Investigate matters of significance
- Handle complaints or resolving grievances



Discretion and Independent Judgment

- **Does not** include:
 - Following specific standards in manuals
 - Clerical or secretarial work
 - Recording or tabulating data
 - Mechanical, repetitive or routine work
 - “Painting by numbers”



Learned Professional Exempt Employees

- Primary duty requires advanced knowledge
- In field of science or learning
- Customarily acquired by prolonged course of specialized intellectual instruction



Advanced Knowledge

- Predominately intellectual
- Requires discretion and judgment
- Advanced knowledge used to analyze varying facts or circumstances
- *Not* routine mental, mechanical, physical work
- *Cannot* be attained at high school level



Field of Science or Learning

Law	Accounting	Actuarial Computation
Theology	Teaching	Physical Sciences
Medicine	Architecture	Chemical Sciences
Pharmacy	Engineering	Biological Sciences



Prolonged Course of Specialized Intellectual Instruction

- Specialized academic training prerequisite for entering profession
- Best evidence is appropriate academic degree
- Caveat: exemption also available if:
 - Substantially same knowledge/ substantially same work
 - But attained knowledge through combination of experience and intellectual instruction



Nonexempt Professions

- Accounting clerks/bookkeepers who normally perform routine work
- Paralegals and legal assistants
- Engineering technicians



Computer Occupation Exempt Employees

- Systems analysts, programmers, software engineers, similarly skilled workers in computer field
- Must be paid at least \$455 weekly salary or \$27.63/hour
 - Be aware of different state law requirements

WR

Computer-related Duties

- Systems analysis techniques, consulting with users to determine hardware, software or system specifications;
- Design, development, documentation, analysis, creation, testing, modification of computer systems/programs, related to user or system design specifications;
- Design, documentation, testing, creation or modification of programs related to machine operating systems; or
- Combination of above duties, performance of which requires same level of skills

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Non-exempt Computer Employees – Functions

- Manufacture/repair of computer hardware and related equipment
- Work dependent on use of computers but not primarily engaged in systems analysis and programming or other similarly skilled computer-related occupations



Outside Sales Exempt Employees

- Primary duty to make sales/obtain orders for which consideration paid by customer; and
- Must be customarily and regularly engaged away from employer's place of business.



“Making sales”

- “Sales” includes any sale, exchange, contract to sell, consignment for sales, shipment for sale, or other disposition



“Away From Employer’s Place of Business”

- Sales made at customer’s place of business
- Doesn’t include sales by mail, phone or Internet unless contact used as adjunct to personal calls
- Any fixed site, whether home or office, used by a salesperson as a headquarters is considered employer’s place of business, even though employer is not owner/tenant



Reclassification of Employees

Issues to Explore...

- Uniformity of treatment across company?
- Same jobs at different locations with different titles?
- Same titles with different duties?
- Consolidation and standardization of job classifications and descriptions, irrespective of location



Non-exempt to Exempt

- When employee classified as nonexempt is properly exempt
 - No significant liability issues
 - Always legal to treat properly exempt employee as non-exempt and pay overtime.
- Must consider morale impact of transition - no longer entitled to overtime
- Explain basis for new salary



Exempt to Non-exempt

- Critical to communicate precisely and effectively
- Everyone in management must be on same page
- Avoid alarming employees
 - Small individualized meetings and announcements
 - Explain reasons for changes
 - Result of comprehensive review process
 - Give new job descriptions - updated/standardized duties
 - Cite prior examples of same jobs/different titles, same titles/different jobs



Exempt to Non-exempt

- Employees resist change even when they get overtime
- Ego Issues – Perceived loss of prestige
 - Some employees may feel devalued
 - Present as “Win/Win” outcome
 - Standardization process resulting in opportunities for enhanced pay



Exempt to Non-exempt

- Be aware of potential liability issues
- If communicated poorly, some employees may seek back overtime
- Again, focus on standardization, creation of “new” jobs/titles with uniform descriptions
- Do not, under any circumstances, admit or acknowledge any past mistake in classification

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Public employees – the rules are different

- Partial overtime exemption for fire protection and law enforcement activities



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Public employees – the rules are different

