



jackson|lewis[®]

Things that Go Bump in the Night: Getting a Handle on the Legal Risks Lurking in Your Workplace

Matthew F. Nieman

Jackson Lewis P.C. | DC Region

NiemanM@jacksonlewis.com

703.483.8331

Charles M. Elmer

Jackson Lewis P.C. | DC Region

Charles.Elmer@jacksonlewis.com

703.483.8347

About the Firm

Represents management exclusively in every aspect of employment, benefits, labor, and immigration law and related litigation

800 attorneys in **56 locations** nationwide

Current caseload of **over 6,000 litigations**
approximately **800 class actions**

Founding member of L&E Global

A leader in educating employers about the laws of equal opportunity, Jackson Lewis understands the importance of having a workforce that reflects the various communities it serves

About the Firm



Named the 2017 **Employment Law – Management Law Firm of the Year** and ranked in the **First Tier** nationally in the category of Labor and Employment Litigation, as well as in both Employment Law and Labor Law on behalf of Management, in the *U.S. News - Best Lawyers® “Best Law Firms”*

Recommended in *U.S. Legal 500* for Labor and Employment Litigation, Labor-Management Relations and Workplace and Employment Counseling

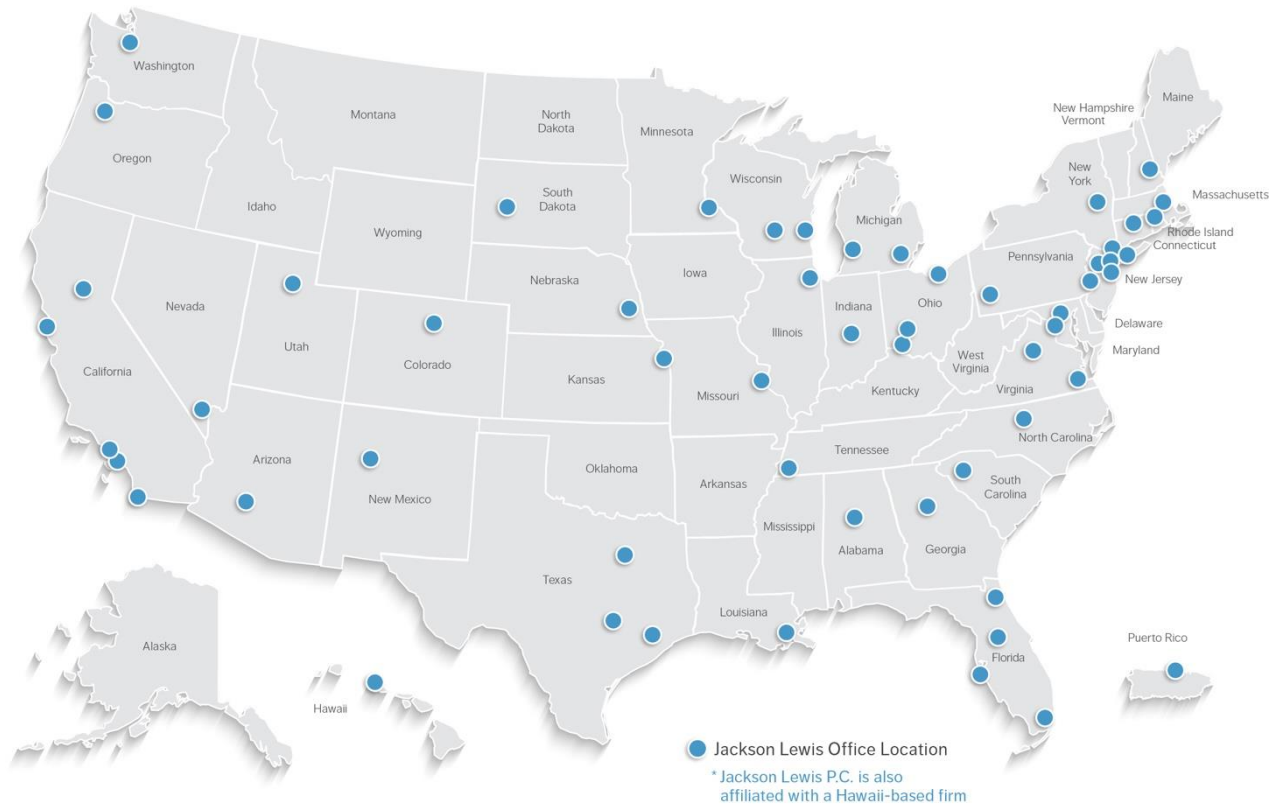
Designated as a **Powerhouse** in both Complex and Routine Litigation in the *BTI Litigation Outlook 2016: Changes, Trends and Opportunities for Law Firms*

65 Jackson Lewis attorneys were named Leaders in Their Field by Chambers USA for 2016; **146** Jackson Lewis attorneys were selected for inclusion in the 2017 edition of *Best Lawyers in America*

Strategically Located Throughout the Nation to Serve Employers' Needs

56 Locations Nationwide*

*Jackson Lewis P.C. is also affiliated with a Hawaii-based firm



Practice Areas



Affirmative Action Compliance and OFCCP Defense



Class Actions and Complex Litigation



Collegiate and Professional Sports



Corporate Diversity Counseling



Corporate Governance and Internal Investigations



Disability, Leave and Health Management



Employee Benefits



General Employment Litigation



Government Relations



Health Law and Transactions



Immigration



International Employment Issues



Labor and Preventive Practices



Non-Competes and Protection Against Unfair Competition



Privacy, e-Communication and Data Security



Wage and Hour



White Collar and Government Enforcement



Workplace Safety and Health



Workplace Training

Industries Represented

Jackson Lewis represents a wide range of companies in various industries, including:



Airline & Airline Service Providers



Automotive



Construction



Education



Energy & Utilities



Financial Services



Food Processing & Manufacturing



Gaming & Hospitality



Government Contractors



Health Care



Mining



Pharmaceuticals



Professional Services



Public Sector



Real Estate



Retail



Sports & Entertainment



Technology & Telecom



Transportation & Warehousing

Matthew F. Nieman



Matthew F. Nieman is a Principal in the Washington, D.C. Region office of Jackson Lewis P.C. He also serves as the Litigation Manager for the office.

Mr. Nieman represents employers in a broad spectrum of labor and employment law matters, including discrimination, wage and hour, questions related to the Uniformed Services Employment and Re-employment Rights Act of 1994 (“USERRA”), and workplace drug-testing issues. He is an active litigator on the full range of employment discrimination and employment-related tort and contract claims, including the representation of employers in actions before the Department of Labor, the Equal Employment Opportunity Commission, the National Labor Relations Board, the Occupational Safety and Health Administration, the Mine Safety and Health Administration, and numerous state and local agencies.

As part of his litigation practice, he has concluded many employment-related adversarial proceedings, including solo trials and multiple jury trial defense-verdicts. He has additionally drafted numerous successful dispositive and summary judgment motions in state and federal courts throughout the Mid-Atlantic region, including a summary judgment victory in the United States District for Maryland on a Sarbanes-Oxley claim.

