Preventing Sexual Harassment... For Employee

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When many people hear the words "sexual harassment," they picture a male supervisor cornering a female employee to make unwanted sexual advances.

But sexual harassment goes far beyond that:

- Anyone can find themselves a victim of sexual harassment.
- Someone might even find your behavior to be sexually harassing, even though you may not think that you have done anything wrong.

Sexual harassment is against the law. But in some ways our society encourages these behaviors. For instance:

- Sexually-oriented advertising on billboards and in magazines is considered okay.
- But displaying a sexy advertising poster in a work environment is inappropriate, and may even be sexually harassing to some.

To make matters worse, sitcoms on television often show people in business situations sexually harassing one another.

- However, what might be funny on TV can be a nightmare in the real world.

Any form of sexual conduct in the workplace is inappropriate.

- It may constitute sexual harassment if the victim finds the actions or comments unwanted or threatening.

"Blatant" sexual acts only need to occur one time to be considered sexual harassment.

Examples of blatant sexual harassment include:

- Sexual assaults.
- Touching someone with sexual intent
- Requiring someone to engage in a sexual act to retain their job or advance their career.

Less blatant forms of sexual conduct usually have to occur repeatedly to be regarded as being sexual harassment.

These include:

- Talking about sex.
- Making obscene gestures.
- Displaying sexually "suggestive" pictures or objects.
- Writing sexually explicit graffiti.
- Sexist remarks.
- Looking at someone in an "inappropriate" manner.
- Commenting on a coworker's physical appearance.

Often sexual harassment starts out with what appears to be innocent remarks or jokes.

- It then slowly escalates, as the harasser "tests" the victim's boundaries.

- Although this conduct or language might initially appear to be mild, constantly being exposed to these actions can be devastating to a victim.

Relentless but subtle sexual harassment can slowly tear down a victim's self respect.
- This can leave them feeling powerless to do anything about it.

Often sexual harassment victims are afraid that no one will understand them.
- They may even think that they are somehow responsible for the harassment.

When a harasser targets a victim, they rely on them being afraid to report the harassment.
- So showing a willingness to go to management will often put an early end to the situation.

Sexual harassment rarely goes away on its own.
- If you choose to ignore it, or try to "laugh it off", you may unwittingly encourage further incidents.

Even if the sexual harassment is from a valued customer or someone else important to your company's business, you should report it to a supervisor or your company's Human Resource Department.

Although most reported cases of sexual harassment involve males harassing females... many of the unreported incidents include:
- Men who are sexually harassed by women.
- Men and women who are sexually harassed by people of their own gender.

Just because language or conduct may not be offensive to most people, doesn't make it okay.
- Each of us is the judge of what we find disturbing.

A sexual harassment victim is not always the harasser's intended "target."
- They could be anyone who doesn't want to be exposed to the statements or actions.

What is considered to be sexual harassment is rarely "cut and dried," since so much is based on the perception of the victim.
- As a result, people are sometimes unaware that their actions or comments are sexually harassing to others.
- For instance, a salesman who flirts with a friendly waitress in his favorite restaurant may be surprised to find himself being accused of sexual harassment by a secretary that he has been "eyeing."
- The difference is not in the salesman's actions, but in the fact that his attention is unwanted by the secretary, but accepted by the waitress.

What is considered appropriate behavior in one situation may, in fact, be sexual harassment in another.

For example:

- It's a hairdresser's job to touch their clients' hair and tell them how good they look.
- But an automobile salesman would be sexually harassing a customer if he did the same thing.

Since what constitutes sexual harassment can vary, most companies have a written sexual harassment policy to define appropriate dress, language and behavior for their specific work environments.
- If you don't know what your company's policy is on sexual harassment, you should ask your supervisor to review the rules with you.

Be aware that it's impossible for any sexual harassment policy to be all inclusive.
- So just because an action is not listed as being inappropriate, that doesn't mean it's okay.

Obviously, anything pornographic should be kept out of the workplace, including:
- Posters.
- Pictures.
- Magazines.
- Books.

You should realize that there is no truly "personal" space when you are at work.
- Other people can be exposed to things that you think are hidden in your locker, office or work area.

Conversations that you have, telephone calls that you make, websites that you visit and emails that you send are never really private either.
- Anything that you say, write or look at could be seen by your fellow employees.
- So always be mindful of your actions and think before you speak.
- You don't want to offend or harass anyone... knowingly or unknowingly.

Sometimes even things people do naturally can create problems.
- For instance, the old saying...

"There is no harm in looking"... is not necessarily true.
- Staring at someone can be intimidating, especially when there appears to be a sexual motive behind it.
- If the "gazing becomes hazing" it's considered to be sexual harassment.

Another innocent behavior to avoid is physical contact, such as placing your hand on a coworker's shoulder to get their attention.
- Even if you didn't mean anything sexual by touching someone, they may not see it that way.
- The best policy is to avoid any unnecessary physical contact with other employees, even those who are good friends.

If you date a coworker you should:
- Make sure that you don't hug, kiss or display other signs of affection at work.

- This conduct might offend someone, and if it happens often enough it could be considered sexual harassment.

Another problem with employees dating is that it can be difficult to determine if someone is being coerced into the relationship against their will.
- This is an important issue, because sex must not be used as a "condition of employment."
- An employee is being sexually harassed when they must endure unwanted sexual advances for fear of not being promoted, not getting pay raises, facing some kind of disciplinary action or losing their job.

Since it's not always easy to distinguish between relationships that are consensual, and those that are sexually harassing, many employers discourage or even forbid their employees from dating coworkers.

Sometimes it can be difficult to tell whether someone's comments or actions are sexually motivated.
- What may appear to be sexual harassment could be nothing more than a misunderstanding, miscommunication or misread social cue.

So what should you do if an incident occurs that bothers you, but you are unsure if the other person meant to harass you?