- Section 207(k)
 - Law enforcement
 - May establish work periods from 7 to 28 days
 - May require law enforcement officers to work from 43 to 171 hours
 - Public agency employer must “declare” a work period that is not less than 7 consecutive days and not more than 28

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Public employees – the rules are different

- Emerging Issues for Law Enforcement
 - Gap Time
 - Policy vs. Contract vs. Ordinance
 - “Blackberry Overtime”
 - K-9 Car
 - Donning/Doffing

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Public employees – the rules are different

- Compensatory time -
Substitute for cash
 - Public employers may use compensatory time (“comp time”) –
29 U.S.C. § 207(o)
 - Prior agreement



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Comp. Time Rules

- One and one-half hours of leave for each overtime hour worked, in lieu of cash overtime pay
- Law enforcement, fire, and EMT and seasonal EEs may accrue up to 480 hours
- All others may accrue up to 240 hours.
- EE permitted to use comp time on date requested unless “unduly disrupts” agency operations
- Paid at rate as of date of use not when earned
- No forfeiture (i.e., no “use or lose” policy)

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CODE OF VIRGINIA AND THE FLSA

- §9.1-701. Overtime compensation rate.
- §9.1-702. Work period.
- §9.1-703. Hours of work.

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**Richmond
Times-Dispatch**

“Federal Judge Could Rule by Friday on Richmond Police OT Pay”

Published Article by Reed Williams dated 03/21/12



Cuccinelli intervened in the case in defense of the 2005 Virginia law he sponsored as a state senator. The law says localities employing at least 100 law enforcement officers must pay them overtime at a rate of at least 1½ times their regular rate for the hours during the gap time.

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Comp. Time Rules



- Private suits
- Government suits
- Criminal actions
- Individual liability



Liabilities – The Big Payback

- Wages
- Overtime compensation
- Liquidated damages
- Criminal penalties
- Attorney's fees



Thank you!



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Family Medical Leave Act (“FMLA”) & Americans with Disabilities Act (“ADA”): Understanding Rights and Responsibilities

Association of Clerks of the District
Courts of Virginia
April 16, 2018



Speakers



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A Twelve-Step Self-Help Program

Step 1

- Believe it or not, this is a benefit – NOT a punishment!
- Need the FMLA rights for employees and obligations for the employer
- Result – lots of paperwork required by DOL



A Twelve-Step Self-Help Program

Step 2

- Employer notice obligations
 - Posting
 - Employee Handbooks
- Employee notice obligations
 - Foreseeable? (30 days)
 - Unforeseeable? (as much as practicable)
 - Call-in policies



A Twelve-Step Self-Help Program

Step 3

- Are you eligible for FMLA?
 - 12 months
 - 1250 hours
 - Employed where 50 or more employees within 75 miles



A Twelve-Step Self-Help Program

Step 4

- Is the leave FMLA qualifying?
 - Birth, Adoption, Foster Care
 - Care for family member with serious health condition
 - Personal serious health condition
 - Military Caregiver Leave
 - Qualifying Exigency Leave



A Twelve-Step Self-Help Program

Step 4 (continued)

- FMLA qualifying leave
 - “Care for” a “family member”
 - Who is in the “family?”
 - Psychological care?
 - Serious health condition
 - Inpatient care
 - 3+ day incapacity and continuing care
 - Prenatal care/pregnancy



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A Twelve-Step Self-Help Program

Step 5

- Proper designation
 - Employer responsibility to designate
 - Designate if must substitute paid leave
 - Retroactive designation?

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A Twelve-Step Self-Help Program

Step 6

- Is employee using available paid leave concurrently with unpaid FMLA leave?



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A Twelve-Step Self-Help Program

Step 7

- Have you certified the health condition?
 - Required by regulations
 - Federally-required forms

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A Twelve-Step Self-Help Program

Step 8

- Maintain group health benefits during FMLA leave
 - Employer must maintain employee's coverage on same conditions as would have been without FMLA leave
 - Employer's obligation can cease:
 - If and when employment relationship would have terminated
 - When employee says he/she will not return from leave
 - When employee fails to return or leaves after exhausting leave
 - Employee fails to make timely premium payments



A Twelve-Step Self-Help Program

Step 8 - Scenarios

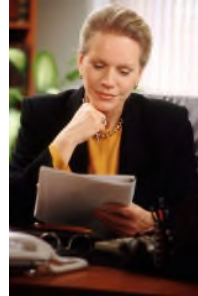
- If a pregnant female employee notifies the supervisor of her intention of not returning after the birth of her child, when does FMLA cease?
- If the female employee's due date is in June but she delivers the baby in April, does FMLA stop in April?