Mr. Nieman is a frequent writer and speaker and provides training to employer groups on various workplace-related topics, including sexual harassment, discrimination, substance-abuse prevention, and litigation avoidance.

Prior to entering private practice, Mr. Nieman was in public service as an active-duty U.S. Army Judge Advocate (“JAG”) at Fort Benning, Georgia and at Camp Liberty, Baghdad, Iraq. During his service as an Army JAG, Mr. Nieman enjoyed unique opportunities to interact with state and local governments in both the criminal and civil arenas as well as to develop trial experience.

Mr. Nieman earned his B.S. in Industrial & Labor Relations from Cornell University and his J.D. from the College of William & Mary Marshall-Wythe School of Law.

Charles M. Elmer

Charles M. Elmer is Of Counsel in the Washington, D.C. Region office of Jackson Lewis P.C. He has extensive experience litigating all forms of labor and employment matters throughout the Southeastern region of the United States.

Mr. Elmer's practice spans the full spectrum of employment litigation before state and federal courts in Virginia, the District of Columbia, Maryland, and Alabama, with special emphasis on the defense of discrimination, retaliation and "whistle blower" claims, the enforcement of non-competition, non-solicitation and confidentiality agreements, and the litigation of employment and compensation agreement disputes. He has extensive experience trying cases in state and federal courts as well as arbitrating cases before the American Arbitration Association ("AAA"), the Financial Industry Regulatory Authority ("FINRA"), and other arbitration organizations. Mr. Elmer has broad experience managing complex litigation and litigating complex electronic discovery issues. He has also had an active appellate practice, including oral argument, before the U.S. Court of Appeals for the Eleventh, Seventh and Fifth Circuits, as well as the Supreme Court of Alabama.

Mr. Elmer routinely advises clients on a variety of employment matters, including employee policies, procedures and handbooks, and employment and separation agreements, with a particular emphasis on agreements involving executives and other highly compensated management and sales employees. He also advises employers regarding compliance with state and federal laws governing wages and hours, leave, privacy, anti-discrimination and conducts audits of employment practices, employee training, and harassment investigations.

In defending litigation and providing legal advice, Mr. Elmer has had substantial experience representing clients in the healthcare, information technology, securities, banking, retail, and hospitality industries.

Mr. Elmer earned his B.A. in Philosophy from Washington & Lee University and his J.D. from the Cumberland School of Law. After graduating from law school, he served as a clerk and staff attorney for the Honorable Reneau P. Almon, Associate Justice of the Supreme Court of Alabama. Mr. Elmer is a proficient speaker and writer of Spanish.



HARASSMENT & DISCRIMINATION

Employment At Will

Employer can terminate an employee and an employee can quit without cause or notice.



Erosion Of The At-Will Doctrine

Anti-Discrimination Laws

Anti-Retaliation Laws



k9077551 www.fotosearch.com

Title VII Of The Civil Rights Act Of 1964

- Title VII of the Civil Rights Act of 1964, as amended, prohibits discrimination in employment from initial help-wanted advertising to termination of employment.
- Protected classes include: race, color, national origin, religion, age, sex, and pregnancy.



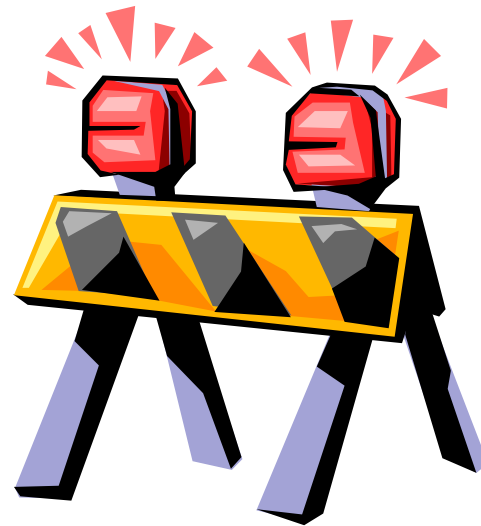
Basics Of Equal Employment Opportunity

- Applicants and employees with equal qualifications and skills must be treated equally.
- Employers must provide valid business reasons for adverse actions.
- Employment decisions based on stereotypes usually lead to unlawful results.
- Standards that appear neutral and apply to all may be discriminatory if they impact more heavily on protected classes.

Basics Of Equal Employment Opportunity, cont.

Exceptions to the rule of equal treatment:

- Religion
- Disability
- Pregnancy



What Characteristics Are Protected?

Discrimination is unequal treatment of employees based on protected characteristics.

- **Race or Color**
- **National Origin or Ancestry**
- **Age**
- **Religion or Creed**
- **Gender/Sex**
- **Marital Status**
- **Familial Status**
- **Disability**
- **Military/Veteran Status**



- **Genetic Information**
- **Alienage**
- **Public Assistance**
- **Pregnancy/Pregnancy Related Conditions**
- **Sexual Orientation/Gender Identity/Gender Expression**
- **Engaging in protected activity**

Sexual Orientation Discrimination

State Laws

◆ Sexual Orientation / Gender Identity

- California
- Colorado
- Connecticut
- Delaware
- Hawaii
- Illinois
- Iowa
- Maine
- Maryland
- Massachusetts
- Minnesota
- Nevada
- New Jersey
- New Mexico
- New York
- Oregon
- Rhode Island
- Utah
- Vermont
- Washington