First write down the facts as soon as possible, including:
- The date and time the incident occurred.
- Who was involved.
- The names of any witnesses to the incident.
- A full description of what happened and what was said.
- An explanation of why the actions or comments were sexually harassing to you.

If you are not used to writing things down, find someone who you trust to help you. It is generally a good idea to let people know when their actions or comments bother you.
- Their reaction will often help you to determine their true intentions.
- Unless you are sure that the person was out to harass you, don't accuse them of sexual harassment right off the bat.
- Instead, tell them that they have "crossed your line", and that you find their behavior/actions unwelcome.

In many instances, people don't realize that their conduct was unacceptable.
- If you are satisfied that it was a misunderstanding, you don't need to take any further action.
- But you should keep your written description of the incident in case you need it for future reference.

If you are not completely satisfied with the person's reaction, or if another incident occurs, you need to go to management or your company's Human Resource Department and report the situation.

Deciding to report a sexual harassment incident can be a difficult thing to do.

- It's easy to be embarrassed by the events.
- You may be fearful that no one will believe you.
- You could be afraid that you will be punished for stepping forward.
- You might even be concerned that the person you are accusing will seek some type of revenge.
- Or you could be overwhelmed by a combination of these feelings.

But coming forward is always the right thing to do.

- It is the only way that your company can identify and deal with sexual harassment that might otherwise go unnoticed.
- In fact, companies will sometimes discipline employees for not speaking up about sexual harassment incidents that they have witnessed.

When reporting sexual harassment, be prepared to provide management with a copy of your written incident description.

- This will make sure that they know what you feel happened.

After reading your statement, a manager will interview you to ask you questions.

- Be sure to answer all of the questions as honestly and accurately as possible.

At the end of the interview you may be asked to sign a statement.

- Read it carefully to confirm that everything is correct.
- Point out anything that you feel isn't accurate, and ask that revisions be made.

Your company will interview the person that you have accused of sexual harassment, to:

- Inform them of the allegations
- Ask them questions about their involvement.

The alleged harasser will also be told about the seriousness of the situation, and notified that they must not do anything to further harass you.

- Your employer may take measures to protect you from any reprisals, such as shifting work schedules so that you don't have to be around the alleged harasser.

Management will always try to keep sexual harassment incidents confidential.

- But when necessary, they will interview other people who might have witnessed the events.

Sexual harassment is never dealt with lightly... and will not be tolerated by your employer.

- The penalty will often depend on the type of incident and how often it occurred.
- At the very least the harasser will receive a stern warning to "cease and desist" or face disciplinary action.

Sexual harassment is something that many of us don't feel comfortable talking about.

But talking is often the best way to prevent these incidents. Let's look at things that you can say

and do to keep your work environment free from sexual harassment.

Become familiar with your company's sexual harassment policy.

Know where your coworkers draw the line on actions and comments... and don't cross it. Think about your own conduct... and avoid anything that might be considered sexual harassment.

Tell people if their actions make you feel uncomfortable.

Be sure to write down the facts about a sexual harassment incident.

Never ignore sexual harassment... it rarely goes away on its own. Don't be afraid to report sexual harassment to management.

Knowing what may offend your coworkers...taking a firm position on what you find unacceptable... treating others with respect, and insisting that they do the same for you... will go a long way in heading sexual harassment off at the "pass"!

POLICY ON HARASSMENT AND DISRESPECT TOWARD OTHERS

To promote equal employment opportunity for all employees, XYZ Temple ("XYZ") strives to maintain an atmosphere of mutual respect and understanding in the workplace. Toward that end, XYZ considers the use of demeaning, belittling, humiliating, insulting, or other forms of disrespectful language toward or about yourself or others to be unacceptable. One or more of the following tests may be useful in determining whether particular terms are unacceptable under this policy:

1. Whether you would feel discriminated against or insulted if someone else who is different from you were to use that term when referring to you or speaking to you about someone else;
2. Whether referring to yourself or another person in such a way would tend to segregate yourself or others on a minority basis;
3. Whether such terminology tends to perpetuate racial, ethnic, gender, or other minority stereotypes; and
4. Whether such terms would make an ordinary person feel belittled, needled, or picked on.

While the context of such statements can be important in judging whether the statements violate this policy, in general, XYZ will consider any such language unacceptable and will follow up on any complaints it receives.

The following examples illustrate what is unacceptable under this policy (the list is not exhaustive and is only a general guide):

- Slurs and other disrespectful terms relating to a person's race, color, religion, age, national origin, citizenship status, gender, sexual orientation, genetic information, or disability
- Excessive or habitual use of terms relating to a person's characteristics, if a reasonable person would feel excluded, belittled, or singled out for unwanted attention through such language
- Referring to people in terms of their assumed nationalities
- Words relating to gender stereotypes
- Profane or obscene references to yourself or others

It is no excuse that you apply an unacceptable term to yourself. Such terms inevitably disturb others, even if they do not say so out loud. Further, they perpetuate unfavorable stereotypes and contribute toward a hostile work environment. While we are all different, and appreciate everything that makes us unique individuals, there is no need to dwell upon those differences to the point where we become preoccupied with ourselves and what separates us from one another.

We are all employees here, we are team members, and we are united in working to give our customers the best possible value and experience with our company.

In sum, using unacceptable language in the workplace calls into question the speaker's maturity, judgment, and suitability as a team member. Such language will not be tolerated. Depending upon the severity and repeat nature of a particular offense, a violation of this policy will result in appropriate corrective action, up to and potentially including termination of employment. XYZ hopes that no such action will be necessary, but will act where action is needed.