A Twelve-Step Self-Help Program

Step 9

- Has the employee provided a fitness-for-duty report?
 - Important protection for employer, employee and co-workers



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A Twelve-Step Self-Help Program

Step 10

- Reinstatement to same or equivalent position?
 - No greater right to reinstatement than employees had worked continuously
 - If the job has changed, employer must give employee opportunity to be retrained
 - Employees entitled to unconditional raises and other benefits

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A Twelve-Step Self-Help Program

Step 11

- Are We Keeping The Required Records?
 - Basic payroll and identifying data
 - Dates FMLA leave is taken
 - Hours of FMLA leave if taken in increments of <1 day
 - Copies of employee notices
 - All documents describing employee benefits or employer policies about paid and unpaid leave
 - Premium payments of employee benefits
 - Records of any FMLA disputes
 - Records relating to medical certification, etc.



A Twelve-Step Self-Help Program

Step 11 – (continued)

- The good news for supervisors is that the H.R. Department is in charge of tracking all of this.
- The one thing that the supervisor needs to do is be sure that the returning employee brings a Return to Work Certification on their first day back (if applicable) and that the form be forwarded to H.R.



A Twelve-Step Self-Help Program

Step 12

Importance of Confidentiality

ADA Issues/Harassment

Think about HIPAA privacy issues

Respect for Others

Think about the shoe on the other foot



Additional Topics

- Employer and employee's responsibilities regarding accommodating intermittent leave or a reduced work schedule
- Employee's responsibility while out on leave to keep the employer informed of their anticipated return to work



AMERICAN'S WITH DISABILITIES ACT ("ADA")



ADA – Definition of “Disability”

- Physical or mental impairment that substantially limits one or more major life activity
- A record of such impairment
- Being regarded as having such impairment



ADA - Accommodations

- Requires ERs make reasonable accommodations
 - Job restructuring, modified work schedule, making existing facilities readily accessible, and providing leave



ADA – Undue Hardship

- ER need not offer requested accommodation if it would constitute an “undue hardship.”
 - Undue hardship is defined as “requiring significant difficulty or expense.”



ADA – Medical Exams/Inquiries

- Prohibited at pre-offer stage
 - Pre-offer inquiries as to ability to perform essential functions, with or without reasonable accommodations, permitted
- Post-offer physicals
 - May require after job offer but only if:
 - All applicants are examined regardless of disability
 - Results kept confidential
 - Examination results are not used for any prohibited purpose
 - Must be job-related and supported by business necessity
 - Inquiries relate to whether individual is able to perform job

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ADAAA

- Preserves the framework of who is deemed “disabled”
- Expanded definition of several key terms; and
- Overturned controversial Supreme Court decisions that narrowed scope of ADA

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Key Provisions:

New Definition of Major Life Activities

- Major life activities include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working
- Definition includes operation of major bodily function

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Key Provisions:

Definition of Disability

- Rule of Construction: Definition of disability shall be “construed in favor of broad coverage”



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Key Provisions:

Definition of Disability

- Impairment that is episodic or in remission is disability if it would substantially limit major life activity when active



Key Provisions:

Mitigating Measures

- Disability determination shall be made without considering mitigating measures such as medication, medical supplies, equipment or appliances
- Ordinary eyeglasses or contact lenses are excluded from the mitigating measures provision (i.e., person not disabled)



Impact of ADAAA

- Disability threshold much lower
- Cases will focus upon:
 - Discrimination analysis
 - Has employer reasonably accommodated
- Management must exercise greater care when making personnel decisions for employees with health impairments or medical conditions.



EEOC 9/08 Guidance

What should employers do if employee requests accommodation for first time in response to counseling or low performance rating?