◆ Sexual Orientation Only

- New Hampshire
- Wisconsin

Federal Contractors

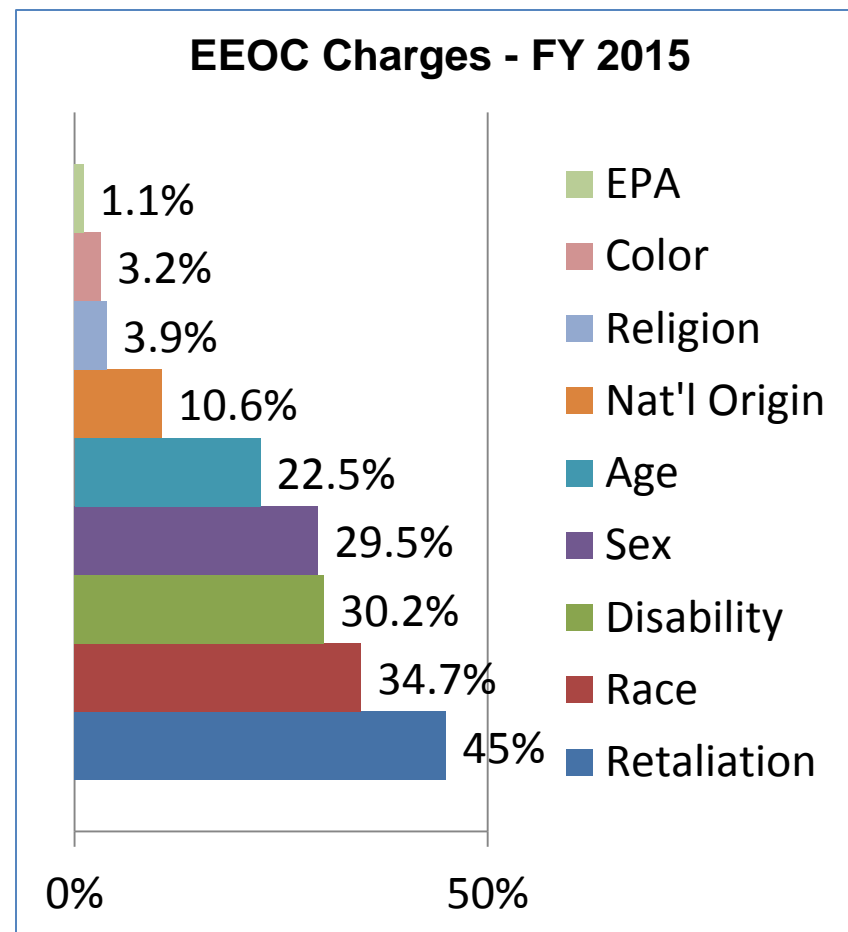
◆ LGBT Executive Order

- Nondiscrimination on basis of sexual orientation and gender identity
- Does not require affirmative action
- No outreach, data collection or analysis
- Include if use extended EEO tagline



EEOC Charges

- ◆ Increase in charges:
 - 89,385 total.
 - Retaliation (up 5%) national priority at EEOC.
 - Disability (up 6%).
- ◆ Most frequent issues:
 - Discharge;
 - Harassment;
 - Terms and Conditions;
 - Discipline / Suspension;
 - Reasonable Accommodation;
 - Wages.



Source: EEOC 2/11/16

Adverse Employment Actions

“Terms, Conditions and Privileges”

Any employment-related decision that affects the “compensation, terms, conditions or privileges” of employment must be made in a non-discriminatory and non-retaliatory way, based on legitimate business reasons.

Adverse Employment Actions

What Kinds of Decisions are Covered?

- ❖ Recruitment/Hiring
- ❖ Promotions, demotions
- ❖ Performance evaluations
- ❖ Employee counseling
- ❖ Compensation decisions
- ❖ Transfer decisions, Benefits
- ❖ Training and similar opportunities
- ❖ Termination

Preventing Workplace Discrimination – What Does The Law Require?

Fair Treatment



- No discrimination
- No harassment
- No retaliation
- Reasonable Accommodation (disabilities and religion)
- Family / medical leaves

Two Types Of Harassment

Economic



Environmental



Economic Harassment (When It's About Sex)

- Making any adverse employment action based on an agreement or refusal to engage in sex, dating, etc.
- Typically involves a threat or promise of a benefit linked to sex
- Adverse actions can include: termination, demotion, negative reviews



Economic Harassment (When It's Not About Sex)



"All the other women in the office are suing you for sexual harassment. Since you haven't sexually harassed me, I'm suing you for discrimination."

Environmental Harassment

Unwelcome conduct based on someone's membership in a protected category that unreasonably:

- Interferes with an employee's job or
- Creates an intimidating, hostile, or offensive work environment



Potentially Harassing Behaviors

- Touches
- Look/Leers
- Jokes
- Storytelling
- Bragging
- Inquiries
- Abusive/Vulgar language
- Posters/Calendars
- Graffiti
- Cartoons or Photos
- E-mail/Screen Savers
- Repeated Requests
- Intimidation



Why Does It Matter To You?

- Continued increase in claims
- Individuals can be liable
- Alleged Harasser may be terminated from employment
- Failing to report Harassment can lead to liability and disciplinary action

Who Can Be Harassed/Harasser?

- Supervisor/manager
- Co-worker
- Non-employee
 - Customer/client
 - Vendor
 - Other third parties



Where Can Harassment Occur?

- In the workplace
- At work-related events
- At any other place if conduct is tied to work
- Social networking sites
 - Where is the line?
 - Facebook? LinkedIn?





DISABILITY & LEAVE

Managing Family/Medical Issues In The Workplace



Family/Medical Leave

- **Federal:**
 - 12 work weeks off per year (unpaid)
- **DC:**
 - 16 work weeks off per 24 months for self (unpaid)
 - 16 work weeks off per 24 months to care for others (unpaid)
- For specific family and medical situations



Copyright © Leo Blanchette · <http://MyFamilyClipart.com/114>

Family/Medical Leave, cont.

- Length of Leave
 - 12 weeks in a 12 month period.
 - 26 work weeks of unpaid leave during a “single 12-month period” to care for an injured servicemember.
- Intermittent/Reduced Schedule Leave.
- Medical certifications.
- Employees have obligations to report the need for leave.
- Employer has obligations to designate leave and request information.
- Job restoration rights at the end of leave.

Reasonable Accommodation Under The Americans With Disabilities Act



Basic ADA Provisions

The ADA prohibits discrimination in employment based on disability and requires employers to provide a reasonable accommodation to disabled individuals to enable them to perform a job's essential functions.

Who Is Protected Under The ADA?

A job applicant or employee with a “disability” defined as:

- A physical or mental impairment that substantially limits one or more major life activities.
- Who can perform the essential functions of the current job.
- With or without **reasonable accommodation**.



Reasonable Accommodations

- The burden is on the employee to make the request and propose the reasonable accommodation.
- Interactive dialogue.
- Assist employee in performing essential functions of job.
- Do not need to create a new job.
- May need to modify duties.
- Not required to grant a request that imposes an “undue hardship”.
- Enlist assistance of HR.



WAGE & HOUR ISSUES, INCLUDING PAY & LEAVE ENTITLEMENTS

OFCCP Audits



	FY 2015	FY 2016	FY 2017 (Q1 – Q3)
Completed OFCCP Audits	2,345	1,522	831
Conciliation / Consent Agreement	14.6%	17.9%	18.5%
Discrimination Violation	1.4%	3.6%	2.5%

- ◆ New Administration
 - Proposed merger with EEOC
 - New OFCCP Head?
 - Tom Dowd is still acting...
- ◆ Courtesy Scheduling Letters
 - Advance notice of potential audit
- ◆ Veterans Hiring Benchmark
 - National benchmark for hiring protected veterans lowered from 6.9% to 6.7%
- ◆ Disability Self-ID Form
 - Approved through 1/31/20

Ban on Salary History

◆ Localities (prohibits inquiring about wage history of applicants)

- Delaware
- Massachusetts
- **Oregon**
- Philadelphia (under challenge)
- Puerto Rico
- New York City
- San Francisco



◆ Localities considering similar measures

- **California** (already prohibits use of salary history alone to justify difference in pay)
- New Jersey and Berkley, CA