Hosanna Tabor Evangelical Lutheran Church and School v. EEOC

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In January 2012, the United States Supreme Court unanimously found that a teacher could not sue her employer for violating the Americans with Disabilities Act because of the minister exception to employment laws. The key to understanding this decision is the historical concept of religious autonomy, also known as the ecclesiastical exemption in employment law.
In *Watson* v. *Jones*, 13 Wall. 679 (1872), the Supreme Court found that the government cannot intrude into the internal governance of a church unless there is an allegation of fraud, or the court can apply a neutral law to resolve the dispute without inquiry into the beliefs of the church. Stated another way, churches have the right to govern themselves without governmental interference. If the government intruded into church governance, the government would violate the Establishment Clause of the First Amendment by establishing a preference for the winning side. At the same time, the government would likewise violate the Free Exercise Clause of the First Amendment by forcing the losing side to support the government's decision in violation of their religious beliefs.

The Supreme Court reaffirmed these First Amendment principles in *Serbian Eastern Orthodox Diocese for United States and Canada* v. *Milivojevich*, 426 U. S. 696 (1976), a case involving a dispute over control of the American-Canadian Diocese of the Serbian Orthodox Church, including its property and assets. These cases are frequently cited by both federal and state courts in finding that the government cannot intrude into the internal governance of the church.

During the 20th century, government began intruding into the relationship between an employer and its employees. In 1972, the Fifth Circuit Court of Appeals applied the ecclesiastical exemption to prevent the court from considering a Title VII claim filed by a minister against her church. *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972). This case is frequently cited as the beginning of the minister exception in employment law. The court observed:

> "The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern. Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection. It is unavoidably true that these include the determination of a minister's salary, his place of assignment, and the duty he is to perform in the furtherance of the religious mission of the church." *Id.* at 559.

Over the last 40 years since *McClure* many lower courts have considered the ministerial exception in a variety of circumstances. The lower courts have applied the ministerial exception well beyond employing churches and beyond church-recognized clergy. They have applied the ministerial exception to virtually every employment law in existence.

In this paragraph you will find a sampling of the types of cases where the court applied the ministerial exception. The Fourth Circuit Court of Appeals applied the ministerial exception to a music director who was not clergy. *EEOC v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795 (4th Cir. 2000). The law was applied to a university chaplain serving in a secular University. *Schmoll v. Chapman University*, 70 Cal. Ct. App. 4th 1434 (Cal. Ct. App. 1999). *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299 (4th Cir. 2004) applied the ministerial exception to a mashgiach (an inspector for kosher dietary products). *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223 (6th Cir. 2007) applied the ministerial exception to a chaplain working for a church controlled hospital regarding his claim under the Americans with Disabilities Act. *Schleicher v. Salvation Army*, 518 F.3d 472 (7th Cir. 2008) applied the ministerial exception when a minister sought minimum wage and overtime under the Fair Labor Standards Act (FLSA). *Adams v. Indiana Wesleyan University*, 2010 U.S. Dist. LEXIS 71403 (N.D. Ind. 2010) applied the ministerial exception to the chair of the Social Work Department at a church owned university. *Fassl v. Our Lady of Perpetual Help Roman Catholic Church*, 2006 U.S. Dist. LEXIS 22546 (E.D. Pa. 2006) applied the ministerial exception to a Director of Music who claimed the church violated the Family Medical Leave Act. *Alcazar v. Corp. of Catholic Archbishop*, 627 F.3d 1288 (9th Cir. 2010) applied the ministerial exception to a seminarian who was primarily performing maintenance on church property and claimed violations of FLSA. *Williams v. African Episcopal Methodist Church*, 2011 U.S. Dist. LEXIS 108117 (W.N.Y. 2011) applied the ministerial exception in refusing to enforce and employment agreement between a church and its minister. *Ginsberg v. Concordia University*, 2011 U.S. Dist. LEXIS (D.C. Neb. 2011) applied the ministerial exception to a claim of religious discrimination by the softball coach.

As can be seen from the prior paragraph, the courts apply the ministerial exception to virtually all employment laws.

During the 40 years since *McClure*, the courts developed two separate tests to determine whether the ministerial exception applied to a position. Most courts used the "primary duties" test. The Sixth Circuit Court of Appeals in the *Hosanna Tabor* case applied the primary duties test to find that the teacher did not perform sufficient ministerial duties to fall within the ministerial exception. She taught a religious class four days a week and spoke in chapel twice per school year. Since the majority of her time was spent teaching secular subjects, the Sixth Circuit Court of Appeals concluded that she failed the primary duties test.

The second test used by courts is a "totality of the circumstances" test. The District Court in the *Hosanna Tabor* case applied this test to find that the teacher fell within the ministerial exception. This test looks at whether the employee must perform essential religious duties as part of their employment. If the employee performs essential religious duties, the ministerial exception applies even if a majority of their time is spent on non-religious duties.

The Supreme Court affirmed the "totality of the circumstances" test as the appropriate test for the courts to use in considering the ministerial exception.

An open question still exists regarding the characteristics of the employer that allows for application of the ministerial exception. The ecclesiastical exemption or religious autonomous

governance exemption provides the basis for the ministerial exception. The ministerial exception issue is frequently framed as an internal governance decision. As a result, the employer must be a religious organization and those characteristics prevent the government from interfering with its internal governance decisions. So far, the courts have applied the ministerial exception to churches, conventions of churches, integrated auxiliaries of churches and integral agencies of churches. However, all these terms are tax terms found in the Internal Revenue Code and are not found in employment law. No cases were found that applied the ministerial exception to an organization not controlled by a church or churches. The common thread among the cases is that the employer is controlled by churches and operated by the churches to further their religious, ecclesiastical purposes. This common thread appears to coincide with the long-standing basis for the ministerial exception, that is, to mitigate or eliminate governmental intrusion into the relationship between an organized religious body and its ministers.

AVOIDING DISCRIMINATION CLAIMS

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1. Reviewing the Application

A. Review for relevant work experience and educational/vocational training. Look for:

- Office Skills Tests scores
- Supplemental Questions
- Look for evidence of excellence (awards, achievements, promotions, etc.)