- Employer may still go forward with discipline or rating based on past performance
- Should engage in “interactive process” to discuss how medical impairment may be affecting performance and what accommodation could help
- Employer may seek appropriate medical documentation



EEOC 9/08 Guidance

What if employee's disability causes violation of conduct rule?

General rule: Employer may follow its conduct rules and impose discipline on individual even if violation was caused by individual's disability

Example 14: Bank teller with Tourette Syndrome that results in him frequently shouting and making loud noises that distract other tellers and upset customers

Bank may terminate because behavior not compatible with essential function of good customer service and is unduly disruptive



GINA

(Genetic Information Nondiscrimination Act)

- Prohibits insurers and plan administrators from requesting genetic information
- Effective 11/21/09, prohibits ERs from using genetic information for
 - Hiring
 - Firing
 - Promotion
 - Other decisions re: terms of employment



GINA

- States can impose stricter restrictions
- VA ERs cannot
 - request, require, solicit, or administer genetic test as condition of employment
 - refuse to hire or promote, discharge or adversely affect terms or conditions of employment solely on basis of genetic characteristics or test

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Breaks for Nursing Mothers

- Applies to ERs with 50EEs
- Reasonable amount of time as often as needed
- Space free of intrusion and cannot be bathroom
- Not technically applicable to Exempt Employees

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Thank you!



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HARASSMENT, #METOO, AND LGBT UPDATE

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Federal EEO Statutes/ Protected Classifications

- Title VII
- ADA
- ADEA
- GINA
- USERRA
- Race
- Color*
- Religion
- National Origin
- Gender*
- Pregnancy
- Disability
- Age
- Genetics
- Military Status



LGBT Issues



Title VII: Transgender Protections EEOC Rulings

- Macy v. Dept. of Justice (4/12/12)
 - Discrimination based on gender identity is sex discrimination in violation of Title VII

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President Obama Signs Executive Order to Protect LGBT Workers

7/21/14

- Prohibits federal contractors from discriminating on basis of sexual orientation or gender identity
- "...today in America, millions of our fellow citizens wake up and go to work with the awareness that they could lose their job, not because of anything they do or fail to do, but because of who they are –lesbian, gay, bisexual, transgender. And that's wrong." *President Obama*

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Title VII: Transgender Protections – EEOC Rulings

ORIGINAL BATHROOM LAW

- Lusardi v. Dep't of the Army (3/27/15)
 - Denying equal access to restroom corresponding to gender identity is sex discrimination
 - Cannot condition on EE providing proof of surgery
 - Cannot restrict EE to single-user restroom
 - ER can make single-user restroom available to all EEs

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Title VII: Sexual Orientation Protections – EEOC Ruling

- Baldwin v. Foxx (7/15/15)
 - EEOC held for first time that Title VII bans sexual orientation discrimination

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2016: Virginia LGBT Bills

- March 30, 2016: Gov. McAuliffe vetoes anti-LGBT bill

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Virginia A.G. Opines on LGBT Rights



5/10/16

Virginia Attorney General Mark Herring (Jay Pua/Getty Images)

By Jenna Purinoy May 10 at 2:04 PM

RICHMOND — Virginia Attorney General Mark R. Herring said Tuesday that courts would probably rule that discrimination on the basis of sexual orientation or gender identity violates state law.

The opinion, which came in response to a request by a conservative lawmaker and not as a reaction to a specific case, follows the increasing recognition by courts and federal agencies that sex discrimination laws protect gay and transgender people, LGBT advocates say.

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New “Bathroom Bills” proposed in 2017

- 8 states with 2017 legislative proposals that would restrict access to multi-user restrooms, locker rooms, and other sex-segregated facilities on basis of “biological sex”
 - Alabama, Kentucky, Minnesota, Missouri, South Carolina, Texas, Virginia and Washington

Source – National Conference of State Legislatures (Jan. 11, 2017)

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2017: Virginia LGBT Bills Update

- Jan. 19, 2017: General Laws Subcommittee kills bill to ban transgender people from using public bathrooms based on gender identity
- Feb. 17, 2017: House of Delegates table HB1667
 - *Prohibited state agencies & any other public bodies from requiring contractor entering into a public contract to agree to non discr. claims with respect to gender identity or sex. orientation*
 - *Included providing civil immunity for business or non profit that does not provide benefit or accommodation with respect to gender identity or sex. orientation*

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Aug. 2016: SCOTUS Reviews Gloucester Co. Case

8/3/16

- 4th Circuit decision stayed based on Gloucester Co. School Board's emergency application
- Court ruled 5-3.
 - Justice Breyer joined the court's conservative members "as a courtesy" to preserve the status quo.