◆ Offshoot of Equal Pay suits

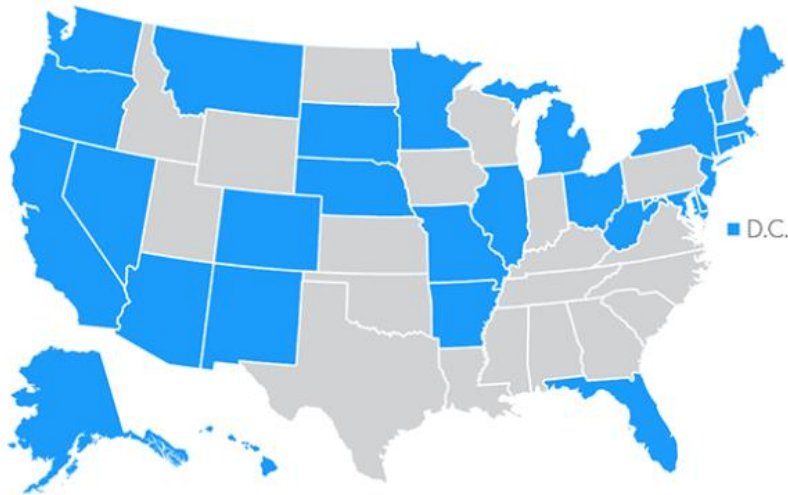
◆ Majority of U.S. workers (53%)

- Believe employers should not ask about current or past history when negotiating offer

State Minimum Wage

HIGHER MINIMUM WAGES

Twenty-nine states and D.C. have minimum wages above the \$7.25 federal level.



Alaska	\$9.80	Ill.	\$8.25	N.J.	\$8.44
Ariz.	\$10.00	Maine	\$9.00	N.M.	\$7.50
Ark.	\$8.50	Md.	\$9.25	N.Y.	\$9.70
Calif.	\$10.00	Mass.	\$11.00	Ohio	\$8.15
Colo.	\$9.30	Mich.	\$8.90	Ore.	\$10.25
Conn.	\$10.10	Minn.	\$9.50	R.I.	\$9.60
Del.	\$8.25	Mo.	\$7.70	S.D.	\$8.65
D.C.	\$12.50	Mont.	\$8.15	Vt.	\$10.00
Fla.	\$8.10	Neb.	\$9.00	Wash.	\$11.00
Hawaii	\$9.25	Nev.	\$8.25	W.Va.	\$8.75

Note: As of July 1, 2017

- ◆ **Maryland** law will increase state minimum wage to \$10.10 on 7/1/18
- ◆ As of 7/1/17, DC law increases minimum wage by the DC cost of living
- ◆ **Virginia** bill to... *just kidding*

Local Minimum Wage

Snapshot: Cities and Counties with Minimum Wage Ordinances

Albuquerque, NM
Bangor, ME
Berkeley, CA
Bernalillo County, NM
Chicago, IL
Cook County, IL
Cupertino, CA
El Cerrito, CA
Emeryville, CA
Flagstaff, AZ
Las Cruces, NM
Los Altos, CA
Los Angeles, CA
Los Angeles County, CA
Malibu, CA (*see municipal code also*)
Miami Beach, FL
Milpitas, CA
Minneapolis, MN
Montgomery County, MD (*see website also*)
Mountain View, CA
Oakland, CA

Palo Alto, CA (*see municipal code also*)
Pasadena, CA (*see municipal code also*)
Portland, ME
Prince George's County, MD
Richmond, CA
San Diego, CA
San Francisco, CA
San Jose, CA
San Leandro, CA
San Mateo, CA
Santa Clara, CA
Santa Fe, NM
Santa Fe County, NM
Santa Monica, CA
Seattle, WA
St. Louis, MO
Sunnyvale, CA
Tacoma, WA
Washington, DC
—1992 ordinance
—2004 amendments
—2013 amendments
—2016 amendments

Montgomery County

- \$11.50 as of 7/1/17
- Council members unfazed by minimum wage impact study

PG County

- \$11.50 on 10/1/17

State Laws

- Nearly half have minimum wage preemption laws

Pay Raises

Current Employees

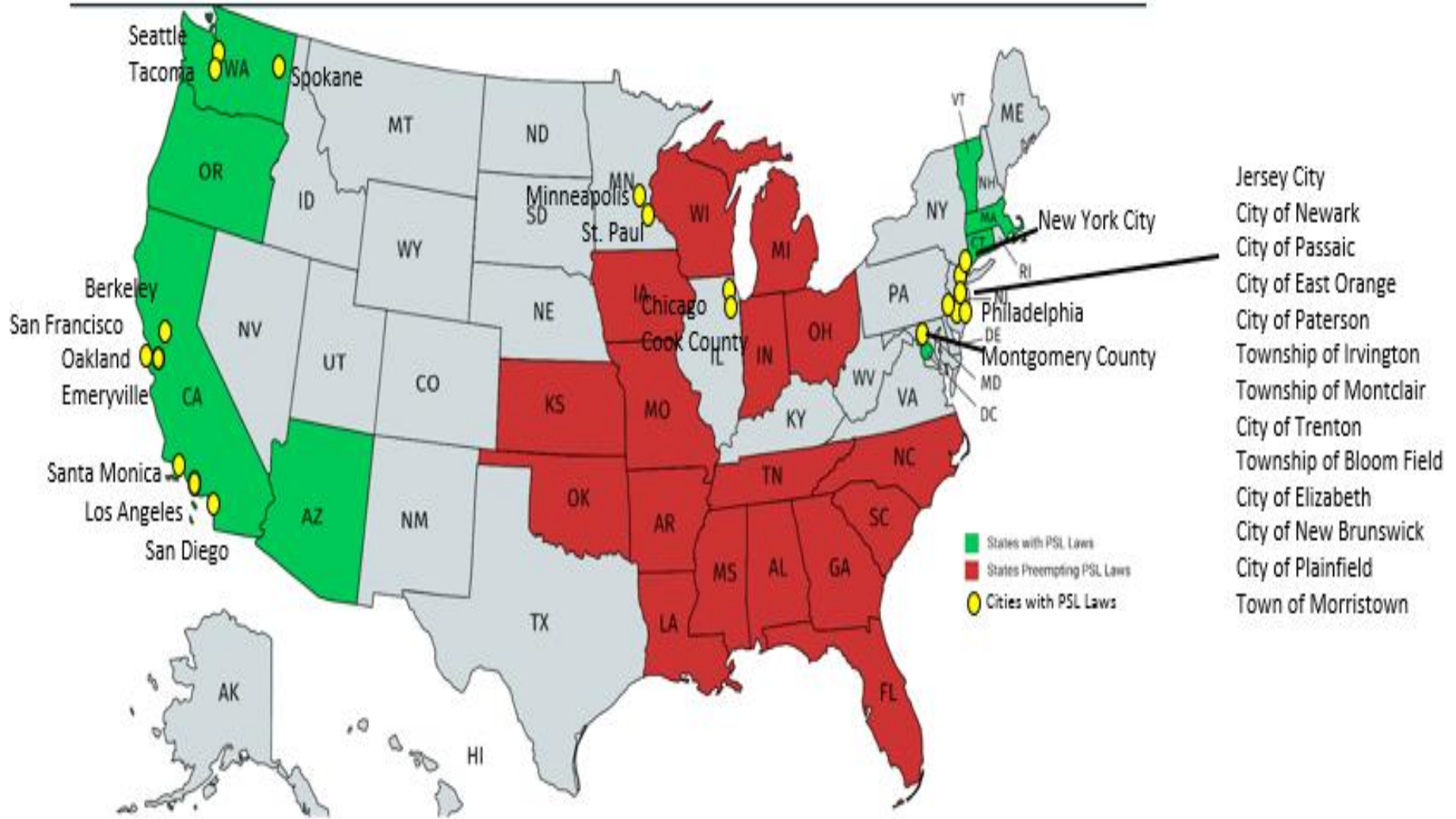
- ◆ 2018 Salary Increase Budgets
 - 3% (same as in 2017)
- ◆ Avg. Hourly Earnings
 - Over the year, average earnings have risen by 65 cents or 2.5%
- Avg. 1st year wage increase
 - In CBAs (Jan-July 2017): 2.5%

