

EMPLOYMENT LAW BASICS:
AVOIDING LABOR PAIN



CONNIE CORNELL
ccornell@cornellsmith.com
(512) 328-1540

Employee or
Independent Contractor

- 1. Who says when, how and where?
- 2. Who trains the worker?
- 3. Is the work integral to regular business?
- 4. Is work assignable?
- 5. Who hires assistants?
- 6. Is this an ongoing relationship?
- 7. Who sets the hours?
- 8. Is it full time?
- 9. Where is the work performed?
- 10. Who sets the order or sequence of work?

Employee or
Independent Contractor?

- 11. Are detailed status reports required?
- 12. Is payment by the hour, week, or the job?
- 13. Who pays expenses?
- 14. Who provides tools and materials?
- 15. Does worker have any investment?
- 16. Could the worker enjoy a profit or a loss?
- 17. Does the worker have more than one client?
- 18. Can the worker offer services to public?
- 19. Is it terminable at will or for cause?
- 20. Can the worker quit mid-job?

Compensation

Minimum Wage + Overtime

Breaks

Tracking Hours

Off the Clock

Exempt

Executive

Professional

Administrative

Computer Professional

Outside Sales

THE AT WILL EMPLOYMENT DOCTRINE

- **"AT-WILL" EMPLOYEES**
MAY BE TERMINATED
 - **For Good Reason**
 - **For Bad Reason**
 - **For No Reason**
 - **But....**



...Not for an Illegal Reason
Such As:

- ◆ Filing personal bankruptcy
- ◆ Asking questions about overtime pay
- ◆ Refusal to engage in a criminal act
- ◆ Filing of a workers' compensation claim
- ◆ Retaliation for taking FMLA leave



UNLAWFUL DISCRIMINATION

- ◆ Sex/pregnancy/(sexual orientation)
- ◆ Race
- ◆ National origin
- ◆ U.S. Citizenship
- ◆ Religion (accommodation)
- ◆ Age (protecting persons age 40 and over)
- ◆ Disability
- ◆ Retaliation



DISCRIMINATION IS
PROHIBITED
WITH REGARD TO:

- ◆ Hiring
- ◆ Compensation
- ◆ Conditions
- ◆ Privileges
- ◆ Firing
- ◆ Constructive discharge




MEDICAL ISSUES?

Workers' Comp


ADA

FMLA

HIPAA!



DISABILITY DISCRIMINATION




AN EMPLOYEE IS PROTECTED IF:

- ◆ Mental or physical impairment that substantially limits one or more major life activities
- ◆ Has a record of such impairment
- ◆ Is regarded as having such impairment
- ◆ Is associated with disabled individual(s)

Family & Medical Leave Act
"FMLA"

- Serious Illness
- Birth, Placement, or Adoption
- Serious Illness of Family
- 12 Weeks / Intermittent
- Retaliation



DOES IT LOOK, ACT, or SMELL
MEDICAL?

- I have another migraine. I'll be in late again.
- My mistakes are caused by the new drugs I'm taking.
- I'm just tired. Not depressed.
- You think I'm an alcoholic? Is that what you're saying?



UNLAWFUL

HARASSMENT

IS A FORM OF DISCRIMINATION BASED ON...

Age (40 and over)

Race

National Origin

Disability

Religion

Sex / Gender/Pregnancy

QUID PRO QUO
sexual harassment



UNWELCOME SEXUAL ADVANCES

+

**EMPLOYMENT ACTION BASED ON
SUBMISSION or REJECTION**

HOSTILE WORKING ENVIRONMENT

UNWELCOME SEXUAL / RACIAL / ETC. VERBAL OR PHYSICAL CONDUCT THAT:



Unreasonably interferes with an individual's work performance, or

Creates an intimidating, hostile or offensive work environment

WHAT DOES "UNWELCOME" MEAN?

Complaining employee did not initiate it.

