



EMPLOYMENT LAW BASICS

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AGENDA

- What is Employment Law?
- Employees vs. Independent Contractors
- Employment At Will
- Hiring Process
- Wage & Hour Issues
- Reasonable Accommodations
- Time Away From Work
- Employee Handbooks
- Handling Discrimination and Harassment Complaints
- Retaliation
- Performance Management
- Termination

WHAT IS EMPLOYMENT LAW?

- Division of law that governs the relationship between employer and employees
- Who do these rules apply to?
 - Employees
 - Volunteers
 - Independent Contractors
 - Third Parties

EMPLOYEE VS. INDEPENDENT CONTRACTOR

- Massachusetts
 - Presumption of employment
- Independent Contractors
 - Freedom from control
 - Service performed is outside employer's usual course of business
 - Customarily engaged in independent trade, occupation or business

WHAT WOULD YOU DO?

- You hire a new trainer, Bo, to work in your office. He wants to be an independent contractor, not an employee. Trying hard to remember if that employment lawyer said anything on this topic at the last MCC program you attended, you recall that there may be an issue with this, so you express reluctance in response. Bo offers to sign an agreement where he acknowledges that he is an independent contractor.
- Great! (Or is it?)

EMPLOYMENT AT WILL

- An employer or employee can terminate employment “at will” for any reason or no reason, with some exceptions
 - “At will” does not mean employees can be terminated for illegal reasons such as discrimination or retaliation
- No agreement defines how long the employment relationship will last
- Certain types of employees are not subject to employment-at-will laws including some employees with contracts and unionized employees

HIRING PROCESS

- Start by controlling the process as much as possible
- Know what you can and cannot ask in an interview
- Create guidance for consistent and lawful interviewing
- Be cautious and calculated when asking questions aimed at specific skills
 - Replace “tell me about yourself” with questions focused on the essential functions of the job
 - Ask the candidate for examples of how they have or would handle scenarios that illustrate the need for certain skills
- Document objective reasons for selections carefully during and after interview

KNOW THE PROTECTED CATEGORIES

- Race/Color
- Gender
- Pregnancy/Pregnancy-Related Conditions
- Gender Identity or Expression
- Sexual Orientation
- National Origin/Ancestry
- Religion
- Age
- Military Status
- Physical/Mental Disability
- Genetic Information

INTERVIEW DO'S AND DON'TS

- Education
- Marital/Family Status
- Pregnancy
- Disability
- Age
- National Origin
- Salary
- Criminal Records
- Religion
- Military
- Genetic Information
- Sexual Orientation

WHAT WOULD YOU DO?

- You are interviewing Mel for a weekend position. Mel mentions in conversation during the interview that he is active in his church.
- What can or should you ask him?

WHAT WOULD YOU DO?

- You are interviewing Heidi for a job as a receptionist. Good attendance is a must. During the interview, Heidi mentions she is 5 months pregnant.
- What questions can you ask Heidi about her pregnancy, maternity leave and/or her intentions after the baby arrives?

WAGE & HOUR ISSUES

- Know your legal obligations regarding:
 - When and how to pay employees for their work
 - Calculating hours worked
 - Meal breaks
 - Overtime
- Maintain clear policies and practices relating to punching in/out, breaks, and approval of overtime
- Regularly review your exempt and nonexempt classifications for compliance
- Conduct routine audits to ensure compliance

WHAT WOULD YOU DO?

- One of your servers, Alex, takes a 30 minute unpaid lunch break each day. The last few days you have noticed him munching on his gluten-free, carb-free, (taste-free) tofu salad in the kitchen during his break. You've also noted that he sometimes assists other servers or a customer here and there during his break.
- Does any of this trouble you?

REASONABLE ACCOMMODATIONS

- Manager must be able to spot a request for reasonable accommodation
- Managers must engage in the “interactive dialogue”
- Never outright reject requests; talk, talk, talk
- Do not have to provide if it will cause “undue burden”
- Do not have to provide the accommodation requested

WHAT WOULD YOU DO?

- Celia, your bookkeeper, has been struggling to keep up with her work lately. You have also noticed that she has been late to work with some frequency in the last few weeks. When you sit down to talk to her about it, she indicates that she is trying her best, but that she has been having a hard time of it due to her chronic depression.
- What do you say in response?

TIME AWAY FROM WORK

- Know all the laws – that apply to your business – that require employers to give job protected time away from work, including:
 - Family and Medical Leave Act
 - Massachusetts Paid Family and Medical Leave Act
 - Massachusetts Earned Sick Time
 - Massachusetts Parental Leave
 - Massachusetts Small Necessities Leave Act
 - Massachusetts Domestic Violence Leave
 - Massachusetts Jury Duty Leave
 - Massachusetts Veteran and Memorial Day Leave
 - Military Leave
- Review your Employee Handbook and make sure that your business has policies consistent with the state and federal leave laws that are applicable to you

WHAT WOULD YOU DO?

- Donald – who recently started working for your business - calls right before his shift to say he is going to be late because one of his daughters is sick and needs to go to the doctor. You tell him he will receive a warning in his file for being tardy AND you require a doctor's note.
 - Did you do the right thing?