New Hires

- ◆ Starting Salaries (Class of 2017)
 - Range: \$48,733 to \$66,097

Engineering	\$66,097
Computer Science	\$65,540
Math & Science	\$59,368
Business	\$54,803
Agriculture & Natural Resources	\$54,364
Social Science	\$53,459
Communication	\$51,925
Humanities	\$48,733

Paid Sick Leave Laws



Paid Leave Laws

Paid Sick Leave

◆ States Requiring

- Arizona **Oregon**
- California **Vermont**
- Massachusetts **Washington** (1/1/18)

◆ Cities Requiring

- Washington D.C.
- Several other cities

◆ Bills Vetoed in 2017

- Maryland – by Gov. Hogan (R)
- **Nevada** – by Gov. Sandoval (R)

Paid Family Leave

◆ States Requiring

- California
- New Jersey
- Rhode Island
- New York (1/1/18)
- **Washington** (1/1/19)

◆ Cities Requiring

- Washington D.C. (7/1/19)



HIRING ISSUES, INCLUDING BACKGROUND CHECKS & DRUG TESTING

Criminal Background Checks

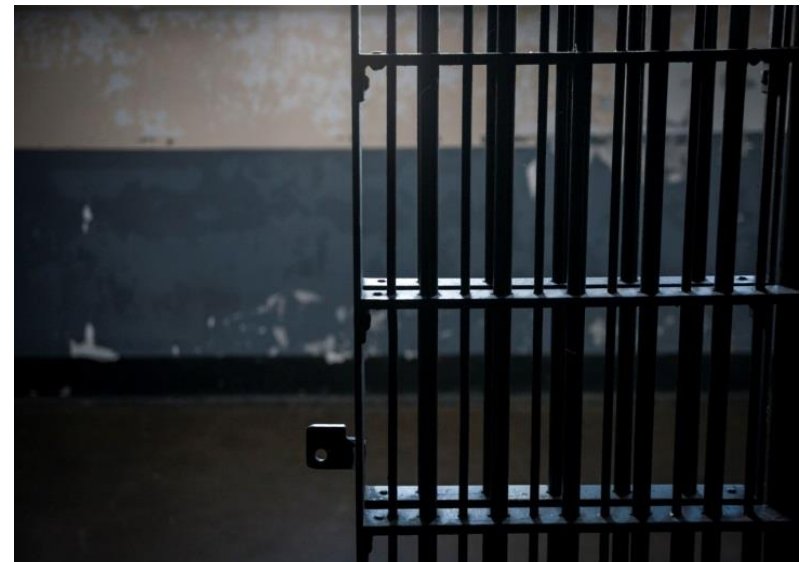
Ban-the-Box Laws

- ◆ States
 - Connecticut
 - Hawaii
 - Illinois
 - Massachusetts
 - Minnesota
 - New Jersey
 - Oregon
 - Rhode Island
 - Vermont
- ◆ Cities and Counties
 - 150 cities and counties

Source: [NELP](#) (8/01/17)

Fair Chance Act

- ◆ Fair Chance to Compete for Jobs Act of 2017
- ◆ Bill would apply to:
 - Federal contractors
 - Executive, Legislative, Judicial



Background Checks

Access to Social Media

◆ States

- Arkansas New Hampshire
- California New Jersey
- Colorado New Mexico
- Connecticut Oklahoma
- Delaware Oregon
- Illinois Rhode Island
- Louisiana Tennessee
- Maine Utah
- Maryland Virginia
- Michigan Washington
- Montana West Virginia
- Nebraska Wisconsin
- Nevada

Source: [NCSL](#)

Credit Checks

◆ States

- California Maryland
- Colorado Nevada
- Connecticut Oregon
- Delaware Vermont
- Hawaii Washington
- Illinois



Workplace Drug Tests

◆ Positive Test Results

- Highest in last 12 years (4.2% overall U.S. workforce)

◆ Drugs

- Almost half (45%) of positive drug tests showed evidence of marijuana use
- Overall urine positive rate for marijuana was higher in **Colorado** and **Washington** than the national average
- Positive cocaine drug tests increased for 4th straight year
- Amphetamines continued its year-over-year upward trend