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NC Blues

LAW +
Carolina Blues
Hoops drain



NORTH CAROLINA is leaking sporting events. On Sept. 12 the NCAA announced that it would remove its championships from the state, and the ACC followed suit two days later. In July the NBA pulled its 2017 All-Star Game from Charlotte. And the Southern Conference is considering moving its basketball tournaments, scheduled for March, out of Asheville. Each organization offered the same explanation: North Carolina's Public Facilities Privacy and Security Act, known as HB2.

Commonly called "the bathroom bill," the legislation was signed into law by Governor Pat McCrory in part as a response to a Charlotte ordinance that extended antidiscrimination protection to the city's LGBTQ community. Although the statute is best known for its mandate that people use bathrooms that correspond with the gender listed on their birth certificates, its critics are more concerned that it removes LGBTQ anti-discrimination protections. Almost from the beginning, the law has been

unpopular among residents. And that was before it cost them—literally: The Williams Institute at the UCLA School of Law estimates that the act could be responsible for a \$5 billion loss per year. Commissioners for each league have said they remain open to returning to the state if the law is repealed. McCrory is locked in a tight re-election race, and his opponent, Roy Cooper, has criticized the law. McCrory may discover this November that North Carolinians prefer their sports to their governor. —David Gardner

woodsrogers.co



What is Unlawful Discrimination

- Disparate Treatment – intentional
- Disparate Impact – unintentional
- Harassment – intentional or unintentional
- Retaliation - reprisal



Unlawful Harassment – 2 Types

- Quid Pro Quo
- Hostile Work Environment



Quid Pro Quo Harassment

- Submission is basis for employment decisions
- Either:
 - Promise of benefit
 - Threat of negative treatment
- Sex Only

WR

Fox Settles Roger Ailes Sex Harassment Claims (Sept. 2016)

September 06, 2016

The New York Times

NYTimes.com »

Breaking News Alert

BREAKING NEWS

Gretchen Carlson, a former anchor, won \$20 million and an apology in her sexual harassment case against Fox News and Roger Ailes

Tuesday, September 6, 2016 10:02 AM EDT

The parent company of Fox News said on Tuesday that it had settled a lawsuit with its former anchor Gretchen Carlson, who said that Roger Ailes had sexually harassed her when he was chairman of the network.

A 21st Century Fox Corporation news release did not specify a settlement amount but a person briefed on the settlement said that it amounted to \$20 million, and that Mr. Ailes was responsible for a portion of the payment. The person also said Fox News was in settlement talks with other women at the network.

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Bill O'Reilly Settled New Harassment Claim, Then Fox Renewed His Contract

- 5 O'Reilly harassment settlements ~\$13 million
- 6 months after Ailes fired, O'Reilly struck \$32 mill. agreement to settle new sexual harassment allegations
- Fox acknowledges that it was aware of the woman's complaints about Mr. O'Reilly
- Despite that settlement, Fox began contract negotiations with O'Reilly, and granted him a four-year extension that paid \$25 million a year



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Breaking News Oct. 2017: Harvey Weinstein & Decades of Misconduct

- NY Times investigation into undisclosed allegations
- Current & former EEs and film superstars
- At least 8 settlements with women b/t 1990 and 2015

“I am a 28 year old woman trying to make a living and a career. Harvey Weinstein is a 64 year old, world famous man and this is his company. The balance of power is me: 0, Harvey Weinstein: 10. ”

— From Lauren O'Connor's memo



WR

#MeTOO GOLDEN GLOBE AWARDS #TimesUP

Golden Globes: All-black fashion effort is 'bigger than a best dressed list'