B. While an applicant should not be ruled out based solely on these criteria, the following could be warning flags of potential problems:

- Job-hopping
- Typographical errors, deleted text, misspellings, poor penmanship, overall sloppiness
- Several previous employers cannot be contacted or are "out of business"
- "Attended" school (but did not graduate?)
- "Degree received" marked, but with a future graduation date more than six weeks away
- Termination, left job by mutual agreement, asked to resign, left for "personal reasons"
- Criminal convictions
- Missing or uncompleted sections of the application form
- "See resume" instead of filling in application
- No explanations for breaks in work history
- Phrases such as "exposure to," "knowledge of," and "familiar with"
- Regressive work history (step backward in duties, career, or salary) without good reason
- Vague answers

2. Selecting Applicants for Interviews

A. Reference Checks. While not required before interviewing, at least two reference checks need to be recorded to hire a potential employee. Past supervisors are the best source of information, although personal references are acceptable.

B. Letters of Recommendation. Letters written for the applicant generally represent biased information and should be viewed skeptically unless they contain negative information.

C. Rank the applications based on the adherence to the job qualifications (as stated in the job description) for the position.

3. Preparing for the Interview

A. Interview Guidelines. At least three qualified applicants should be interviewed. Predetermine what you are looking for based on your job description, with adjustments if needed. Design questions that are open-ended. For example: "What experience do you have using Microsoft Excel?" Instead of: "Are you good at using Microsoft Excel?" Learn the rules of interviewing and play by them. You should prepare an outline the topics the interview must cover. You should write out sensitive questions, verbatim, to avoid mistakes in asking the question.

In general, do not ask questions that cover the following:

- Age
- Date of Birth
- Place of Birth
- Race
- Nationality
- Arrest Record
- Marital Status
- Gender
- Anything About Children and Childcare
- Height and Weight
- History of Alcohol or Drug Addiction
- Hobbies and Sports Activities
- Disabilities or Physical Limitations
- How They Feel About Unions

4. Interview Tips

A. Interviewing and Questioning Techniques.

Interviews should flow more like a conversation, not an interrogation. To achieve this, comments and spontaneous conversation about relevant topics are encouraged; however, if the candidate self-discloses information that would have been inappropriate to obtain, further probing or documentation of the information should not occur.

B. Interview Objectives.

David Cherrington in The Management of Human Resources gives 4 purposes of interviews:

- To obtain information about the applicant.
- To sell the organization.
- To provide information about the organization.
- To establish friendship.

C. 80/20 Rule

Candidates should do approximately 80% of the talking, interviewers 20%.

D. Silences

Sometimes candidates will fill in a silence with important additional information; however, the situation should not be allowed to turn awkward.

E. Follow Up Questions

Probing or follow up questions will encourage further conversation. These questions can elicit useful information beyond rehearsed responses. Basic example: "Can you provide more detail on that?" or "Then what did you do?"

F. Consistency in Questioning

Generally, all candidates should be asked the same series of questions. It is much easier to compare candidates if everyone is measured against the same criteria.

G. Inviting Questions

Candidates should be invited to ask questions. The quality and quantity of questions asked by candidates also provides useful information to the interview committee.

H. Scheduling Considerations

- Determine the length of time for each interview.
- Hold the interviews relatively close together to provide a better comparison of the candidates.
- The interview room or location should be free from interruptions.

I. Informing the Candidates

- Day, time and location of the interview.
- Directions and parking instructions.
- Approximate time to allot from arriving on campus to departure.
- What he or she can expect in the interview.

J. Setting the Stage

- Interviews should be free of interruptions (no phone calls, visitors, etc.).
- Interviewers should not be late to the meeting or act rushed.
- A warm greeting and suitable introductions should be made.
- "Small talk" at the beginning of the interview can be made; however, interviewers need to be cautious to avoid small talk that could lead to inappropriate questions.

- Candidates should be informed as to what will occur in the interview.
- The position should be explained, including working hours and any special schedules (required to work weekends, swing shift, etc.).

K. Be Aware of the Candidates

- Give them a chance to sell themselves.
- Give yourself a chance to evaluate their qualifications.
- Stay neutral in the interview.
- Don't be overly positive or optimistic.
- Explain how you will handle the selection process.
- The interview should be ended with a friendly, positive "Thank you."
- Candidates should not be rejected until the entire process is completed and a candidate has accepted an offer.

5. Americans With Disabilities Act

An employer may not make any pre-employment inquiries regarding disabilities:

- on application forms.
- in job interviews.
- in reference checks.

The same set of questions should be asked of all applicants. However, if an applicant has a "known" disability that would appear to interfere with or prevent performance of a job-related function, he/she may be asked to describe how this function would be performed even if other applicants do not have to do so.

6. Guidelines for Legal Interviews

Respect for the candidate and his/her personal information should be exercised. The following shows what is considered lawful or unlawful to discuss in an interview.

Topic	Lawful	Potentially Unlawful
Sex	Must be a bona fide job qualification or necessity. Distinctions based on gender are uncommon (e.g. issue attendant in locker room, actor or actress playing a part).	Employment decisions should not be based on gender, but on the ability to perform the job.
Marital & Family Status	Whether candidate can meet specified work schedules.	"Are you married, single, divorced, engaged etc.?" Number and age of children. Any questions or references to pregnancy.
Age	Inquiry as to minimum age requirements, by law, to work.	Inquiries regarding age, retirement, etc. The law protects individuals over the age of 40 from being discriminated against because of age.
Disability Accommodation	This question must be asked of each candidate: "After reviewing the essential job functions, are you able to perform them?"	Any pre-employment inquiry about the existence, nature, or severity of a disability.
Citizenship	"Are you authorized to work in the U.S.?" This question must be asked of each candidate.	"Of what country are you a citizen?" "Do your parents originate from the U.S.?" "I see you were born in…"
Ancestry	Languages that the candidate reads and/or speaks fluently, if it is job related.	Inquiries into lineage, ancestry, native language, etc. How foreign language was acquired.
Race	None.	Discrimination should not occur on any basis related to the race of the candidate.
Convictions/Arrests	Whether the applicant has any actual convictions.	Any inquiries about arrests.
Credit Rating	None unless job related.	Inquiries about credit rating, charge accounts, etc.
Name	"Do you have work or school records under a different name?"	Inquiries which would indicate candidate's lineage, national origin, previous name of candidate where it has been changed by court order, marriage, etc.