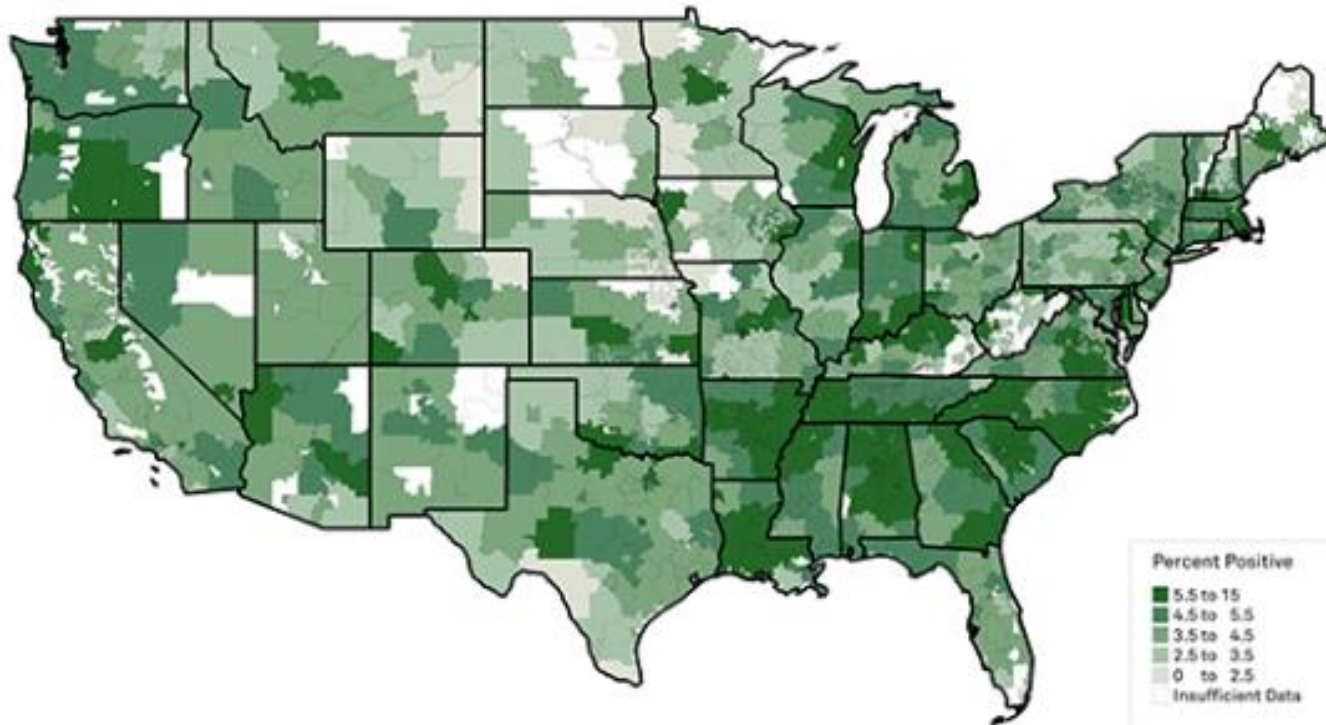


Workplace Drug Tests

Overall Positivity by 3-Digit Zipcode

Urine Drug Tests

January - December 2016



Illicit Drugs

- 1 in 10 Americans (10.1%) are current users of illicit drugs
 - 22.2 million current marijuana users
 - 3.8 million who misuse prescription pain relievers
- Opioid painkillers following on-the-job injuries
- Heroin epidemic
- DOT to add synthetic opioids to drug testing panel



Recreational Marijuana

◆ Marijuana Use

- 43% of U.S. adults tried marijuana
- 13% are current users
- 60% favor legalizing



◆ Legalized

- Alaska
 - California
 - Colorado
 - Maine
 - Massachusetts
 - Nevada
 - Oregon
 - Washington
 - District of Columbia
-
- More than 20% of Americans live in states where legal

◆ Canada

- Expected to be legalized by 7/1/18

Medical Marijuana

◆ States Where Permitted

- 29 states and D.C.
- 17 other states allow low THC products in limited situations
- Can employers discharge if prescribed?

◆ Can Employers Discharge/Rescind?

- Connecticut (Noffsinger)
- Massachusetts (Barbuto)
- Rhode Island (Callaghan)

◆ DOJ

- Reviewing Obama policy on marijuana enforcement priorities

◆ Drug Enforcement Agency

- Marijuana remains a Schedule I controlled substance because it does not meet the criteria for currently accepted safety for its use under medical supervision and it has high potential for abuse ([8/11/16](#))



CONDUCTING EFFECTIVE INTERNAL INVESTIGATIONS

Why Investigate?

- ◆ Better decision-making.
- ◆ Legal compliance.
- ◆ Protection from certain types of liability, including punitive damages.
- ◆ Opportunity to take corrective action.
- ◆ Reveal training needs.
- ◆ Employee relations.

Complaint is Raised

- ◆ Starts with offensive conduct.
- ◆ Employee is sufficiently upset to make a complaint.

Immediate Response Necessary

- ◆ Absent extraordinary circumstances, investigations should begin within 24 hours of the initial complaint and should be completed as soon as reasonably possible, but no later than a few business days after the complaint.
- ◆ Delays may undermine integrity of investigation.
- ◆ Delays undermine a swift resolution and permit argument that the employer did not take it seriously.

Consider Need for Preliminary Action

- ◆ Is any interim action necessary?
 - Any threat of imminent harm?
 - Likelihood that investigation may be compromised?
- ◆ Possible interim actions:
 - Separation from wrongdoer.
 - Suspension or leave of absence.
 - Contacting local law enforcement in extreme cases.
 - Taking steps to secure employer property or restrict access.

Consider Need for Preliminary Action

- ◆ In deciding on the need for interim action, **CONSIDER:**
 - The wishes of the employee complaining.
 - The nature and extent of the allegations.
 - Issues of workplace safety.
 - The number of employees complaining.
 - The history of the alleged wrongdoer.

Identify Investigator, Who Must...

1. Have time necessary to be prompt and thorough.
2. Have necessary experience.
3. Not be directly/indirectly involved in this or prior incidents or have conflict of interest.
4. Be objective and unbiased and perceived as such.
5. Have ability to make credibility determinations.
6. Be an effective witness in court.
7. Be capable of maintaining confidentiality.
8. Know Company's policies.

Options for Investigator

- ◆ Internal HR personnel.
- ◆ In house counsel.
- ◆ Outside counsel.
- ◆ Member of management.
- ◆ Member of ethics/security department.
- ◆ Outside investigator.

Whom To Interview...

- ◆ The complaining employee.
- ◆ Witnesses.
- ◆ The alleged wrongdoer.

Interviews should be in person and conducted as confidentially as possible.

Actions In Addition To Witness Interviews

- ◆ Request and review RELEVANT:
 - Documents.
 - Personnel files.
 - Voice mails.
 - E-mails.
 - Telephone records.
 - Recordings.
 - Photographs.

Prefatory Statement for Each Interview

- ◆ Explain allegations, purpose.
- ◆ State policy against retaliation and advise about discipline for retaliation.
- ◆ State expectation for truthful and complete information.
- ◆ State expectations about confidentiality.
- ◆ If counsel is the interviewer, the attorney-client privilege may or may not apply depending on the circumstances.

Order of Investigative Interviews

- ◆ Whom you interview and in what order will depend on the allegations of the complaint and the circumstances.
- ◆ One effective approach consists of the following:
 - Complainant.
 - Potentially corroborating witnesses.
 - Accused.

Investigative Interview of Complainant

- ◆ Identify from the Complainant the nature and scope of the alleged misconduct.
 - The perpetrator or perpetrators.
 - The timeline of events.
 - Witnesses or potential witnesses for each event.
 - Relevant or potentially relevant documentation, e.g. emails, texts, notes, photographs, etc.
 - Facts tending to show the motive for the alleged misconduct.
- ◆ This information informs the scope of a “reasonable” investigation.

Conducting Interviews

◆ Don't:

- Make accusations: explain suspicions in a factual, not finger-pointing fashion.
- Lead the witness: the question should not suggest the answer you expect to hear.
- Reveal more than is necessary to ensure an accurate, thorough statement.
- Express any opinion regarding the truthfulness, accuracy, or legal implications of the allegations.
- Promise more than you can deliver.

Conducting Interviews (cont.)

◆ Do:

- Keep questions simple.
- Avoid multi-part or compound questions.
- Use open ended questions.
- Start broad, then narrow the inquiry.
- Encourage employees to talk freely.