EMPLOYEE HANDBOOKS

- Think strategically about employee handbooks
 - Can create legal exposure
 - No policies the organization will not follow; no wishful thinking
 - No using handbooks from your last job or online!
 - Handbooks are not operations manuals or vision statements
- Under Massachusetts law, handbooks may be deemed an employment contract
- Employers cannot have it both ways – expecting employees to follow handbook while holding themselves free to ignore the policies
- Fine print disclaimer provision may not protect employer from contract claim
- Progressive discipline process policy may be relied upon by employee

HANDBOOK POLICIES TO INCLUDE

- Anti-harassment
- Massachusetts Earned Sick Time
- Massachusetts Pregnant Workers Fairness Act
- Safe harbor for deductions from exempt employees
- Vacation (use it or lose it)
- Family & Medical Leave Act
- Massachusetts Domestic Violence Leave Law
- Disclaimers

SAMPLE HANDBOOK TABLE OF CONTENTS

- WELCOME / OUR VALUES
- INFORMATION ABOUT THE HANDBOOK
- YOUR RESPONSIBILITY REGARDING THIS HANDBOOK
- AT-WILL EMPLOYMENT
- EQUAL EMPLOYMENT OPPORTUNITY
- AMERICANS WITH DISABILITIES ACT
- IMMIGRATION REFORM AND CONTROL ACT
- SEXUAL AND OTHER UNLAWFUL HARASSMENT
- CATEGORIES OF EMPLOYMENT
- WORK SCHEDULES AND REPORTING YOUR HOURS WORKED
- OVERTIME
- BREAK AND MEAL PERIODS
- PAYDAY POLICY & PAYROLL DEDUCTIONS
- HOLIDAYS
- PAID SICK TIME
- VACATION
- BEREAVEMENT
- JURY DUTY
- MILITARY LEAVE
- FAMILY AND MEDICAL LEAVE ACT (50+)
- MA SMALL NECESSITIES LEAVE ACT (50+)
- MA PAID FAMILY AND MEDICAL LEAVE ACT
- MA PARENTAL LEAVE
- MA DOMESTIC VIOLENCE LEAVE (50+)
- MA VETERANS AND MEMORIAL DAY LEAVE
- MA PREGNANT WORKERS FAIRNESS ACT
- INSURANCE PROGRAMS
- STANDARDS OF CONDUCT
- SAFETY AND SECURITY PROCEDURES
- ATTENDANCE STANDARDS
- SMOKING
- NON-FRATERNIZATION
- NO SOLICITATION
- TELEPHONE AND CELL PHONE USE
- CONFIDENTIALITY
- PERSONAL APPEARANCE AND HYGIENE
- WORKPLACE SAFETY AND ANTI-VIOLENCE
- ELECTRONIC COMMUNICATIONS AND INFORMATION TECHNOLOGY
- SOCIAL MEDIA POLICY
- TALKING TO THE MEDIA
- SUBSTANCE ABUSE
- PERFORMANCE APPRAISALS
- WORKER'S COMPENSATION
- INSURANCE BENEFITS
- IF YOU MUST LEAVE US
- ACKNOWLEDGEMENT

HANDLING DISCRIMINATION AND HARASSMENT COMPLAINTS

- Do you have a discrimination and harassment prevention policy?
- Do your employees know how to report an issue?
- Regular training is recommended!

WHAT WOULD YOU DO?

- You sit down with Henry to deliver his performance review. When you announce that his overall rating is a “Really, really, needs to improve, and fast,” he is crying. That is when he informs you that he believes his supervisor is unfair, and that he doesn’t think she likes older employees.
- What do you do now?

RETALIATION

- To set forth a claim of retaliation an employee needs to show:
 - Protected activity
 - Adverse employment action
 - Causal connection
- Most employment laws have anti-retaliation provisions
- Make sure your policies include a strong no-retaliation provision!

PERFORMANCE MANAGEMENT

- Have a consistent approach to performance evaluation and ensure Handbook reflects reality
- Embrace performance management
 - Know your rights and those of your employees in this process
 - Follow 5 easy steps!
- Lots of laws that protect employees and their time away from work
 - Protected characteristics
 - Leave laws
 - Accommodation of disability & religion
 - No retaliation for complaints

5 EASY STEPS

1. Identify the problem and how it is affecting the business
2. Identify potential rights of employee to engage in that conduct
3. Identify your responsibilities for addressing the problem
4. Identify resources available to you and the employee
5. Deliver feedback and DOCUMENT

DOCUMENTATION

- Provides the best foundation against litigation
 - Memories fade; witnesses leave
 - Decision-makers believe what they read
- Do not be caught ready to terminate an employee with no documentation in the file!
- Protects you and your company

WHAT DOES GOOD DOCUMENTATION LOOK LIKE?

- Provide details of what employee did
- Be accurate – don't exaggerate or falsify
- Make it complete (date it!)
- Create a plan for improvement
- Ensure consistency with handbook/progressive discipline
- Give employee opportunity to sign or object
- Be professional!

TERMINATION

- Clear communication to the employee
- Don't act hastily or "in the moment"
- Review policy or performance issues and consider whether you have held others to same standard
- Document, document, document!

WHAT WOULD YOU DO?

- You are sick and tired of Harry's lackluster performance as Banquet Manager. He is grumpy with members, and you have received complaints from members and guests. You feel like you have given him ample opportunity to improve. You decide to fire him, and sit down with him to inform him of your decision.
- What do you say?



Thank You!

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