7. Reference Checks

Reference checks are a great way to gather past behavior and performance information about a potential employee by personally contacting previous employers. References are best done before interviewing. Letters of recommendation are not considered reference checks.

There are two aspects of a reference check: Record checks to verify information about dates of employment, job titles, salary information, licenses, etc. Position match checks look at the applicant's work habits, personality, and personal character. Inquiries may include work ethic, attendance, performance, time management, communication skills, quantity and quality of work performed, and also weaknesses.

An employer MAY NOT request any information about the job applicant from:

- Family members
- Other sources not supplied by the job applicant.

A. Calling a Previous Employer

Prior to the conditional offer being made, the employer may inquire about the following from a previous employer:

- Job functions
- Tasks performed
- Quality and quantity of work performed
- How job functions were performed
- Attendance record
- Other applicable issues that do not relate to disability

If an applicant has a "known disability" and has indicated he or she could perform the job with reasonable accommodation, the previous employer may be asked about accommodations that were made.

Remember: do not inquire about an applicant's

- Disabilities
- Illnesses
- Worker's Compensation History

8. Selecting a Finalist

After the initial interview process, the hiring manager should consider whether each candidate is 1) definitely a finalist, 2) a good candidate, but not a finalist, or 3) definitely not a

finalist. The committee should then narrow down the "definite" group to approximately three finalists.

To help when deciding between candidates, three main questions regarding the candidates should be considered:

- Can they do the job (do they have the knowledge, technical skills, interpersonal skills, character, work ethic, and abilities to perform the duties)?
- What motivates them to do a good job, what patterns have they demonstrated in past positions; can they be trained?
- How will they "fit" with the organization?

As interviewers attempt to answer these questions, they should:

- Read over the job requirements.
- Review the candidates' qualifications, education, and work histories.
- Consider the candidates' potential to learn and eventually to be promoted.
- Conduct second or third interviews as needed.

9. Background Checks

Since minority groups have historically higher criminal records and lower credit scores, background checks should be reserved for your finalists. First, determine whether this position justifies a criminal background check or credit report. You should only request criminal background checks when the position is dealing with substantial assets of your organization, when the position will come in contact with youth or children, when the position deals with receipts, bookkeeping or accounting. You should request a credit report only when the position deals with receipts, bookkeeping or accounting.

Next, conduct the criminal background check your credit report only on the finalists. When you communicate with the candidate, request written consent(s) to the criminal background check or credit report.

After you receive the report, if any item on the report causes you concern, you should address that item with the candidate and allow them to explain the item. Please remember that some surveys report that 65% or more of the reports contain material errors.

After you have made a decision on the applicant, you should secure the report in a locked file cabinet or a password-protected file. When it comes time to destroy the report under your document retention and destruction policy, the report must be securely destroyed.

10. Making and Accepting the Offer

At the completion of the clearance, references, and pay-level calculation, you will receive notification to offer the job to the finalist at the approved wage/salary.

A. The Regretful Phone Call

After the offer has been accepted, the interviewer should promptly notify all of the other interviewed candidates of the filling of the position. A personal contact by phone or letter is recommended. For non-interviewed applicants, please change their statuses to “Not Hired – Send Email.” As you converse, remember to:

- Be honest and to the point
- Talk in a friendly tone
- Maintain the dignity of each candidate
- Do not embellish or misrepresent the facts, i.e., "You were in our top three..."
- Do not discuss qualifications of other candidates
- Refer to those you hired as being the best match (or best fit) for the position.
- Do not open the conversation to questions.

Sample:

"As you are aware, the candidates were numerous and the decision was extremely difficult, but we decided to extend an offer to another person we felt made the best match with our office at this point in time. I want to thank you for sharing your time and efforts with us in this process."

SAFELY TERMINATING EMPLOYEES

Frank Sommerville, JD

Since insurance companies estimate that up to 85% of all lawsuits involving houses of worship result from employment decisions, many houses of worship hesitate to terminate employees. Further complicating the situation, houses of worship attempt to extend the concept of unlimited grace to employment circumstances. If houses of worship can avoid employment related lawsuits, it has gone a long ways towards reducing risk. This article will highlight the things that a house of worship can do to reduce the risk that it will be on the losing end of the lawsuit. This article does not address the situation where the house of worship has a written employment agreement with the employee.

START WITH THE HIRING PROCESS

To protect the house of worship, the house of worship should have a clear written employee handbook. This handbook will detail the expectations the house of worship places on its employees. A good employee handbook will include policies on sexual-harassment, theft, drug use, performance, attendance, behavior expectations and excusable absences. Every employee should be given a copy of the handbook. Each employee should acknowledge in writing that they have read and understood everything in the handbook.

I suggest that houses of worship consider requiring new employees to sign an agreement that mandates Christian arbitration if a dispute arises. This agreement will avoid the possibility that the house of worship can be dragged into court and receive unwanted publicity. It does not mean that the house of worship can avoid liability for its wrongful actions. Many houses of worship include this agreement in their employee handbooks.

The employee should also be given a written job description. The employee should also acknowledge in writing receiving the job description. Employees should also represent in writing that they have the ability to perform all the duties listed in the job description.