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Who's Who: List of Infamy

TIME ENTERTAINMENT

Here Are All the Public Figures Who've Been Accused of Sexual Misconduct After Harvey Weinstein



By **SAMANTHA COONEY** Updated: December 11, 2017 4:50 PM ET | Originally published: November 9, 2017
<http://time.com/5015204/harvey-weinstein-scandal/>

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Public Figures Accused of Sexual Misconduct Since Jan. 11, 2017

- James Rosen
- Morgan Spurlock**
- Marcelo Gomes
- Charles Dutoit
- Mario Batali**
- Ryan Lizza
- Alex Kozinski
- Trent Franks
- Lorin Stein
- Danny Masterson**
- Matt Dababneh
- Peter Martins
- Ruben Kihuen
- Israel Horovitz
- Justin Huff
- Matt Lauer**
- Garrison Keillor
- Johnny Iuzzini
- Charlie Rose**
- David Sweeney
- Stephen Bittel
- Wes Goodman
- Russell Simmons**
- Steve Jurvetson
- Tony Cornish
- Eddie Berganza
- Andrew Kreisberg
- Louis C.K.**
- Dan Schoen
- Benjamin Genocchio
- Al Franken**
- David Guillod
- Andy Dick
- Michael Oreskes
- Kevin Spacey**
- Hamilton Fish
- Raul Bocanegra
- Mark Halperin**
- Rick Najera
- Knight Landesman
- Leon Wieseltier
- John Conyers Jr.**
- Terry Richardson
- John Besh
- Lockhart Steele
- Robert Scoble
- Cliff Hite
- Harvey Weinstein**
- Chris Savino
- Roy Price
- Andy Signore
- Marshall Faulk**
- Charlie Hallowell
- Don Hazen
- Glenn Thrush
- Heath Evans
- Ike Taylor
- Donovan McNabb**
- Eric Davis
- Eric Weinberger

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Matt Lauer Fired by NBC for 'Inappropriate Sexual Behavior'

On the same day "Today" announced Lauer had been let go following a "detailed complaint" of inappropriate sexual behavior with a female colleague, Variety reported Lauer's behavior with women at NBC included luring a female employee into his office and exposing his penis to her, giving a sex toy as a gift and playing the game "f-k, marry or kill." The magazine also reported the TV host had a button beneath his desk to lock his office door if he wanted privacy.

When NBC fired Lauer the network stated, "we were also presented with reason to believe this may not have been an isolated incident."

11/29/2017




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Breaking News: Rep John Conyers Resigns over sex harassment allegations

12/5/2017



Rep. John Conyers Jr. (D-Mich.) said he is resigning as Congress's longest-serving member Tuesday, becoming the first lawmaker to step down as Capitol Hill grapples with allegations of inappropriate behavior by lawmakers.



Marshall Faulk, Donnavan McNabb and others named by ex-NFL staffer in sexual harassment, report says



12/12/2017

- Wardrobe stylist named Eric Weinberger, Marshall Faulk, Ike Taylor and Heath Evans as a part of a lawsuit against NFL
- Former analyst Donnavan McNabb

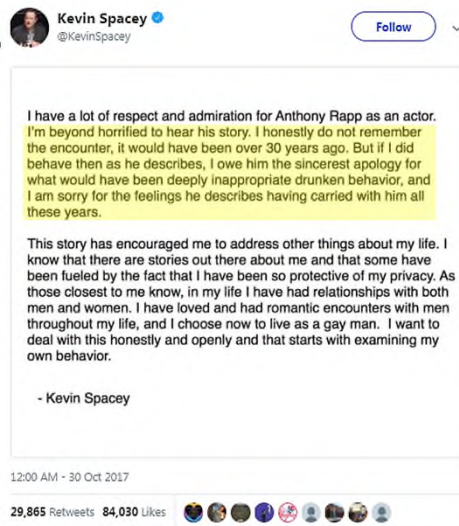


Even Mr. Sulu (George Takei)?!?



Kevin Spacey

- The first accusation of sexual misconduct against Oscar-winning actor Kevin Spacey landed on Oct. 29, and a little more than **a week later more than a dozen men — including five who said they were teens at the time** — have come forward to allege he sexually harassed, assaulted or attempted to rape them.