Conducting Interviews (cont.)

- ◆ Listen and take good notes.
- ◆ Be patient and allow witness to fully respond.
- ◆ Read body language.
- ◆ Periodically affirm and repeat your understanding of the witness' statement.
- ◆ Consider repeating a question to evaluate credibility.
- ◆ Use silence to your advantage.
- ◆ Follow up on new information.
- ◆ Conceive the event described by the witness in your head. If you can't fully picture it, ask more questions.

Conducting Interviews (cont.)

- ◆ Conclude by affirming policies regarding:
 - Non-retaliation.
 - Confidentiality.
 - Underlying policy being investigated.

Reaching A Determination

- ◆ Investigator should prepare a final written report documenting findings.
- ◆ Detail the scope of the investigation and steps taken by the investigator.
- ◆ Take prompt and appropriate remedial action.
- ◆ Make a decision! If there is a trial, the jury will.

Factors to Determine Credibility

- ◆ Inherent plausibility:
 - Is the testimony believable on its face?
 - Does it make sense?
- ◆ Demeanor:
 - Did the person seem to be telling the truth or lying?
- ◆ Motive to falsify:
 - Did the person have a reason to lie?

Factors to Determine Credibility (cont.)

◆ Corroboration:

- Is there **witness testimony** (eye-witnesses, people who saw accuser soon after alleged incidents, people who discussed incidents with him or her at around the time that they occurred)?
- Is there **physical evidence** (such as written documentation) that corroborates the party's testimony?

◆ Past record:

- Did the alleged wrongdoer have a history of similar behavior in the past?

Final Decision

- ◆ Informing the parties:
 - Preserve privacy and confidentiality.
 - “Need to know.”
 - Reminders regarding non-retaliation.
- ◆ Reaffirm policy at issue.
- ◆ Try to make the complaining employee to feel satisfied with the process as much as the result.

Confidentiality

- ◆ Assume all documents may be discoverable.
- ◆ Protect attorney-client privileged communications.
- ◆ All records regarding the investigation should be kept confidential with the exception of any employment action taken.
- ◆ Duty to preserve documents.

What You Should Do

- ◆ No shortcuts in investigations! Follow every lead until it is exhausted.
- ◆ Make decisions based on facts, not emotions or assumptions. Consider a neutral advisor.
- ◆ Remind supervisors about non-retaliation requirements.
- ◆ Avoid potential “Cat’s Paw” retaliation.
- ◆ Retaliation cases are compelling and believable.

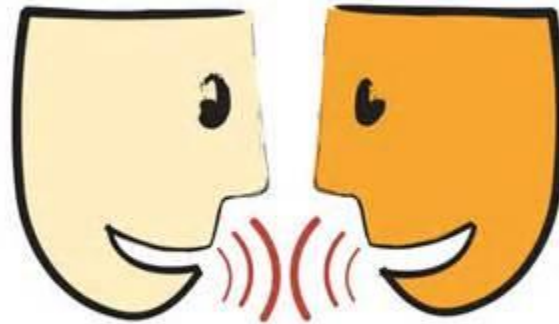
Preserving Privilege

- ◆ Separate discoverable files or documents from privileged documents.
- ◆ Label all privileged documents.
- ◆ Have counsel maintain privileged files.
- ◆ Limit circulation and reproduction of privileged materials.
- ◆ Integrate legal advice with facts discovered in investigation. If documents contain business advice, legal rationale should be articulated.
- ◆ Label documents in anticipation of litigation and make litigation purpose apparent.
- ◆ Investigations should be conducted under direction of counsel.



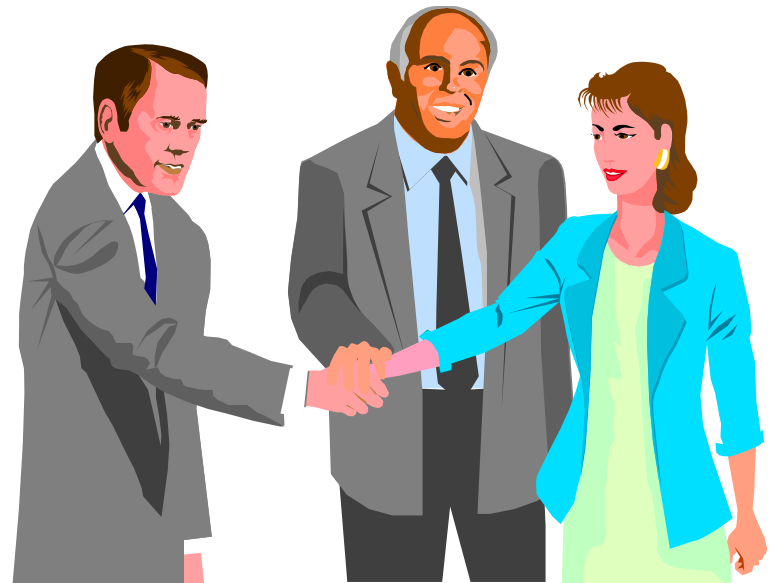
NOW WHAT?

The Importance Of Communication



Performance Communications

- A Fair Treatment Practice
- Discipline
- Performance Monitoring
- Performance Evaluations
- Effective Terminations



Purpose Of Discipline

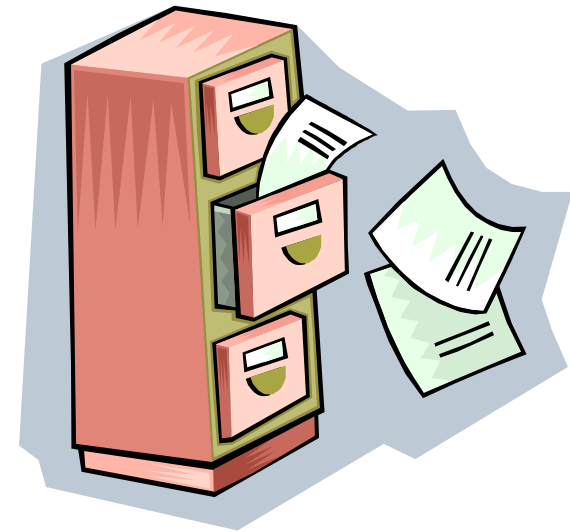
To Correct:

- Unsatisfactory Performance
- Attendance Issues
- Violations of Policy



Basics Of Performance Management

- Advance Notice
- Documentation
- Investigation
- Timeliness
- Consistency
- Fair and Impartial



Threshold Questions For Discipline

- Should we discipline?
- If so, at what level?

Should We?

- Is there a known policy or standard?
- Is it reasonable?
- What is the past practice?
- Have we investigated (if necessary)?



At What Level?

- What is the past practice?
- What is the Employee's prior record?
- How serious is the offense?
- Employee discussion form?
- Written warning?