DOCUMENTATION

Houses of worship find it difficult to create the documentation that is needed before terminating an employee. Unfortunately, houses of worship do not write down criticisms of employees. Grace has no place in the decision whether to document. Honesty and integrity must prevail in the documentation. Supervisors write glowing reviews of problem employees because they do not want to hurt their feelings. Imagine a jury's reaction when a house of worship terminates an employee two months after receiving glowing reviews for the last five years. Without the proper documentation, the jury will believe that the employee was wrongfully terminated.

I suggest either eliminating the annual review or make the annual review meaningful. This means that supervisors must be brutally honest in their reviews. It also means that the review accurately reflects the employee’s performance.

Supervisors must also be taught to document individual instances of concern. If a specific incident of misconduct is discovered, then that incident must be documented in the employee's file. (Of course, your employee handbook should define misconduct.)

WHEN TO TERMINATE

Before terminating any employee, you should determine that the reason for the termination is not one of the reasons protected by law. Congress, state legislatures, county commissioners, and city councilman have the authority to pass laws reducing the availability of lawful reasons to fire an employee. This will require you to check not only the Department of Labor standards, it will also require you to check with your state employment agency and local city offices to determine all of the unlawful reasons to terminate an employee. If you are unsure that your reason is lawful, you should check with an employment lawyer in your area.

You should consider terminating an employee only after you have fully documented the reasons for the termination. You should follow all procedures that are described in your employee handbook. Under usual circumstances, this means you have provided an oral notice to the employee that his or her conduct is unacceptable. If the employee fails to change, you provide written notice to the employee that his or her conduct is still unacceptable.

Once you have properly documented the problem, you should act promptly to terminate the employee. Most employment lawyers do not recommend terminating the employee on Friday afternoon because the employee cannot start looking for another job until Monday. This means they spend the weekend stewing over the termination. A better approach is to terminate them earlier in the week.

THE FINAL MEETING

Your employee handbook is in order. The job description is accurate and complete. You have properly documented the problem. You have decided the best day to do it. Now you must face the final meeting. Everyone dreads that meeting. It is best to get it over with early in the day.

The final meeting should include at least two representatives of the house of worship and the soon to be terminated employee. You should meet in a private place. The meeting should be short and controlled by the house of worship's representatives. You should announce the termination decision at the very beginning of the meeting because employees might blurt out something that might make the termination questionable. For example, employee may state that he or she is about to file a worker's compensation claim for carpal tunnel syndrome. It is unlawful for an employer to terminate an employee because they file a worker's compensation claim. If you announce the decision at the beginning of the meeting, then it cannot be inferred that the termination was related to the filing of a worker's compensation claim.

You should provide very general information about why the employee is being terminated. Your reason should be based on the employee handbook, job description, oral

warnings and the written warnings. Some experts suggest that you prepare a letter outlining the general reasons for the termination and provide instructions for post termination benefits.

While in the meeting, you should have the employee's computer passwords changed. You should request that the employee turn over all house of worship property immediately, including keys.

RELEASE AGREEMENTS

The employment bar frequently debates the value of release agreements. In sum, a release agreement relieves the house of worship of any liability for its wrongdoing in dealing with the terminated employee. The employee frequently receives compensation for executing the release agreement. If the house of worship is offering anything in excess of what the house of worship owes the employee, I suggest that a release agreement be secured. I also suggest that you provide the employee an opportunity to discuss the release agreement with an attorney of his or her choice. While a release agreement will not prohibit the employee from filing a lawsuit, it reduces the risk that the employee will do so.

If you have any questions, please contact me at fsommerville@nonprofitattorney.com.

Failure to Pay Overtime/Minimum Wage By Houses of Worship

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Since virtually all houses of worship are subject to overtime rules, these new regulations will require many organizations to amend their policies and procedures on overtime pay. If your state's overtime rules mandate overtime pay, the state rules apply even though a federal exemption may apply.

The 2004 changes represent the first major rewrite of the overtime rules in over 40 years. Some employers were getting hit with large class-action judgments for overtime, so they called for the revision because the old rules became confusing when applied in our modern context. In fact, the Employment Standards Administration's Wage and Hour Division (WHD) admitted that its enforcement varied greatly from examiner to examiner. The new rules are designed to define certain bright line tests so employers may correctly classify its workers.

TYPES OF EXEMPTIONS

The new regulation retains the familiar exemption names, but changes the requirements for the exemption. The workers are classified as exempt if they are (1) an executive (sometimes called the management exemption), (2) an administrative worker, or (3) a worker in a recognized profession. A new classification, computer worker exemption, has been added in the new regulations.

The biggest change relates to the minimum salary required to be exempt from overtime pay. The new rule raises the minimum wage for an exemption from $155 per week to $455 per week (about $24,000 per year). This means that workers who earn less than $455 per week must receive overtime pay even if they may qualify for an exemption.

Minister Exemption

Before discussing the specific exemptions, I should note that ministers are not listed in the statute as exempt from overtime rules. They are also not mentioned in the new regulations. Historically, the courts have exempted ministers from overtime rules because of the legislative history. During a Congressional debate, the sponsor of the overtime bill told Congress that overtime rules did not apply to ministers because they were not considered employees. Of course, this was also the position of the Internal Revenue Service (IRS) at the time. A judicially created clergy exclusion prevents the WHD from applying the overtime regulations to ministers.

Executive Exemption

The executive exemption requires that the worker meet the following tests:

- Their primary duty must include managing the organization or some distinct department or division of the organization, and they must meet the minimum salary requirement mentioned above.
- They must direct the work of at least the equivalent of two full-time employees.
- Either they have the authority to hire or fire employees, or their input on a decision carries significant weight.

Please note that volunteer supervision is not included in the test. If the hiring and firing decisions are made by a committee, then the organization should amend its committee charge to name the positions whose input is needed in any employment decisions.

Administrative exemption

The administrative exemption requires that the worker meet the following tests:

- Their primary duty must be to perform office work or non-manual labor related to the management of the organization, and they must meet the minimum salary requirement.
- The primary duty must include the exercise of discretion and independent judgment with respect to matters of significance to the organization.