Nashville Mayor Admits Affair With Police Bodyguard

- Not #MeTOO but this is dangerous!
- Jan. 31, 2018 - Mayor Megan Barry revealed she had extramarital affair with former head of her security, Sgt. Robert Forrest.
- Forrest also provided protection for previous mayors, but pay increased dramatically once Barry took office.
- Police records show Forrest averaged \$34,000 a year for 3 years prior to Barry taking office
- When Barry took office in Sept. 2015, his OT nearly doubled to \$60,000 for FY. The next year, his OT increased to ~\$75,000 bringing his total pay to \$157,187.



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Unlawful Harassment – Second Type

- Hostile Work Environment
 - Unwelcome and offensive; Severe or pervasive; Condition of employment
 - Examples:
 - Jokes and cartoons
 - Looks, Glaring at someone
 - Comments
 - Shunning
 - E-mail, Text Messages, Social Media or Voice Mails
 - Touching

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Ford Motor Company to Pay up to \$10.125M to Settle Investigation

- Incidents at two Ford facilities in Chicago area
- Female and African American EEs subjected to harassment
- Ford chose to resolve issue—details to remain “private”
- During the next 5 years, Ford will:
 - Conduct regular training
 - Disseminate harassment & discrimination policies
 - Report to EEOC regarding complaints
 - Monitor workforce

8/15/2017



Aqua Resources to Pay \$150,000 to Settle EEOC Racial Harassment and Retaliation Suit

- Aqua Resources Inc., a Delaware-based water and wastewater service company, will pay \$150,000 and provide significant equitable relief to settle federal racial harassment and retaliation lawsuit.
- EEOC said a white superintendent and white foremen at Aqua Resources' Bear, DE facility repeatedly made derogatory and offensive comments to and about an African-American foreman and black employees, including calling them racial epithets such as “n----r,” “monkey,” and “boy.”
- The African-American foreman complained to company management officials about the racially hostile work environment. Aqua Resources not only failed to stop the harassment, they promoted one of the harassers and even assigned him to supervise the African-American foreman. The company fired the black foreman in retaliation for complaining about the racially hostile work environment, the EEOC charged.

2/1/2018



A Special Word about Electronic Communications and Social Media

- Use Discretion
- Think Twice Before hitting SEND /POST
 - Permanent record – deleted does not mean irretrievable
 - Loss of control
- Social Media never sleeps
- Everyone is watching



Yet Another Fox Harassment Claim

HUFFPOST

- Host Eric Bolling of “Fox News Specialists” suspended...then fired
- Allegations of sexting female colleagues
- “I know other women have had similar experiences with Bolling, which means that lots of folks at Fox knew about his behavior well before 2017.”

8/5/2017

•--Caroline Heldman

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Preventing Harassment

- Elements of an effective preventive program include:
 - Explicit policy
 - Training
 - Complaint procedure
 - Investigation
 - Prompt and effective action



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HYPOTHETICAL CASE STUDY



Fourth Circuit – Wilson v. Gaston County

- Putman began harassing Wilson, telling her she had “nice ass,” sent pictures of his genitals, asked her for naked pictures, expressed his desire to kiss and have sex with her.
 - Dec. 2011: Putman pulled her from seat, pinned her against side of vehicle, groped her breasts, pelvic area, and genitals until co-worker approached.
 - Jan. 2012: Putman walked behind her and slapped her buttocks so hard her sunglasses and clipboard went flying.



Fourth Circuit –Wilson v. Gaston County (cont'd)

- EE failed to allege sufficient facts for reasonable jury to conclude ER had adequate notice of co-worker's sexual harassment
- Because EE failed to show ER was adequately aware of harassment, or that it failed to respond reasonably once it was notified, ER could not be said to have allowed hostile work environment to persist in retaliation for EE's request for medical leave



Thank you!