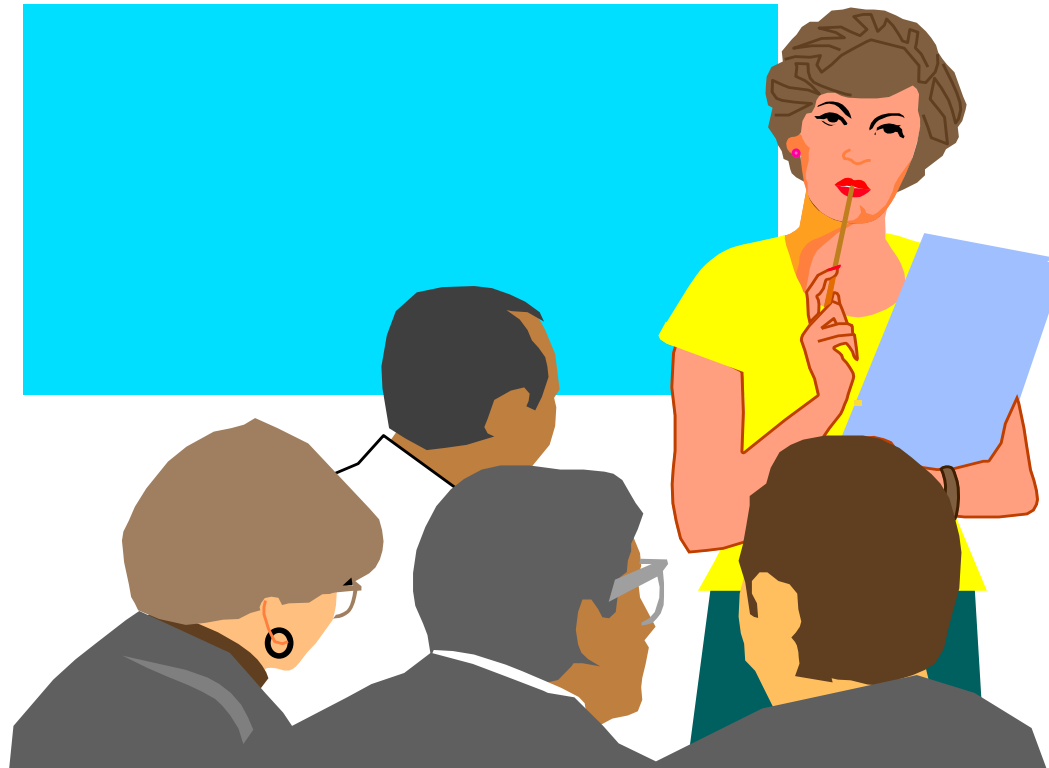


*"Remember, Spike, he gets a 1/2 hour lunch.
One minute more and you attack!"*

All Discipline Should:

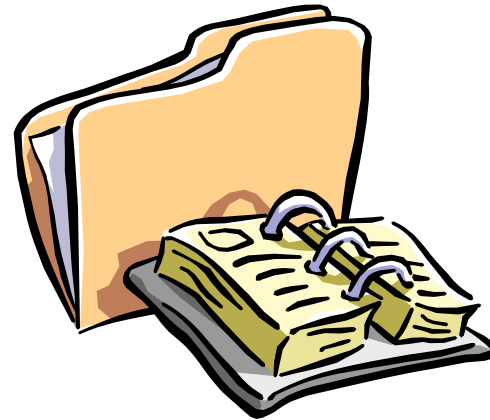
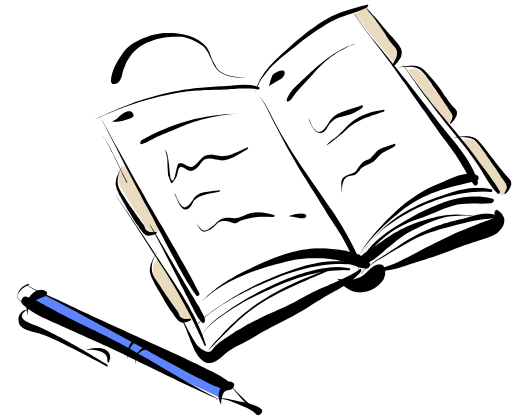
- Clearly Identify the Issue(s)
- Identify Corrective Action
- Indicate the Next Step of Discipline
- Summarize the Employee's Version of the Incident
- Be Written, Signed and Dated
- Delivered Appropriately

Performance Monitoring And Evaluations



Keys To Evaluations

- Do Evaluations on Time
- No Surprises
- Be Honest
- Be Fair



Writing The Performance Management Document

- Evaluate Performance, NOT the Person
- Use Objective facts, NOT Subjective Conclusions
- Cite specific examples to support conclusions
- Will be used as evidence later



Effective Documentation

<u>Job Knowledge</u>	Strongly Agree 4.0	Generally Agree 3.5	Agree 3.0	Disagree 2.5	Completely Disagree 2.0
----------------------	-----------------------	------------------------	--------------	-----------------	----------------------------

Bobby is a real team player; he is an absolute joy to be around and to supervise. I just think he is the most fantastic employee; possibly the best employee I've ever supervised. Signed: Manager

Manager Rating of Employee: 2.75

What does this even mean?

Grossly exaggerated evaluation of performance ("Minnesota Nice")

Effective Documentation

1/4/12 <u>Annual Review</u>	7/1/12	1/6/13	2/1-15/13	3/30/13
Bobby is a real team player; he is an absolute joy to be around and to supervise. I just think he is the most fantastic employee; possibly the best employee I've ever supervised.	No mid-year review as required by company policy.	Exceeds expectations in all categories. Bobby rocks! He is simply amazing in every way imaginable. He is truly a super-star.	Approved FMLA leave.	Bobby is fired because of his "consistent poor performance."

How To Properly Discipline/Terminate

- Be business-like.
- Treat the employee with respect and dignity.
- Be brief, but not brutal.
- If at all possible, plan for the discussion ahead of time.
- Rehearse or discuss the presentation with others. Be sure that you have your facts in line, and that your analysis makes sense and is understandable.



How To Properly Discipline/Terminate

- Present a positive situation if at all possible
- Do not engage in debate
- Do not apologize



Termination Checklist – Poor Performance

- **Consistent with performance appraisals?**
- **Performance expectations communicated to employee?**
- **Employee told how/when to improve?**
- **Employee given an opportunity to improve?**
- **Have other people who have had same performance issues also been terminated?**
- **Was the employee told that if he/she did not improve, he/she would be terminated?**
- **Is the articulated reason for the discharge the real reason?**

Termination Checklist – Misconduct

- Have other people who engaged in same or comparable misconduct also been terminated?
- Was the rule the employee violated published?
- Was the event giving rise to termination fully investigated?
- Did the employee have an opportunity to explain?
- Were the witnesses credible?
- Is there documentation?
- Did the company contribute to the problem? (e.g., supervisor made them do it, conflicting policies)?
- Does the punishment fit the crime?

Questions?



THANK YOU

With 800 attorneys practicing in major locations throughout the U.S. and Puerto Rico, Jackson Lewis provides the resources to address every aspect of the employer/employee relationship.