This exemption will apply to workers with decision making authority, but do not have the same amount of worker supervision the executive exemption requires. The administrative exemption would typically apply to a worker who supervises many volunteers and their activities.

Professional Exemption

The professional exemption requires that a worker meets the following tests:

- Their primary duty must be performing work that requires advance knowledge; the work must be primarily intellectual in character and requires consistent exercise of discretion and judgment; and the worker must meet the minimum salary requirement.
- Their work must be in a recognized science or field of advanced learning.
- The knowledge they acquired must be from an extensive, specialized intellectual instruction over a long period of time.
- If the field of advanced learning relates to a creative profession, such as music or art, then the work must be characterized by imagination, creativity, originality or exceptional talent.

The regulation contains specific examples of jobs that meet or fail this test, including health care professionals and teachers. This regulation generally requires a four-year college degree or its equivalent.

Computer Professional

The computer worker exemption requires the worker to meet the following tests:

- They must earn at least $455 per week, or $27.63 per hour if compensated on an hourly basis.
- They must work as a systems analyst, programmer, software engineer, or similar position.
- Their primary duty must consists of application of systems analysis; design development; creation, testing or modification of systems or programs; testing design, development or creation; or modification of operating systems.

This exemption will apply to managers of IT departments, but not to those maintaining the organization's networks.

Outside Sales Professional

Outside sales employees paid at least $455 per week also may be FLSA exempt if their primary duties are one of the following:

- Making sales *or*
- Obtaining orders or contracts for services or use of facilities for which a consideration will be paid by the customer *and*
- Who are customarily and regularly engaged away from the employer's place or places of business while selling or obtaining orders or contracts for services.

OVERTIME AND COMPENSATION ISSUES

1. All exempt employees must be compensated by a weekly salary that is guaranteed regardless of the number of hours actually worked. A worker cannot be compensated using an hourly rate and still be exempt from overtime.

2. An exempt employee cannot be docked for missing work in any week where the employee worked at any time. For paid time off, the employee must utilize paid time off in daily increments. For disciplinary purposes, an exempt employee can be docked in one half day increments.

3. An exempt employee cannot perform non-exempt duties more than 20% of the time they work.

4. If the nature of the work changes over time, the overtime exempt status must be reviewed to determine the correct status.

5. At all times the weekly salary must equal minimum wage regardless of the number of hours worked.

6. Comp time must be utilized during the same work as the overtime was worked.

WHEN IS AN EMPLOYEE ON THE CLOCK?

1. When Does Travel Time Count as Overtime Work?

Generally, travel time conducted for work during work hours is compensable whereas ordinary home-to-work travel is not. Set forth below are some different travel circumstances:

- Working While Traveling: Time spent working while traveling is compensable. For example, in the federal government travel time while driving a government vehicle, at least outside of the employee's regular commute, is considered compensable work time.
- Travel On Weekends: Travel on weekends is compensable even if no work is performed so long as the work hours cut across the administrative workday for the employee. For example, if the employee's administrative workday is 7:00 a.m. to 5:00 p.m. and the employee travels on a weekend during those hours, the travel time is compensable.
- Emergency Travel from Home to Work: This time can be compensable depending on the circumstances. For example, if a worker is called in the middle of the night and ordered to return to work. Interestingly, the Department of Labor takes no position on the compensability of this time.

2. When Does Training Time Count as Overtime Work?

Attendance at training, meetings and lectures must be counted as work activities unless all four of the following criteria are met:

- Attendance is outside the employee's regular work hours;
- Attendance is voluntary;
- The course is not directly related to the employee's job; and
- The employee does not perform any productive work while attending the lecture.

Attendance is not voluntary if the employee is led to believe that his or her present employment would be adversely affected if he or she did not attend.

Certain DOL approved apprenticeship training programs are exempt from the FLSA.

3. When Does an Employer Have to Pay for On-Call Time, Waiting Time and Break Time?

Break Time is Compensable Unless the Breaks are Really Long

Although there is little case law on the issue of whether breaks are compensable, the U.S. Department of Labor's rule is that if a break or rest period is twenty minutes or less, the break time is compensable. Longer breaks, including meal breaks, may be compensable, as well, depending on the circumstances. In some states, breaks are mandatory.

Waiting Time is Often Compensable

Time spent waiting while on-duty is compensable, particularly if it is on the employer's premises, is unpredictable and/or is of relatively short duration. For example, a restaurant worker who is required to report to work at a certain time, though he does not have to bus tables until a certain number of customers are present, is probably entitled to compensation for his waiting time.

In addition, in certain occupations employees are hired to be "engaged to wait" for something to occur. For example, fire fighters and emergency workers are hired, in part, to be available to respond immediately to emergencies. Some people are hired to be available to immediately repair expensive machinery. Some truck drivers are hired to wait until assignments come in so that they can leave immediately. All of these employees have been found to be "engaged to wait" and, therefore, their waiting time has been found to be compensable.

4. Must an Employer Pay Employees for On-Call Time?

Some employees are required to remain available at home or on the employer's premises during meal periods to respond to calls in person, or through a telephone or pager. Clearly, the time spent responding to calls, including time spent at home on the telephone or computer responding to calls or email, is compensable. With regard to waiting time, however, there is no bright line rule as to whether or not on-call time is compensable or not.

In determining whether on-call time is compensable, the factors that courts have viewed include:

- the average number of calls the employee responds to during the on-call period;
- the required response time: in other words, the amount of time in which the employee has to be at the work site after being called in;
- whether an employee is subject to discipline for missing or being late to a call-back;
- the extent to which an employee is able to engage in other activities while on-call; and
- the nature of the employee's occupation (in some jobs, it is the nature of the job to be paid to be available to respond immediately to a situation).