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Association of Clerks of the District Courts of Virginia
April 16, 2018

Avoiding Wrongful Discharge Claims

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INTRODUCTION

The Potential for Legal Challenge

- **The Critical and important responsibility of personnel manager**
- **Personnel managers and executives must plan and act to avoid litigation risks**



Discipline

Confronting Disciplinary Situations

- **Common situations that require some type of disciplinary action:**
 - **Schedule infractions, excessive absenteeism or tardiness, poor work performance, poor work attitudes, policy violations**
 - **Insubordination**
 - **May be related to employee behavior off the job (e.g., substance abuse, social media)**



Standards of Review

- Legitimate Non-Discriminatory Business Reason
- “For Cause”
- “Just Cause”
- “Misconduct connected with work”



Discipline

Disciplinary Process & Just Cause

- ***Just cause (proper cause):* refers to the fairness of disciplinary action taken**
 - Proper notification
 - Investigation
 - Sufficient evidence
 - Penalty equals the infraction

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Discipline

Precautionary Measures

- ***Investigate the situation:* Find out what happened and why before doing anything**
- ***Investigatory interviews:* May be necessary to interview those who were involved**
 - Conducted in private
 - Individual basis
 - Guarantee confidentiality when possible
 - Avoid making final judgment

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Discipline

Precautionary Measures

- ***Maintain self-control:*** Regardless of severity of the violation, supervisor must not lose control
- ***Privacy in disciplining:*** Communicate course of discipline chosen with employee in private
- ***Disciplinary time element:*** How long should violation be held against the employee

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The Disciplinary Interview

Script

- **State the problem**
- **Ask for employee's view of problem**
- **Ask for employee's solution to problem**
- **Agree on a plan to solve problem**
- **Provide reprimand**
- **Set up a review date**

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Practicing Progressive Discipline

- Progressive discipline is disciplinary action that increases severity of punishment with each offense

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Documenting Discipline

- The supervisor must keep records of each offense an employee commits, the decision made, and the reasoning involved for potential justification in the future



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Documenting Discipline

Supporting Records

- **Regularly kept records: time cards, production tallies, archival data**
- **Written complaints from third parties**
- **Examples of unsatisfactory work**
- **Written summaries of disciplinary conferences**

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Discipline Without Punishment

- **Major focus of this approach is to stress extensive coaching, counseling, and problem solving to avoid confrontation**

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Legal Troubleshooting

- **No clear-cut breach of rule**
- **Inadequate warning**
- **Lack of positive evidence**
- **Prejudice**
- **Inadequate records**
- **Too severe**
- **Violation of policy or contract**

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10 Important Policies

Include in Your Handbook

- ***At-will provisions:* Defines employees' rights regarding termination**
- ***Harassment policy:* Includes sexual harassment**
- ***Equal employment opportunity policy:* Clarification that the employer does not discriminate against qualified persons with disabilities**
- ***Benefits:* Overview of such things as vacation, sick time, etc.**

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10 Important Policies

Include in Your Handbook

- **Leave of absence policy**
- **Pay and overtime pay provisions**
- ***Discipline:* Employers should maintain flexibility in determining appropriate discipline up to termination**
- ***Complaint procedures:* Must be carefully worded so as not to be legally binding**

The logo consists of the letters 'W' and 'R' in a stylized, white, serif font, positioned on a dark blue rectangular background.

10 Important Policies

Include in Your Handbook

- ***Acknowledgment:* Require employees to sign and return form stating that they have received, read, and understood the provisions in the handbook**
- ***Right to revise/update:* Employer has the right to revise policies at any time**

The logo consists of the letters 'W' and 'R' in a stylized, white, serif font, positioned on a dark blue rectangular background.

Danger Signals

- **Long service**
- **History of satisfactory/good performance**
- **Lack of documentation**
- **Sudden changes in performance evaluations**
- **Departure from personnel policies**
- **Disparate treatment**

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Carrying Out The Termination Decision

Practical Consideration

- **Treat the termination of an employee as a liability event**
- **Rehearsal**
- **Day of Week**
- **Location**
- **Who Delivers?**
- **What to say during termination meeting?**



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Carrying Out The Termination Decision

Practical Consideration

- **Special Precautions**
- **Unemployment**
- **Severance**
- **Benefit Continuation**
- **Protecting Confidentiality/Trade Secrets**

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Carrying Out The Termination Decision

Practical Consideration

- **Deduction from final paycheck**
- **Outplacement services**
- **What to say after termination?**



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