Complaining employee is offended

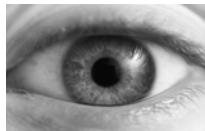


HARASSMENT IS IN THE EYE OF THE BEHOLDER

The harasser's intent is irrelevant

Whether there is a sexual attraction is irrelevant

Consent is irrelevant



DATING - IS THE COMPANY'S AFFAIR!!!

Conduct that was once welcomed, may not always be welcomed

- THE HOPELESS ROMANTIC
- THE BROKEN HEARTED

So give HR (the Love Referees) a heads up!



THE HUMOR POLICE

Conduct welcomed from one may not be so welcome from another...



- **But** he/she was laughing too!
- **But** it was at a happy hour!
- **But** he/she tells the same type jokes!

RECIPE FOR A HOSTILE ENVIRONMENT

- Degrading verbal abuse
- Graphic comments
- Offensive objects, cartoons, pictures
- Explicit or offensive jokes
- Innuendo
- Nicknames (Gramps; Laddie; Preacher)
- Email, EMAIL, EMAIL
- Any unnecessary touching - ASSAULT



WHERE IS THE LEGAL LINE?

1. Was it **SEVERE**?
2. Was it **PERVASIVE**?

WOULD A REASONABLE PERSON
find the conduct created a hostile
environment based on race, sex, age,
religion, national origin, disability...?



WHAT TO DO IF YOU RECEIVE A COMPLAINT

RUN To HR... even if...



...the employee doesn't want to
complain

...if the employee begs you not to
report it

...you just hear a rumor

GENERAL RULES OF THUMB

KEY INTERVIEWING RULES

- If Not Job-Related, Don't Ask!

EXAMPLES:

- Are you married?
- Do you have young children?
- How old are you?
- What year did you finish high school?

- Be Consistent
- Stay on Topic – Don't Strike Up a Conversation



MANAGING RULES



**Trust Your Instincts ...
Involve HR Early & Often**

ORAL WARNINGS?
THERE IS NO SUCH THING!

By the 3rd Oral Warning... they either

1. CAN'T GET IT

OR

2. DON'T CARE



What's Your Excuse for
Not Documenting?

- "I didn't want to make a federal case out of it."
(Well they just did!)
- "I'm too busy."
(What an arrogant _____!)
- "I believe in positive reinforcement!"
(Coward!)

GO DOCUMENT YOURSELF!

- Send me an Email about the importance of being on time.
- Send me an Email about how you will meet your quota next quarter.
- Send me an Email about our discussion so I know we're on the same page.

REFUSAL TO SIGN?



Then you go write up this meeting in your own words.

BE HONEST IN REVIEWS



80% of Employees MEET EXPECTATIONS
10% of Employees EXCEED EXPECTATIONS
10% of Employees FAIL TO MEET EXPECTATIONS
Can you justify firing someone who met your expectations last review?

INITIAL INTRODUCTORY PERIOD

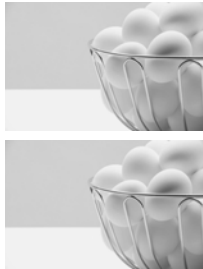


**Your Window
of Opportunity...**

If they stink the first 90 days, they'll really stink the next.

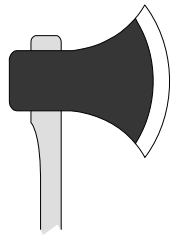
When in doubt, extend the introductory period & document why.

DON'T PASS ON YOUR BAD EGGS



FIRING SCRIPT

- **Get Right to the Point.**
"You are being terminated effective immediately."
- **If Stating Why...**
"I've lost confidence in you."
"This just isn't working out."
- **Turn it over to HR**
- **Listen Politely**



THE NO. 1 WAY TO AVOID
GETTING SUED BY YOUR
EMPLOYEES!

GET TRAINED BY.....

CORNELL SMITH & MIERL, LLP