Based on these criteria, fire fighters and emergency medical personnel have been found to be entitled to overtime pay for the entire on-call period where the on-call period was spent at home.

5. Are meal periods and/or sleep time counted as overtime hours?

Meal periods and sleep time spent on the employer's premises are compensable under certain circumstances. Employers who require employees to remain on the employer's premises and to respond to calls and interruptions during an employee's meal periods and sleep time are required, in most circumstances, to pay the employees for their meal periods and sleep time.

On-Duty Meal Periods are Compensable

The Department of Labor's regulations require that meal periods be counted as compensable work time unless the employee is "completely relieved from duty for the purposes of eating regular meals." Thus, employers who impose work-related restrictions on employees during their meal periods, such as answering phones or responding to work related requests should pay employees for their meal periods.

An example of how this test is applied is a case involving telephone line installation workers. Their employer required them to eat lunch at their worksite and to remain there throughout the meal period to ensure that the expensive equipment that they used was not stolen. The entire lunch period was found to be compensable work time.

Some courts apply a different test than the Department of Labor's meal period test. These courts have applied what is called the predominant beneficiary test. Under the predominant beneficiary test, courts determine whether the employer or the employee is the predominant beneficiary of the meal period. Under this test, employees who are required to remain on the employer's premises in a place which is not a dining room, or some other area which is not an eating facility, are usually found to be entitled to compensation for their meal periods. In these circumstances, the employer has been found to place substantial restrictions on the employee during the meal period for the employer's benefit.

For example, in cases in which police officers and fire fighters have been required to monitor their radios and to remain on the employer's premises during a meal period, the employer is usually considered to be the predominant beneficiary of the meal period and the employer must pay the employees for their meal periods. These cases are particularly strong if the police officers receive 1 or more calls on average during each meal period.

On-Duty Sleep Periods are Compensable Under Most Circumstances

As a general rule, employers must count on-duty sleep periods as compensable work time. On-duty sleep periods are occasions in which an employee is required to sleep on the employer's premises and may have his or her sleep interrupted by some type of incident to which the employee must respond.

Employers can avoid paying for on-duty sleep periods only if the employer has an express or implied agreement to exclude such periods, the employer has furnished adequate sleeping facilities and the employee's work day is 24 hours or longer. In addition, under no circumstances may an employer avoid paying for on-duty sleep time if the employee has not had the opportunity to receive 5 or more hours of sleep. Under no circumstances can an employer exclude more than 8 hours of on-duty sleep time per 24 hour shift when computing employees' overtime pay.

SAFE HARBOR FOR EMPLOYERS

When the DOL rewrote the overtime labor laws, it created a "safe harbor" defense for employers that unintentionally make improper deductions from exempt employees' salaries. That

provision allows you to correct improper-deduction mistakes without losing an employee's FLSA exempt status.

To use that defense, you must adopt a policy that bans improper deductions and provides an avenue to raise complaints.

If a question is raised about an employee's exempt status, it pays to act fast and be able to show good cause why you classified them as exempt in the first place.

The FLSA allows employees to collect double (or "liquidated") damages unless you can show your mistake was made in good faith and you honestly intended to classify the employee correctly.

To head off such complaints, host an annual classification review. Have a team compare all employees' job descriptions (and actual duties) against the FLSA exemption regulations. (Some states set their own rules. Get a legal opinion if you're stumped about an employee's status.)

If any positions should be switched to hourly, make the change as soon as possible and start paying overtime. Then, do your best to calculate what you owe for past unpaid overtime.

If an employee files an overtime suit, your annual classification audit would likely be enough proof of your good-faith efforts to ward off double damages.

RECORDKEEPING REQUIREMENTS

1. Exempt Employee Recordkeeping

The FLSA's record-keeping requirements for exempt employees differ from those for nonexempt workers. Because you don't pay exempt employees by the hour, you shouldn't track the exact number of hours they work on a daily basis. Doing so could make it seem to a wage-and-hour Labor auditor that you are indeed basing pay on the number of hours worked, which might raise the question of whether the employee is truly exempt.

However, just because a worker is exempt doesn't mean your company is freed from keeping records on him or her. With exempt employees, you should keep records that describe the workweek and the wages paid for that period.

Specifically, you should keep these records on FLSA exempt employees:

- Personal information, including name, home address, occupation, gender (for equal pay laws), birth date for workers under age 19 (for child labor laws) and the person's workplace identification number
- Time of day and day of week when the employee's workweek begins
- Total wages paid each pay period
- Date of payment and the pay period covered by each payment

Your records for exempt employees can also track which days are used for sick days, vacation days or personal days.

2. Nonexempt Employee Recordkeeping

Every covered employer must keep certain records for each non-exempt worker. The Act requires no particular form for the records, but does require that the records include certain identifying information about the employee and data about the hours worked and the wages earned. The law requires this information to be accurate. The following is a listing of the basic records that an employer must maintain:

a. Employee's full name and social security number.
b. Address, including zip code.
c. Birth date, if younger than 19.
d. Sex and occupation.
e. Time and day of week when employee's workweek begins.
f. Hours worked each day.
g. Total hours worked each workweek.
h. Basis on which employee's wages are paid (*e.g.*, "$9 per hour", "$440 a week", "piecework")
i. Regular hourly pay rate.
j. Total daily or weekly straight-time earnings.
k. Total overtime earnings for the workweek.
l. All additions to or deductions from the employee's wages.
m. Total wages paid each pay period.
n. Date of payment and the pay period covered by the payment.

3. Retention and Destruction of Employment Records

Each employer must preserve for at least three years payroll records, collective bargaining agreements, sales and purchase records. Records on which wage computations are based should be retained for two years, i.e., time cards and piece work tickets, wage rate tables, work and time schedules, and records of additions to or deductions from wages. These records must be open for inspection by DOL auditors, who may ask the employer to make extensions, computations, or transcriptions. The records may be kept at the place of employment or in a central records office.